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ALIEN GANG REMOVAL ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

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ALIEN GANG REMOVAL ACT OF 2005

TUESDAY, JUNE 28, 2005

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

The Subcommittee met, pursuant to notice, at 3:02 p.m., in Room 2141, Rayburn House Office Building, the Honorable Louis Gohmert (acting Chair of the Subcommittee) presiding.

Mr. GOHMERT. It's a few minutes after 3 o'clock, so we'll go ahead and get started.

Today, the Subcommittee on Immigration, Border Security, and Claims will examine H.R. 2933, the "Alien Gang Removal Act." We have witnesses here ready to testify.

At this point I do have an opening statement, but in the interest of time, we have four witnesses, I may just go ahead and submit that in writing if there's no objection. So with unanimous consent of the Committee, that will be done.

I would like to introduce the witnesses. The first witness, the Honorable Randy Forbes. Congressman Randy Forbes is currently serving his third term representing the Fourth District of Virginia. He is a Member of the House Armed Services Committee, Science Committee and the House Judiciary Committee. It seemed like I had seen you here before. He has focused his efforts in Congress on protecting the security and sovereignty of our Nation. From 1989 to 1997, he served the Commonwealth of Virginia in the General Assembly, first as a member of the House of Delegates and then as a State Senator from 1997 to 2001. Congressman Forbes was valedictorian of his 1974 class at Randolph Macon College, and holds a J.D. degree from the University of Virginia Law School.

Also we have Professor Kris Kobach. Is that c-h like a "k?" All right, thank you. Kris Kobach. He is a Professor of Law at the University of Missouri at Kansas City School of Law, where he teaches constitutional law, American legal history, legislation and legislative drafting. From 1995 to 1996, Mr. Kobach was a judicial clerk for Judge Deanell Tacha of the 10th Circuit U.S. Court of Appeals. In 2001 he came to Washington to become a White House Fellow. After his fellowship, from 2002 to 2003, Mr. Kobach was counsel to Attorney General John Ashcroft. In this position he served as the Attorney General's chief legal and policy advisor on immigration law and border security. The author of numerous books and scholarly publications, Mr. Kobach is a summa cum laude graduate of Harvard University with a BA in government. After graduating

first in his class from the Government Department at Harvard, Mr. Kobach was a Marshall Scholar at Oxford University, where he received a master's and a doctorate in politics. He returned to the United States and received his J.D. from Yale Law School in 1995.

Then we have Mr. Michael Hethmon. He is Staff Counsel for the Federation for American Immigration Reform and a member of the Maryland State Bar. He has published several law review articles and has had material published on ILW.com, the leading immigration law publisher. Mr. Hethmon has served as a spokesman for FAIR in various media settings and has participated on radio programs. He received a bachelor's degree from the University of California Los Angeles, a master's degree in international management at the Thunderbird Graduate School of International Management, and his J.D. from the University of Maryland School of Law.

Then also we have Professor David Cole. Professor Cole is a Professor of Law at Georgetown Law School with an expertise in constitutional law, criminal procedures, and Federal courts. He has worked as a staff attorney for the Center for Constitutional Rights and litigated a number of major first amendment cases including *Texas v. Johnson,* and *National Endowment for the Arts v. Finley.* Professor Cole served as a law clerk to Judge Arlen Adams of the United States Court of Appeals for the Third District. He is a legal affairs correspondent for The Nation, a commentator on National Public Radio, and the author of three books. Mr. Cole has received awards for his civil rights and civil liberties work from the American Bar Association, the National Lawyers Guild, the American-Arab Anti-Discrimination Committee, Political Asylum and Immigration Rights Project, and the American Muslim Council. Mr. Cole received his B.A. and his J.D. from Yale University.

At this time I'd ask the witnesses to please rise for the oath. If you would rise and raise your right hand.

[Witnesses sworn.]

Mr. GOHMERT. Let the record reflect all four witnesses have been sworn.

I've been advised that the gentleman from Michigan, Mr. Conyers, would like to make an opening statement. Is that correct?

Mr. CONYERS. Yes, Chairman Gohmert.

Mr. GOHMERT. Then the Chair will yield 5 minutes to the gentleman from Michigan.

Mr. CONYERS. Right. Did you intend to make an opening statement, sir?

Mr. GOHMERT. I had mentioned earlier, as we started, that I have an opening statement. In the interest of time that I would just submit it in writing, and there was unanimous consent. I offered and all these people here did not object, so——

Mr. CONYERS. Well, I certainly won't object.

Thank you, Mr. Chairman, and Members of the Committee.

I want to welcome all the witnesses and let you know that this is a very unusual time that we're in. First of all, we're having limits put on the right of habeas corpus for those on death row. We've got a Subcommittee hearing coming up on this in the Subcommittee on Crime. In addition, we've just passed another bill out of this Committee that would expand the Federal death penalty

provisions and mandatory sentencing on—and it would have a detrimental impact on young people in particular.

So we've got capital punishment provisions on the way and habeas corpus limitations also coming out of the Subcommittee, and today we're dealing with a subject matter that raises the questions about how we deal with anti-gang—with gang violence and what steps can be taken to deal with them.

And I am a little bit surprised that we are in the process of considering a measure that is replete with constitutional violations. I can't remember scanning through so quickly to come across so many all at once. This bill empowers Homeland Security to deport foreign nationals who have never committed any crimes whatever. It has a procedure for designating criminal street gangs that violates constitutional rights, giving the Secretary of Homeland Security unchecked power to blacklist domestic groups through a secret process with little or no notice to be heard by others.

We have a system that to me I thought we had taken care of in some earlier Supreme Court cases, but it looks like they haven't been. The Alien Gang Removal Act now embraces guilt by association, which has been dealt with by the Supreme Court in other cases a number of years ago. We are concerned about the treatment of gang crimes that would radically expand deportation grounds for certain crimes that are already criminalized.

We think—I would like to start off by positing this to the witnesses, that there are sufficient criminal penalties and process that would allow us to get at all youth criminal gangs, all non-citizen gangs, within immigration law and with criminal law, that would make a measure like this completely unnecessary. And the idea that we could criminalize people who have never committed a crime in their life within the scopes of this proposal is quite staggering. And so I'm hoping that we will have a discussion that can point to some of these issues, and I welcome the witnesses as they come forward, and I thank the Chairman for giving me the time.

Mr. GOHMERT. Thank you.

We've been joined by the gentleman from California, Mr. Darrell Issa, and Mr. Issa, would you like to make an opening statement?

Mr. ISSA. Very briefly, and I'll have——

Mr. GOHMERT. The Chair yields for 5 minutes.

Mr. ISSA. I ask unanimous consent to have my written statement put in the record. But I do want to offer a perspective in concert with the Ranking Member. When Mr. Conyers says he's deeply concerned, I'm deeply concerned, but I think from a slightly different perspective. I wonder if in fact this country is going to continue to be the only country on earth in which a guest, a non-citizen guest, is allowed to operate in an organized gang that—in Los Angeles or in San Diego or anywhere in the country, terrorizes communities, reduces the quality of life for residents, both citizens and non-citizens, and then say, "But if you don't catch me with a felony and incarcerate me, you can't send me outside the United States."

So I certainly hope that this piece of legislation on a bipartisan basis will be looked at in light of the problem of people who in fact should be deported but we have to wait until we catch them in a specific criminal act, particularly a felony, before we have a chance. That's not the standard in the rest of the world. The standard in

the rest of the world is, if you're a guest, you are held to a higher standard of behavior than in fact a citizen for whom deportation is not an administrative remedy. And with that, I yield back.

Mr. GOHMERT. The gentleman from California yielded back.

We've also been joined by the gentleman from California, Mr. Dan Lungren. Would you like to make an opening?

Mr. LUNGREN. No.

Mr. GOHMERT. All right. Very well.

At this time we're ready to proceed with opening—well, we've been joined by the gentlewoman from Texas, Ms. Jackson Lee. Would you want to make an opening at this time?

Ms. JACKSON LEE. Yes, Mr. Chairman.

Mr. GOHMERT. Very well. The Chair yields 5 minutes to the gentlelady from Texas.

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

And I acknowledge my Ranking Member of the Full Committee, Mr. Conyers. I thank him for his presence here today and the other Members.

Let me thank the witnesses for their presence here as well.

This is an important hearing because it's an opportunity for the concern we have about terrorist gangs to have a full hearing along with the restraints and concern that we have about the automatic deportation of individuals on the basis of association.

We all agree, Mr. Chairman, that violent immigrants who commit crimes should be deported, and particularly we agree that those who associate with violent gangs, now who are springing up in many of our southern regions and particularly on the border, should be in line for deportation, those who perpetrate violent acts and those who may be associated with gangs that ultimately may be engaged in terrorist acts.

But I think there is a clear demarcation, and that is that sheer membership, sheer association should not equate to deportation. And in the instance of the legislation that we will be reviewing today, as I've read it, even if this gang has been classified as violent or on the list on the basis of crimes that the gang perpetrates, the gang may be in the business of getting as many friends and recruits as they possibly can, even to the extent of recruiting 10-year-olds, such as what is happening in Houston, Texas, my question would be, does that sheer association and membership equate to a deportation? If that is the case, that is unacceptable.

So this is an important hearing because I believe in keeping an open mind. I believe this legislation introduced by Congressman Forbes on June 16, 2005, called the Alien Gang Removal Act of 2005, has some positive elements regarding dealing with gangs that perpetrate criminal acts. But in such we have relied primarily on three basic strategies for dealing with the problem of youth gangs, suppression which has meant longer sentences and penalties, intervention through job training, education and skills development in an attempt to reform gang members, and prevention through school and community based programs designed to reach out to at-risk children before they become involved with gangs.

The Alien Gang Removal Act presents a new strategy. AGRA would attempt to reduce the number of immigrant gang members in the United States by changing our immigration laws. From my

perspective then, it eliminates intervention and prevention, which are very important elements, and the question is whether Federal jurisdiction should take the place of local communities trying to fight against at-risk children engaging in membership in gangs.

This bill would establish 3 new exclusion grounds. The first would make someone inadmissible to the United States for having been deported on the basis of criminal street gang participation. Someone who has been deported is already inadmissible regardless of the reason for deportation. Under existing law, however, inadmissibility would only be for a 5-year period. Under the new provision, inadmissibility would be permanent.

The second would make an alien excludable if the immigration inspector had a reasonable ground to believe that the alien is a gang member entering to engage in unlawful activity. I'm concerned that this would lead to profiling and that aliens who have tattoos or other indicia of gang membership would be excluded on little more than their appearance. Once excluded, they would be permanently barred from admission to the United States without judicial review.

The third would make someone inadmissible for being a member of a group or association of three or more individuals that have been designated by the Attorney General as a criminal street gang. Another provision in AGRA would make membership in a designated criminal street gang a deportation ground too. Members of designated criminal street gangs also would be statutorily ineligible for asylum, withholding and removal and temporary protected status, and they would be subject to criminal alien detention provisions.

Mr. Chairman, it is not whether or not you are a person that should be deported because you are violent, you are engaging in terrorist activities, you're a member of a gang and you have participated in violence. It is a question of whether random association equates to deportation of mass numbers of individuals because we don't like them.

Mai Fernandez was our witness at the April 13, 2005 hearing on imminent gangs—immigrant gangs. She is the Chief Operations Officer for the Latin American Youth Center in the District of Columbia. She works with gang members on a daily basis. She explained at the hearing that most youth gang members in our community are not criminals. According to Ms. Fernandez, joining a gang gives a youth a group of friends to hang out with and a sense of security which they cannot get elsewhere in their lives. These kids are not super predators. They're kids looking for a sense of belonging.

According to Houston's Anti-gang Office and Gang Task Force, the gang known as MS-13 has been recruiting children from local elementary schools. That is wrong, and it is wrong from the children to join, but if they do join, their membership alone may cause them to be deported, taken away from their families and youngsters as young as 10-years-old.

In conclusion, Mr. Chairman, might I say that I find the approach of a strict deportation on association to be questionable minimally and wrong at best. I hope that we can work together to

solve this problem, but to also understand that prevention and intervention are important.

I ask unanimous consent that the entirety of my statement be submitted in the record. I yield back.

Mr. GOHMERT. Hearing no objection, there is unanimous consent for submitting the entirety of your written remarks.

I would also advise the witnesses today you'll be given up to 5 days to revise and extend your remarks if you care to do so. We are operating under a 5-minute rule. Each of you will have 5 minutes to make an opening statement. We'll be very strict with that, so please understand. But understand also the testimony will not be lost because you will have an opportunity to submit it in writing and make it a part of the record, and it will be part of the permanent record.

So with that, Mr. Forbes, if you would, your time will begin with your opening statement. Thank you.

TESTIMONY OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. FORBES. Thank you, Mr. Chairman, and thank the Members of the Committee for allowing me to be here. It is a privilege for me to be here with the other members of the panel.

Mr. Chairman, I also have a written statement that I would like to submit for the record, and I am just going to talk to you outside of that written statement if it's agreeable. The first thing I want to do is tell you I'm not going to repeat all of the gang problems that we have in the United States because I know that the Members of this Committee have heard them, and at least at this point in time I don't think there's any disagreement that we have an enormous gang problem that we're facing in the country with as many as 750 to 800,000 criminal gang members.

Just in the last 4 years gang crimes have been up 50 percent, and if you just picked North Carolina in the last 2 years, there have been 18 MS-13 killings alone, Northern Virginia 11, LA 8.

The important thing about this bill is it is a bipartisan bill, and whenever we try to address the gang problem, one of the things that always happens—this is like an old Casablanca movie—we round up the normal suspects and everything in it is unconstitutional. The other thing that we always find is this, we always will find that there's two different strategies. There are those who want us to wait until we have victims to do something about it, and there are others of us who believe that we can make the situation better before we get the victims.

There are three big pipelines that feed the gang problem in the United States today. If we miss those pipelines we can never solve the problem. The first one is the gang leaders and the gang networks that continue to recruit and expand and franchise their violence. We passed a bill a few weeks ago that deals with those networks and will try to bring those networks down.

The second problem is what Ms. Jackson Lee mentioned, in that we allow environments of opportunity for gang recruitment, whether it's broken families or loss of job opportunities, or lack of education, and that's a whole other pipeline that we have to look at.

But the third big pipeline, what this bill deals with, is some of the immigration problems that we face. By testimony given to this Subcommittee alone, we heard that MS-13 probably has between half to two-thirds of their members that are here illegally, the most violent gang in America today. Eighteenth Street, 60 percent of their members here illegal; Surenos-13, 75 percent. Lil' Cycos, 60 percent of their people here illegally.

Mr. Chairman, there are two big problems with that. The one thing that we have is if somebody comes to our doors today, wants to come in the borders, if they have a sign on their forehead that says they're a member of the most violent criminal gang in America, if they have stamped on their visa application they were a member of that gang, that in and of itself is not reason enough under our law to keep them from coming into the country.

The second thing is, based on temporary protected status, which we gave to people from El Salvador in 2001, we essentially put a blanket of protection over criminal gang members here illegally because under TPS if a criminal gang member is outside of our doors today, and he has a sign that says "I'm here illegally," a sign that says "I'm a member of a violent criminal gang," he is protected by TPS and cannot be deported out of the country. We think that's wrong.

And what this bill does is to say this. It says that when somebody comes into our country, that we ask them whether or not they're a prostitute, we ask them many other questions that keep them out of the country. We think it makes good common sense to ask them, are you a member of a violent criminal gang? This bill would say we're not only going to ask them that, but if they're a member of a violent criminal gang, we're not going to give them admission into the country.

The second thing it says is, if you're here in this country, if you're visiting in this country and you decide that you're going to be a member of a violent criminal gang, then we can deport you out of this country, and that is a reason for deportation because there is no socially redeeming value for individuals to be members of violent criminal gangs in the country.

In addition to that, Mr. Chairman, what this bill will do is allow the Attorney General to designate violent criminal gangs in the country. We set forth a judicial review process for that. We give notice to Congress for that so that we can overturn that. We have a method for looking at and examining that designation. And then once the Attorney General has done that, Homeland Security then will be able to designate individuals who are members of violent criminal gangs.

It would have to be proved, of course, in an immigration hearing, but once that's done, if you're in this country, and you're a member of a violent criminal gang, we can deport you. If you're coming into the country we can stop you from coming. We think that's an important component for stopping this huge rise in violence from our criminal gangs, and we hope this Committee will see fit to pass the bill.

[The prepared statement of Mr. Forbes follows:]

PREPARED STATEMENT OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, Ranking Member Jackson Lee, and members of the Subcommittee, I thank you for inviting me to join you to discuss efforts to strengthen our laws that will protect our communities from violent gang members. Let me commend you at the outset for holding this important hearing and for your willingness to examine this critical issue.

According to the U.S. Justice Department, there are currently over 30,000 gangs and over 800,000 gang members who are active in more than 2,500 jurisdictions across the United States. Every city in the country with a population of 250,000 or more has reported gang activity. Gang activity has been directly linked to the narcotics trade, human trafficking, identification document falsification, violent maiming and assault, and the use of firearms to commit deadly shootings.

No longer is the "gang problem" limited to so-called urban street gangs, or motorcycle gangs from the past—the violent gang epidemic is national and even international in scope and extends into suburban and rural communities, and has grown into organized, tightly-knit criminal syndicates.

One of the most notorious gangs—MS-13—is international in scope and has 8,000 to 10,000 active members operating a sophisticated network of organized units in 31 states. MS-13 has a significant presence in Northern Virginia, New York, California, and Texas, but can also be found in Oregon City, Oregon, and Omaha, Nebraska. Internationally, the gang is estimated to have as many as 50,000 members.

MS-13 is a violent gang comprised primarily of illegal immigrants from Central America, which originated in Los Angeles and has now spread across the country. They were recently dubbed by Newsweek as "the most dangerous gang in America."

Fortunately, through the leadership of Chairman Sensenbrenner and members of the Judiciary Committee, the House passed with bipartisan support, H.R. 1279, the Gang Deterrence and Community Protection Act of 2005 by a vote of 279 to 144. The passage of this ground-breaking legislation marks the toughest and most targeted federal gang legislation ever to come out of the U.S. House of Representatives. The bill seeks to rip apart criminal gang networks by increasing tools and resources for local, state, and federal police and mandating tough sentences for violent criminal gang acts.

Yet, more must be done to win the fight against violent criminal gangs. America's gang epidemic is not just a crime problem, but an immigration problem as well. Our current immigration laws have not kept pace with the flood of gang members who have entered our country over the last several decades.

For that reason, I introduced H.R. 2933, the Alien Gang Removal Act (AGRA), which would designate aliens who are members of violent criminal gangs as an inadmissible class under the Immigration and Nationality Act (INA). Currently, there is no specific authority under the INA that allows for the deportation of an alien based on their membership in a criminal gang. My legislation would build upon similar provisions in the INA that render members of terrorist organizations also inadmissible. My legislation starts with the basic principle that there is no societal benefit to allowing aliens to come to the United States as part of a violent criminal gang.

First, AGRA would put violent gang members on a fast-track for deportation by designating an alien who is a member of a violent criminal gang inadmissible for entry into the United States and deportable under the INA. Currently, an alien's membership in a criminal gang is not grounds for inadmissibility to the United States in and of itself under the INA. The Alien Gang Removal Act would amend the INA to give consular officers an automatic reason to reject entry into the United States to any alien they know, or have reasonable grounds to believe, is a member of a criminal gang.

While it is unlikely that an alien would admit to membership in a criminal gang on his or her visa application, providing a false answer to such a question would be grounds to charge an alien with immigration fraud. If convicted, the alien could be fined and subjected to jail time based on the circumstances of the offense. Also, while the majority of gang members enter the United States illegally, our laws should state the general principle that criminal gang members are specifically inadmissible and deportable under the INA.

Second, my legislation would protect our neighborhoods from gang members who have already entered the U.S. by allowing for the deportation and mandatory detention of aliens who are members of a violent criminal gang. My bill states that it is not enough to wait until a gang member has committed a crime to deport them. If you join a violent criminal gang, then you should lose the right to stay in the United States.

Third and more importantly, AGRA would expedite the deportation of alien gang members by barring most forms of immigration relief, including Temporary Protected Status (TPS). Unfortunately, under current law, alien gang members who have been granted TPS generally cannot be returned to their native countries without having first been convicted of a felony or other specified criminal offense. My legislation would expand the bars to TPS to include affiliation with a federally identified criminal gang.

Aliens from eight countries currently have temporary protection from deportation. Among these are El Salvador (native country to the MS-13 gang), Burundi, Honduras, Liberia, Montserrat, Nicaragua, Somalia, and Sudan. The estimated number of aliens currently protected range from 292 Montserratians to over 290,000 Salvadorans.

It makes absolutely no sense to allow gang members, many of whom are here illegally, to be free from deportation until they have committed a crime. Gang members who are shielded from deportation by TPS are a significant problem that must be addressed through legislation. While the exact number of gang members protected by TPS is unknown, at an April 13, 2005 Immigration Subcommittee hearing, the Department of Homeland Security stated that of the 5,000 gang members detained under Operation Community Shield, approximately 350 had been granted TPS. That means that because of TPS, we know there are 350 gang members who will be back on our streets terrorizing our communities and neighborhoods. What we do not know, however, is how many gang members who are protected by TPS we would find if we examined the 800,000 gang members the Department of Justice suggests are currently within our borders instead of only examining the 5,000 gang members detained under Operation Community Shield.

In order to offset the destructive influence of gang activity in our nation, it is crucial that those who participate in gang activity are identified and met with appropriate action. For the large number of gang members who are foreign nationals, this goal would best be served through their deportation and immediate removal from our communities—regardless of their immigration status. H.R. 2933 is a fair and reasonable response to further secure the safety of our communities, and I would deeply appreciate the Subcommittee's assistance in moving the Alien Gang Removal Act through the Committee and to the floor of the House of Representatives. Thank you for your attention to this important matter.

Mr. GOHMERT. Thank you, Mr. Forbes.

At this time, we will hear from Mr. Kobach for 5 minutes.

I'm sorry. For the record, it should reflect that Mr. Berman from California has entered the hearing early on in Mr. Forbes' comments, and also Mr. Smith from Texas has also joined us.

Ms. JACKSON LEE. Did you note—excuse me, Mr. Chairman. Did you note Mr. Berman has also joined us?

Mr. GOHMERT. Yes, that's what I just—I'm sorry. I guess you were talking when I said this, but yeah, I did note that.

Mr. Kobach, you have 5 minutes.

TESTIMONY OF KRIS W. KOBACH, PROFESSOR OF LAW, UNIVERSITY OF MISSOURI-KANSAS CITY

Mr. KOBACH. Thank you, Mr. Chairman. I will skip much of my written comments, statistics on the extent of the gang problem. I think the Committee is well aware of that.

But I want to pause on one point, and that is that—let me give you a case study. The study is the city of Omaha. I'm good friends with a police officer in Omaha. Omaha is not a place you would normally think of as a gang-ridden city, but in fact it has become exactly that. Omaha typically sees just over 20 homicides a year, but that's changing. In the final quarter of 2004, the gangs MS-13 and the 18th Street gang dramatically increased their presence in Omaha, and in the last quarter of 2004 gang activity was up 29 percent, and in the first quarter of 2005 it was up 39 percent, and

the number of homicides has risen accordingly. Omaha is now on pace to have the greatest number of homicides in any year.

The police officers are scared. The police officers know that they face a threat unlike any previous gang periods or phases in this country's history. These are nationwide, indeed continent-wide networks of gangs. They are very well armed and they behave differently than gangs in the past have done. They shoot to kill, and I'll talk a little bit more about that in a moment. And their associations with other gangs around the country are much tighter and much more well organized.

Now, the gangs that we face today in America's cities such as Omaha—and of course there are much bigger gang problems in places like the D.C. area and Los Angeles and New York—is that these alien gangs have an advantage that previous gangs did not have, and that gangs composed primarily of U.S. citizens do not have; and that is that they have sanctuaries in foreign countries. This gives them a real advantage in escaping law enforcement. I'm of course referring to the fact that there are several countries that refuse to extradite their citizens if their citizens face the death penalty, or more recently in the case of Mexico—since October of 2001—if they even face life imprisonment.

This in effect allows the gang members to commit a serious crime and then escape to their home country where they can remain until they feel safe coming back into the United States. I would note also that El Salvador, the nationality of the majority of MS-13 gang members, also has a constitutional provision prohibiting the extradition of any of its citizens to a country where the death penalty is in force.

Now, this not only creates a sanctuary for the gang members after they commit a crime in the United States, it also creates a very disturbing incentive, and this is an incentive that police officers have noticed. It's very difficult to document, but it is simply this: the more serious your crime, the greater the likelihood that your country's laws will offer you shelter from extradition. It is a well-established fact that so many of the MS-13 murders conclude with an execution style murder. The victim is shot initially through the chest or some other part of the body, but then the gang member assassinates the person with a bullet to the head. It is often thought that this is not only a means of intimidation, but it is also a means of ensuring that the person cannot be extradited to the United States, and then of course the person departs for El Salvador or Mexico or wherever the destination is.

Clearly, this is a threat that law enforcement has not encountered before. In the last few years, with the rise of these illegal alien gangs, it is important that every possible law enforcement tool be brought to the conflict, and that's why immigration enforcement is so critical here, because so many of the members are aliens.

Now, we know that Immigration and Customs Enforcement, or ICE, has had some success with, for example, Operation Community Shield, which in March resulted in the arrest of 105 MS-13 members. But that operation is limited to those members who are—gang members who are already in violation of immigration law. This bill, 2933, would expand the ability of ICE to use immi-

gration enforcement in a just and reasonable way against gang members present in the United States.

There are basically three ways where it improves the situation. One is by making membership in the gang—active membership in a gang—which must be established I might add in front of an immigration judge; it's not simply the mere exertion by an Executive Branch official, and that of course can be appealed to a Circuit Court of Appeals—making that a basis for removal is critical. Another critical portion of 2933 is alleviating the restriction on removal to countries where the alien's life might be in danger. And a third critical component of 2933 is to raise the protection of temporary protected status.

Now, under current law, for example, with Operation Community Shield, the way that operation worked is that the relevant police departments provided lists of known gang members to ICE, and then ICE was able to take those lists and run them against their data of all people lawfully admitted to the country. And they were able to deduce who was not lawfully admitted to the country.

Well, some gang members are actually legally present, albeit not U.S. citizens, and this would allow them to expand the number of gang members against which immigration enforcement tools could be used.

The second aspect that I just mentioned was where a gang member uses the protections of 241(b)(3)—that is, he can't be removed to his home country because he fears reprisal or he fears some sort of persecution in his home country. I have personally seen this happen in my capacity representing the United States in the courts of the United States. Lawyers representing these gangs—these aliens, will use every means they can to avoid deportation to the home country, and that includes even cases where the alien himself has been a member of a death squad. And I've actually argued a case of exactly that. Using——

Mr. GOHMERT. All right. Thank you. Your time has expired. Thank you.

Mr. KOBACH. Okay.

[The prepared statement of Kobach follows:]

PREPARED STATEMENT OF KRIS W. KOBACH

THE SCOPE OF THE ILLEGAL ALIEN STREET GANG PROBLEM

Mr. Chairman and Members of the Committee, as you know, the alien street gangs that are responsible for hundreds of murders in the United States in the last few years present an extremely difficult law enforcement challenge. As one police officer told me recently, these gangs present a far more deadly threat than their predecessors. Compared to the dominant gangs of the early 1990s, which were composed primarily of U.S. citizens from inner-city areas, today's street gangs are composed overwhelmingly of illegal aliens and are more violent, more likely to kill, and more likely to operate within well-organized criminal networks that not only span the country, but span the continent.

A few statistics illustrate the scope of the problem. Mara Salvatrucha-13 (MS-13), the most notorious and fastest-growing alien gang, started as a Salvadoran gang in Los Angeles in the late 1980s. Its association with El Salvador has always been an important part of its identity, with gang members in many cities using the blue and white national colors of El Salvador as their gang colors. MS-13's more than 10,000 members operate in at least 33 states. Those states are as far flung as Alaska, Michigan, Idaho, Georgia, New York, and Nebraska. The overwhelming majority of its members are illegal aliens, primarily from El Salvador, but also from Honduras. The presence of MS-13 is particularly strong in the metropolitan Washington, D.C.,

area (including northern Virginia and southern Maryland), with an estimated 5,000 to 6,000 members. But MS-13 also has established a very large footprint in areas that have not previously been subject to gang violence. There are approximately 200 MS-13 members in Charlotte, North Carolina. There are approximately 300 in suburban Long Island. And MS-13 still remains smaller than the largest alien gang, the 18th Street Gang—which started in Los Angeles with primarily Mexican membership and then expanded nationwide. It is estimated to have more than 20,000 members in the Los Angeles area alone. In both gangs, the majority of members are *illegal* aliens. The gangs generate cash in different ways in different parts of the country. But by far, the most common forms of activity are drug trafficking, theft, gun trafficking and immigrant smuggling.

Where MS-13 or the 18th Street Gang establish a presence, the blood inevitably flows soon thereafter. In Los Angeles, the various street gangs accounted for 291 of the city's 515 homicides in 2004—an increase of 12.4% in gang killings over 2003. In places newly acquainted with alien gang activity, the numbers are smaller, but each murder is more shocking to these once gang-free communities. In Charlotte, for example, MS-13 members have committed at least 19 murders in three years between 2000 and 2003.

Consider the example of Omaha, Nebraska, not far from where I live. Mid-sized Midwestern cities like Omaha have recently seen the growth of illegal alien gangs—an entirely new phenomenon for local law enforcement. Omaha is a city that typically sees between 20 and 30 homicides a year. However, in late 2004, there was a dramatic increase in violence in south Omaha, perpetrated mainly by alien gangs. MS-13 and the 18th Street Gang increased their presence in the city, and this is reflected in recent statistics. According to the Omaha Police Department figures, total gang activity in the fourth quarter of 2004 increased 27% (over the same period the previous year), and gang activity in the first quarter of 2005 increased 39%. The number of homicides has risen accordingly, with the increase almost entirely attributable to the gangs.

The alien gangs in Omaha control and perpetuate the drug trade there. According to the National Drug Intelligence Center, the marijuana in Omaha comes primarily from Mexican criminal gangs who transport it into the state by road using private and commercial vehicles. The same is true of the powdered and crack cocaine distributed in Omaha. And contrary to popular misconception, the majority of methamphetamine in Omaha comes from Mexico or California through the alien gang network. Although methamphetamine can be produced virtually anywhere, the alien gangs dominate the trade, bringing it in from south of the border or from California. This once-quiet city now hears the gunfire of alien street gangs with disturbing regularity.

EXTRADITION BARRIERS

Gangs composed primarily of aliens possess an advantage over law enforcement that other gangs do not have—sanctuaries in foreign countries that refuse to extradite criminals eligible for the death penalty. Those countries include Mexico and El Salvador. Mexico is the most notorious example, with more than 3,000 individuals who are suspected of committing murder in the United States now at large in their home country of Mexico. Mexico has no formal extradition arrangement with the United States. And since the Mexican Supreme Court's ruling in October 2001 (that life imprisonment is unconstitutional), that country has also resisted extraditing criminal suspects who are eligible for life imprisonment if convicted. El Salvador's constitution currently bans the extradition of Salvadoran nationals.

This not only creates a sanctuary for gang members after they have committed their crimes in the United States, it may also be contributing to a disturbing incentive for gang members operating in the United States. The frequency of execution-style murders carried out by MS-13, the 18th Street Gang, and other gangs has been widely reported. Many in the law enforcement community will tell you that some alien gang members have intentionally and deliberately shot to kill, including shooting wounded victims through the head. One prominent theory is that many alien gang members do this in order to make sure that their crime is first degree murder—serious enough to bar extradition. Establishing the motive of such killers with certainty is obviously problematic. But given gang members' frequent reliance on the absence of extradition arrangements in order to evade U.S. law enforcement, it is not at all unreasonable to suspect that many intentionally heighten the severity of their crimes.

THE USE OF IMMIGRATION ENFORCEMENT AS A TOOL IN FIGHTING ILLEGAL ALIEN GANGS

Because so many of these gang members are aliens without lawful presence in the United States, sustained and focused enforcement efforts by Immigration and Customs Enforcement (ICE) can have a massive impact in fighting this national scourge. This was perhaps most dramatically demonstrated in March 2005, when ICE announced the arrest of 103 members of MS-13 in an operation spanning several weeks. Known as Operation Community Shield, it led to the arrest of 30 gang members in New York, 25 in the Washington, D.C., area, 17 in Los Angeles, 10 in Newark, and 10 in Miami. Although all were arrested for violations of federal immigration laws, approximately half had prior arrest records of prior convictions for violent crimes.

This successful ICE operation was accomplished through the sharing of information between state and local law enforcement. Local police departments provided to ICE lists of names that those police departments had compiled of known alien gang members. ICE was then able to run that list through its databases to determine which, if any of those aliens was legally present in the country. After determining that the alien gang members were illegally present, ICE moved in with a series of arrests.

Operation Community Shield was not the first use of immigration law enforcement against these gangs. In October-November 2004, ICE agents worked with local law enforcement in San Diego to arrest 45 MS-13 members. And in 2003, ICE worked with local law enforcement in Charlotte to arrest and remove more than 100 MS-13 gang members.

This episode demonstrates well how focusing immigration enforcement efforts against particular immigration violators can provide invaluable support to local law enforcement in their efforts to stem gang violence. It is an undeniable fact that immigration enforcement is a tool that can be used to effectively combat gangs when illegal aliens comprise a substantial proportion of gang members. Just as many members of terrorist organizations were removed after 9/11 on immigration violations rather being prosecuted in criminal courts, so to immigration enforcement can serve to remove illegal aliens who pose a danger to the community due to their membership in violent gangs.

THE PROVISIONS OF H.R. 2933

Turning now to the provisions of H.R. 2933, it is clear that this bill, if enacted, would be very helpful in fighting alien street gangs. In my judgment, the three most useful aspects of the bill from a federal immigration enforcement perspective are the fact that it makes membership in a designated gang a basis for removal, the fact that it eliminates restrictions on removal to countries where the alien's life would be in danger (under INA § 241(b)(3)), and the fact that it eliminates restrictions on removal to countries where "temporary protected status" (TPS) applies (under INA § 244(c)).

The first aspect would come into play whenever ICE launches an effort like Operation Community Shield and obtains lists of suspected gang members provided by local law enforcement. Under current law, ICE can only arrest those gang members who are not lawfully present in the United States. H.R. 2933 would expand the list of arrestable alien gang members to include those who happen to be lawful permanent residents or who are lawful nonimmigrant visa holders. As I have already noted, illegal aliens comprise the majority of gang members in these organizations, particularly in MS-13 and the 18th Street Gang. Nevertheless, there are some alien gang members who do have lawful status. H.R. 2933 would allow ICE to remove those alien gang members as well.

The second aspect comes into play at the stage of removal proceedings. I have personally seen this happen when I have argued removal cases for the United States in federal court. Lawyers assisting criminal aliens who face removal will use any and every legal hook they can find to keep their client in the United States, including the fact that the alien himself was an abuser of human rights in his home country and now fears reprisals. I kid you not. Our laws are routinely twisted by aliens facing removal so that provisions designed to protect victims of human rights abuse end up protecting the abusers themselves. Without this provision in H.R. 2933, some alien gang members might be able to evade removal. For example, one of the MS-13 gang members arrested on March 13, 2005, during Operation Community Shield, in Hollywood, was a former member of the Salvadoran military who has prior convictions in the United States for robbery, possession of a dangerous weapon, and mail theft. Depending on the specific facts of his case, which I have not

seen, he may attempt to claim that he cannot be removed to his home country under INA § 241(b)(3).

The other barrier to removal occurs when aliens are citizens of countries with temporary protected status. Although TPS protections do not apply to aliens who have been convicted of a felony or of two or more misdemeanors in the United States (under INA § 244 (c)(2)(B)), TPS protections do prevent the immediate removal of an alien gang member not yet convicted of a felony in the United States. Removing TPS protection for gang members is of crucial importance if this bill is to have any serious effect on MS-13. MS-13 is primarily a Salvadoran gang, with substantial numbers of Honduran nationals as well. Salvadoran nationals have been sheltered from removal under temporary protected status since March 9, 2001, after the country suffered extensive damage from earthquakes in January and February, 2001. And that status was most recently extended on January 7, 2005. Honduran nationals in the United States have been sheltered by TPS since January 5, 1999, shortly after Hurricane Mitch swept through the area. That status was most recently extended on November 3, 2004. It is absolutely essential that members of violent alien gangs not be able to exploit natural disasters in their home country in order to continue to prey upon American society. H.R. 2933 will remove that possibility.

CONSTITUTIONALITY OF H.R. 2933

H.R. 2933 rightly makes membership in a criminal street gang a basis for inadmissibility or removal. This is entirely within the constitutional authority of Congress. The most likely challenge to such an act would claim that membership in a such a gang is protected by the First Amendment's protection of "the right of the people peaceably to assemble." Such a challenge would fail, for two reasons. First, the protections of the First Amendment do not apply to violent activity. Even the most expansive judicial iteration of the right to assemble, that of the Supreme Court in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), stated clearly that associational rights do not extend to violent activity: "The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."' *Id.* at 916 (quoting *Samuels v. Mackell,* 401 U.S. 66, 75 (1971) (Douglas, J., concurring)). Second, there must be an advocacy or speech element in the group's activities. It would be absurd to suggest that alien gangs existing solely to further criminal activity, are akin to the civil rights organizations considered by the Court in *Claiborne Hardware.* They do not carry a message or exercise speech rights in any constitutionally meaningful sense. Plainly, a challenge to H.R. 2933 based on an associational rights claim would be the longest of long shots, with no real basis in law.

CIVIL FORFEITURE

Although I am strongly supportive of H.R. 2933, I do believe that it could be substantially improved by this committee. I have submitted amendatory language to committee staff that would make a massive difference in its effectiveness. As it stands, H.R. 2933 will remove barriers to more effective use of immigration law enforcement against members of alien street gangs. However, it does not transform the law enforcement landscape fundamentally. If this committee wishes to dramatically improve the ability of local law enforcement to deal with these criminal predators, there is a means of doing so that has already been proven effective in other contexts—civil forfeiture of assets.

A basic problem with the use of removal proceedings against these gang members is that so many of them return to the country with impunity after being removed. The immense problem of prior deportees returning to the United States can be seen in the thousands upon thousands of reinstatements of prior removal orders and encounters of prior deportees by federal immigration enforcement officers. It is an undeniable fact that many of these career criminals move back and forth across our borders with impunity. The threat of being removed again is simply no deterrent whatsoever for these individuals.

Civil forfeiture of assets would change the calculation substantially. If an alien gang member knew that there was a high probability that law enforcement officers could seize all property used in his criminal gang activity, including his automobile, any equipment used the commission of his crimes, and the proceeds of his crimes, he would have substantial reason to relocate his gang activities outside of the United States and remain there. The risk of facing civil forfeiture would dramatically increase the cost of returning to the US to "do business."

Judges would oversee the forfeiture of assets, applying the necessary protections of due process, ensuring that only "tainted" property is seized, and ensuring that the requisite connection with criminal gang activity is established. For two decades, the courts of the United States have reviewed the civil forfeiture provisions of U.S. law dealing with drug trafficking, and have repeatedly held these provisions to be constitutional, while delineating the specific procedural protections that must be provided. The proposed amendments that I have submitted to this committee will likewise withstand constitutional scrutiny.

Civil forfeiture of assets has substantially altered the playing field in favor of law enforcement in the war against drugs. Through the use of civil forfeiture, prosecutors are not only able to incarcerate drug dealers, but also able to hobble their operations financially. We must similarly change the game in immigration enforcement if we are to stop criminal gang members from entering and reentering the United States with impunity. Such aliens not only have no right to prey upon our society, they have no right to the proceeds of their violent and destructive activity.

CONCLUSION

In conclusion, I commend the Members of the Committee for taking up this urgent issue. It is quite literally a matter of life and death. The bloodshed brought by alien gangs to the streets of our country must be met with every available law enforcement tool. I urge you to recommend H.R. 2933 favorably, and I strongly suggest that you augment its effect by including civil forfeiture provisions.

Mr. GOHMERT. Mr. Hethmon, you have 5 minutes.

TESTIMONY OF MICHAEL M. HETHMON, STAFF COUNSEL, FEDERATION FOR AMERICAN IMMIGRATION REFORM

Mr. HETHMON. Mr. Chairman, thank you for the opportunity to present the views of FAIR in support of H.R. 2933.

In assessing legislation like this, FAIR looks first to see whether the proposed bill represents reform in the national interest, which is expressed in the 7 principles for comprehensive reform, which are attached to our statement. We look also to see whether the bill meets a genuine unmet need in existing law, and third, we look carefully at the effectiveness of the solution within the context of existing restraints that have been imposed by Congress, the budget program integration.

And, Mr. Chairman, our members around the Nation commend the sponsors for this bill for their focus on finding solutions to the alien criminal gang problem in this country.

And while H.R. 2933 is not a comprehensive solution, it is demonstrably in our national interest, it responds to a dangerous vulnerability in public safety, and can be feasibly integrated into our existing immigration enforcement scheme.

Previous hearings and previous witnesses have spoken on the impact and scope of the criminal alien gang problem, and I will not touch on this at this point. However, I would say the role of foreigners in the rise of criminal gangs is undeniable, and any solution that does not closely integrate effective immigration law enforcement will fail.

H.R. 2933 would adapt the regulatory scheme that has been created by Congress and found to be effective in identifying, detaining and removing aliens who are terrorists or supporters of terrorist activities, and apply it to the functionally related gang activities of narco-terrorism, human trafficking and the collateral crimes of violence.

The bill will, in our view, for the first time allow the removal of alien street gang members who otherwise would have status to remain in the United States either as lawful permanent residents or

non-immigrant visa holders. Aliens illegally in the United States, who are already removable, could also be charged under the new section so as to limit their eligibility for relief from removal.

Now, the need for this kind of legislative approach, in our view, is regrettable but compelling, and I say regrettable because we believe that the broad factors that account for most of the appalling growth in alien criminal gang activity in this country all arise from the failure of Congress over more than a generation to control illegal immigration.

The three factors I would mention at this time would be the failure to require and support effective border control and interior enforcement. A second factor would be the apparent willingness of Congress, going back to the 1970's, to use refugee policy as an expedient way to deal with the upheavals that have followed our intervention in third world countries, notably in Central America. And finally, the third factor would be the blowback from the failure of Congress to protect the American workplace from illegal employment.

Mr. Chairman, we view this tough legislative approach that has been taken by Representative Forbes to be necessary and compelling. Previous approaches in the previous situation show massive failure, but unfortunately, we cannot turn the clock back. Although H.R. 2933 takes, we believe, a pragmatic approach to this problem, FAIR also believes that the existing antiterrorist provisions on which this legislation has been modeled, responsibly—have been responsibly adapted—excuse me—to avoid civil liberties concerns.

For example, we would note that the authority of DHS in the existing legislation to consider classified information to designate a foreign terrorist organization under existing law is not present in the procedures for designation of a criminal street gang.

Now, in assessing the potential for detention and removal bills, FAIR relies often upon the experience of our members who work in the immigration law field, and the feedback on this bill has been very positive. They tell us that H.R. 2933 supports local law enforcement by closing loopholes and providing new avenues to combat the problem.

They believe it will be an effective weapon against drug cartel members or affiliates who are foreign nationals, but who would not otherwise be removable from the United States. They believe the new grounds of removability could be put to immediate use to break up violent street gangs that work as foot soldiers, hit-men or supporters, and who are vital links in the food chain of trafficking organizations.

Our members would like to make a technical suggestion they believe could increase the effectiveness of this legislation. They believe that the threat caused by alien gang members within the U.S. is so grave that it would be appropriate to add the grounds of inadmissibility in H.R. 2933 to the expedited removal process in the Immigration Act Section 235(c)(1).

We have also included as an attachment to our testimony, a list of additional loopholes that the Committee might want to consider in making this approach more effective.

[The prepared statement of Mr. Hethmon follows:]

PREPARED STATEMENT OF MICHAEL HETHMON, ESQ.

Testimony of

Michael Hethmon, Esq.
Staff Counsel
Federation for American Immigration Reform

Presented to the

IMMIGRATION, BORDER SECURITY AND CLAIMS SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE

Tuesday, June 28, 2005

This statement is in support of H.R.2933,
the "Alien Gang Removal Act of 2005"

FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.

Testimony of Michael Hethmon
Staff Counsel
Federation for American Immigration Reform

Hearing on H.R. 2933, the Alien Gang Removal Act of 2005
House Judiciary Subcommittee on Immigration, Border Security, and Claims
June 28, 2005

Mr. Chairman and members of the committee, thank you for the opportunity to present the views of the Federation for American Immigration Reform (FAIR) on H.R. 2933, the Alien Gang Removal Act of 2005. FAIR is a national, not-for-profit organization of concerned citizens nationwide promoting better immigration controls and substantial reductions in overall immigration for the benefit of all Americans. FAIR does not receive any federal grants, contracts or subcontracts. My name is Michael Hethmon, and I am FAIR's staff counsel.

In assessing immigration legislation, FAIR looks first to whether it represents reform in the national interest, as expressed in the seven principles for comprehensive reform attached to this statement. Second, we look for an unmet need in existing law. Third, we look carefully at the effectiveness of the legislative solution, within the context of existing budgetary and program restraints imposed by Congress.

Mr. Chairman, our members around the nation commend you for your focus on finding solutions to the major and growing criminal gang problem in this country. As the record will already clearly show, the role of foreigners in the rise of criminal gangs is undeniable. H.R. 2933 is not a comprehensive solution, but it is demonstrably in our national interest, responds to a dangerous vulnerability to public safety, and can be feasibly integrated into our existing immigration regulatory scheme.

When I was a young man in Southern California, the term 'Mexican street gang' more often than not meant a car club devoted to cruising rather than street racing. 'Gang violence' meant the probability that, if you insulted a member's girlfriend, you could expect to be challenged to a fistfight. This was a quintessential American social phenomenon. A gang member may not have been college material, but a good auto body and upholstery worker didn't need a white collar job to make a decent middle class living.

Mr. Chairman, how life in America has changed -- and not for the better. As testimony at a previous hearing on April 13, 2005 made clear, in 2005 the public violence and other barbaric behavior associated with the drug and human trafficking criminal enterprises

operated by criminal street gangs has reached unprecedented levels, and has spread nationwide, far beyond its traditional "turf" in immigrant urban enclaves.

Today, large numbers ? and in some cases most ? of the members of criminal street gangs are foreigners. Any solution that does not closely integrate effective immigration law enforcement will fail. Immigrant members of these gangs are predominately from Latin America, although hyper-violent Caribbean, Southeast Asian, and Eastern European street gangs have also emerged. Despite differences in national origin, alien criminal street gangs exhibit similar trends in increasingly violent behavior, placing the safety of the general public at risk.

H.R. 2933 would adapt the regulatory scheme created by Congress and found to be effective in identifying, detaining, and removing aliens who are terrorists or supporters of terrorist activities, to the functionally-related gang activities of narco-terrorism, human trafficking, and collateral crimes of violence.

H.R. 2933 amends the Immigration Act to create a new ground of inadmissibility – Section 212(a)(2)(J)(i) – and a new ground of removability – Section 237(a)2)(F)(i) – for aliens who are members of any informal criminal street gang who have also been convicted of a "gang crime," and for aliens who are members of a criminal organization officially designated by the Secretary of Homeland Security as a criminal gang.

The bill will, for the first time, allow the removal of alien street gang members who otherwise would have valid legal status in the United States, either as lawful permanent residents or non-immigrant visa holders. Aliens illegally in the U.S. (who are already removable as being present in the U.S. without inspection; or as visa-overstayers) could also be charged under the new sections so as to limit their eligibility for relief from removal.

The need for a legislative approach that applies internationally known counterinsurgency techniques to the alien membership of criminal street gangs in this country is regrettable but compelling.

It is regrettable, because three main factors identified by analysts to account for the appalling growth in alien criminal gang activity in this country all arise from the failure of Congress, over more than a generation, to control illegal immigration.

The failure by Congress to require and support effect border control and interior enforcement is the first cause. Alien smuggling has allowed the immigrant enclaves in which these gangs thrive to expand to the point that local governments have been intimidated from taking any actions that might be misrepresented as ethnic profiling. As a result, many jurisdictions have tied the hands of their law enforcement agencies with sanctuary policies and 'don't ask, don't tell' restrictions. This has produced a "race to the bottom" in public safety terms. Immigrants and their U.S. citizen ethnic relatives are the most frequent victims of alien street gangs, as residents see gang members demonstrate

their ruthlessness and retaliatory power without fear of permanent removal from the United States.

The willingness of Congress, beginning in the 1970s, to use refugee policy as an expedient way to deal with the economic upheavals that followed our intervention in Third World insurgencies, notably in Central America, is a second cause. Illegal aliens from El Salvador introduced terrorist-style brutality to the turf wars of domestic street gangs. With Temporary Protected Status, they organized and expanded violent criminal networks nationwide.

The third factor is the blowback from the failure of Congress to protect the American workplace from illegal employment. Victor Davis Hansen described the phenomenon in California in his acclaimed study *Mexifornia*. The children of the illegal aliens who "do jobs Americans won't do" come to despise the rule of law and American culture after seeing how it ground down their parents, and make gang membership a rational career choice. Indeed, the need to control unauthorized employment was stressed by all but one of the witnesses at the subcommittee's hearing on this topic last week on June 21.

Unfortunately, we cannot turn the clock back and change these national failures from the past. Recognizing the problem alone won't resolve it. Nevertheless, we should learn that what might appear to be an easy humanitarian response by our country to a foreign situation can have future unintended consequences that are deeply harmful to the American public.

Mr. Chairman, we view the tough legislative approach taken by Representative Forbes to be necessary and compelling, because the previous approach, the combination of irresponsible humanitarianism and the corrupt tolerance of the economic exploitation of aliens, has failed massively.

Nonetheless, we appreciate that the existing anti-terrorist provisions have been responsibly adapted by H.R. 2933 to avoid civil liberties concerns. For example, we note with approval that a request to designate a criminal street gang may not be based on classified information.

In assessing the potential effectiveness of detention and removal bills, FAIR relies on the experience of our members working in the immigration law enforcement field.
They are applauding the sponsors of this bill, and say it addresses the fastest growing major crisis in law enforcement by closing loopholes and providing new avenues to combat the problem. They tell us that H.R. 2933 will be an effective weapon against known drug cartel members or affiliates who are foreign nationals, but who would not otherwise be removable from the United States. Proving criminal charges against shadowy operatives from the drug cartel underworld is a daunting task. The new grounds of removability and inadmissibility could be put to immediate use to break up violent street gangs that work as foot-soldiers, hit-men or support workers, and who are vital links in the food chain of trafficking organizations.

Our members have made a technical suggestion that they believe could further increase the effectiveness of this important legislation. They suggest that the threat of violence by gang members within the U.S. is so grave a situation that it would be appropriate to include the H.R. 2933 grounds of removability under the expedited removal process of Immigration Act Section 235(c)(1), which covers arriving aliens inadmissible under national security, terrorist grounds, and foreign policy grounds, rather than the currently proposed placement under the mandatory detention provisions of Immigration Act Section 236(c).

Under the current text, an arriving criminal alien gang member would be given full access to the EOIR immigration appeals process, making prompt removal of the gang member more difficult, while in contrast an arriving alien charged with inadmissibility under Section 212(a)(6)(C) [fraud] or Section 212(a)(7) [no documents] would be summarily removed without a hearing before the EOIR through the expedited removal process.

Including gang-related inadmissibility under the expedited removal provision is a technical change that would sensibly restrict the access of inadmissible gang criminals to the litigation-based immigration court appeals system, and would also lessen the government's burden of proving "gang membership." As long as the gang member benefits from removal proceedings, the government must as a practical matter meet the Immigration Act Section 240(c)(3) standard of "clear and convincing evidence" of removability. In the real world, few criminal aliens would ever admit to gang membership during removal proceedings, even though the Department of Homeland Security files may be filled with police information noting that the alien is "a known member of the XYZ Gang." For example, the testimony of a law enforcement officer (or the introduction of a police report) that a particular alien is a member of a criminal gang could be refuted if the alien claimed the information was a mistake, or that he was misidentified by the officer. If invoking inadmissibility under H.R. 2933 means imposing additional evidentiary requirements on DHS or local law enforcement agencies, the tools created by this bill are less likely to be used to their full potential.

Mr. Chairman, H.R. 2933 eliminates the loopholes that are most often used by violent criminal gang members to avoid removal. But the Swiss cheese that is our Immigration and Nationality Act contains numerous other relatively obscure loopholes that could, cumulatively, still divert limited government litigation resources and lower the success rate for gang member removal. We have attached a list of these lesser-known loopholes identified by our members, which you may wish to consider eliminating from the relief still available to gang members.

Mr. Chairman, FAIR commends your work to address the fast growing major crisis in law enforcement represented by vicious criminal gangs, and the efforts of the sponsors of this bill to close loopholes and provide new avenues to combat the problem. The success of this bill will ultimately depend importantly on whether the rate and tempo of apprehension and removal actions against foreign members of criminal street gangs improves, and whether or not the removed aliens are unable to reenter the United States.

FAIR believes that this bill provides needed tools in that effort. We respectfully urge the members of this committee continue to address the larger context in which deported aliens see our nation's border as a revolving door.

Attachment 1: Seven Principles of True Comprehensive Immigration Reform, FAIR (2005).

Attachment 2: List of additional Immigration Act loopholes for relief from removal for street gang members (as identified by FAIR members).

Attachment 1:

FAIR's Seven Principles of True Comprehensive Immigration Reform

True comprehensive immigration reform, as FAIR — the nation's largest immigration reform organization — and the overwhelming majority of Americans believe it to be, must adhere to this set of immutable principles:

First Principle: Cut the Numbers

Any level of illegal immigration is unacceptable, and current legal immigrant admissions of about one million persons each year are entirely too many. Any measure that increases either illegal or legal immigration violates this principle. Immigration is a discretionary public policy. Its primary purpose, since our founding, is to advance the interests and security of the nation.

Second Principle: No Amnesty or Mass Guest-Worker Program

The 1986 amnesty was a failure; rather than reducing illegal immigration, it led to an increase. Any new amnesty measure will further weaken respect for our immigration law. Therefore, all amnesty measures must be defeated. Laws against illegal immigration must be enforced, if they are going to act as a deterrent. Redefining illegal aliens as "guest-workers" or anything else is just that: a redefinition that attempts to hide the fact it is an amnesty, not reform.

Third Principle: Protect Wages and Standards of Living

Immigration policy should not be permitted to undermine opportunities for America's poor and vulnerable citizens to improve their working conditions and wages. The need for guest workers must be determined by objective indicators that a shortage of workers exists, i.e., extreme wage inflation in a particular sector of the labor market. The current system accepts self-serving attestations of employers who seek lower labor costs as protections of American workers. True reform requires an objective test of labor shortage demonstrated by rising wages to attract more American workers.

Fourth Principle: Major Upgrade in Interior Enforcement, Led by Strong Employers Penalties

Employers who knowingly employ unauthorized workers are the magnet that attracts illegal entry into the U.S. These employers are complicit in the illegal alien cartel activity of smuggling, trafficking, harboring, and employing and must be punished. We must reform the current system by enforcing employer sanctions and fully punishing employers who break the laws of this country. These punishments will be fines, jailing for repeat offenders, and loss of corporate charters. Employers who knowingly or unknowingly employ illegal workers must be weaned off of their growing use of such workers by assuring a level playing field for all employers and demonstrating effective

enforcement actions against employers who continue to exploit illegal workers. No U.S. industry has jobs in which there are no American workers. If illegal workers are decreased over time, wages offered will rise to attract back more American workers. Real shortages, as noted above, can be met with short-term temporary foreign workers.

The Basic Pilot Employment Verification program must be made mandatory and at no extra cost to employers.

Effective immigration enforcement on the border and the interior of the country requires that staffing, equipment, detention facilities, and removal capabilities be adequate to fully meet current needs. The measures needed to identify and remove illegal aliens will also remove the ability of potential terrorists to operate freely in our country as they plot the next catastrophic attack on our people.

Fifth Principle: Stop Special Interest Asylum Abuse

Reforming the refugee and asylum system means returning to the original purpose and definition of the program: "any person who... is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...." America must honor its responsibilities to protect people who are fleeing true political persecution as defined by U.S. and international law. Efforts to expand those definitions to include all forms of "social persecution" invite massive fraud and endanger the security of this nation. Similarly, treating aliens illegally residing in the country the same as foreigners on legal visitor visas for purposes of the Temporary Protected Status designation is illogical and a form of amnesty that must be ended.

Sixth Principle: Immigration Time Out

We must restore moderation to legal immigration. Beginning with the recommendations of the Jordan Commission in 1995, we need to restrict immigration to the minimum consistent with stabilizing the U.S. population. Overall immigration must be reduced to balance out-migration, i.e., about 300,000 per year while still permitting nuclear family reunification and a narrowly focused refugee resettlement program. A moratorium on all other immigration should be immediately adopted pending true comprehensive immigration reform. We should abolish the extended relation preferences.

Seventh Principle: Equal Under the Law

There should be no favoritism toward or discrimination against any person on the basis of race, color, creed, or nationality. All admission of immigrants should come within a single, stable ceiling that is periodically reviewed on the basis of a reasoned, explicit goal of achieving population stability. We should abolish special preferences such as the Cuban Adjustment Act.

Attachment 2:

List of additional Immigration Act loopholes for relief from removal for street gang members (as identified by FAIR members):

1. **Section 240A(a)** – Cancellation of removal for certain permanent residents.

Charged aliens are still eligible for this relief if otherwise qualified. Gang members could apply for relief before the EOIR and remain in the U.S. despite the requirements of H.R. 2933. Congress might wish to consider a bar against eligibility of legal permanent resident aliens who are charged as deportable gang members for cancellation of removal.

2. **Section 240A(b)** – Cancellation of removal for non-permanent residents.

Charged aliens may still be able to file for this relief based on the wording of Immigration Act Section 240A(b)(c), which allows an application if the alien "has not been *convicted* of an offense under Section 212(a)(2) or 237(a)(2) of the Immigration Act." H.R. 2933 would add a new Section 212(a)(2) inadmissibility ground, but the part of the new ground dealing specifically with gang "membership" (as opposed to conviction of a gang crime) might not serve to bar an alien from applying for non-resident cancellation of removal.

3. **Section 212(c)** – Former waiver of deportability/inadmissibility.

This waiver provision of the Immigration Act was resurrected in part by the U.S. Supreme Court in the case of INS v. St. Cyr. 533 US 289 (2001). Charged alien gang members can make an argument for 212(c) eligibility if any of their predicate crimes (for the new gang crime charge) occurred prior to 1996, so that they would have an expectation of being able to apply for a waiver of inadmissibility based on St. Cyr. Although the "no objection" provision of Section 2(c)(8) of H.R. 2933 would bar aliens from raising an objection to the specific designation of a criminal street gang, charged aliens could nevertheless make an argument that the predicate crimes considered by the DHS Secretary's gang designation occurred prior to 1996, and are therefore covered under the logic of St. Cyr (allowing a Section 212(c) relief application even years after the fact).

4. **Section 240B(a)** – Pre-hearing voluntary departure.

Charged aliens would still be eligible for this relief, which would allow a gang member to avoid a formal order of removal and depart the U.S. voluntarily at their own expense.

5. **Section 240B(b)** – Post-hearing voluntary departure.

Charged aliens would still be eligible to apply for voluntary departure at the conclusion of Immigration Court proceedings. To bar charged gang members from this relief, Congress would need to amend the definition of "good moral character" under Section

101(f)(3) of the Immigration Act to include the new Section 212(a)(2)(J)(i) gang ground of inadmissibility. This addition to the "good moral character" definition would bar a charged alien from receiving post-conclusion voluntary departure under the requirements of Section 240B(b)(1)(B). Under H.R.2933 as written, criminal alien gang members would still be considered as persons of "good moral character" under Section 101(f)(3) of the Immigration Act.

6. Section 316 – Naturalization to U.S. Citizenship.

An additional amendment including the new Section 212(a)(2)(J)(i) gang ground of inadmissibility in the "good moral character" definition of Section 101(f)(3) would also prevent the naturalization of aliens under Immigration Act Section 316, which relies on a good moral character requirement as well. Under current immigration law, aliens convicted of an aggravated felony under Immigration Act Section 101(a)(43) are permanently barred from naturalization. But under H.R. 2933 as written, criminal alien gang members are *not* permanently barred. Congress might want to consider amending Section 316 to permanently bar aliens from naturalization if found inadmissible or removable under the new gang grounds.

7. 8 C.F.R. Section 208.17(a) – deferral of removal under the United Nations Convention Against Torture.

Aliens charged under H.R. 2933 will still be eligible for relief in the form of deferral of removal under the United Nations Convention Against Torture. The existence of this form of relief will provide charged alien gang members a clear avenue of litigation up to the federal circuit courts of appeal in contesting orders of removal under the new grounds created by H.R. 2933. To obtain deferral of removal, an alien must prove that it is "more likely than not" that the alien would be tortured if removed, as per 8 C.F. R. Section 208.16(c)(2). This form of relief is currently a criminal alien's relief application of last resort, especially for aliens falling under the aggravated felony provisions of Immigration Act Section 101(a)(43).

8. Section 241(a)(5) and 8 C.F. R. section 241.8 – Reinstatement of removal.

Charged aliens *outside* the Ninth Circuit could still apply for reinstatement of removal. See Morales-Izquierdo v. Ashcroft, 388 F.3d 1299 (9th Cir. 2004). The Morales-Izquierdo case presents an anomaly affecting H.R. 2933. If Congress does not clarify that the current regulation under 8 C.F.R. section 241.8 is entirely consistent with the intent of Immigration Act Section 241(a)(5) – in terms clearly understandable by the federal circuit courts of appeal – this chaotic situation for immigration law enforcement will persist. Currently, previously-deported criminal alien gang members (including aliens charged in the future under H.R. 2933 provisions) from the western (Ninth Circuit) states are entitled to a hearing before the EOIR Immigration Court, while gang members from other parts of the country will not. Congress should amend Section 241(a)(5) of the Immigration Act accordingly, to incorporate the language of 8 C.F.R. Section 241.8 in order to resolve this situation of the uneven applicability of federal immigration law.

9. Section 238(a)(1) – Expedited removal of aggravated felons.

Charged aliens will not be subject to the administrative expedited removal provisions currently in effect against aliens convicted under the aggravated felony provisions of Immigration Act Section 101(a)(43). These administrative removal provisions could be amended to include aliens charged under the new H.R. 2933 gang crime and gang membership grounds of inadmissibility and removability. As aliens covered by the aggravated felony provisions are already subject to this form of expedited removal without EOIR hearing, it would be consistent to subject aliens charged under the new gang grounds to summary removal without EOIR hearing as well.

Mr. GOHMERT. Thank you, Mr. Hethmon.

Mr. Cole, you have 5 minutes. Let's go ahead and take your testimony.

TESTIMONY OF DAVID COLE, PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL

Mr. COLE. Thank you, Mr. Chairman. I'd ask that my written remarks be incorporated in the record.

Mr. GOHMERT. That's been granted.

Mr. COLE. I want to make four points about this bill. First, that it imposes guilt by association, resurrecting the worst tactics of the McCarthy era, targeting people not for their own individual culpable conduct, but for their mere association with groups that we have blacklisted.

Second, that the procedure by which we blacklist—we would blacklist groups under this bill—is on its face unconstitutional and in conflict with governing decisions of the D.C. Circuit.

Third, that the bill radically expands the grounds for deportation for crimes from aggravated felonies, which is already a very broad concept, to essentially minor misdemeanor assault offenses that merit no jail time whatsoever. Nonetheless, they would be deportable offenses under the statute.

And fourth, that this statute, by barring asylum and withholding to people based solely on their association in blacklisted groups, violates our obligations under international law not to send people back to countries where they're going to be persecuted simply because we find that they're a member of a group we don't like. It's one thing to send someone back to a country to be persecuted where they have been found to be a serious criminal or a terrorist, it's another thing to send someone back to a country where they're going to be persecuted simply because we find that they're a member of a group that we don't like, without any showing that they've engaged in any criminal activity.

Terrorism, crime, gang crime, violent crime, they're all problems, they're all serious problems that we need to respond to, but the challenge here, as with the challenge with respect to terrorism, is whether we can respond while remaining true to the principles upon which this country was founded. Unfortunately, this bill fails in remaining true to those principles. So let me talk about those four points.

First, it imposes guilt by association. It is already a deportable offense for a gang member, or indeed any other foreign national who is convicted of an aggravated felony, a very broad term that as this Committee no doubt knows, includes misdemeanors, misdemeanors, includes shoplifting crimes and the like. What this bill does is make people deportable who have never committed a crime in their life, who are not suspected of committing a crime, who are merely deemed by the Department of Homeland Security to be a member of a group which is deemed by the Attorney General to be a bad group. Bad groups have bad people in them. They also have good people in them. This bill makes no distinction between the two. It deports anyone who is found to be a member of any group which has been blacklisted by the Attorney General. That's guilt by association.

If you took the McCarthy era laws that this Congress repealed in 1990, and you just substitute "criminal street gang" for "communist," that's what this bill would be. It essentially takes that approach where we punished people not for their own individual culpable conduct, but for their association with groups that we didn't like, and rendered them deportable. That's what this bill does, and it violates the first amendment right of association, and violates the fifth amendment right of an individual to be treated as an individual and not treated as culpable based on your associations.

Secondly, the designation process is patently unconstitutional. It provides no notice to the group that is designated. It provides no opportunity to the group that's designated to provide any evidence in its defense. It doesn't even allow the group to approach the Attorney General about its designation until 2 years after it's been designated.

And although it gives the gang the right to go to court to challenge its designation in court, in the D.C. Circuit, it doesn't allow the group to provide any evidence in challenging its designation. The evidence is solely that which has been created in a one-sided administrative process with no notice and no opportunity to respond. That very process has been held unconstitutional by the D.C. Circuit in the National Council of Resistance of Iran case, in the context of foreign terrorist organizations with presence here in the United States. A fortiori, it violates the Constitution with respect to domestic groups of three or more individuals who happened to have committed two or more gang crimes at some point in their history.

Third, it radically expands the grounds for inadmissibility and deportability far beyond your aggravated felonies, to—as I point out in my testimony—misdemeanor assault offenses that are found by the criminal justice system to merit no jail time whatsoever. We would turn those into deportable offenses that not only render the person deportable, but deny him any relief whatsoever.

I'll conclude there.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF DAVID COLE

Testimony of David Cole Before the
United States House of Representatives
Subcommittee on Immigration, Border Security, and Claims
of the House Committee on the Judiciary

Hearing on H.R. 2933, the "Alien Gang Removal Act of 2005."

June 28, 2005

INTRODUCTION

Thank you for inviting me to testify on H.R. 2933, titled the "Alien Gang Removal Act of 2005." I am a professor of constitutional law at Georgetown University Law Center, and a volunteer attorney with the Center for Constitutional Rights. I have litigated and testified often on issues of immigration law and constitutional rights. In my view, this bill, if enacted, would be unconstitutional in several respects. It would repeat some of the worst errors of the past in our treatment of foreign nationals, by failing to treat non-citizens as individuals, and by failing to accord them the basic human rights of due process and political freedom that we owe to all persons, and routinely insist upon for ourselves.

There is no question that gang crime is a serious matter that needs the country's attention. There are a wide variety of responses that governments might adopt to deal with the issue, from increased police presence in communities beset by gang crime, to criminal law enforcement targeted at the crimes that gang members commit, to providing alternatives to gangs through aftercare programs, sports, and social organizations, to relieving the poverty and desperation in the inner cities that leads too many young people to join gangs in the first place.

Immigration enforcement also has a role to play. But existing law affords immigration authorities sufficient tools to play such a role. Indeed, Michael Garcia, Assistant Secretary of U.S. Immigration and Customs Enforcement, recently testified before this subcommittee on ICE's Operation Community Shield, which had used immigration law to arrest more than 150 members of the notorious gang, MS-13.[1] Mr. Garcia did not suggest that existing law was insufficient to the task. In fact, he described the program as a success, and ongoing. Thus, there has been no showing that broader immigration powers are necessary to use immigration law to target foreign gang members who have violated their status.

Many if not most "gang crimes," at least as that term is colloquially understood, are

[1] Statement of Michael J. Garcia Before the House Committee on Judiciary Subcommittee on Immigration, Border Security and Claims, Hearing on Immigration and the Alien Gang Epidemic: Problems and Solutions," Apr. 13, 2005.

already "aggravated felonies" under immigration law. Any foreign national gang member convicted of an aggravated felony is already deportable, without regard to his or her membership in a gang. Thus, there is no bar on deporting gang members convicted of crimes.

What this bill does is empower the DHS to deport foreign nationals who have *never committed any crimes whatsoever*, and who have obeyed all of our laws, simply by claiming that the DHS has determined that they are members of designated street gangs. Such individuals are subject to mandatory detention and automatically rendered ineligible for asylum, withholding, and temporary protected status, even if they can show that they would be persecuted if they were returned to their country of citizenship. In short, they are treated even worse than aggravated felons, even if they have never committed a crime and pose no threat to anyone. This is guilt by association in its purest – and most clearly unconstitutional – form. It violates both the First and Fifth Amendments, both of which apply equally to citizens and foreign nationals residing here..

The bill's procedure for designating "criminal street gangs" also violates basic constitutional rights. The bill gives the Secretary of Homeland Security virtually unchecked power to blacklist domestic groups, through a secret process that provides no notice or opportunity to be heard to the designated group, and no meaningful opportunity to challenge the blacklisting decision once announced. The Secretary may designate as a proscribed "criminal street gang" any formal or informal group of three or more persons who have committed two or more enumerated "gang crimes." There are likely to be tens of thousands of such groups across the country, any of which could be designated by the Secretary. Once designated, any foreign national who immigration authorities deem to be a "member" of the group is deportable. There is no defense for those who did not know that the group was designated. There is no defense for those who never committed or supported a single criminal act. And the individual facing deportation has no right to challenge the validity of the designation.

This scheme violates the due process and freedom of association rights of gangs, gang members, and perhaps most importantly, those who are not in fact gang members but who a DHS official erroneously deems to be a member. The process contemplated by the bill provides no meaningful checks to ensure that innocent individuals and groups are not caught up in a potentially sweeping dragnet.

The "Alien Gang Removal Act of 2005" would expand the grounds of inadmissibility and deportability in two basic ways. First, it would make anyone whom DHS determines to be a member of a designated "criminal street gang" deportable and inadmissible, without more. Second, it would make members of *nondesignated* gangs who have been convicted of a "gang crime" deportable, and would render inadmissible any person whom DHS has "reasonable grounds to believe" is a street gang member and has committed or seeks to enter to commit "any unlawful activity."

The first approach, which relies on the blacklisting of proscribed gangs and requires no proof of criminal conduct by the foreign national whatsoever, violates both due process and the

freedom of association. The second approach radically expands the grounds of inadmissibility and deportability, without any showing of need. Both approaches entail exceedingly harsh consequences in terms of eligibility for asylum, withholding, and temporary protected status, some of which violate our obligations under international law. I will address these aspects of the bill in turn.

I. THE BILL WOULD IMPOSE GUILT BY ASSOCIATION ON INDIVIDUALS WHO NEVER COMMIT OR SUPPORT ANY CRIMINAL ACTIVITY

Section 2(a) of the bill, which would add Section 212(a)(J)(i)(I)(bb), renders inadmissible any person who a consular officer or DHS officer has reasonable grounds to believe "is a member of a criminal street gang designated under section 219A." Section 2(b), which would add Section 237(a)(F)(i)(II), renders deportable anyone who "is determined by the Secretary of Homeland Security to be a member of a criminal street gang designated under section 219A." These provisions would impose guilt by association in its purest sense, for they would render individuals deportable and inadmissible not based on their own conduct, but solely on their association with others. A permanent resident who had never committed a single crime would be deportable under this provision for membership alone.

These provisions would prohibit all association with select disfavored groups, while granting executive branch officials effectively unreviewable discretion to select and designate the disfavored groups of their choice. These provisions do not punish crime, gang crime, or even material support to crime or gang crime. They punish membership per se, without more. They would render people deportable who had never committed an illegal act of any kind. Under this statute, a Cambodian refugee who was befriended by a Cambodian immigrant group designated a "criminal street gang" would be deportable even if he never committed any illegal act.

The Supreme Court has declared guilt by association "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982). It violates both the Fifth Amendment principle that guilt must be personal, and the First Amendment right of association.

These provisions are materially indistinguishable from the McCarthy era laws that penalized association with the Communist Party. They substitute "criminal street gang" for "communist organization," but indulge in the same guilt by association. Yet despite specific findings that the Communist Party was engaged in criminal activity for the purpose of overthrowing the United States,[2] the Supreme Court consistently held that individuals could not be penalized for their Communist Party associations absent proof of "specific intent" to further the

[2] 50 U.S.C. § 781 (West 1991) (repealed 1993).

group's illegal ends.[3]

In *Scales v. United States,* 367 U.S. 203 (1961), the first case to establish the prohibition on guilt by association, the Supreme Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25. In other words, the Fifth Amendment forbids holding a moral innocent culpable for the acts of others.

Guilt by association also violates the First Amendment right of association. As the *Scales* Court explained, many groups have both legal and illegal ends. The right of association means that one who joins a group to further its legal ends cannot be punished for his membership. Only those who specifically intend to further the group's *illegal* ends may be punished. *Id.* at 229.

The Alien Gang Removal Act does not incorporate a specific intent standard. It appears to punish association regardless of intent, knowledge, or individual conduct. As such, it violates the prohibition on guilt by association.

Scales involved citizens, not foreign nationals. But the Supreme Court has said that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens.*"

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[3]*See, e.g.*, *United States v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (emphasis added).[4]

Scales involved a criminal statute, not a civil sanction. But the Court has extended the prohibition on guilt by association to a wide range of civil sanctions, holding unconstitutional laws that on the basis of association: imposed tort liability, *Claiborne Hardware*, *supra*; denied a security clearance for employment in a defense facility, *Robel*, *supra*, denied employment as a public school teacher, *Keyishian*, *supra*; denied passports, *Aptheker v. Sec. of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958); and even denied students access to campus meeting rooms. *Healy v. James*, 408 U.S. 169 (1972).

The Alien Gang Removal Act's focus on membership in gangs also raises difficult issues of proof. It is one thing to prove membership in an established political organization like the Communist Party. Such organizations often have membership cards and lists, dues records, formally elected positions, and the like. But it is fairly certain that most street gangs do not have membership cards, dues payments, or official membership lists. "Membership" is likely to be a much more fluid concept. This is particularly likely given the bill's expansive definition of a "criminal street gang" as any group, *formal or informal*, of three or more individuals who have committed two or more gang crimes. Membership alone should never be a ground for deportation, but when one is dealing with membership in often amorphous informal gangs, this approach is even more likely to ensnare innocents.

In sum, the Alien Gang Removal Act indulges in unconstitutional guilt by association, imposing disabilities on individuals not based on their individual conduct, but based solely on their alleged association with others. We learned in the McCarthy era, when guilt by association was the modus operandi, that such tactics are overbroad, prone to widespread abuse, a direct infringement of constitutional liberties, and certain to harm many innocent people. There is no justification for repeating that history in the name of fighting gang crime, as current law permits authorities to arrest and deport all those foreign nationals who have actually committed an "aggravated felony," or have otherwise violated their immigration status.

II. THE DESIGNATION PROCEDURES VIOLATE DUE PROCESS

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[4] *See also Bridges v. California*, 314 U.S. 252 (1941) (applying First Amendment to resident alien); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) ("the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1074-83 (C.D. Cal. 1989) (declaring unconstitutional a statute that made Communist affiliation a deportable offense), *affirmed in part and reversed in part on other grounds*,. 970 F.2d 501 (9th Cir. 1992).

The procedure by which groups would be designated under the bill raises a host of other constitutional concerns. The bill would give the Secretary of Homeland Security virtually unchecked power to blacklist groups at will. It affords prospective "designated gangs" neither notice nor the opportunity to be heard before being designated. Even after designation, the bill bars designated groups from seeking any administrative review until *two years after* they have been designated. And if they want to challenge their designation in court, gangs must file a lawsuit in the U.S. Court of Appeals for the District of Columbia, where review is limited to the one-sided administrative record created by DHS, affording the designated gang no opportunity to present evidence in its own behalf.

These designation procedures are evidently modeled on an existing procedure for designating "foreign terrorist organizations." 8 U.S.C. §1189. But those procedures have already been declared unconstitutional for failure to provide notice and an opportunity to be heard to any foreign terrorist groups with a presence in the United States (and therefore protected by due process). *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001). In that case, the D.C. Circuit held that prospective terrorist organizations with a U.S. presence must be afforded notice and an opportunity to be heard before the administrative agency regarding their designation. Since criminal street gangs will presumably all be domestic (they must engage in conduct that violates federal or state law), they are all entitled to due process. Yet the bill provides the gangs no notice or opportunity to be heard on the issue of their initial designation.

Indeed, the bill appears to bar a designated gang from even approaching DHS about its designation until two years *after* the group has been designated. Sec. 2(c)(1) (adding Section 219A to 8 U.S.C. 1181 et seq.) Sec. 219A(4)(B)(ii)(II). A group is not permitted to petition for revocation of a designation until the "petition period" begins, which is two years after initial designation. *Id.* Thus, the bill violates due process by providing designated groups with no notice and no opportunity whatsoever to address DHS at a meaningful time on their initial designation.

Even after the two-year waiting period, a designated group may not challenge its *initial* designation as erroneous or unjustified, but may only show "that the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the gang is warranted." Sec. 219A(4)(B)(iii). This standard appears to render the administrative review process meaningless. If, on the one hand, a group was erroneously designated because it never committed any gang crimes, the petition process would provide no opportunity to correct the error, for the gang would be unable to show that "the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation." And if, on the other hand, a group was initially properly designated under the law, because two of its members at some point committed two "gang crimes," those circumstances will not be "different" at a later time. Even if an initially designated group has engaged in no further crimes, the mere fact that it committed two or more "gang crimes" at some

point alone makes its designation appropriate under the law.[5] Thus, the administrative petition process not only comes two years too late, but appears to be a sham.

The bill would permit gangs to challenge their designation in court. But this process, too, is largely a sham. First, the bill requires any designated gang to file a challenge in the D.C. Circuit within 30 days of the publication of its designation in the Federal Register. It is fanciful to think that gangs, defined expansively under this bill as informal groups of three or more individuals who commit two or more gang crimes, are going to be in a position to check the Federal Register on a regular basis and hire an attorney to appear on their behalf in the DC Circuit. Moreover, even if a designated group were to read the Federal Register, find a lawyer, and file suit, the judicial review process does not permit the group to present any evidence of its own. Review is limited to the one-sided administrative record compiled by DHS without any notice to or input from the designated group. Thus, unless DHS were to designate groups without having any evidence that they had engaged in two gang crimes, its designation would be immune from challenge.

The person who is prosecuted for providing material support to a designated gang is barred from challenging the propriety of the designation. Thus, if the Secretary of Homelsnd Security were to erroneously designate an informal New York group of youth that had never engaged in gang crimes, but the designated group failed to file a challenge within the requisite 30 days, a foreign national subsequently charged with having belonging to that group could not defend himself by showing that the group never engaged in any gang crimes, and therefore should never have been designated in the first place. This prohibition raises serious due process and First Amendment concerns. There can be no question that individuals have a right to associate with groups that commit *no* criminal activity. Accordingly, an individual being punished solely for his associations certainly should have the right to make the case that his group engaged only in lawful activity, and should not have been proscribed. *McKinney v. Alabama*, 424 U.S. 669 (1976). Yet the statute expressly precludes just such a defense.[6]

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[5] One of the only situations in which circumstances might be different enough to warrant revocation under this standard would be where the group had disbanded and no longer existed as a group. But in that case, there would be no entity to petition for revocation.

The only other situation that might satisfy the standard for revocation would be one where a conviction previously relied upon to designate a group was overturned on appeal. But that would only be grounds for a revocation if the gang were designated on the basis of two crimes alone. Wherever DHS had evidence of more than two crimes in the gang's past, even an overturned conviction would not appear to require revocation.

[6] The Ninth Circuit recently upheld a similar bar on defendants charged with providing material support to designated foreign terrorist organizations. *United States v. Afshari*, 2005 U.S. App. LEXIS 11556 (9th Cir. June 17, 2005). However, the Court in that case rested its decision on three factors: (1) the "material support" at issue was the provision of money, which the Court distinguished from speech protected by the First Amendment; (2) the designation

As noted above, the designation procedure used here is modeled on an existing procedure for designating "foreign terrorist organizations." *See* 8 U.S.C. §1189. In my view, that existing procedure is also deeply problematic – beyond the constitutional infirmities that the D.C. Circuit has identified. But even if such a procedure were appropriate for foreign organizations engaged in terrorism that threatens national security, it does not follow that the same procedure is appropriate for domestic street gangs who have committed two relatively petty crimes.

First, the existing procedure is directed at *foreign* terrorist organizations, while this bill's procedure would be directed at *domestic* groups. As the D.C. Circuit has held, any group with a physical presence in the United States is unquestionably entitled to due process. *National Council of Resistance of Iran, supra*. Few foreign terrorist organizations have such a presence here, while all the groups that will be affected by this bill will have such presence. To give an executive official this kind of authority to blacklist domestic groups harkens back to the Attorney General's list of subversive organizations of the McCarthy period.

Second, the existing procedure is directed at *terrorist* organizations, defined as groups that engage in terrorist activities that undermine our national security. Such groups plainly pose a greater threat to the United States than the groups encompassed by this bill – literally any group of three or more individuals who have committed two "gang crimes," which, as noted below, could consist of burglaries, obstruction of justice, or misdemeanor assaults. To be designated as a "foreign terrorist organization," the Secretary of State has to determine that an organization's terrorist activities threaten the country's national security. No such finding is required for the designation of street gangs. It is enough to find that there are three individuals who have committed two burglaries or got into two bar fights.

Third, the discretion that this standard gives to the Secretary in designating is virtually limitless. The Department of Justice estimates that there are more than 25,000 gangs in the United States. And given the extremely expansive definition of "gang" used in this bill, the number of "formal or informal" groups of three or more persons who might fit the definition could well exceed 100,000. The Secretary has carte blanche to pick and choose among such groups, and his decision is inevitably likely to be selective and arbitrary. In essence, this bill would create an expansive licensing scheme for domestic organizations.

Thus, the procedure for designating "criminal street gangs" violates basic due process rights, and should be rejected. All of these problems can be avoided, as above, by targeting actual criminal activity, rather than targeting individuals based solely on their associations.

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involved sensitive foreign policy decisions; and (3) only *foreign* organizations could be designated. None of those factors is present here: (1) this bill punishes association per se, not material support; (2) the designation process involves no foreign policy determination; and (3) the bill affects domestic groups.

III. THE BILL'S TREATMENT OF GANG CRIMES WOULD RADICALLY EXPAND DEPORTATION GROUNDS FOR CERTAIN CRIMES WELL BEYOND THEIR ALREADY EXPANSIVE

The second way the bill expands the grounds of deportability and inadmissibility requires the DHS to show something more than mere association. Individuals who the DHS deems to be members of *nondesignated* street gangs are inadmissible if DHS also has reasonable grounds to believe that they have committed or seek to enter the United States to commit "a gang crime or any other unlawful activity." Sec. 2(a); amending 8 U.S.C. §1182. A foreign national is deportable if he is determined to be a member of a *nondesignated* street gang and has been convicted of a gang crime. Sec. 2(b), amending 8 U.S.C. §1227(a)(2).

These grounds also impose a form of guilt by association, because in many circumstances, individuals who commit the same offenses but are not associated with "street gangs" would not be subject to deportation or exclusion. In effect, this part of the bill radically expands the sorts of crimes for which some people may be deported. Some of the "gang crimes" defined in the bill are already aggravated felonies under existing law's already sweeping definition of that term.[7] But despite the expansive definition already given to "aggravated felonies," "gang crimes" under this bill would include many garden-variety crimes that are *not* aggravated felonies under current law. As such, these provisions radically expand the grounds of deportability and inadmissibility for garden-variety offenses.

Consider three of the crimes identified as gang crimes: burglary, obstruction of justice, and crimes of violence. Under current law, such crimes are "aggravated felonies" only if the defendant is actually sentenced to a year or more of incarceration. Under this bill, such crimes would be deportable offenses for gang members so long as the crimes are "punishable by imprisonment for one year or more." The distinction between crimes that *actually receive* a one-

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[7] The definition of "aggravated felony" for immigration law purposes has virtually no relation to the common-sense meaning of that term. The current law treats many misdemeanors as "aggravated felonies" if they trigger a sentence of one year. Thus, courts have ruled that misdemeanor convictions for shoplifting, assault, and theft of a video game worth $10 all constitute "aggravated felonies." *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001) (misdemeanor conviction for theft by shoplifting, with 12 months suspended sentence is "aggravated felony"), *cert. denied*, 534 U.S. 877 (2001); *Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000) (misdemeanor shoplifting with one-year suspended sentence); *United States v. Holguin-Enriquez*, 120 F.Supp.2d 969 (D.Kan. 2000) (misdemeanor assault with one-year suspended sentence); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor theft of a small video game with one-year suspended sentence), *cert. denied*, 533 U.S. 904 (2001)

year sentence and those *punishable* by a one-year sentence may seem technical. It is not. States routinely authorize punishment of up to one year for misdemeanors, but it is only the rare defendant who actually receives a one-year sentence for a misdemeanor conviction.

For example, under New York law, simple assault – the kind of charge that a garden-variety bar fight or street fight might trigger – is a Class A misdemeanor punishable by up to one year of incarceration. In 2004, 10,779 people were convicted of this charge in New York, yet only 349, about 3%, were sentenced to the maximum of one year of incarceration. The vast majority – about 70% – served no jail time at all. And the median sentence for the 30% who received any jail time was 89 days.[8]

Under current law, any foreign national who was among the 3% who actually received a one-year prison sentence might be deportable for having committed an "aggravated felony." Under this bill, by contrast, any foreign national among the 97% of defendants who do *not* receive a one-year sentence for misdemeanor assault would be deportable if they were deemed to be a member of any group, formal or informal, of three or more individuals who had committed two or more similar assaults in the past. This is a radical expansion of the grounds of deportation.

The inadmissibility standard is even more sweeping, for three reasons. First, to establish inadmissibility the DHS need not establish as a matter of fact that a foreign national is a member of a "street gang," but need only have "reasonable grounds to believe" that this is the case. Second, to establish inadmissibility the DHS need not show that the foreign national was convicted of any crime, but merely that the DHS has reasonable grounds to believe that he has committed or is likely to commit such an offense in the future. No conviction is needed. And third, inadmissibility is not limited to the expansive category of "gang crimes," but encompasses "any other unlawful activity," thus sweeping in the most petty of crimes.

Inadmissibility grounds are not infrequently broader than deportation grounds, in part because less is thought to be at stake for the typical entrant than for the foreign national already living among us, and in part because government officials often have to make admission decisions on less complete information than deportation decisions. But it is important to realize that inadmissibility grounds are used not merely to assess who may enter the country in the first place. They are also applied to permanent resident aliens every time they return from any trip outside the country. And they are used as eligibility thresholds for a variety of immigration benefits, including adjustment of status to permanent resident.

IV. THE BARS ON ELIGIBILITY FOR ASYLUM, WITHHOLDING, AND TEMPORARY PROTECTED STATUS ARE UNWARRANTED, AND IN SOME CIRCUMSTANCES VIOLATE OUR INTERNATIONAL LAW OBLIGATIONS

The bill imposes especially harsh immigration consequences on all deemed deportable or

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[8] *See* Exhibit A attached hereto.

inadmissible as gang members. Anyone who falls within the expansive grounds of inadmissibility and deportability is automatically subject to mandatory detention and rendered ineligible for asylum, withholding of deportation, and temporary protected status (TPS).

There is little justification for such harsh consequences. Foreign national gang members convicted of particularly serious crimes are already deportable, subject to mandatory detention, and barred asylum and temporary protected status, under the "aggravated felony" provisions of current immigration law. What this law does is extend such consequences to persons who have *never committed a crime in their life,* but are simply deemed to be members of designated street gangs, or are deemed members of nondesignated gangs who have been convicted of routine misdemeanors, such as simple assault, even if the criminal justice system sees no need even to impose any prison time for the offense.

The effect on withholding is most dramatic. Under current law, an alien is generally ineligible for withholding of deportation only where he has been convicted of an aggravated felony *and* has been sentenced to five years or more incarceration. 8 U.S.C. §1158(b)(2)(B)(I). Under this law, an alien would be rendered ineligible for withholding based solely on his association with a gang, and/or on the basis of a minor assault conviction that warranted no jail time whatsoever.

To receive asylum or withholding, an individual must show that he is likely to suffer persecution if sent back to his country of origin. To deny asylum and withholding and send a person back to likely persecution is a drastic step. To do so where the individual poses a direct threat to national security or is a hardened criminal is one thing; to do so on the basis of "membership" in a gang, without any evidence of criminal activity, or on the basis of a minor criminal charge that does not even warrant a day's incarceration is an entirely different matter.

Indeed, to deny eligibility for asylum or withholding to otherwise qualified foreign nationals based on nothing more than their perceived associations, and or a minor crime, violates our obligations under the Refugee Convention. Article 33 of the Refugee Convention provides as follows:

> Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

A person deemed solely to be a member of a designated street gang, who has committed no crimes, cannot be returned to a country where he faces persecution. Yet under this bill, he would be. Similarly, burglary, obstruction of justice, or assault charges cannot under any reasonable definition be defined as "particularly serious crimes," especially where they are deemed by the criminal justice system to warrant no incarceration. Yet this bill would bar withholding, and send immigrants back to persecution, based on such petty crimes, and based solely on association.

CONCLUSION

Reducing gang violence is undoubtedly an important objective, although in general more a state and local than a federal responsibility. Using immigration law to deport violent gang members makes sense, as does using immigration law to deport violent foreign nationals who are not gang members. But the Alien Gang Removal Act goes far beyond the legitimate purpose of removing violent foreign nationals. It authorizes mandatory detention and deportation of persons who have never committed a single crime in their life, and who pose no threat to the community – simply on the basis of their perceived association with even "informal" groups. And it would send such foreign nationals back to countries where they are likely to be persecuted, again without any showing that their continued presence here poses any threat. At the same time, it radically expands the types of crimes for which foreign nationals can be deported, far beyond even the already expansive definition of "aggravated felonies" in current law.

As Michael Garcia testified recently, DHS and ICE are already engaged in an ongoing effort to use immigration law to fight gang violence. There is no evidence that the tools they already have at their disposal are inadequate to the task. This bill is accordingly premature at best. What's worse, in its zeal to fight gang violence it has lost sight of the problem – violent crime – and indulged instead in sweeping guilt by association, in violation of constitutional law and our international law obligations. This bill, if enacted, would resurrect the unwise and unconstitutional tactics of the McCarthy era, giving government officials broad discretion to punish individuals not for their own culpable conduct, but solely for their associations.

STATE OF NEW YORK - DIVISION OF CRIMINAL JUSTICE SERVICES

PL 120 MISDEMEANOR ASSAULT OFFENSES
NEW YORK STATE

DISPOSITION YEAR	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
TOTAL DISPOSITIONS	41859	44479	48996	51309	47295	47246	41214	44537	42465	42873
PROSECUTED, LOWER COURT	38983	42599	47081	48852	45474	45017	38890	41860	39129	38353
CONVICTED	9551	10342	10653	11228	10984	10947	10506	10647	9911	9738
--PLEA	9133	9984	10348	10891	10597	10558	10137	10314	9630	9442
--VERDICT	174	186	152	217	224	177	192	205	171	167
--UNKNOWN	244	172	153	120	163	212	177	128	110	129
DISMISSED	28389	31182	35296	36439	33226	32846	27288	30112	28122	27659
ACQUITTED	276	294	295	318	336	287	245	349	295	272
OTHER DISPOSITION	767	781	837	867	928	937	851	752	801	684
SENTENCES TO: PRISON	0	0	0	0	0	0	0	0	0	0
JAIL	3124	3382	3582	3624	3495	3660	3479	3624	3355	3320
TIME SERVED	718	818	792	859	808	729	784	702	707	727
JAIL + PROBATION	495	727	771	784	698	648	652	621	596	472
PROBATION	2308	2476	2509	2724	2639	2553	2506	2393	2183	1994
FINE	778	741	740	782	764	720	650	717	684	639
COND. DISCHARGE	1972	2038	2065	2274	2372	2430	2270	2435	2234	2260
OTHER	33	56	50	61	63	41	24	36	37	42
UNKNOWN	123	104	144	120	145	166	141	119	115	284
PROSECUTED, UPPER COURT	730	760	795	758	703	714	699	859	1056	1670
CONVICTED	692	723	761	708	655	681	650	728	865	1041
--PLEA	620	649	683	660	588	607	580	655	804	976
--VERDICT	58	70	70	46	63	70	67	71	60	63
--UNKNOWN	14	4	8	2	4	4	3	2	1	2
DISMISSED	19	11	9	15	11	12	17	100	157	553
ACQUITTED	4	3	3	2	3	3	1	3	9	21
OTHER DISPOSITION	15	23	22	33	34	18	31	28	25	55
SENTENCES TO: PRISON	0	0	0	0	0	0	0	0	0	0
JAIL	191	214	217	210	193	198	183	221	222	313
TIME SERVED	37	36	37	46	50	66	49	41	64	64
JAIL + PROBATION	81	83	91	105	73	76	66	66	94	92
PROBATION	263	277	290	237	241	229	237	250	332	291
FINE	17	21	20	28	16	9	17	14	16	16
COND. DISCHARGE	94	84	97	75	75	83	84	107	109	201
OTHER	3	4	1	0	3	3	2	2	3	5

	UNKNOWN	6	4	8	7	4	17	12	27	25	59
OTHER DISPOSITION-COURT UNKNOWN		2146	1120	1120	1699	1118	1515	1625	1818	2280	2850
CONVICTION RATE (% OF DISPOSED)		24.5%	24.9%	23.3%	23.3%	24.6%	24.6%	27.1%	25.5%	25.4%	25.1%
INCARCERATION RATE (% OF CONV)		45.4%	47.5%	48.1%	47.2%	45.7%	46.2%	46.7%	46.4%	46.8%	46.3%
% OF CONVICTION TO:	FELONIES	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
	MISDEMEANORS	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	LESSER OFFENSES	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

SOURCE: COMPUTERIZED CRIMINAL HISTORY SYSTEM (AS OF 04/21/2005)

Jail Sentences - Top Disposition Charge PL 120
Misdemeanor Assault Convictions
New York State
Source: DCJS, Computerized Criminal History System (6/2005)

Days	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
1	0	4	5	5	3	1	7	3	3	4
2	3	4	1	2	4	2	1	2	3	0
3	11	5	8	18	10	11	13	6	5	25
4	3	3	1	2	4	7	2	1	3	3
5	34	32	38	41	23	39	48	28	33	30
6	1	6	7	3	3	4	2	8	5	5
7	25	30	36	34	24	36	41	27	28	35
8	3	10	1	4	2	9	4	4	3	2
9	3	2	4	3	3	4	9	8	2	6
10	82	99	79	65	63	82	88	75	72	95
11	0	0	0	2	1	0	1	0	1	1
12	4	3	3	5	6	1	11	6	3	7
13	0	0	1	2	2	1	2	0	1	1
14	6	2	2	3	5	5	5	6	5	1
15	116	122	122	135	110	115	120	125	110	124
16	2	3	1	3	1	0	0	2	0	2
17	1	1	0	1	1	0	1	2	1	2
18	3	1	2	2	0	2	3	2	1	7
19	1	0	1	0	2	0	0	0	0	0
20	71	88	91	74	60	78	83	86	86	109
21	4	14	7	8	8	6	5	7	6	9
22	1	2	0	0	1	2	0	0	0	0
23	0	0	0	1	1	0	0	1	2	1
24	3	5	5	4	1	3	3	4	4	3
25	9	6	5	8	11	9	7	5	9	9
26	0	0	1	0	1	0	1	3	0	1
27	5	0	0	4	1	1	1	1	1	1
28	13	6	7	10	8	2	6	9	5	4
29	1	1	1	0	3	1	0	3	0	0
30	474	490	572	534	558	589	553	589	496	513

Jail Sentences

31	1	2	1	7	4	3	5	9	7	3
32	1	0	0	1	0	2	0	0	1	0
33	1	1	0	0	0	0	3	0	1	1
34	0	1	1	1	1	0	0	0	1	1
35	7	3	3	4	2	3	4	4	7	4
36	1	2	1	4	2	2	1	1	2	0
37	0	1	1	1	0	0	0	0	0	0
38	1	0	1	0	0	1	2	0	0	0
39	0	2	0	1	2	1	0	0	0	2
40	13	14	11	11	17	13	10	12	6	10
41	0	0	0	0	0	0	0	1	1	0
42	8	5	3	6	4	4	7	0	1	1
43	1	0	1	0	2	1	2	0	0	0
44	0	0	0	0	0	0	0	0	1	0
45	181	207	200	193	176	213	185	190	220	231
46	0	1	0	0	0	1	1	0	0	0
47	1	0	0	1	0	0	0	0	0	2
48	0	2	2	2	0	0	2	0	1	1
49	0	0	1	0	2	1	0	0	2	0
50	4	6	7	6	9	3	5	3	6	7
51	0	0	0	0	0	0	0	1	0	0
52	0	0	1	0	0	1	1	0	1	0
53	0	0	1	0	0	0	1	0	1	2
54	2	0	1	1	0	0	0	0	0	2
55	3	1	1	0	1	1	1	1	1	0
56	0	7	7	7	4	5	4	6	1	1
57	0	1	1	0	1	0	0	0	1	0
58	0	0	0	0	0	1	2	0	2	1
59	1	0	0	1	1	1	0	1	1	3
60	403	400	419	414	415	448	441	409	390	410
61	6	8	11	12	6	11	7	14	18	9
62	2	0	0	0	0	0	0	0	0	2
63	1	1	2	2	0	2	0	1	1	1
64	0	0	0	1	1	1	1	0	0	0
65	2	1	1	0	2	0	2	2	2	1
66	0	1	1	0	1	0	1	1	0	0
67	0	0	0	0	0	1	2	0	0	2

69	0	0	1	0	0	0	1	0	0	1
70	6	0	11	1	10	6	8	6	3	5
72	0	0	0	0	1	0	0	0	0	0
73	0	0	0	0	0	1	0	0	1	0
74	0	0	0	0	1	0	0	0	1	0
75	18	28	21	33	25	26	35	33	22	28
76	0	0	0	0	0	1	0	0	0	0
78	1	0	0	0	0	0	0	0	1	0
79	1	0	0	0	0	0	0	0	0	1
80	7	4	11	1	3	5	5	4	4	3
81	0	0	0	1	0	0	0	0	0	1
82	0	0	0	0	0	1	0	0	0	0
83	1	0	0	0	0	0	0	0	1	0
84	9	8	3	5	2	1	3	3	1	0
85	2	0	1	1	2	2	0	2	1	0
86	0	0	1	0	0	1	0	0	1	0
87	1	1	2	2	0	1	0	0	0	2
88	0	0	2	1	1	3	0	0	1	0
89	52	67	62	69	49	63	62	55	51	42
90	515	574	561	617	589	639	557	614	540	551
91	2	1	0	0	0	1	0	0	1	1
92	27	26	45	40	48	47	56	55	53	39
93	0	1	0	0	0	0	0	0	0	0
94	0	0	1	0	0	0	0	0	0	0
95	0	1	0	0	0	1	1	0	1	2
96	0	0	0	1	0	0	0	0	0	0
98	0	0	0	1	0	0	0	0	0	0
99	0	0	0	0	0	1	0	1	0	0
100	4	4	2	2	4	4	2	3	5	5
101	0	0	0	0	0	0	0	1	0	0
102	0	1	0	0	0	0	0	0	0	0
105	0	5	1	1	0	8	0	3	1	3
110	0	0	0	1	0	0	0	0	1	0
111	0	0	0	0	0	0	1	0	0	0
112	1	1	3	0	2	2	0	0	0	1
115	1	0	0	0	0	0	0	0	0	0
117	0	0	0	0	0	0	0	1	0	0

118	0	0	0	0	0	0	1	1	0	1
119	0	1	0	2	0	0	0	0	0	0
120	28	25	29	28	32	22	31	42	44	30
121	0	0	0	0	0	0	0	0	2	0
122	110	116	133	151	134	128	128	137	146	120
123	0	0	0	0	1	0	0	0	0	0
125	0	1	0	0	0	0	0	0	0	0
126	0	0	1	0	1	1	1	0	0	0
127	0	0	0	0	0	0	0	0	1	0
129	0	0	0	0	0	0	0	0	1	0
130	0	0	0	1	0	0	0	0	0	0
131	0	0	0	0	0	0	0	0	1	0
132	0	0	0	0	1	0	0	0	1	0
134	0	0	1	0	0	0	0	0	0	0
135	1	1	2	2	0	3	0	1	2	2
136	0	0	0	0	0	1	0	0	0	0
137	0	0	0	0	0	1	0	0	0	0
140	0	1	2	2	1	1	2	1	0	0
142	0	0	0	0	0	0	0	1	0	0
145	0	0	0	0	0	1	1	1	0	2
150	5	4	7	5	6	6	2	8	5	13
151	0	0	0	0	0	0	1	0	0	0
152	0	0	0	0	0	0	0	0	1	2
153	52	53	50	53	57	45	40	56	49	60
154	0	0	1	0	0	0	1	1	0	0
158	0	0	0	0	0	0	0	0	0	1
159	0	0	0	0	0	1	0	0	0	0
160	0	0	1	1	3	1	1	1	0	1
163	0	0	0	0	1	0	0	0	0	0
164	0	0	0	0	0	0	0	1	0	0
165	0	2	1	0	2	2	2	0	1	1
168	0	0	0	0	1	0	0	0	0	0
169	1	0	0	0	0	0	0	0	0	0
170	0	1	0	0	0	0	0	0	0	1
173	1	0	0	0	0	0	0	0	0	0
180	23	28	38	40	40	44	28	25	28	33
182	0	1	1	3	0	1	1	0	0	3

Jail Sentences

183	352	407	424	432	439	429	361	432	381	362
184	0	1	0	0	0	1	0	0	0	0
187	1	0	0	0	0	0	0	0	0	0
188	0	0	0	1	0	0	0	0	0	0
190	0	0	0	0	0	0	0	0	0	1
192	0	0	1	0	0	0	0	1	0	0
195	0	2	0	1	0	0	0	0	1	0
196	1	0	1	0	0	0	0	0	0	0
200	1	1	1	1	0	1	0	0	1	0
204	1	0	0	0	0	0	0	0	0	0
210	1	0	0	1	2	1	2	4	1	1
214	23	16	22	29	29	23	27	28	20	25
215	0	0	0	0	0	0	1	0	0	0
220	0	1	0	0	0	0	0	0	0	0
221	0	0	0	0	0	0	0	0	1	0
224	0	0	1	0	0	1	0	0	0	0
225	0	4	1	1	1	0	0	1	1	1
226	0	0	0	0	0	0	1	0	0	0
227	0	0	0	0	0	0	0	1	0	0
228	0	0	0	1	0	0	0	0	0	0
230	0	1	0	0	0	1	0	0	0	0
234	1	0	0	0	0	0	0	0	0	0
238	0	0	0	1	0	0	0	0	0	0
240	3	0	2	3	3	4	5	7	2	2
244	38	36	47	53	47	39	39	50	47	48
245	0	1	1	0	0	0	0	0	0	0
250	0	0	1	0	0	0	0	0	0	0
252	0	0	0	1	0	0	0	0	0	0
260	0	0	1	0	0	0	0	0	0	0
270	6	3	3	7	6	4	5	6	9	4
274	0	2	0	0	0	0	0	0	0	0
275	113	130	149	125	130	141	126	136	146	125
280	0	0	0	0	0	0	1	0	0	0
285	0	0	0	0	0	1	1	0	0	0
291	0	0	0	0	0	0	1	0	0	0
300	2	1	2	4	2	1	2	0	1	4
305	18	36	19	38	27	31	35	33	34	38

315	0	1	0	0	0	0	0	0	0	0
326	0	0	0	0	0	0	0	0	0	1
330	1	1	0	0	0	0	0	0	0	1
336	10	6	8	6	6	8	8	9	4	9
346	0	1	0	0	0	0	0	0	0	0
360	1	1	1	0	3	0	4	0	2	7
364	2	0	0	0	2	1	1	0	0	1
365	329	366	428	411	401	363	363	411	389	349
Missing	23	16	10	4	0	6	1	0	1	2
Total	3315	3596	3798	3834	3688	3858	3662	3845	3577	3633

Mr. GOHMERT. Thank you, Mr. Cole. Your 5 minutes expired.

That last buzzer was indicating we have 10 minutes left to go vote, and then I'm informed that we'll have another 15-minute vote after that, followed by another 5-minute vote. So we'll hopefully be able to reconvene perhaps as early as 4:20 back here. I'm sorry for the delay.

Mr. BERMAN. Mr. Chairman?

Mr. GOHMERT. Yes, Mr. Berman?

Mr. BERMAN. Could I just ask you a question?

Mr. GOHMERT. Surely.

Mr. BERMAN. I'm curious in the context of Congressman Forbes' testimony and then Professor Cole's testimony, would it be possible before we marked up a bill like this to submit to the Justice Department a question about—just the Department's opinion about the constitutionality of some of these provisions?

Mr. GOHMERT. It certainly sounds reasonable.

Mr. BERMAN. Thank you.

Mr. GOHMERT. So we will—I'll tell you, let me just ask one question, one question quickly and reserve the balance of my time.

Mr. Cole, you're obviously a constitutional scholar. Is there a constitutional right to be in this country in violation of the United States immigration laws?

Mr. COLE. Well, I think the answer to that is it depends on whether the immigration laws are themselves constitutional. So, for example, if we make——

Mr. GOHMERT. That's all right. That answered my question.

Mr. COLE. Okay.

Mr. GOHMERT. Your answer basically, it depends.

All right, thank you. We will be in recess until 4:20 unless the vote takes longer. Thank you very much.

[Recess.]

Mr. GOHMERT. I thank you for your patience everyone. We do—for the record, the four witnesses who were previously sworn are back here for the hearing, and we do have the gentlelady from Texas, Ms. Jackson Lee. We also have Mr. Inglis. Anyone else? No, that's it for now, okay.

So we will resume the hearing, and at this time the Chair recognizes the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

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

I think we started out by suggesting that we all are on common ground in protecting the homeland, and particularly weeding out terrorists or violent gangs in a manner that would be protecting of the homeland, but I think we also realize that compliance with constitutional provisions is warranted as well. I might add that I believe this bill covers individuals in a legal permanent status, means that they are not at citizenship level but they also are able to offer their lives in the United States military in Iraq and Afghanistan and other places around the world.

So I really strongly feel that we've got to find, one, an answer to Mr. Berman's question, which is what the Justice Department might—as to how they might assess this legislation, and I am very grateful the Chairman believes that this would be an appropriate review process, is to get an assessment analysis by the Department of Justice.

Let me ask Mr.—Congressman Forbes this question regarding the point that I made earlier. I think you said something to the effect that intervention and prevention are meritorious, at least as a separate legislative initiative. You indicated if you join a violent criminal gang that you should lose the right to stay in the United States. I indicated to you that MS-13, one of the gangs that might happen to be on the list, is already recruiting in our elementary schools, such that some elementary school child might be vulnerable enough to join or to associate with a gang with the name of MS-13. Would you be willing to modify your bill to provide an exception for children who have not engaged in criminal activity, and only by the sheer existence of the group in their neighborhood, possibly named Ms-13, and their foolishness in associating themselves with that group, might be caught up in your legislation if it was passed?

Mr. FORBES. Well, first of all, Congresswoman, I would not be so presumptuous as to say what the Committee may or may not pass in an amendment, and if they saw fit to put that amendment in there and it passed, certainly I would still support the bill.

I think one of the things that we need to recognize though is that as I've traveled across the country and I've looked at phone calls that we've had and letters that we've had across the country from people in various groups that have asked us to support this legislation, never, never once have I heard anyone say that we have been overzealous in the enforcement of our immigration laws. In fact, it has been just the opposite.

I think with this legislation what we find Homeland Security doing is they would never be going after the second grader or the third grader. The people they would be going after would be those gang members that they feel are dangerous to the community and are here, that should be deported. Certainly, I don't think anyone in here is talking about getting a second grader or a third grader. However, I will tell you, as you move into teenagers, especially as we talked about in our previous bill, one of the things these gang leaders do very, very well is work the system, and they will end up getting teenagers that are doing their actions for them if they think there's a loophole there, but I would——

Ms. JACKSON LEE. I don't have too much time. I appreciate the gentleman—I'd appreciate the gentleman working with us on the idea of the number of young people that could be caught up in this fishnet.

Mr. Cole, I'd like to yield the rest of my time to you because I don't believe you sufficiently finished your analysis on the potential unconstitutionality of this effort. You know, we run up against those who are law enforcement, who think that we are against them, and I will put my record up against anyone in terms of support for law enforcement around this Nation. I think all of us believe in a Nation of laws. I have always said that we are a Nation of laws and that we're a Nation of immigrants. I also said that immigration does not equate to terrorism.

Help us understand that the wide net of this legislation may in fact also pull in citizens, if that is the case. But if that is not the case, then focus specifically on some of the vulnerabilities of this legislation in terms of relief, designation, inability to protest legis-

lation, and the point that you made, which I thought was very valid, that you have no provisions in there to defend yourself, meaning that you may go into court, but you can provide no evidence to suggest that you are not or should not be on the list. And I thank you very much for your presentation.

Mr. COLE. Thank you. Well, I think the place to start really is that there's nobody from ICE here saying, "We don't have sufficient resources to go after gang members." Mr. Garcia testified before this Committee a short while ago, and was very proud about talking about ICE's efforts to go after gang members, and did not say, "We don't have sufficient authority. We can't do it. We need you to make guilt by association the modus operandi of the day. We need you to return to the days of the McCarran-Walter Act." No. He said, "We've got resources. We're doing it. It's an ongoing process." So why the rush to infringe on first amendment rights?

Secondly, it seems to me that you've already got tremendous resources under immigration law. Any gang member who's out of status can be deported. Any gang member who commits an aggravated felony can be deported. One of my colleagues on the panel said that one-half to two-thirds of the members of MS-13 are here illegally under our current immigration law. That means that one-half to two-thirds can be deported. It's not a question of the law not being sufficient, it's a question of resources, it's a question of priorities.

And so this it seems to me, very premature, totally unnecessary to deal with the problem, and raise exactly the problem that you identified, which is that it sweeps up innocent people who have committed no crime, who are not in violation of their immigration status, who are 10-years-old, who are permanent residents and who have just joined a group because, you know, in their community that's the socially—that's what you do, but have never intended nor engaged in any kind of illegal activity.

Those people have no right to defend by saying that they engaged in no criminal activity. They have no right to defend by saying the group they joined is not in fact a gang. The gang has no right to tell the Attorney General that they're not a gang. I mean this bill simply ignores the distinction between guilt and innocence.

Ms. JACKSON LEE. I thank the gentleman.

Mr. HOSTETTLER [presiding]. I thank the gentlelady, and I thank the Subcommittee for your indulgence. I apologize to the members of the panel. Thank you for being here today. I will move straight into questions.

Professor Kobach, in his testimony, Professor Cole states that H.R. 2933 would be unconstitutional because of similarities to foreign terrorist organization provisions and other laws. Do you agree?

Mr. KOBACH. No, I do not agree. And if I may divide my answer into two parts. Professor Cole asserts that there are basically two constitutional problems. He says first there's a right of association problem with this statute, the proposed statute, and also that there's a due process problem.

To look at the right of association claim that Professor Cole makes, I think it is a—it is fair to say that it is a long shot at best. Such a challenge fails for two reasons. The first is that the protections of the first amendment right to peaceably assemble have to

be—can only be triggered when there is a speech or an expressive content in the association's organization. Even the most expansive judicial iteration of that, in the Claiborne case, stated very clearly that the protections of the first amendment right to assemble do not extend to violent activity. If I may quote from the Court, "The first amendment does not protect violence. Certainly violence has no sanctuary in the first amendment, and the use of weapons, gunpowder and gasoline may not constitutionally masquerade under the guise of advocacy."

Second, to trigger the first amendment associational rights, there must be some speech element in the group's activities; and I think it's absurd to suggest that these alien street gangs are engaged in political advocacy or social advocacy or any other kind of advocacy. They are not exercising speech rights in any meaningful sense.

Let's imagine that there was a gang that did have both an illegal activity—a criminal activity component—and an expressive activity component. The Supreme Court has clearly held that membership even in a dual-purpose organization like that is not only a basis for removal, as the Supreme Court held in Galvan, but it's also a basis for criminal prosecution, which, the statute contains—this proposed statute contains none of—in the Scales case.

Now, basically, there's only two types of constitutional association claims you can bring: an expressive one under the right to assemble, as I've just described, and also one under the right to intimate association, which is found in the fourteenth amendment, and was expanded upon in Griswold and in *Roberts v. Jaycees.* This clearly is not of that category either. So there's no first amendment or associational problem with the statute.

Getting to his due process claim, Professor Cole cites the D.C. Circuit case of National Council of Resistance of Iran in support of his contention that there would need to be greater notice provisions and due process provisions for the designation of these alien gangs. However, he neglects to mention an important distinction between H.R. 2933 and the law—the Antiterrorism Effective Death Penalty Act—that was at issue in that case. And that is, that that act allowed the immediate freezing of assets of an organization upon designation. And in the case the Circuit Court for the District of Columbia specifically and explicitly tied its holding to the, "the invasion of fifth amendment protected property rights," which *Galvan v. Press* entitles the plaintiffs to—said that the plaintiffs are entitled to the due process of law if property rights are immediately triggered by the or taken away by such designation.

There is no such invasion of property rights here. So while it is certainly interesting to imagine what National Council of Resistance of Iran might have said if it was based on something other than the seizure of assets. That's largely irrelevant to 2933. So I don't see any due process problem with this case.

Now, if, presumably, Professor Cole and others out there might try to persuade the D.C. Circuit some day to expand its holding in that case to other areas where the violation was of something other than property rights, the Committee may wish to consider a few minor amendments that might delay the implementation or the effective date of the statute to allow a slight notice provision. Those changes could be easily made, but as it stands now it is not uncon-

stitutional; and there is no first amendment violation or due process violation in it.

Mr. HOSTETTLER. Thank you, Professor, very much.

I'll yield back the balance of my time, and yield to the gentleman from Michigan, Mr. Conyers, for 5 minutes, the Ranking Member of the Full Committee.

Mr. CONYERS. Thank you, Mr. Chairman.

I thank all the witnesses for their testimony.

I just wanted to pick up on our colleague, Mr. Forbes' point, that we have no way to prevent acknowledged gang members from entering the country, even if they had a stamp on their hand, that we wouldn't be able to stop them.

But I've got a section here, 8 USC 1182, section 212, that says: Classes of aliens ineligible for visas or admissions, and then: "Security and related grounds. In general, any alien who a consular officer or the Attorney General knows or has reasonable ground to believe seeks to enter the United States to engage solely, principally or incidently in activities that violate the laws and evade the laws, or any other lawful activity is excludable." Do you agree?

Mr. FORBES. Do I agree with your first statement that my testimony said that there was no way of keeping gang members out, or do I agree with the statement that you just read that the law——

Mr. CONYERS. The statement that I just read.

Mr. FORBES. The statement that you read is correct, but my testimony was not the way you stated it. What I said in my testimony—and I'll restate it——

Mr. CONYERS. No, you don't have to. If you agree with this, I'll get corrected later on.

All right, let me just move on. You know what the 5-minute rule is like.

What I'm troubled by is the fact that we have so many problems with guilt by association—well, let me just start here, Professor Cole. We might be in this bill imposing guilt by association on individuals who never commit or support any criminal activity. Do you think that's possible in this bill, Mr. Forbes, Congressman Forbes?

Mr. FORBES. I would say, Mr. Conyers, that one of the things that I disagree with Mr. Cole on, on page 5 of his testimony is he does not——

Mr. CONYERS. No, no, just on this point alone.

Mr. FORBES. I believe that if it's a member of al-Qaeda here, that we want those individuals out of the country whether we can prove that they've committed a criminal act or not. I believe if there's a member of a violent criminal gang here, we want them out of the country whether we can prove that they've committed a crime or not because we want to protect victims from occurring.

Mr. CONYERS. Okay. Thank you, sir.

What do you say to that, Mr. Hethmon? Do we use guilt by association in this bill? And that's what's worrying me.

Mr. HETHMON. I think that the terms "guilt" and "innocence," they don't fit in this context at all. Remember, we're talking about immigration law, where detention and removal are not criminal punishments, and whether someone is guilty or innocent really isn't the issue. Constitutionally, the——

Mr. CONYERS. In other words, that if someone hasn't committed any criminal activity we could deport them under the provisions of this law and that would not be too troublesome to you?

Mr. HETHMON. Well, I think the vast majority of people who are deported from the United States are not done on the basis of a criminal conviction.

Mr. CONYERS. No, but——

Mr. HETHMON. That's in an essential——

Mr. CONYERS. —but I'm talking about this bill.

Mr. HETHMON. —aspect of immigration law.

Mr. CONYERS. Yeah. I'm talking about this bill. Mr. Cole, Professor Cole's suggesting that this is what would happen.

Mr. HETHMON. Well, he's posing a hypothetical which really is not relevant to immigration law.

Mr. CONYERS. Why would you put a hypothetical in here, Professor Cole, and we're studying hard case law? Please.

Mr. COLE. I don't consider this to be a law school exam. I consider this to be real life, and I think that this bill is meant to have effect on people with real lives. And as written, it makes any person who's ever been associated with any group that the Attorney General decides to put on a blacklist through a process that affords no opportunity to challenge it, automatically subject to mandatory detention, deportation and barred from any form of relief. And that concerns me, not as a hypothetical. That concerns me because it seems to me it's Congress's obligation to abide by the terms of the Constitution, abide by principles like individual culpability, abide by principles like due process, and deal with real problems like violent crime by targeting violent crime and violent criminals, and not by targeting people who have engaged in no criminal activity whatsoever. And that's where this bill goes wrong.

Mr. HOSTETTLER. The gentleman's time has expired.

Mr. CONYERS. Thank you.

Mr. HOSTETTLER. And to make a correction for Mr. Cole. You said "any person that has associated can be subject to deportation." You mean a non-citizen, correct?

Mr. COLE. Of course. This is an immigration bill, which is what makes it easier for Congress to disregard the rights of those who are affected because they're not people who vote, but it's—nonetheless, they are, as the Supreme Court has reminded us very recently, they are fully protected by the first and fifth amendments to the Constitution the same way that U.S. citizens are, and it is our obligation to protect their rights as much as it is to protect the rights of our sons and daughters.

Mr. HOSTETTLER. But the categorization as "any person."

Mr. COLE. It goes without saying, this is an immigration bill. It applies to foreign nationals only.

Mr. HOSTETTLER. Well, if it goes without saying then it is said that any person can be deported, which any person includes citizens. And so——

Mr. COLE. Right. And in this context where we're discussing an immigration bill, I apologize, Mr. Chairman, but if I use the term "person" to describe a foreign national occasionally, you can deem it to mean foreign national.

Mr. HOSTETTLER. Thank you.

The Chair recognizes the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

As I heard the litany of things that we should be abiding by, abide by the Constitution, abide by this law, abide by that law, I can't help but think shouldn't we force people for a change to abide by the immigration laws that we have? And that's a rhetorical question. It just seemed to be begged by the litany of abidings that were offered.

And I guess from my background as a judge and having seen violent gang members prosecuted in my court for murder, for some horrible actions, and having seen issues come to bear about whether or not individuals in the gang did more than just stand there and watch a poor Hispanic young man be brutally murdered. Did they aid or abet? Is there a criminal offense there, or is there some horrible thing that would be in place by saying guilt by association. Well, they can't be criminally guilty by association. There has to be more than that. There has to be some overt action.

But when it comes to abiding by the laws of immigration in this country, it just seems to me that it's time to enforce the laws, and if the laws are going to be there, they need to be enforced, and if they're not going to be enforced, let's get rid of them, let's throw the doors open and all of us stand in 2-hour lines to get in anywhere we want to go including flights. But it seems to me that until we start enforcing the borders, the immigration laws, that we're going to lose more and more of our rights in this country, more and more of our rights to avoid being subjected to searches as we get on airplanes or go in public buildings like this one.

The more we fail and refuse to defend ourselves at our borders, the more rights we're going to give up of the people, and it's time to enforce the immigration laws.

And it seems to me, Mr. Forbes, that this bill would have helped immensely those people that stood by and couldn't be proved beyond a reasonable doubt that they aided or abetted in murder and torture, but just were part of it. The association alone should be sufficient to say, "You're here illegally. It's time to leave." Is that your feeling?

Mr. FORBES. Yes, sir, Mr. Gohmert. And you know, it was stated earlier this is not a law school exam, but words do matter. That's what we're here for. When you cite testimony that somebody has made, it's important that you cite that testimony accurately. When we cite cases, it's important you cite the facts that are in the case. When you use the words guilt by association, as we've mentioned, we're not talking about guilt. We're talking about the immigration laws of this country which this body has a right to determine the people that are going to come into this country and the people that are not going to come into this country.

We had the question posed to us by Mr. Berman, can we get an opinion from Department of Justice? Just for the record, the Chief Legal and Policy Advisor on Immigration Law, Border Security and the Immigration Court System to the Attorney General is sitting right here. He said it is constitutional.

Mr. Cole made a statement just a few minutes ago that he said in my testimony that I said a half to two-thirds of MS-13 were here illegally. Therefore, we can go after them. That's just not accurate,

because what Mr. Cole did not tell you is that TPS was granted in 2001 to El Salvador. A large portion of MS-13 members are here from El Salvador. When we granted that blanket protection, we essentially encapsulated those violent criminal gang members who could stand out on the street today, be here illegally, be a member of that violent criminal gang, and because of temporary protected status, we cannot deport them. It's nothing about guilt there. It's a policy decision that we can make that says we think we should be able to deport them.

Mr. GOHMERT. Thank you.

And my time is about expired, but I just can't help but go back to some of the common sense things my mamma used to say. She was a brilliant woman, and a brain tumor took her away too early, but it's what a lot of mothers have told their children, and that is, be careful with whom you associate, and she did say "with whom" because she was an English teacher, because it matters. And I've had people prosecuted who did end up offering some overt aid to a friend who committed a crime, and come in over, probably hundreds and hundreds of times I've had people say, "I'm so sorry. I just got in with the wrong crowd and got caught up in it."

And I'm proud of the bill you're forwarding here, and pushing forward, and appreciate the opportunity to participate.

Mr. HOSTETTLER. I thank the gentleman.

The Chair recognizes and thanks the members of the panel for your participation today on this very important issue. Members are advised that they'll have 5 legislative days to make additions to the record.

The business before the Subcommittee being complete, by unanimous consent, we are adjourned.

[Whereupon, at 5:05 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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 subject of this hearing is, H.R. 2933, the Alien Gang Removal Act of 2005 (AGRA), which was introduced by Congressman Forbes on June 16, 2005.

We have relied primarily on three basic strategies for dealing with the problem of youth gangs: suppression, which has meant longer sentences and penalties; intervention, through job training, education, and skills development in an attempt to reform gang members; and prevention, through school and community-based programs designed to reach out to at-risk children before they become involved with gangs.

The Alien Gang Removal Act presents a new strategy. AGRA would attempt to reduce the number of immigrant gang members in the United States by changing our immigration laws.

It would establish three new exclusion grounds. The first would make someone inadmissible to the United States for having been deported on the basis of criminal street gang participation. Someone who has been deported is already inadmissible, regardless of the reason for the deportation. Under existing law, however, inadmissibility would only be for a five-year period. Under the new provision, inadmissibility would be permanent.

The second would make an alien excludable if the immigration inspector has a reasonable ground to believe that the alien is a gang member entering to engage in unlawful activity. I am concerned that this would lead to profiling and that aliens who have tattoos or other indicia of gang membership would be excluded on little more than their appearance. Once excluded, they would permanently be barred from admission to the United States.

The third would make someone inadmissible for being a member of group or association of three or more individuals that has been designated by the Attorney General as a criminal street gang. Another provision in AGRA would make membership in a designated criminal street gang a deportation ground too.

Members of designated criminal street gangs also would be statutorily ineligible for asylum, withholding of removal, and Temporary Protected Status; and they would be subject to the criminal alien detention provisions.

Mai Fernandez was our witness at the April 13, 2005, hearing on immigrant gangs. She is the Chief Operations Officer for the Latin American Youth Center in the District of Columbia. She works with gang members on a daily basis. She explained at the hearing that most youth gang members in her community are not criminals. According to Ms. Fernandez, "Joining a gang gives a youth a group of friends to hang out with, and a sense of security which they cannot get elsewhere in their lives. These kids are not super-predators—they are kids looking for a sense of belonging."

According to Houston's Anti-Gang Office and Gang Task Force, the gang known as "MS-13" has been recruiting children from local elementary schools. It is a certainty that MS-13 will be on the designated list of criminal street gangs if this bill is enacted. Those children would then be subject to deportation even if they never participate in any criminal activities.

The procedures for challenging a "criminal street gang" designation are much too narrowly drawn. Someone wishing to petition the Attorney General for review of a designation would have to wait two years before filing the petition. Immediate redress would be limited to court action, and then only before the U.S. Circuit Court for the District of Columbia. Also, judicial review would be based solely upon the

administrative record. The petition for court review would have to be filed within 30 days of the date on which the designation is published in the Federal Register.

Although I understand the desire to remove violent immigrant gang members from the United States, this is not the way to do it. The provisions in AGRA are not limited to violent gang members. They also would apply to gang members who never engage in criminal activity of any kind. AGRA would cast a broad net that would ensnare innocent children along with the dangerous criminals.

Thank you.

REVISED PREPARED STATEMENT OF DAVID COLE, PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL

Revised Prepared Statement of David Cole
Before the United States House of Representatives
Subcommittee on Immigration, Border Security, and Claims
of the House Committee on the Judiciary

Hearing on H.R. 2933, the "Alien Gang Removal Act of 2005."

June 28, 2005

INTRODUCTION

Thank you for inviting me to testify on H.R. 2933, titled the "Alien Gang Removal Act of 2005." I am a professor of constitutional law at Georgetown University Law Center, and a volunteer attorney with the Center for Constitutional Rights. I have litigated and testified often on issues of immigration law and constitutional rights. In my view, this bill, if enacted, would be unconstitutional in several respects. It would repeat some of the worst errors of the past in our treatment of foreign nationals, by failing to treat non-citizens as individuals, and by failing to accord them the basic human rights of due process and political freedom that we owe to all persons, and routinely insist upon for ourselves.

There is no question that gang crime is a serious matter that needs the country's attention. However, a recent study from the Bureau of Justice Statistics demonstrates that in fact gang crime has *decreased* dramatically over the last decade. U.S. Dept of Justice, Bureau of Justice Statistics, Crime Data Brief, *Violence by Gang Members, 1993-2003* (June 2005, NCJ 208875). The BJS reports that the gang crime victimization rate fell from 5.2 per 1,000 persons in 1994 to 1.4 per 1,000 persons in 2003, *a 73% decrease*. *Id.* In addition, the percentage of all violent crimes committed by gang members (as reported by victims) fell from 9% in 1993 to less than 6% in 2003, a drop of more than 33%. *Id.* This is not to suggest that gang crime does not continue to pose a problem, but to suggest that current strategies are working, and that efforts such as this one may be based less on fact than on political hyperbole.

In any event, there are a wide variety of responses that governments might adopt to deal with the issue, from increased police presence in communities beset by gang crime, to criminal law enforcement targeted at the crimes that gang members commit, to providing alternatives to gangs through aftercare programs, sports, and social organizations, to relieving the poverty and desperation in the inner cities that leads too many young people to join gangs in the first place.

Immigration enforcement also has a role to play. But existing law affords immigration authorities sufficient tools to play such a role. Indeed, Michael Garcia, Assistant Secretary of U.S. Immigration and Customs Enforcement, recently testified before this subcommittee on ICE's Operation Community Shield, which had used immigration law to arrest more than 150

members of the notorious gang, MS-13.[1] Mr. Garcia did not suggest that existing law was insufficient to the task. In fact, he described the program as a success, and ongoing. Thus, there has been no showing that broader immigration powers are necessary to use immigration law to target foreign gang members who have violated their status, and indeed the Justice Department's own data show that gang violence has been steadily decreasing over the last decade.

Many if not most "gang crimes," at least as that term is colloquially understood, are already "aggravated felonies" under immigration law. Any foreign national gang member convicted of an aggravated felony is already deportable, without regard to his or her membership in a gang. Thus, there is no bar on deporting gang members convicted of crimes.

What this bill does is empower the DHS to deport foreign nationals who have *never committed any crimes whatsoever*, and who have obeyed all of our laws, simply by claiming that the DHS has determined that they are members of designated street gangs. Such individuals are subject to mandatory detention and automatically rendered ineligible for asylum, withholding, and temporary protected status, even if they can show that they would be persecuted if they were returned to their country of citizenship. In short, they are treated even worse than aggravated felons, even if they have never committed a crime and pose no threat to anyone. This is guilt by association in its purest – and most clearly unconstitutional – form. It violates both the First and Fifth Amendments, both of which apply equally to citizens and foreign nationals residing here..

The bill's procedure for designating "criminal street gangs" also violates basic constitutional rights. The bill gives the Attorney General virtually unchecked power to blacklist domestic groups, through a secret process that provides no notice or opportunity to be heard to the designated group, and no meaningful opportunity to challenge the blacklisting decision once announced. The Attorney General may designate as a proscribed "criminal street gang" any formal or informal group of three or more persons who have committed two or more enumerated "gang crimes." There are likely to be tens of thousands of such groups across the country, any of which could be designated by the Attorney General. Once designated, any foreign national who immigration authorities deem to be a "member" of the group is deportable. There is no defense for those who did not know that the group was designated. There is no defense for those who never committed or supported a single criminal act. And the individual facing deportation has no right to challenge the validity of the designation.

This scheme violates the due process and freedom of association rights of gangs, gang members, and perhaps most importantly, those who are not in fact gang members but who a DHS official erroneously deems to be a member. The process contemplated by the bill provides no meaningful checks to ensure that innocent individuals and groups are not caught up in a potentially sweeping dragnet.

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[1] Statement of Michael J. Garcia Before the House Committee on Judiciary Subcommittee on Immigration, Border Security and Claims, Hearing on Immigration and the Alien Gang Epidemic: Problems and Solutions," Apr. 13, 2005.

The "Alien Gang Removal Act of 2005" would expand the grounds of inadmissibility and deportability in two basic ways. First, it would make anyone whom DHS determines to be a member of a designated "criminal street gang" deportable and inadmissible, without more. Second, it would make members of *nondesignated* gangs who have been convicted of a "gang crime" deportable, and would render inadmissible any person whom DHS has "reasonable grounds to believe" is a street gang member and has committed or seeks to enter to commit "any unlawful activity."

The first approach, which relies on the blacklisting of proscribed gangs and requires no proof of criminal conduct by the foreign national whatsoever, violates both due process and the freedom of association. The second approach radically expands the grounds of inadmissibility and deportability, without any showing of need. Both approaches entail exceedingly harsh consequences in terms of eligibility for asylum, withholding, and temporary protected status, some of which violate our obligations under international law. I will address these aspects of the bill in turn.

I. THE BILL WOULD IMPOSE GUILT BY ASSOCIATION ON INDIVIDUALS WHO NEVER COMMIT OR SUPPORT ANY CRIMINAL ACTIVITY

Section 2(a) of the bill, which would add Section 212(a)(J)(i)(I)(bb), renders inadmissible any person who a consular officer or DHS officer has reasonable grounds to believe "is a member of a criminal street gang designated under section 219A." Section 2(b), which would add Section 237(a)(F)(i)(II), renders deportable anyone who "is determined by the Secretary of Homeland Security to be a member of a criminal street gang designated under section 219A." These provisions would impose guilt by association in its purest sense, for they would render individuals deportable and inadmissible not based on their own conduct, but solely on their association with others. A permanent resident who had never committed a single crime would be deportable under this provision for membership alone.

These provisions would prohibit all association with select disfavored groups, while granting executive branch officials effectively unreviewable discretion to select and designate the disfavored groups of their choice. These provisions do not punish crime, gang crime, or even material support to crime or gang crime. They punish membership per se, without more. They would render people deportable who had never committed an illegal act of any kind. Under this statute, a Cambodian refugee who was befriended by a Cambodian immigrant group designated a "criminal street gang" would be deportable even if he never committed any illegal act.

The Supreme Court has declared guilt by association "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware,* 458 U.S. 886, 932 (1982). It violates both the Fifth Amendment principle that guilt must be personal, and the First Amendment right of association.

These provisions are materially indistinguishable from the McCarthy era laws that penalized association with the Communist Party. They substitute "criminal street gang" for

"communist organization," but indulge in the same guilt by association. Yet despite specific findings that the Communist Party was engaged in criminal activity for the purpose of overthrowing the United States,[2] the Supreme Court consistently held that individuals could not be penalized for their Communist Party associations absent proof of "specific intent" to further the group's illegal ends.[3]

In *Scales v. United States*, 367 U.S. 203 (1961), the first case to establish the prohibition on guilt by association, the Supreme Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25. In other words, the Fifth Amendment forbids holding a moral innocent culpable for the acts of others.

Guilt by association also violates the First Amendment right of association. As the *Scales* Court explained, many groups have both legal and illegal ends. The right of association means that one who joins a group to further its legal ends cannot be punished for his membership. Only those who specifically intend to further the group's *illegal* ends may be punished. *Id.* at 229.

The Alien Gang Removal Act does not incorporate a specific intent standard. It appears to punish association regardless of intent, knowledge, or individual conduct. As such, it violates the prohibition on guilt by association.

Scales involved citizens, not foreign nationals. But the Supreme Court has said that "once

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[2] 50 U.S.C. § 781 (West 1991) (repealed 1993).

[3] *See, e.g.*, *United States v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens*." *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596 n.5 (1953) (emphasis added).[4]

Scales involved a criminal statute, not a civil sanction. But the Court has extended the prohibition on guilt by association to a wide range of civil sanctions, holding unconstitutional laws that on the basis of association: imposed tort liability, *Claiborne Hardware*, *supra*; denied a security clearance for employment in a defense facility, *Robel*, *supra*, denied employment as a public school teacher, *Keyishian*, *supra*; denied passports, *Aptheker v. Sec. of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958); and even denied students access to campus meeting rooms. *Healy v. James*, 408 U.S. 169 (1972).

The Alien Gang Removal Act's focus on membership in gangs also raises difficult issues of proof. It is one thing to prove membership in an established political organization like the Communist Party. Such organizations often have membership cards and lists, dues records, formally elected positions, and the like. But it is fairly certain that most street gangs do not have membership cards, dues payments, or official membership lists. "Membership" is likely to be a much more fluid concept. This is particularly likely given the bill's expansive definition of a "criminal street gang" as any group, *formal or informal*, of three or more individuals who have committed two or more gang crimes. Membership alone should never be a ground for deportation, but when one is dealing with membership in often amorphous informal gangs, this approach is even more likely to ensnare innocents.

In sum, the Alien Gang Removal Act indulges in unconstitutional guilt by association, imposing disabilities on individuals not based on their individual conduct, but based solely on their alleged association with others. We learned in the McCarthy era, when guilt by association was the modus operandi, that such tactics are overbroad, prone to widespread abuse, a direct infringement of constitutional liberties, and certain to harm many innocent people. There is no justification for repeating that history in the name of fighting gang crime, as current law permits authorities to arrest and deport all those foreign nationals who have actually committed an "aggravated felony," or have otherwise violated their immigration status.

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[4] *See also Bridges v. California*, 314 U.S. 252 (1941) (applying First Amendment to resident alien); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) ("the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1074-83 (C.D. Cal. 1989) (declaring unconstitutional a statute that made Communist affiliation a deportable offense), *affirmed in part and reversed in part on other grounds*,. 970 F.2d 501 (9th Cir. 1992).

II. THE DESIGNATION PROCEDURES VIOLATE DUE PROCESS

The procedure by which groups would be designated under the bill raises a host of other constitutional concerns. The bill would give the Attorney General virtually unchecked power to blacklist groups at will. It affords prospective "designated gangs" neither notice nor the opportunity to be heard before being designated. Even after designation, the bill bars designated groups from seeking any administrative review until *two years after* they have been designated. And if they want to challenge their designation in court, gangs must file a lawsuit in the U.S. Court of Appeals for the District of Columbia, where review is limited to the one-sided administrative record created by DHS, affording the designated gang no opportunity to present evidence in its own behalf.

These designation procedures are evidently modeled on an existing procedure for designating "foreign terrorist organizations." 8 U.S.C. §1189. But those procedures have already been declared unconstitutional for failure to provide notice and an opportunity to be heard to any foreign terrorist groups with a presence in the United States (and therefore protected by due process). *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001). In that case, the D.C. Circuit held that prospective terrorist organizations with a U.S. presence must be afforded notice and an opportunity to be heard before the administrative agency regarding their designation. Since criminal street gangs will presumably all be domestic (they must engage in conduct that violates federal or state law), they are all entitled to due process. Yet the bill provides the gangs no notice or opportunity to be heard on the issue of their initial designation.[5]

Indeed, the bill appears to bar a designated gang from even approaching DHS about its designation until two years *after* the group has been designated. Sec. 2(c)(1) (adding Section 219A to 8 U.S.C. 1181 et seq.) Sec. 219A(4)(B)(ii)(II). A group is not permitted to petition for revocation of a designation until the "petition period" begins, which is two years after initial designation. *Id.* Thus, the bill violates due process by providing designated groups with no notice and no opportunity whatsoever to address DHS at a meaningful time on their initial designation.

Even after the two-year waiting period, a designated group may not challenge its *initial* designation as erroneous or unjustified, but may only show "that the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation such that

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[5] The *Natl Council of Resistance of Iran* court noted that designation imposed a deprivation of property because it barred the designated group from holding a bank account. 251 F.3d at 203-04. The Alien Gang Removal Act would not have that effect, but would effectively bar any foreign nationals from joining the group, and would render deportable any foreign national members that were already members of the group. That fact plainly infringes on the group's liberty interests, and a deprivation of liberty also requires due process.

a revocation with respect to the gang is warranted." Sec. 219A(4)(B)(iii). This standard appears to render the administrative review process meaningless. If, on the one hand, a group was erroneously designated because it never committed any gang crimes, the petition process would provide no opportunity to correct the error, for the gang would be unable to show that "the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation." And if, on the other hand, a group was initially properly designated under the law, because two of its members at some point committed two "gang crimes," those circumstances will not be "different" at a later time. Even if an initially designated group has engaged in no further crimes, the mere fact that it committed two or more "gang crimes" at some point alone makes its designation appropriate under the law.[6] Thus, the administrative petition process not only comes two years too late, but appears to be a sham.

The bill would permit gangs to challenge their designation in court. But this process, too, is largely a sham. First, the bill requires any designated gang to file a challenge in the D.C. Circuit within 30 days of the publication of its designation in the Federal Register. It is fanciful to think that gangs, defined expansively under this bill as informal groups of three or more individuals who commit two or more gang crimes, are going to be in a position to check the Federal Register on a regular basis and hire an attorney to appear on their behalf in the DC Circuit. Moreover, even if a designated group were to read the Federal Register, find a lawyer, and file suit, the judicial review process does not permit the group to present any evidence of its own. Review is limited to the one-sided administrative record compiled by DHS without any notice to or input from the designated group. Thus, unless DHS were to designate groups without having any evidence that they had engaged in two gang crimes, its designation would be immune from challenge.

The person who is prosecuted for providing material support to a designated gang is barred from challenging the propriety of the designation. Thus, if the Attorney General were to erroneously designate an informal New York group of youth that had never engaged in gang crimes, but the designated group failed to file a challenge within the requisite 30 days, a foreign national subsequently charged with having belonging to that group could not defend himself by showing that the group never engaged in any gang crimes, and therefore should never have been designated in the first place. This prohibition raises serious due process and First Amendment concerns. There can be no question that individuals have a right to associate with groups that

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[6] One of the only situations in which circumstances might be different enough to warrant revocation under this standard would be where the group had disbanded and no longer existed as a group. But in that case, there would be no entity to petition for revocation.

The only other situation that might satisfy the standard for revocation would be one where a conviction previously relied upon to designate a group was overturned on appeal. But that would only be grounds for a revocation if the gang were designated on the basis of two crimes alone. Wherever DHS had evidence of more than two crimes in the gang's past, even an overturned conviction would not appear to require revocation.

commit *no* criminal activity. Accordingly, an individual being punished solely for his associations certainly should have the right to make the case that his group engaged only in lawful activity, and should not have been proscribed. *McKinney v. Alabama*, 424 U.S. 669 (1976). Yet the statute expressly precludes just such a defense.[7]

As noted above, the designation procedure used here is modeled on an existing procedure for designating "foreign terrorist organizations." *See* 8 U.S.C. §1189. In my view, that existing procedure is also deeply problematic – beyond the constitutional infirmities that the D.C. Circuit has identified. But even if such a procedure were appropriate for foreign organizations engaged in terrorism that threatens national security, it does not follow that the same procedure is appropriate for domestic street gangs who have committed two relatively petty crimes.

First, the existing procedure is directed at *foreign* terrorist organizations, while this bill's procedure would be directed at *domestic* groups. As the D.C. Circuit has held, any group with a physical presence in the United States is unquestionably entitled to due process. *National Council of Resistance of Iran, supra*. Few foreign terrorist organizations have such a presence here, while all the groups that will be affected by this bill will have such presence. To give an executive official this kind of authority to blacklist domestic groups harkens back to the Attorney General's list of subversive organizations of the McCarthy period.

Second, the existing procedure is directed at *terrorist* organizations, defined as groups that engage in terrorist activities that undermine our national security. Such groups plainly pose a greater threat to the United States than the groups encompassed by this bill – literally any group of three or more individuals who have committed two "gang crimes," which, as noted below, could consist of burglaries, obstruction of justice, or misdemeanor assaults. To be designated as a "foreign terrorist organization," the Secretary of State has to determine that an organization's terrorist activities threaten the country's national security. No such finding is required for the designation of street gangs. It is enough to find that there are three individuals who have committed two burglaries or got into two bar fights.

Third, the discretion that this standard gives to the Attorney General in designating is virtually limitless. The Department of Justice estimates that there are more than 25,000 gangs in the United States. And given the extremely expansive definition of "gang" used in this bill, the

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[7] The Ninth Circuit recently upheld a similar bar on defendants charged with providing material support to designated foreign terrorist organizations. *United States v. Afshari*, 2005 U.S. App. LEXIS 11556 (9th Cir. June 17, 2005). However, the Court in that case rested its decision on three factors: (1) the "material support" at issue was the provision of money, which the Court distinguished from speech protected by the First Amendment; (2) the designation involved sensitive foreign policy decisions; and (3) only *foreign* organizations could be designated. None of those factors is present here: (1) this bill punishes association per se, not material support; (2) the designation process involves no foreign policy determination; and (3) the bill affects domestic groups.

number of "formal or informal" groups of three or more persons who might fit the definition could well exceed 100,000. The Attorney General has carte blanche to pick and choose among such groups, and his decision is inevitably likely to be selective and arbitrary. In essence, this bill would create an expansive licensing scheme for domestic organizations.

Thus, the procedure for designating "criminal street gangs" violates basic due process rights, and should be rejected. All of these problems can be avoided, as above, by targeting actual criminal activity, rather than targeting individuals based solely on their associations.

III. THE BILL'S TREATMENT OF GANG CRIMES WOULD RADICALLY EXPAND DEPORTATION GROUNDS FOR CERTAIN CRIMES WELL BEYOND THEIR ALREADY EXPANSIVE

The second way the bill expands the grounds of deportability and inadmissibility requires the DHS to show something more than mere association. Individuals who the DHS deems to be members of *nondesignated* street gangs are inadmissible if DHS also has reasonable grounds to believe that they have committed or seek to enter the United States to commit "a gang crime or any other unlawful activity." Sec. 2(a); amending 8 U.S.C. §1182. A foreign national is deportable if he is determined to be a member of a *nondesignated* street gang and has been convicted of a gang crime. Sec. 2(b), amending 8 U.S.C. §1227(a)(2).

These grounds also impose a form of guilt by association, because in many circumstances, individuals who commit the same offenses but are not associated with "street gangs" would not be subject to deportation or exclusion. In effect, this part of the bill radically expands the sorts of crimes for which some people may be deported. Some of the "gang crimes" defined in the bill are already aggravated felonies under existing law's already sweeping definition of that term.[8] But despite the expansive definition already given to "aggravated

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[8] The definition of "aggravated felony" for immigration law purposes has virtually no relation to the common-sense meaning of that term. The current law treats many misdemeanors as "aggravated felonies" if they trigger a sentence of one year. Thus, courts have ruled that misdemeanor convictions for shoplifting, assault, and theft of a video game worth $10 all constitute "aggravated felonies." *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001) (misdemeanor conviction for theft by shoplifting, with 12 months suspended sentence is "aggravated felony"), *cert. denied*, 534 U.S. 877 (2001); *Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000) (misdemeanor shoplifting with one-year suspended sentence); *United States v. Holguin-Enriquez*, 120 F.Supp.2d 969 (D.Kan. 2000) (misdemeanor assault with one-year suspended sentence); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor theft of a small video game with one-year suspended sentence), *cert. denied*, 533 U.S. 904 (2001)

felonies," "gang crimes" under this bill would include many garden-variety crimes that are *not* aggravated felonies under current law. As such, these provisions radically expand the grounds of deportability and inadmissibility for garden-variety offenses.

Consider three of the crimes identified as gang crimes: burglary, obstruction of justice, and crimes of violence. Under current law, such crimes are "aggravated felonies" only if the defendant is actually sentenced to a year or more of incarceration. Under this bill, such crimes would be deportable offenses for gang members so long as the crimes are "punishable by imprisonment for one year or more." The distinction between crimes that *actually receive* a one-year sentence and those *punishable* by a one-year sentence may seem technical. It is not. States routinely authorize punishment of up to one year for misdemeanors, but it is only the rare defendant who actually receives a one-year sentence for a misdemeanor conviction.

For example, under New York law, simple assault – the kind of charge that a garden-variety bar fight or street fight might trigger – is a Class A misdemeanor punishable by up to one year of incarceration. In 2004, 10,779 people were convicted of this charge in New York, yet only 349, about 3%, were sentenced to the maximum of one year of incarceration. The vast majority – about 70% – served no jail time at all. And the median sentence for the 30% who received any jail time was 89 days.[9]

Under current law, any foreign national who was among the 3% who actually received a one-year prison sentence might be deportable for having committed an "aggravated felony." Under this bill, by contrast, any foreign national among the 97% of defendants who do *not* receive a one-year sentence for misdemeanor assault would be deportable if they were deemed to be a member of any group, formal or informal, of three or more individuals who had committed two or more similar assaults in the past. This is a radical expansion of the grounds of deportation.

The inadmissibility standard is even more sweeping, for three reasons. First, to establish inadmissibility the DHS need not establish as a matter of fact that a foreign national is a member of a "street gang," but need only have "reasonable grounds to believe" that this is the case. Second, to establish inadmissibility the DHS need not show that the foreign national was convicted of any crime, but merely that the DHS has reasonable grounds to believe that he has committed or is likely to commit such an offense in the future. No conviction is needed. And third, inadmissibility is not limited to the expansive category of "gang crimes," but encompasses "any other unlawful activity," thus sweeping in the most petty of crimes.

Inadmissibility grounds are not infrequently broader than deportation grounds, in part because less is thought to be at stake for the typical entrant than for the foreign national already living among us, and in part because government officials often have to make admission decisions on less complete information than deportation decisions. But it is important to realize

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[9] *See* Exhibit A attached hereto.

that inadmissibility grounds are used not merely to assess who may enter the country in the first place. They are also applied to permanent resident aliens who return from extended trips outside the country. And they are applied to many foreign nationals within the United States, as eligibility thresholds for immigration benefits, including adjustment of status to permanent resident.

IV. THE BARS ON ELIGIBILITY FOR ASYLUM, WITHHOLDING, AND TEMPORARY PROTECTED STATUS ARE UNWARRANTED, AND IN SOME CIRCUMSTANCES VIOLATE OUR INTERNATIONAL LAW OBLIGATIONS

The bill imposes especially harsh immigration consequences on all deemed deportable or inadmissible as gang members. Anyone who falls within the expansive grounds of inadmissibility and deportability is automatically subject to mandatory detention and rendered ineligible for asylum, withholding of deportation, and temporary protected status (TPS).

There is little justification for such harsh consequences. Foreign national gang members convicted of particularly serious crimes are already deportable, subject to mandatory detention, and barred asylum and temporary protected status, under the "aggravated felony" provisions of current immigration law. What this law does is extend such consequences to persons who have *never committed a crime in their life*, but are simply deemed to be members of designated street gangs, or are deemed members of nondesignated gangs who have been convicted of routine misdemeanors, such as simple assault, even if the criminal justice system sees no need even to impose any prison time for the offense.

The effect on withholding is most dramatic. Under current law, an alien is generally ineligible for withholding of deportation only where he has been convicted of an aggravated felony *and* has been sentenced to five years or more incarceration. 8 U.S.C. §1158(b)(2)(B)(I). Under this law, an alien would be rendered ineligible for withholding based solely on his association with a gang, and/or on the basis of a minor assault conviction that warranted no jail time whatsoever.

To receive asylum or withholding, an individual must show that he is likely to suffer persecution if sent back to his country of origin. To deny asylum and withholding and send a person back to likely persecution is a drastic step. To do so where the individual poses a direct threat to national security or is a hardened criminal is one thing; to do so on the basis of "membership" in a gang, without any evidence of criminal activity, or on the basis of a minor criminal charge that does not even warrant a day's incarceration is an entirely different matter.

Indeed, to deny eligibility for asylum or withholding to otherwise qualified foreign nationals based on nothing more than their perceived associations, and or a minor crime, violates our obligations under the Refugee Convention. Article 33 of the Refugee Convention provides as follows:

Prohibition of expulsion or return ("refoulement")

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

A person deemed solely to be a member of a designated street gang, who has committed no crimes, cannot be returned to a country where he faces persecution. Yet under this bill, he would be. Similarly, burglary, obstruction of justice, or assault charges cannot under any reasonable definition be defined as "particularly serious crimes," especially where they are deemed by the criminal justice system to warrant no incarceration. Yet this bill would bar withholding, and send immigrants back to persecution, based on such petty crimes, and based solely on association.

CONCLUSION

Reducing gang violence is undoubtedly an important objective, although in general more a state and local than a federal responsibility. Using immigration law to deport violent gang members makes sense, as does using immigration law to deport violent foreign nationals who are not gang members. But the Alien Gang Removal Act goes far beyond the legitimate purpose of removing violent foreign nationals. It authorizes mandatory detention and deportation of persons who have never committed a single crime in their life, and who pose no threat to the community – simply on the basis of their perceived association with even "informal" groups. And it would send such foreign nationals back to countries where they are likely to be persecuted, again without any showing that their continued presence here poses any threat. At the same time, it radically expands the types of crimes for which foreign nationals can be deported, far beyond even the already expansive definition of "aggravated felonies" in current law.

As Michael Garcia testified recently, DHS and ICE are already engaged in an ongoing effort to use immigration law to fight gang violence. There is no evidence that the tools they already have at their disposal are inadequate to the task. This bill is accordingly premature at best. What's worse, in its zeal to fight gang violence it has lost sight of the problem – violent crime – and indulged instead in sweeping guilt by association, in violation of constitutional law and our international law obligations. This bill, if enacted, would resurrect the unwise and unconstitutional tactics of the McCarthy era, giving government officials broad discretion to punish individuals not for their own culpable conduct, but solely for their associations.