

STRUCTURED DIALOGUE ON BUILDING A SUSTAINABLE, STABLE IMMIGRATION ENFORCEMENT SYSTEM

This conversation occurred on October 24, 2014, ten days before the mid-term elections that gave Republicans control of the U.S. Senate for the first time since 2007 and increased their majority in the House of Representatives. The conversation occurred approximately four weeks before President Obama announced his executive actions to provide the opportunity for many undocumented immigrants to obtain work authorization and temporary legal status. Most of the symposium panelists were present for the discussion.¹ I have edited the transcript for clarity and added explanatory footnotes where necessary.

Kerry Abrams

KERRY ABRAMS: In listening to all of your talks today, I've been noticing several themes that have consistently emerged. I'd like to take the opportunity to use this concluding panel, which includes all of today's speakers, to explore some of these themes.

The first theme I noticed was an idea that Doris Meissner brought up in her keynote address, the idea of the "new normal." There are some things that have changed in the world that may change how we should think about immigration enforcement, and I heard different ideas from different people about what constitutes this "new normal." Doris used the phrase "new normal" when she told us that Mexican migration is now at net zero, and therefore might not be the biggest problem faced by the United States going forward. She also mentioned the possibility that a consistent flow of children and families with infants from Central America may be the new normal.

Bo Cooper claimed that Congress is incapacitated and many panelists implicitly agreed. If Congress is indeed incapacitated—if that's the "new normal"—then we must rely on other ways to address immigration going forward. This change explains more aggressive executive action, such as

¹ For brief descriptions of the panelists, see *Foreword: The Future of Immigration Enforcement, a Tribute to David A. Martin*, *supra* at p. 403-04.

the Morton Memo on prosecutorial discretion and Deferred Action for Childhood Arrivals (DACA).

Bo also argued that states are “where it’s at.” If states are going to be increasingly involved in enforcement, and they certainly seem to be, we might need to think about pursuing what Cristina Rodríguez was advocating for in her talk—a new *détente* between states and the federal government in immigration matters.

I’d like to hear from the members of our panel about what you think of these examples. Are they the new normal? Are there other pieces of the new normal we are missing that we should talk about? What does it mean to enforce immigration in this new normal?

JOHN MORTON (2:25): One thing that I would add to the “new normal” is that I think that in addition to all of the things you mentioned—and I think that the political dysfunction that Bo mentioned is a truly a new normal and a worrisome one—is that we are just living in a dangerous world right now and I don’t see that changing in the new future. I don’t just mean that ISIS² is going to be around for the next three or four years or there will be another Ebola scare. I just think if it isn’t those two things it will be something else. We are not just living in an increasingly global environment but an increasingly insecure one in which there aren’t a high degree of shared norms. Those fissures and fractures and challenges tend to play out in immigration terms. You see it playing out right now, as the Department of Homeland Security scrambles to deal with the merits of the Ebola scare, as well as the politics of it and the emotions of it. Those three aspects are very different, and the merits are often very far from the politics or the emotions of something, and we’ll just have to see how it plays out over time. Unfortunately, it dovetails with this increasingly immediate world that we live in, with things being Twittered and blogged about in an instant. A loose remark we may make today could already be the headline of some blog and the distance between that blog and the Senate and the House of Representatives is so short now, in a way that couldn’t have happened 15 years ago. There used to be a certain gravitas to the system that didn’t allow for that to happen. Now, I can’t tell you how many times I was testifying where something that was on what I would refer to as a “crazy blog” was in fact what I was having to address before

² ISIS, an acronym for “Islamic State in Iraq and Syria,” is a group that ignores international borders with the stated aim of creating an Islamic state across Sunni areas of Iraq and Syria. *See ISIS Fast Facts*, CNN LIBRARY, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> (last updated Feb. 11, 2015).

the Congress of the United States. There were some pictures of Humvees going along the southwest border – it was an army munitions train—and I had to answer questions about why was ICE buying a thousand MRAPS³, because it had been reported on some blog and taken as gospel truth.

STEPHEN LEGOMSKY (5:43): I agree with what John has said, but I'm not so sure that's a *new* normal. It seems to me that episodically throughout our history we've had specific events that put a scare in people. In 1901, President McKinley was assassinated and within two years there were all kinds of laws that prohibited the admission of foreign anarchists even though the guy who shot him, Czolgosz, was not even a non-citizen, he was a U.S. citizen. Then we had the preoccupation with communism in the 1940s and 1950s, then we had the preoccupation with HIV, and now we have Ebola and ISIS. My guess is there will always be times when new scares periodically emerge.

The other point I would add, in response to Kerry's question about whether there are any other new normals, relates to Bo's point that Congress is broken. The observation I would add is that it has therefore fallen to the executive branch to do much more of the decision-making than it would otherwise have had to do. One of the things that has really begun to inhibit the executive branch in doing so—and I know that those of you who have worked in government will appreciate this—is that it is such a pain to get a regulation through. The entire regulatory process is so broken that it can get a year or two to get even a non-controversial regulation through. So many of the fixes that have to be made are the kinds that really do require formal APA⁴ notice and comment rulemaking. The combination of Congressional inaction and barriers to executive action pose real problems in a field where events change so quickly that dynamic action is often needed.

DANIEL KANSTROOM (7:27): I think it's always perilous to define what the new normal is because it changes so fast. Even the demographics in Mexico can be problematized by looking at the movement of people from Guatemala, El Salvador, and Honduras into Mexico which will change the situation there. We may differ as to the prediction of the southern border.

I think that one aspect of the new normal that we should think hard about is that we are now trying to work with an incredibly complicated system, where some pieces have been developed by design but a lot of it

³ MRAPs are Mine Resistant Ambush Protected vehicles.

⁴ Administrative Procedure Act, 5 U.S.C. §§ 500–596, 701–706, 801–808 (2012).

has developed over time by accretion. We have tried to add pieces to it; we've taken old concepts like suspension of deportation and tried to put them in new garb as cancellation of removal, with some updates. There are a lot of new forms of relief now that need to be sorted through: U visas, T visas, VAWA, asylum, new theories of asylum, new theories of this, that, and the other thing.⁵ Another interesting aspect of the new normal for us to ponder is that we may have gotten to a point of legal complexity—and bureaucratic complexity—that just renders the system unworkable. That is part of my call to get to simpler first principles and convene a group of people to rethink the whole thing. Of course, that would have to go through Congress and it's hard to be optimistic about that to say that least. But I think a lot of what I've heard today is that we have achieved a level of complexity that has brought us to an inevitable dysfunctionality that is basically the new normal.

HIROSHI MOTOMURA (9:20): I agree with the skepticism of the “new” part of the new normal, but I think it's worth identifying the pieces of the normality here, to see whether each is new or not. Think about the effect of the Mexican economy. It has changed, but one dimension that I don't think is new is that immigration reflects economic trends and that the problem for policy makers is that they can't predict what those trends will be. The second piece is where the action is, if not in Congress. Even though Congress maybe more incapacitated now that it has been, it has always been the case that immigration law is largely made in the executive branch. The third is the role of the states. That's been part of “normal,” certainly since before the Civil War. If we put it in broader perspective, I think that the Civil War was just one of many episodes defining the role of the states in saying who belongs here. And finally, the different perceptions, as Steve mentioned, of national security. It could be health-related, it could be political. It's worth thinking abstractly and generalizing from these examples so that we can see these themes. These four themes have been very dominant for a very long time.

BO COOPER (10:43): I think that we might be pioneers here today for participating in a day long immigration enforcement symposium that had

⁵ U visas are available for certain aliens who cooperate in the investigation or prosecution of criminal activity. 8 U.S.C. §1101(a)(15)(U) (2012). T visas are available for certain aliens who have been victims of trafficking. 8 U.S.C. §1101(a)(15)(T) (2012). The Violence Against Women Act (“VAWA”) allows certain immigrants to self-petition for lawful permanent residency if they were battered by or the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse. 8 U.S.C. §1154 (a)(I)(A)(iii) (2012).

almost no mention of detention issues; I've never seen that happen before. But so much of what has been talked about today depends on mechanisms for serving the purpose that detention has always served, which is ensuring someone's presence before court and enforcing their removal. Think about the calls for swift enforcement action, for swift identification of people after a violation. Think about the UAC⁶ context that Doris was focusing our attention on earlier, it was a big question: could we treat something other than actual detention as custody legally, so that we could put people in expedited removal and fulfil the mandatory custody requirement, without having actual space to put them in. Well that raises questions about how to identify people who are not in actual custody. We focused a lot on detainees. If you've got situations where the federal government is issuing detainees that the states choose not to honor, that's going to put a lot of pressure on the question of how do you identify people, locate them, and put them before judges at repeated intervals over the course of the process and remove them at the end of the proceeding. I think that our foray into the future of immigration enforcement is going to focus a lot on whether there are new ways to accomplish that purpose. I think we're going to watch technology be a friend to that effort. I think people's general approach to privacy is evolving. I think people are going to be more open to suggestions like Dave's that you might be able to track someone's movement through credit cards, for example. There are a lot of alternative ways that identification can be accomplished. I think we'll see a focus on this as years rumble on, and detention is seen as too crude and too expensive an instrument for fulfilling the purpose of finding people subject to enforcement.

DAVID MARTIN (13:10): One of the most troubling elements on our list is Congress's incapacitation. I haven't heard it described quite so bluntly before, but I think that description is right on. This issue ties in with the point John was making about blogs and the observation Bo made that Congress is not a place to wrestle with policy but instead a place to score political points. That's very discouraging. If it lasts, all these other problems become very difficult. It will mean that there's more pressure on the executive to do things, and although the executive already does a lot in this arena, if that becomes the way that things are generally managed,

⁶ Unaccompanied Children's Services is a program of the Office of Refugee Resettlement, an office of the Administration for Children and Families. See *About Unaccompanied Children's Services*, ADMIN. FOR CHILDREN & FAMILIES, www.acf.hhs.gov/programs/orr/programs/ucs/about (last visited Mar. 5, 2015).

based on very broad interpretations of presidential authority, particularly not to enforce, I really worry where that goes. There would be so much room for each party coming in to dismantle statutory schemes that were worked on very hard, passed through enormous effort, and then are just incapacitated, not because the law is changed but because of presidential decisions. I'm not quite so sure that Congress's condition is permanent—we'll have to see. The blogs, the instantaneous communications, make it difficult to see how we get beyond it, but things will change as the political configurations change—who holds the White House, who has control of Congress. We actually may have a better chance at comprehensive immigration reform if there's a Republican President, assuming that party also has dominance in Congress at that time.

Complexity is also an enormously important point. It is astounding how much the immigration laws have grown and how new ideas just get grafted on to the old structure. When we in the General Counsel's office at INS⁷ were working on the bills that became the 1996 Act, trying to discuss changes with a Congress of the other party, we made some headway during initial committee consideration on what were then regarded as more technical changes, to simplify things. If there was something one member of Congress wanted to do, we might not agree with the policy, but they would talk with us and we'd come up with a way to rewrite the provision that would accomplish the same goal but be much more operationally sound. That's an important part of good legislative drafting. A lot of that got lost in the 1996 Conference committee, which was done in a really secret way: essentially the Republican caucus drafted what they wanted to be the final bill and then took it to a very perfunctory conference committee with very limited time to raise any issues. That's where some of these really bizarre things came in. We already had the changes in cancellation program, where there was some tightening of the provisions. The Conference tightened up the substantive provisions even more, and as I recall, the 4,000 ceiling came in at the end. For all the reasons Margaret suggested, a ceiling like that is an impossible thing to graft onto a statute that has already set forth terms for determining when somebody is deserving of a discretionary grant based on exceptional and extremely unusual hardship. Maybe Congress meant the ceiling, as someone was suggesting earlier, to feed back into the process and to mean that

⁷ INS is the former Immigration and Naturalization Service. It was reorganized into the Department of Homeland Security through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) following the terrorist attacks of September 11, 2001.

exceptionally and unusual hardship would be interpreted as a very stringent provision. But if that's what you want to do you can't give that role to 230 immigration judges who act as separate actors. You could maybe do that—it would be very hard—you could maybe do that if you gave it to USCIS and they could draft guidance and have supervisory review. All those pieces don't fit together. The problem is that with Congress incapacitated we are not likely to see that situation improve. We usually found so little interest in saying, "well if you are going to add this provision let's clear out or consolidate ten other provisions on the same subject." The political resistance to such a move is strong. In many Congressional offices where they didn't fully understand the law, they'd say, "Maybe we can accept this new provision but we don't know the full implications if we remove these other ones. So let's just leave them in there." If we have any chance for the reasonable long-term health of our migration management system, we must find a way to use legislation for addressing the key and most pressing problems.

MARGARET TAYLOR (18:22): I think the point about overreaction is actually an "old normal." One thing that strikes me is how common it is for legislative change to be an overreaction. Sometimes executive branch decisions as well, if you consider the detention of women and young children in Artesia and Karnes County to be an overreaction.⁸ I wonder if that's unique to our field, that there is always a disproportionate reaction to whatever problem we are addressing or whatever crisis or perceived crisis we are experiencing, that then yields statutes that are not only so complex but also have all these dysfunctional provisions.

STEPHEN LEGOMSKY (19:07): One more new normal to throw in (and this is a *world* new normal): Most of the facts we have discussed, Doris's observation about Mexican push and pull factors being an exception, have to do with U.S. domestic realities. If you look at the world today, the gap between rich and poor is greater than ever and continuing to widen. We have global warming and we have overpopulation, which is getting worse and worse all the time. We have increased resort to violence in political movements. All of these are factors that are going to continue to push people. At the same time here in the US we have the kinds of factors we

⁸ Artesia refers to the Federal Law Enforcement Training Center in Artesia, New Mexico. In June 2014, DHS made it into a temporary family housing and administrative facility for detaining the unexpectedly high number of Central American children and families crossing into the United States. DHS closed the detention center in December 2014. Karnes County refers to a similar facility, the Karnes County Residential Center, in Karnes City, Texas.

have been discussing. It does seem to me that in the past we haven't had quite as many push factors, at least as a matter of degree. In addition to that, modern technology—especially information technology—has brought the possibility of immigration to the attention of the world's poor. Modern advances in transportation have enabled many of those who might have thought of it but had no way of doing it before to do so now. So it does seem to me that we have already entered a phase in which both the incentive to immigrate and the means and opportunity to do so are going to continue to increase. I see that as a new difference in degree, rather than a new conceptual shift.

INGRID EAGLY (20:43): In thinking about this new moment of migration, it is important to acknowledge the recent increase in women and children coming to the United States border. Their stories of fleeing extreme dangers in their home countries have gotten a lot of play in the press, as well as from the pro bono legal community and immigrant rights organizations. This group of immigrants is bringing claims, such as asylum, that are widely seen as sympathetic, and some of these women and children have already won their cases. We have partners from major law firms going to remote detention centers in New Mexico and Texas to represent unaccompanied children and families, and coming back to their firms complaining that there is insufficient due process in our detention system and immigration courts to adequately defend their clients' rights to remain in the United States. This situation with immigrant children and their mothers should make us wonder whether the techniques we have been using—ranging from detention to criminal prosecution at the border—are effective. We should begin to ask hard questions, such as whether so many immigrants should be subject to detention while they litigate their lawful right to remain in this country and whether at least some immigrants should be provided counsel at government expense to defend themselves in court. We should seize this moment to challenge us to think more creatively about what enforcement techniques are necessary to achieve a balance between effective immigration enforcement and humane treatment of immigrants that is consistent with due process.

KERRY ABRAMS (22:03): When I walked into the room today, I thought of comprehensive immigration reform as the gold standard for what we want to achieve. This discussion of Congress as incapacitated is making me question that assumption. It seems to me based on our discussion that one of the “old normals” that have existed is this: Congress passes a law. It

might be a good law, and it might work for a while. Or it might not be a good law, but a well-intentioned one. Or it might be a last minute, back-room compromise that everyone knows is not good. But regardless, eventually, pressures build up and you get a 4000 person cap getting breached, or all sorts of bad results as Margaret described in her talk. It seems that we're at the point now that the only way to get out of some of these problems is a complete reform of the whole system, which seems to be impossible. But even if that did happen, we'd still have the same problem of unintended consequences. Even if we could fix everything in one fell swoop, we might just end up back in the same place in twenty years. Perhaps a more nimble approach, in which Congress responds quickly and specifically on small issues, might be a better alternative. A good example came up in this morning's panel, on what interior enforcement would look like post-legalization of the undocumented population. Often we think we have to find a path to citizenship or to authorize status for the millions of unauthorized migrants to create a clean slate before we can legislate anew. But even if that happened, and even if we did everything the morning panel suggested on interior enforcement, I just don't see how we are not in the same position in twenty years with a new unauthorized population that has come for new reasons because of whatever the future "new normal" turns out to be. Maybe that's just how immigration law works. There's a fight for comprehensive immigration reform every twenty, thirty, or forty years, and then the bubble bursts and then it all starts happening again.

DAN KANSTROOM (24:32): The dilemma in efficiency and due process is exacerbated by the binary nature of the current system and by the high stakes of removal. If we were, for example, to open post-deportation claims to soften the enforcement mechanisms to allow visits to family, attendance at funerals, and all that sort of thing, it might be a way to mediate it, analogous to something like temporary worker programs (although I'm as skeptical of these programs as anyone). It seems to me that we've been a prisoner of binary solutions, which raises an irreconcilable dilemma between the high stakes of removal and the cost of enforcement. There is no way that the system can ever generate enough capital to fund CIR. So either, then, we have to sacrifice some of our notions of due process or we have to change the nature of the available sanctions.

DAVID MARTIN (25:50): I'm glad Dan brought up these points. These ideas came up at a conference we both attended a few weeks ago, and I've been thinking about them. It's good that we would look at ideas like that in a little smaller compass, because I think we just talked ourselves into a really depressing state with regard to larger scale changes. With all of the things we added into the "new normal," about the only good one, maybe, is that Mexico has a bigger middle class and is unlikely to generate as much outflow. That's really important. It can mean lower pressures on the overall enforcement system if we can clear out the old cases.

But to the non-binary point: Dan identifies a real dilemma. It's another reason why this field has some unique features that are often overlooked, particularly in the public debate. In some ways, for an immigration violation, the binary response that you are talking about – we either deport somebody or not -- is perfectly proportional. The violation consists of being someplace where you didn't have permission to be. Instead of slapping you with a twenty- or thirty-year sentence or a big fine, we are just going to enforce the particular result that the law calls for.

In the real world, however, it often isn't seen that way; the human reality grows much more complex after someone has been in a place for a long time, legally or not. By then, the formally proportional result has impacts on lots of other people and on the removed individual that may go far beyond what much of our population sees as a fair outcome.

If we are trying to get away from strict binary outcomes, what could we do in between? Would we fine some people, or actually use a short criminal sentence, but let them stay and maintain their connections here? That outcome holds some attractions, but I believe that a lot of our fellow citizens who are not deeply connected to immigration communities would say, "wait a minute, you are just letting them buy their way in with a small slap on the wrist."

Dan also suggested greater possibilities for people to come back in and at least visit family sometime after they have been removed. Acceptance of such a step would depend on developing a better system to keep track of people and help assure that they would leave. That's a hard one. I like the basic idea, and I'd like to think of ways to make it work. But it's a hard one because the covered individuals by definition have already committed a violation and have failed to honor an earlier departure requirement. We'd have to think more creatively about how to secure return – and any progress in that department could also have payoffs in managing other temporary migration.

Some of the most interesting possibilities along those lines may derive from arrangements that have been worked out by some receiving countries and some sending countries, where the sending country's government takes a major role in assuring that the people on temporary worker permits come back home at the end of their stay, because the government doesn't want to sour the receiving country on the overall temporary worker system. Eleanor Brown has written about this with regard to Jamaica and Canada in particular. Maybe that idea could be adapted in some way for these sorts of family visits that Dan proposes. Because this is such a novel way of approaching the return issue, at least for the United States, I despair of getting Congress interested. But maybe executive initiatives could succeed in pilot-testing some such arrangements—probably beginning with temporary worker programs. Still, it's pretty hard to envision non-binary alternatives that are both operationally workable and reasonably likely to find political acceptance.

STEPHEN LEGOMSKY (29:41): There is one other option we haven't discussed, one other possible answer to the question "what do we do when, despite legalization, the undocumented population starts to creep up again?" The other option is: live with it. We live with all kinds of violations of law. Anyone who's ever driven a car, or been a passenger in one, knows that if you are not going over the speed limit you are probably slowing down traffic. We live with a certain amount of legal violation. So the question really becomes: How much of a social harm do you think illegal immigration is? Conceptually, of course, it does violence to the rule of law. Any type of mass violation of the law has to be a concern. But how *great* a concern it is, I think, should drive some of our conversation about how much are we willing to invest in enforcement, how far away from zero tolerance are we are willing to get. I know people differ anywhere from "illegal immigration is a nightmare, it's the worst thing that's ever happened to us," to "it's a serious social harm," to "yes, it's harmful, but it's not that bad," to "it even has positive benefits," etcetera. We all have different political views on that spectrum, but part of what we have to take into account is how much harm we are facing and, therefore, how great an investment of resources we are willing to make, in addition to the question about what is the smartest way to use those resources. I just throw that question out there—I'm not sure I have an answer to it.

DANIEL KANSTROOM (31:33): Wanda Sykes had the best answer to the question. People analogize undocumented workers to trespassers or

burglars. But imagine a burglar comes into your house while you're upstairs and you come downstairs and she's washing the floor or making up the beds. Nobody would be as troubled by that as trespassing or burglary. [Laughter from audience.]

JOHN MORTON (32:00): I'll like to disagree with an earlier point. I disagree that part of the answer is, full quote-unquote due process across the board for violations. I think that would be the wrong answer. Part of the problem we have now is that too many people can go to the Supreme Court and too many cases take eight years to resolve. We need a much better sense of bucketing, of graduation. The person who says to the government, "I'm coming to Florida to go to Disney World for two weeks," is something we want to promote, we want tourists to come to Disney for two weeks. We grant you certain expedition because of that, or maybe we allow you to come to the country without a visa, because we have a relationship with your country and you can come on your passport. I don't think the country needs to spend eight years, a lot of treasure, and deep, deep due process to resolve the question of whether you should have gone home when you said you were going to go home. Now, there are obvious caveats to that. There are certain protection issues that always need to be built in so it's not a one-size-fits-all. We need to think through those areas that we need firm, expeditious, efficient enforcement—and that tends to correlate with recent violators and some very, very serious offenders—and for the rest, a rigid rule will never work and we need to have a combination of some of the things that have been talked about. There needs to be some understanding that we will have a threshold for a certain level of noncompliance. I like the idea of a rolling amnesty, whether you view it as an individualized one or a collective one, which recognizes that the system will never be perfect and we will need an escape valve, we've got to let off some steam, and we're just going to provide for that. Individual judges, after a certain amount of time, regardless of the underlying illegality, would have the authority to say on behalf of the United States, "in sum, on total, ten years later, we're going to let you stay." And whether you're going to put a five hundred dollar fine on that—or nothing—we've got it built into the system. The piece that makes this whole question complicated is that people are people and their lives change. Most people tend towards a positive contribution. They get married. They have kids. We need some way to recognize that and not just be caught in the underlying illegality.

JULIE MYERS WOOD (35:15): But I think we *are* having a rolling amnesty. If you think about all the temporary protected statuses, the “temporary” is a misnomer. Once it is enacted, there is a lack of will to overturn it. I think that we’re going to see that DACA. People will get used to the status quo, which is happening with TPS, which is happening with DACA. It’s a piecemeal way to get at it and fix it. Now Congress may not affirmatively authorize something, but Congress is less likely to go in and do something that is harmful because folks are conditioned to it and they’re used to it. So I think we are “living with it.” And I think that makes sense because Congress will not act and has not acted. One of the things that is frightening about that, and we have to measure it, is whether or not that is a draw to come into the US. When it is known that we can live with it, when it’s known that you can come here and you can commit even several minor crimes and that’s not a problem, it incentivizes individuals to come in here. That is a real tough thing. It’s one thing to say that there are certain laws that are not enforced *as much*, but it is another thing to proclaim that from the rooftops. In a recent MPI study that Marc Rosenblum did, although there was all this hubbub about the Morton Memo, when they looked at enforcement data, there were only about 10,000 people that were treated differently, although Doris may disagree with me about the numbers.⁹ Most of the time, the priorities had been the same, before and after the Morton Memo was issued. But we advertised those priorities in a different way. I think that one of the critical ways in which priorities were different was that in worksite enforcement, in the Bush administration there was a belief that you couldn’t turn a blind eye to illegal workers. That was a small number of individuals, of the 340,000 people were deported, only 10,000 of them involved individuals at the worksite.

One area that I’m not sure was talked about today but is also part of this new normal is the proliferation of lists that keep you out and bar you from ever getting in. These affect people who believe they are good people, who are honest people, but are barred from getting into the US. They try to come legally and they are told they are a terrorist or a risk for violating immigration status, and they have no option. They get no process. Once you get a on a list there is nowhere to go. You have to go through informal means to address it. The number of people on these lists, I think is really growing. That is, frankly, a problem for our country, because if they have

⁹ Marc R. Rosenblum & Kristen McCabe, *Deportation and Discretion: Reviewing of the Record and Options for Change*, MIGRATION POLICY INST. (Oct. 2014), <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>.

no option they are more likely to enter illegally, or they could start taking a different view of the United States. It's very frustrating when you try to assist some of these individuals. They may be called a terrorist, and you find out that the state department made a typo when they read the application. The state department ultimately apologizes after ten years and three sets of lawyers. It's very frustrating. Or someone who was trying to come to the US to give a kidney to their brother and was denied. I don't think there should be formal means—big courts—to address it but the fact you that you have to find informal routes is not a good thing. These are often good people who want to come in on non-immigrant visas and are being kept out.

HIROSHI MOTOMURA (39:43): I'd like to say something that's been triggered by several other comments. One is the comment that Steve made regarding whether the system might actually be functioning in a way that actually works, or at least with imperfections we can tolerate. It made me think about the framing of the symposium, which I really welcome. It's interesting that the framing of the symposium to assume a post-legalization world, and then to ask the question: after legalization, what will enforcement look like? I can imagine a different framing, one that maybe ends up at the same place but maybe is different. And that is this: let's assume that legalization is completely off the table. Let's assume that it's unconstitutional for some reason, and that any rate we just forget about it. What I'm saying is triggered by the Congress-being-incapacitated point; maybe that's the same thing as saying let's take it off the table. What if instead we say that we're going to revise the system for letting people into the country in the future? Let's assume *that*, and then have enforcement.

I don't know if our conversation would have been different, but it's interesting to think about. It makes me ask what the political conditions are for working for the best lawful admission system in the year 2030, as opposed to thinking about this in terms of legalization at all. Anyone who's been around this particular block on IRCA legalization understands that if you legalize people and you don't do anything with anything else, then you're just going to face the same problem. This is tied to a more general comment. Advocacy groups naturally, understandably, put so much energy and political capital into legalization, which, ultimately, fifteen years from now, may not matter.

DAVID MARTIN (42:13): That taps into several things that are really important for us to focus on. Let me first say that the idea for framing our

conference inquiry —what would enforcement look like if we could clear out all the really old and sympathetic cases?—was developed last March or April when it looked as though legalization could really happen. We hadn't yet been crushed by Bo's observation about Congress being completely incapacitated. [Laughter from audience.] We're in a more pessimistic time now. Steve has put his finger on it: at least right now, when the flows are relatively low, we as a society have generally come to terms with the population that's here. A lot of people have learned to tolerate the status quo. This summer the *New York Times* ran a fascinating series by Damien Cave that addressed these subjects. He traveled up Interstate-35, which goes north through the heart of our country, and he examined how people are reacting to the immigration situation now. And even in places like Farmers Branch, Texas, where a few years ago they enacted a very strict anti-illegal immigrant rental ordinance, later struck down by courts, he depicted the residents as saying that they'd basically come to terms with this outcome. A government official in another town said in essence, "we're figuring out how to deal with it here, but the federal government has a responsibility to keep us from dealing with more of it."

That leads me to Steve's comment: we have speed limits, but we live with it when people drive five, ten miles over the speed limit. We don't conclude from that reality, though, that we should revoke the law, or that we just categorically announce that when the sign says sixty-five, the speed limit is really seventy-five. That's a formula for continued escalation to a point where the citizenry would stop tolerating the status quo. Or to put it another way: there's a feedback effect that complicates the business of immigration control. When you try to do something that's very sensible and humane for a particular situation with a contained number of people, it often brings wider consequences making a seemingly small-scale issue into a really big problem later on.

A good example is where we are now with asylum reform. The asylum reforms implemented in 1994-95 had a pretty good eighteen-year run. They succeeded in keeping application levels at a reasonable point while providing timely decisions, with a high protection rate. But over the last few years, it has come apart. The incomprehensible failure of Congress and the Justice Department and OMB to staff the immigration courts at a level that could keep up with the processing, as we've discussed, is primarily responsible. But another cause may stem from the enforcement priorities and the way their implementation played back into the system. A big part of asylum reform, as adopted in the mid-1990s, was to put people into the full process and reach final decisions promptly. As an asylum applicant,

you don't get work authorization unless your administrative process, including immigration court, extends past six months – or earlier, of course, if your claim is granted. If your claim is denied, a removal order is promptly entered – an essential element to help deter ill-founded claims.

Over the years, especially while I was in government, I have heard from several friends who are federal courts of appeals judges and who get lots of asylum appeals. Many times I was asked: “Why are we putting this person, who is just a failed asylum seeker, into removal proceedings?” They had in mind a hard-working honest person, or a grandmother, whoever it might be. And they had a wonderful point to make about priorities if you look just at the individual case. But if you change the overall system and start saying that asylum applicants who have failed claims but no other negative factors in their backgrounds won't be put into proceedings, then we're going to get to the point where the six months run, and lots of unsuccessful applicants get work authorization. News of such results feeds back into the system, and it doesn't just apply to grandmothers and very sympathetic people. It attracts new migrants or applicants – maybe lots of them – to test the boundaries. It plays back with the kind of dynamic Margaret described in her paper.

That feedback effect is one of the main reasons that migration control is such a hard business. We may be able to “live with it” at a certain level, but we only keep violations at that tolerable level by formally enacting stronger provisions and, pretty regularly, actually enforcing those stronger provisions. Now that's often an uncomfortable place to be if you're an official in the system and you're trying to explain why resolute enforcement is needed when the immediate issue seems to involve very benign violators. I've been in government meetings where I understand that it looks really attractive to do something a certain way, but today's leniency can attract large new flows, and then one can see the system coming apart several years down the road. The 2008 Wilberforce Act is an example; it made sense with the limited unaccompanied minor issues we faced back then, but in my view its mandates helped attract last summer's big surge. We still have speed limits and we do enforce them. We need the equivalent here. Play in the joints and wise prosecutorial discretion are important, but maybe something along the lines of what Julie is suggesting—discretion needs to be behind the scenes, not announced categorically.

STEVE LEGOMSKY (47:59): Julie and John and David have all made the point, which I agree with, that we shouldn't affirmatively announce that

from now on we're not going to enforce the immigration laws. I'm assuming we will and should always maintain some level of border enforcement and interior enforcement. All I was suggesting was that, whenever we go to evaluate a new enforcement strategy or a new technique, we need to balance the cost of that new technique not just against the humanitarian concern but also against what we think is the magnitude of the harm we are trying to prevent. I'm suggesting a balancing, not an affirmative announcement of "no, we're not going to come after you."

DORIS MEISSNER (48:48): I'm very struck by the "live with it" notion, too. I'm so discouraged by what's happening politically and so convinced that I don't see in the near term how things realign in ways that make it possible to do what we think of as comprehensive immigration reform. And I think when we say "comprehensive reform," what we really mean is can you pass a piece of legislation that includes a robust legalization program. I don't even think of a legalization program at the end of the day as one that leads to a path to citizenship even though that is the big advocacy goal; if you could get to the point, in a negotiation in Congress, where a legalization could be agreed on that did not lead to a path to citizenship but did include a work permit, the ability to travel, and a reliable legal status – not one where you have to check in every six months and show you haven't been out of work for more than sixty days—something the community would have faith in, I think you could get to yes. But I don't see that happening in the near term. And so this idea of can we live with it, and how would we live with it, and how are we going to function with the disarray in legal statutes, and all of the systemic implications of that, I think is a real possibility. I hope it doesn't happen, but many of us in this field have not allowed ourselves to go there because we are so persuaded of how important comprehensive immigration reform is. With limits in our ability to do useful work and mobilize, it's natural to try to achieve immigration reform. But that may not be, ultimately, the best use of effort in the next couple of years. We'll see.

Steve said, "live with it"; I think of it as muddling through. As in most countries, and certainly the U.S., we muddle through on many critical things. We're muddling through on the ultimate threat to our existence—climate change. We muddle through in many policy arenas. My own sense of it is that may be where we are now on immigration. If that is where we are, we have a couple of saving lifelines as a society. One is birthright citizenship. At the end of the day, the unauthorized population - as

corrosive as it is for our democracy, for what we believe in, certainly for the unauthorized as people in their individual lives - is a one-generation phenomenon. That is a huge difference between us and many other countries that is really important over the long term. Between sixty and seventy percent of the unauthorized population has already been in this country more than ten years. And with reduced levels of unauthorized immigration, the size of the resident population is not growing; instead, it's more of a long-staying population every day. As a result, their kids—although some are Dreamers or DACA kids—their kids are largely U.S. citizens. So a sizeable unauthorized population is over time a one-generation, rather than a permanent underclass, phenomenon.

The deeper concern or danger for us as a society is that if you're in illegal status for a long time, your chances of doing well in this society and becoming upwardly mobile are significantly decreased. That's an important longer-term concern for the country. Kids in families with parents who are unauthorized have a much harder time doing well in school. With the Affordable Care Act (ACA),¹⁰ there are negative health implications, in that those with legal status are eligible for health care but one group—people without legal status—are barred. There are other areas where the fact of not having legal status is really a problem for both individuals and communities.

Yet, on the other hand, people are managing. Even in “tough” states, at the community level a lot of positive things are actually going on. It's not pretty, we wouldn't choose it that way, but it's amazing how - as a country - we cope. It's also amazing how, given our muddy immigration law and legal system, there are ways for people ultimately to get legal status. If the administration uses executive action in some targeted ways that would make it possible for spouses, for example, or for those who would otherwise be eligible for immigration through other measures but for the 5 and 10 year bars to be granted parole-in-place or something akin that would make it possible for them to get green cards—such measures might be the most intelligent, long-term way of bringing people into legal status, recognizing that it's not going to happen through a Congressional legalization program in the near term.

Then, what kicks in is what has always kicked in for us as a country, as a democracy, and that is that people get political power. The Latino

¹⁰ Under the Affordable Care Act of 2010 (“ACA”), individuals who are “lawfully present” in the United States are eligible for the insurance coverage options made available by the Act. For an analysis, see *“Lawfully Present” Individuals Eligible under the Affordable Care Act*, NAT'L IMMIGRATION LAW CTR. (Sept. 2012), www.nilc.org/document.html?id=809.

population and other immigrant groups are getting political power and when you look to 2020 and 2024, even in places like Texas, elections will no longer be able to be won without the foreign-born vote. That may very well be the longer-term picture that resolves the issue of the unauthorized, and it will happen in our lifetimes.

KERRY ABRAMS (56:05): I'd like to take the last few minutes to open it up to questions from the audience.

DOUG FORD (DIRECTOR, UVA IMMIGRATION LAW CLINIC) (56:15): I'd like to ask a question about Secure Communities. One effect of the program may be that the immigrant community is less trustful of the police than they were before. There is a perception that you can get pulled over for something, like driving with a busted tail light, and then find yourself being deported. The real reason for the removal might be that the person has something in their background that makes them an ICE priority – it's not the broken tail light. But the community doesn't know that. All they know is that someone was pulled over, put into custody, and removed. And the local police and jail may not know the real reason, either. Is there a way to improve communication, or possibly detain post-conviction, such that the community doesn't view the event as someone's being deported for a minor traffic violation?

DAVID MARTIN (58:54): A big part of the reaction to Secure Communities, especially right after the rollout, came because a lot of undocumented people who had nothing else problematic about their background got caught up in the system, even for traffic offenses. They'd lived here for 10 years, and then they get stopped for a burned out tail light. Normally that's not an arrestable offense, of course, and only arrests trigger the Secure Communities process. But combine that minor traffic offense with the wave of restrictive driver's license laws that swept through the country in about 2007, so that, in all but about three states, you couldn't get a driver's license unless you could show a legal immigration status. So you're stopped, and you're found to be driving without a license. Now *that* is a typical basis on which someone would be arrested, for reasons that have nothing to do with immigration enforcement. The officer really needs to know: exactly who am I dealing with here? The person stopped could be a serious criminal, and I certainly don't want to be responsible for releasing a dangerous person. Arrest and then fingerprinting at the booking station are required to be sure about identity.

So a lot of people in the undocumented community came into the system in that way.

I don't have a good answer for that problem without legalization, although now that ICE is getting much better about applying its enforcement priorities in a systematic way, even after a database hit through Secure Communities, this scenario is much less likely to result in removal. A person whose only offense is driving without a license would be a low priority. Operationally, however, consistent post-arrest application of the priorities is still better than waiting until after conviction to check fingerprints against ICE's database.

The one other thing I think you're suggesting, Doug, is that there might be somebody who, as far as the community is concerned, has a completely clean criminal record but still falls within one of ICE's removal priorities, even if the charges that led to the immediate arrest are dropped. There has to be a better way for ICE to clarify why that person really is within the priorities. But even with clarification, some such enforcement, of course, is going to be controversial anyway. Some of the priorities, including ones I think are well-founded, don't necessarily involve criminal conviction. Recent violators, a term which is usually interpreted to mean entry during the last three years, remain an ICE removal priority. I think their removal is a necessary concomitant of trying not to let the problem get too much bigger; it's a way of back-stopping border enforcement. But that means that some people will be removed who do not fit the criminal profile that some advocates have come to expect.

In the end, improvements in the way ICE actually implements its priorities are the best nonlegislative hope for moving us some distance in the direction you suggest.

JOHN MORTON (1:02:11): Listen, having dealt with a lot of this, the government started in a hole. As Julie accurately noted earlier, a lot of people mistakenly put Secure Communities at the executive branch's feet. A lot of the botched terminology and thinking in the rollout was very much the executive branch's fault; but it was a statutorily-created program, both in terms of the information sharing and the appropriations language that Julie in her day had to deal with. It was very real: just because it came in our appropriations language didn't mean it wasn't a law, or something the executive branch had to pay attention to.

I think if you take a look at the detainer form, one of the many reforms we tried to undertake was to try to bring much greater clarity to the

detainer form.¹¹ If you take a look at the new form, you're going to find that the government really, really tried to limit that form so that it matched very closely with the stated priorities. And so what you're left with now—and I'm not saying it doesn't happen every once in a while that there is a detainer placed on someone who doesn't meet the required boxes—we require the officer to check the box: aggravated felon, felon, multiple criminal convictions, prior outstanding order. These are all clear priorities that the government has stated are their priorities.

What we now face is that there is a disagreement with *those* enforcement priorities. For some of the non-criminal priorities -- removing recent entrants or people with final orders, for example—there are people who really think they shouldn't be included. When I first went through confirmation, confirmation was all about detention reform, there was a lot about worksite enforcement. The landscape shifted dramatically to where the conversation was not about whether you should detain and remove criminal offenders; it was “why are you removing people who are something other than an aggravated felon?” That's a huge shift. And while I think there were some instances in which the agency said “the worst of the worst,” and there were also some instances in which the stated priorities of the agency—which included recent border crosses, which included people with outstanding orders, which included people who had obtained status by fraud—were forgotten by a variety of people, both outside and within the administration.

People tended to leave off the “other enforcement priorities” and even within the criminal offenders tended to focus on Level Ones, which was aggravated felons, and forgot that the government said “no wait a second, when you're done with Level Ones, and felons, generally, it's a good place for you to look at whether your resources are being used wisely.” That's in instance in which the government wasn't particularly nimble on the public relations front. There was always some tension I think within the administration and the executive branch about how these things should be characterized. And over time, the narrative became, “well the government says its priority is to remove Level One criminal offenders, the worst of the worst.” And that became the only priority and the rest all dropped off. And when you look at the detainer form, you'll see the rest of the priorities are

¹¹ An immigration detainer is a notice that DHS issues to federal, state, and local law enforcement agencies to inform them that ICE intends to assume custody of an individual in the law enforcement agency's custody. The ICE detainer form, Form I-247, is available on the ICE website. *ICE Detainers: Frequently Asked Questions*, IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 28, 2011), <http://www.ice.gov/factsheets/detainer-faq>.

there. They are very rational from an immigration enforcement perspective. If you're a multiple criminal offender, or you have two outstanding orders, and the law says, "that order *shall* be reinstated, and you *shall* be detained and removed," with no further hearing, it's a far bridge to ask the government to simply say we're not going to look at that, we're not going to respond to the statutory language that Congress has very, very firmly imposed time and time again.

JULIE MYERS WOOD (1:07:22): John leaned over a few minutes ago and said this whole day could be an advertisement for why becoming the head of ICE is not a wise calling. I actually think that John's exactly right that things have shifted dramatically, and although I'm all for nuance, I don't think that the advocacy community will ever be satisfied with anything. Even if you say only Level One felons who did X,Y,Z and you add a million more things... In think in part because they've been so extraordinarily successful in moving the bar. From what John talks about what he faced for his confirmation hearing, I think about a few years before, when a female governor of a western state called me into her office and wanted to know why ICE wasn't arresting and detaining every single person that all of law enforcement in this western state had identified. This would have required a huge number of ICE resources that we didn't have. I tried to explain how not all of those were priorities, that we had priorities and we were funded to have special response units in this western state. And she would hear none of that. There was a ton of pressure—Congressional pressure, pressure from the good Senators from that state, the Secretary, the White House—and we ultimately had to staff up these small units in that state. I don't think those units exist anymore, I'm just guessing. The advocacy community has made the case that we're not in the business of prosecuting turnstile jumpers, that we're in a different kind of business. I was in there in the post 9/11 era, where that was part of the business. We were addressing issues of, as the 9/11 Commission Report on Terrorist Travel¹² talks about, routine enforcement. But we still did priorities, and if you look at the numbers, they still really were the priorities, but we also did routine enforcement. I think the advocacy community has been so effective in moving the bar, that whatever this poor new ICE director does to identify priorities, there won't be satisfaction. Part of that leads back to legalization, because maybe if there was

¹² Thomas R. Eldridge et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. (Aug. 21, 2004), http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf.

legalization for a while that would take the pressure off, but, frankly, only for a while. So I agree with David and John's points. We need to think rationally about how we do enforcement and what the priorities are.

DAN KANSTROOM (1:10:22): I have a list of things in life that are never going to happen, and my being appointed to be head of ICE is one of them, so I don't have to worry. [Audience laughter.] That frees me up, I suppose, in various ways. First of all, I would urge more nuance in how we characterize the "advocacy community." I think it's actually a quite multifaceted coalition of groups whose interests sometimes coalesce and sometimes diverge. On the point of opposition to certain perceived excesses of enforcement, I think we should ask how politically successful they have actually been in that regard. I think people like Julie and John may feel that more acutely than actually, if we looked at it objectively, might be borne out by budgets and support for these programs, which have increased steadily over the years—eighteen billion dollars is not petty cash. So to the extent there has been success by the "advocacy community," and I don't mean to trivialize your feelings about it—I understand that people in government positions feel beset by this—but on the other hand I think when we talk about measures of success we have to look at who has been really successful. But to the extent it has been successful, I think we have to go back to Doug's question and acknowledge that there really have been large numbers of low-level offenders who have been removed, and there have been widespread reports of various types of home invasions and factory raids.

In that regard, let me get back to Secure Communities, because I think this is a real problem. The enticing aspect of Secure Communities it seems to me is two-fold. One is normative: it seems like a reasonably good idea to go after "criminal aliens," and it's hard (though far from impossible) to argue with that proposition. It's very convincing to say, "we don't want to go into schools, we don't go into hospitals, so if we can't go here, where can we go?" I think that's a serious argument. But there is also a problem on a different level. It goes back to the reason immigration enforcement was centralized in this country in the first place in the 1920s with J. Edgar Hoover and others, which is that although local police are a force multiplier, they are problematic allies. And that's part of the danger of Secure Communities. The local police stop and arrest people for all sorts of reasons. This is why I always thought the §287(g) model was far superior to the Secure Communities model, and why Sheriff Arpaio, for instance, resisted it so strongly. So that's a problem with the Secure Communities

model, and it's not just push-back against ICE we're seeing, but particularly communities of color, and particularly young men of color, feel oppressed by the local police, and rightfully so in many cases.

JOHN MORTON (1:13:47): I must say, I have got to agree with Julie here, and I don't think it's quite as Dan says. I think the gap between where we are and what the statute calls for is enormous. Absolutely enormous. I think what Congress calls upon the agency and the Department of Homeland Security to do every day, by statute, and what it actually does and what it can achieve in both pragmatic and political terms is just a huge sea of difference. That's a big part of why I think the enforcement system is so broken. I think the coalition of various factions—and I certainly take the point that it's a broad community—has been very successful in making immigration enforcement narrow and difficult in a way that may not be obvious when you look at the statute. Notwithstanding the significant appropriation of resources to the agencies, which Julie and I would say tended to go to Customs and Border Enforcement instead of ICE. But part of the reason we have this conversation, part of the reason that Congress kept pouring money into the detention budget, part of the reason why we have caps, and the central reason for having this conference, is that there is a deep frustration with an inability to enforce the law in a consistent and thoughtful way. I find that advocates, and many within the academic community, have brilliant observations on the shortcomings of the present system, yet I rarely, rarely hear really thoughtful, intellectually honest proposals on what to do about it. That's why my job—and Julie, Bo, David, Doris, and Steve's jobs when they were there—are tough. Many of the criticisms are justified. How do you deal with them, and still have that rough integrity that aligns with what the legislature of the United States has called upon you to do, and addressing the very serious policy interests in having immigration control? Government is about balance. At the end of the day, the job is difficult because you've got to weigh the individual interests of the grandmother, who is often a compelling individual case, against the very real and weighty interests that the sovereign has in immigration control and in an orderly and lawful system that can welcome people to Disneyworld, make sure that there are a million LPRs every year, etc. That's not to say that people shouldn't continue to criticize, and shouldn't continue to make observations about how the present enforcement system could be made better, but I do think if we are ever to have a brave new world—and maybe we won't, as Doris has laid out a lot of reasons why that is going to be a challenge—we can't get there without

an intellectually honest, probing, thoughtful, and innovative approach to how to enforce the rules going forward in a way that works.

DAN KANSTROOM (1:17:39): Part of the deep frustration that people who have held positions like yours feel, in my view, derives from what may be the fundamentally impossible task that you were given by the Congress. From that perspective, I go back to Steve's earlier analogy. I don't think that speeding laws are the best analogy here, because a lot of the complexity of enforcement—this goes back to Hiroshi's point—is that it's tied to admissions in a funny way. Since the very same Congress that has not actually reformed the front end of the system keeps throwing money towards the back end to clean up the mess that reflects the failure of policy on the front end. The best that one can hope for, as some have said about criminal law, is not to solve all social problems but to keep them down to below the level of a roar. And that's got to be frustrating to feel like you're constantly trying to plug all these leaks. The analogy might be better to something like marijuana laws. There might be some things that fundamentally are not solvable as problems of law enforcement but instead require broader conceptualization on the other side of the problem. That's where I've found this symposium exciting and challenging. I hope some of the work that comes out of it will fill some of the gaps that you've talked about. It's a chance for academics like to put our money where our mouths are and come up with some proposals to actually solve these problems. The problem I have there is that if I'm stuck with the existing paradigm, which is a relatively dysfunctional, archaic, unduly complex immigration admissions system, and added to that the problems bilaterally with Mexico and Central America, I'm not sure there is an enforcement solution, there just may not be.

KERRY ABRAMS (1:19:50): I hope that if there is a future ICE director in the audience that we haven't dissuaded you from your career path, and that in twenty or thirty years you'll come back to the law school and tell us what you've accomplished. Thank you to our panelists, and to all of the organizers of the symposium.