

Washington University Journal of Law & Policy

Volume 25 *Access to Justice: The Social Responsibility of Lawyers*

January 2007

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Recommended Citation

Lucas Guttentag, *Immigrants' Rights in the Courts and Congress: Constitutional Protections and the Rule of Law After 9/11*, 25 WASH. U. J. L. & POL'Y 11 (2007),
https://openscholarship.wustl.edu/law_journal_law_policy/vol25/iss1/3

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Immigrants' Rights in the Courts and Congress: Constitutional Protections and the Rule of Law After 9/11[†]

Lucas Guttentag^{*}

We are facing difficult challenges and significant opportunities as Congress grapples with immigration legislation and the courts address immigrants' rights. We all witnessed the astonishing demonstrations across the country in the spring of 2006. We watched with surprise as legislation recently was passed by the U.S. Senate to address a dysfunctional immigration system. The so-called comprehensive immigration reform bill held out the promise of legal status to millions of undocumented immigrants and suggested it would do something for the additional millions who are stuck in an immigration backlog despite being eligible for legal status. That was the hope, but it also camouflaged grave deficiencies. My goal is to draw attention to some of those shortcomings, to put them into the context of 9/11 and recent legislation as well as our historic attitudes, and to focus on the essential need to preserve and restore effective judicial review as a cornerstone of immigrants' rights.

The current legislation arises in a time fear and even hostility toward immigration and immigrants. First and foremost, the aftermath of 9/11 permeates every debate over immigration and every discussion of proposed reform. The continuing perception that the border is out of control, the agitation of the so-called minutemen in towns and cities across the country, and the enactment of local

[†] This speech was originally delivered in October 2006 at Washington University in St. Louis School of Law as part of the 2006–2007 Public Interest Speakers Series. It has been revised and edited for publication.

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ordinances targeting immigrants (including here in Missouri where a Valley Park ordinance is currently subject to legal challenge as an unconstitutional regulation of immigration) all play a significant role. We could talk about each of these topics at great length and each deserves substantial discussion. My comments will necessarily be limited and general.

Let me first say something about 9/11 because that was a watershed event. In some respects, it fundamentally altered the way the country is thinking about immigration. At the same time, it exposed problems in the immigration system that have long been festering but generally receive little attention, such as individuals being administratively detained for lengthy periods of time, being transferred to remote jails far from families and communities, being unable to access lawyers, and being subjected to inhumane detention conditions. Some of those practices drew sustained public scrutiny for the first time in the aftermath of 9/11. The policies of the Administration after the terrorist attacks focused the public and press on the vulnerability of immigrants and bared the government's power in ways that are not evident when the immigration authority lays dormant.

The impact of 9/11 was not just in terms of affecting the general view of immigration. The terrorist attacks also triggered very specific policies and practices that threatened the core constitutional rights of immigrants. Let me identify a few of the practices and address where I think they fit into the larger picture. First, many non-citizens were detained in the aftermath of 9/11. Second, and relatedly, there was overt discrimination against people from Arab countries and Muslims through targeted interrogations, arrest and detention practices and policies, and through the so-called "special registration" program applicable to non-immigrants from only certain countries. That program seemed more like a trap than an investigative tool. It erected new and complex technical requirements without adequate notice or explanation in a way that created grounds of deportation for those who misunderstood or failed to comply. Third, the Administration implemented so-called "closed"—or secret—deportation hearings that had the effect of preventing the public from knowing where an immigrant was, what he was charged with, how he was being

detained and when his hearing might be scheduled. No public docket was posted. There was no practical way to know when or where a person who had been arrested a day, a week, or a month ago would get a hearing before an immigration judge. We challenged those closed hearings on First Amendment grounds, and the federal courts ultimately divided on whether they were constitutional. In the face of Administration representations that the hearings were no longer being conducted, the Supreme Court declined to hear the issue.

Today, the larger debate transcends the immediate post-9/11 policies. Comprehensive immigration legislation asks us to consider the role of immigrants in society more broadly. At bottom, I believe that the contemporary debate is not fundamentally different than the ambivalence with which we have always confronted immigration policy in this country.

In my view, there are always two strands in America's response to immigration and immigrants; there are two instincts in us as Americans. On the one hand, we truly are a nation of immigrants. We celebrate that rightfully. We are the most generous country in the world in terms of welcoming newcomers and granting them legal status and citizenship. The Statue of Liberty is the icon that we all hold up as the ideal. This is a fundamental part of what we are as a country and in many ways it sets us apart from other countries in the world. It is always a part of what informs our policy and our instincts.

The other strand is not so pretty, but it too is always present. We are fearful of immigrants. We are xenophobic. We have a history of racism. We have excluded people based on their political beliefs, based on their sexual orientation, based on their country of origin, and based on their race. Throughout our history, we have feared new waves of immigrants from different places, of different colors, and with different backgrounds than those who have come before.

Sometimes, one strand predominates and sometimes the other. But both are always present, whether at the forefront or just beneath the surface. Whichever is predominating, the other is there as well. When we are less confident, whether due to concerns over national security, economic uncertainty, or change more generally, the risk is much greater that we will blame immigration as the source of our problems.

At other times, when our values of equality and liberty are ascendant, they are more likely to be reflected in our immigration policy as well. For example, during the civil rights period of the 1960s, the last great era of federal civil rights legislation, we repealed the notorious and overtly racist National Origins Act enacted in the 1920s. Those quota laws were expressly designed to preserve an earlier America by trying to roll back the racial and ethnic composition of our country to what it had been in the 1880s. During the decades of the quota laws, the acknowledged goal of U.S. immigration policy was to try to maintain a population dominated by descendents of a white northern Europeans by admitting immigrants from western European countries while severely restricting or entirely prohibiting new immigration from Asia and eastern or southern Europe. Repealing those quota laws was a manifestation of our confidence and a sign of progress.

Today we are again in a period too easily dominated by fear and insecurity. We fear the dangers of terrorism, the loss of job opportunities, wage stagnation, and global competition. All those dynamics are feeding into the immigration debate.

The challenge, I believe, is to recognize that immigration has never been static. Too often we look backwards to celebrate the immigration that occurred long ago, while fearing the immigration that is occurring today. We see immigration as an historical artifact rather than as an ongoing dynamic process. At every point in our history, the immigration of the moment has been perceived as being different than the immigration of an earlier generation. And in some sense, that is of course true. Immigration is never exactly as it was before. It is a continually evolving process. And it is also true that immigration changes America. It has always done that, and it will continue to change us as a country.

But, in my view, that is not something to be afraid of; that is something to celebrate. I am glad that we are not the same country that we were forty, fifty, or one-hundred years ago; that my parents could immigrate to the United States, and that many others who have come since are part of the fabric of our nation. I think we should continue to welcome the change that immigration brings, not fear it. We should appreciate that while immigrants change us, the more

profound and fundamental change is to those who come. They are different because they become Americans. And that evolution in ourselves and in the immigrants who come sets us apart from the rest of the world, has made us a great country and will continue to do so. The fear of immigration needs to be abandoned and rebutted.

As immigration reform proposals percolate, we also need to consider the consequences of the most recent piece of major immigration legislation, namely the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, or IIRIRA. For those of us who grapple with immigrants' rights or who represent individual immigrants before the immigration service or in the federal courts, the consequences of IIRIRA have in many respects proven to be far more profound and lasting than the effects of 9/11. The hallmark of the 9/11 policies—which I tend to encapsulate as the practices of detention, discrimination and secrecy—is that virtually all were adopted not by statute or law, but by regulation, executive order and administrative rule. In other words, although the U.S.A. Patriot Act contained nefarious immigration provisions, it had little immediate impact on immigration policy and enforcement. Rather, the Bush Administration's post-9/11 policies were largely based on the orders and decisions of the Executive Branch. That in itself, of course, reveals the extraordinary power of the Executive over immigration and the need for rigorous checks and scrutiny. But it also underscores that many of the most lasting challenges to immigrants' rights today are still the consequence of the 1996 IIRIRA rather than of the specific policies adopted post 9/11.

Like many other immigration statutes, IIRIRA got virtually no attention when it was proposed or enacted. Immigration law is super technical. Immigration policy engenders all sorts of odd political alliances. As already noted, it gets wrapped up in law enforcement concerns and other kinds of security considerations. For all those reasons, it is very difficult to debate immigration policy in a calm, rational, and policy-driven way.

The 1996 law, signed by President Clinton, contained a series of devastating provisions that imposed massive new detention measures; enacted something called “expedited removal,” which provides that that someone who is arriving at the borders of the United States can

be summarily expelled without any hearing, without any adversarial process, without any opportunity to present his or her claim unless the border inspector determines that the individual might be a refugee; authorized applications of expedited removal to some immigrants and interior areas of the United States; and dramatically expanded the categories of crimes included in the then-recent category of crimes known as “aggravated felonies.” That last provision warrants a brief explanation. The term aggravated felony conjures up images of horrible crimes. But in fact, it has come to encompass minor offenses—misdemeanors, non-violent crimes, and others—that far exceed any commonsense definition. And the government has so aggressively and expansively interpreted the term that it has spawned immense court of appeals litigation and even several Supreme Court decisions that have rejected the government’s position.

The lasting impact of IIRIRA is also the result of its elimination of significant areas of discretion that have historically been a part of the immigration system and that have traditionally ameliorated some of the law’s harshest effects. In a very simplistic way, the immigration laws often work by sweeping incredibly broadly to make large numbers of non-citizens potentially vulnerable to deportation or removal or exclusion based on relatively expansive and vague grounds. In fact, many of the grounds would be constitutionally suspect if applied to a U.S. citizen in the criminal or even civil regulatory context. These include, for example, economic status, predictions of future behavior, engaging in certain immoral acts, suffering from a dangerous or contagious medical condition, political beliefs and affiliations, and so on. The fact that they are deemed acceptable in the immigration setting is based on the notion that different interests are at stake and on the deeply entrenched view that constitutional deference is owed to immigration policy choices. Removal laws may impose severe penalties even on people who may have lived here for many years, who are legal residents, and whose children and spouses may be United States citizens. But—and perhaps in recognition of the severity—the law has also traditionally provided a significant measure of discretion to allow immigration judges to consider the specific facts and equities of individual

circumstances in deciding whether to enforce deportation in a particular case or to exercise discretion favorably. The breadth of that discretion has raised its own issues of fairness and consistency, and the federal courts were a crucial component in providing some measure of oversight.

The 1996 law largely eviscerated that framework in several important respects. First, IIRIRA restricted or eliminated eligibility for discretion in many cases. Then it set the standards so high as to make the waivers almost unattainable in practice. Finally, IIRIRA largely prohibited the courts from reviewing a decision for abuse of discretion, thereby eliminating a crucial external check. The effect of harsher laws, restrictions on waivers and unreviewable agency discretion has fundamentally altered the functioning of the system and caused untold hardship and pain.

But IIRIRA's most profound and enduring threat, in my judgment, is the statute's attempt to enact sweeping restrictions on federal court jurisdiction over whole categories of deportation orders. These are the so-called "court-stripping" provisions that sought to eliminate the historic role of the federal courts to decide claims by immigrants that the government is violating the law or even the Constitution. Court-stripping is the term to describe a measure that strips the federal courts of jurisdiction to review certain acts or decisions of the government. Court-stripping seeks to deny the Judiciary the power to enforce the rule of law and the Constitution by erecting jurisdictional barriers. I call it a kind of "backdoor" amendment to the Constitution because prohibiting the courts from enforcing the Constitution is an indirect way of eliminating the constitutional protection itself.

That device is not new. The modern history of court-stripping arose, so far as I know, in the aftermath of the *Brown v. Board of Education*¹ decision when the federal courts first required that the schools of the South desegregate and subsequently began issuing orders that busing be used as a means to accomplish that integration. Senators opposed to integration but knowing they could not change the Constitution tried to restrict the federal courts' jurisdiction to hear

1. *Brown v. Bd. of Educ.*, 347 U.S. 482 (1954).

school desegregation cases or to issue busing orders to desegregate the schools. Similar proposals arose again after the abortion decision to deny the federal courts' power to enforce a woman's right of choice under *Roe v. Wade*.² And it came up after the Supreme Court held that prayer in schools was impermissible.³ In each of those instances, those who opposed a substantive right sought to undermine or eliminate the ability of individuals to enforce their right by taking away the federal courts' jurisdiction to hear categories of cases or issue specified types of remedial orders. Those court-stripping proposals were defeated because they were recognized for what they were—a way of keeping the schools segregated, denying women the right to choose, and restoring prayer in public schools in violation of the Constitution.

But in 1996, court-stripping measures actually were enacted. Who were the targets? Immigrants and prisoners. For immigrants, the law tried to deny the right of judicial review over certain deportation orders; for prisoners the restrictions sought to limit injunctive relief for inhumane prison conditions that courts across the country had been enjoining for decades.

And so the question arose whether the Constitution permits depriving immigrants of judicial review of deportation decisions. May Congress take away the right of immigrants to go to court to obtain a judicial determination from an Article III court of the Executive Branch's removal order? At the time of IIRIRA, most did not recognize the profound significance and danger of these enactments. The peril to judicial review, to separation of powers and to checks and balances was not widely appreciated. But we designed and launched a national legal and advocacy strategy to challenge the new restrictions. For five years, my colleagues and I with the support of key scholars and some prominent commentators brought legal challenges to the 1996 laws in courts around the country. That campaign culminated in my argument in *INS v. St. Cyr*⁴ where the Supreme Court rejected the broad claim of executive power,

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. *Murray v. Curlett*, 374 U.S. 203 (1963).

4. *INS v. St. Cyr*, 533 U.S. 289 (2001).

preserved the role of judicial review and denied the government's attempt to deny immigrants recourse to independent judicial scrutiny. The Court found that an immigrant is constitutionally entitled to bring legal and constitutional challenges to a deportation order by the Great Writ of Habeas Corpus. The ruling vindicated a critical principle even while the Court avoided declaring IIRIRA's restrictions unconstitutional. By employing the constitutional avoidance doctrine, the Court construed IIRIRA to preserve access to habeas corpus. That decision was issued just months before 9/11. It precipitated national headlines then, and its significance is even more striking now.

Today, the debate over habeas corpus rages with respect to the rights of Guantanamo detainees and congressional repeal of habeas corpus in the Military Commission Act. That Act was, on the one hand, touted as a great accomplishment because it limited the government's power to engage in torture, something that most of us thought was already prohibited. At the same time, it eliminates the right of detainees at Guantanamo to bring habeas corpus actions to challenge their detention. As the courts begin to consider the MCA, the government's defense echoes its arguments for denying habeas corpus to immigrants. The government argues that habeas corpus does not encompass the claims that today's "enemy combatant" detainees seek to bring, that there is another means by which the detainee can get to court, and that the alternative is adequate and effective. It remains to be seen how the courts will decide that question. For our purposes today, the critical observation is that this fundamental battle first arose in the immigration context and that the struggle over immigrants' rights has repercussions beyond its own narrow confines.

Let me then return to the question of comprehensive immigration reform legislation and connect it to the court-stripping issue. As I said at the outset, the legislation has some positive elements and its stated goal of providing a mechanism for legal status for countless undocumented immigrants in the United States commands the support of many policymakers across the spectrum. The concern with the current proposals that I want to emphasize is that embedded in the

Senate immigration bill are further restrictions on judicial review and further restrictions on access to the courts for immigrants.

While I am encouraged that the sensitivity to judicial review and access to the courts is much greater now than it was a year ago—and certainly much greater than it was ten years ago when IIRIRA became law—the issues still appear too abstract to command sufficient attention and opposition. The experience with Guantanamo, the battle over the rights of those detainees, and the effort of Congress and the President to prohibit access to the courts, should create a much broader recognition of the historic importance of habeas corpus and its role in our constitutional system. I am often reminded of Zechariah Chaffee’s famous but sometimes forgotten law review article from 1953, “The Most Important Right in the Constitution.”⁵ He explains how every other individual right ultimately flows from the Great Writ because if the Executive can unilaterally throw you into prison without cause or process, then what does any other right mean? Thus, there is a growing recognition across many ideological divides that restricting habeas corpus for Guantanamo detainees violates such a fundamental principle that it threatens the civil liberties of all. I am struck that Richard Epstein just wrote a very compelling article in the Wall Street Journal on exactly why it is a huge mistake to repeal Habeas Corpus for Guantanamo detainees. So I am optimistic that both the legal community and broader public are much more attuned to proposals that might deprive individuals of access to the courts.

Still, it is difficult to animate public concern over judicial review for immigrants. And the proposals to impose new limits on the courts’ authority over immigration decisions have become more nuanced and strategic. For example, in the immigration bill there is a provision enacting a so-called “certificate of reviewability.” That is a mechanism that would prohibit any appeals of immigration orders to any federal court unless it is first approved by a single judge whose decision is not reviewable. In other words, a single judge, whoever he or she might be, is the ultimate and final gatekeeper of each appeal.

5. Zechariah Chaffee, *The Most Important Right in the Constitution*, 32 B.U. L. REV. 143 (1953).

One judge holds the singular power to determine whether or not an appeal can go forward.

It is telling that the federal appellate judges who are actually grappling with a burgeoning docket of immigration appeals and for whose benefit the new restrictions are purportedly designed, oppose these measures. Judges from across the political spectrum, including Judge Posner on the 7th Circuit, Chief Judge Walker and Judge Newman on the 2d Circuit (who are Republican and Democratic appointees respectively), and judges appointed by Presidents of both parties on the 9th Circuit, have all expressed opposition to these new proposals. They all have said they don't want to limit access of immigrants to judicial review. As Judge Newman recently testified before Senator Specter's Committee, "We have never in the history of this country allowed one judge to cut off appeal on an issue of personal liberty in a case that has not been fully reviewed by a prior judicial system."⁶

As we stressed in *St. Cyr* and as Judge Newman's criticism highlights, any restriction on review of deportation orders is especially troubling because an immigration appeal is not reviewing a previous judicial determination. It is not reviewing of a previous state court trial. It is not even like a death penalty case where the consequences are obviously as high as they could possibly be but where there has at least been a *judicial* process. In the immigration context, there has been nothing other than an Executive Branch process that is under the ultimate authority of the Attorney General.

6. *Judicial Review of Immigration Matters: Hearing Before the S. Judiciary Comm.*, 109 Cong. 11 (2006) (statement of Jon O. Newman, Senior Judge, U.S. Ct. App. 2d Cir.). The Judicial Conference of the United States submitted written opposition to both the certificate of reviewability provision and a proposal to centralize all immigration appeals in the Court of Appeals for the Federal Circuit. Senator Specter and the Committee received correspondence from numerous other appellate judges opposing one or both provisions. Among the Circuit Judges who submitted letters were Judges Richard A. Posner, John T. Noonan, Kim McLane Wardlaw, and Sidney R. Thomas as well as the Chief Judges of the Second and Ninth Circuits. John M. Walker and Mary M. Schroeder. Prominent scholars also expressed their opposition. *See, e.g.*, Letter of Professors Rochelle C. Dreyfus, Harold Hongju Koh, David A. Martin, Henry Paul Monaghan, Gerald L. Neuman, Judith Resnik, Richard L. Revesz, Philip G. Schrag, Peter H. Schuck, David L. Shapiro and Kathleen M. Sullivan. Numerous other letters from retired federal judges, law professors, and professional organizations also opposed one or both proposals.

Furthermore, the legislation also raises another crucial judicial review concern—one that relates directly to whether any legalization program will actually fulfill its promise. Namely, whether the government's implementation of the program will be subject to judicial enforcement. Experience shows that what a legalization program might actually accomplish and who might actually benefit depends, first, on exactly what the criteria are. Then, and crucially, it depends on how those criteria are interpreted and how the program is actually administered and applied by the agency charged with its implementation. As the saying goes, the devil is in the details. Without judicial review, those details are left solely to the government and could torpedo the best-intended congressional plan.

The last legalization law, enacted in 1986, provides a sobering lesson. The rules and regulations adopted by the immigration service under IRCA would have compromised the program dramatically. But because of a series of class action lawsuits filed in the federal courts—virtually all of which were successful in compelling change in the government's interpretation of eligibility criteria—the program was forced to operate the way that Congress had intended. Those suits were possible because there was federal court jurisdiction over the claims, because judicial oversight was possible, in short, because eligible immigrants could bring litigation to require the agency to comply with the law. Today, because of restrictive court decisions, because of jurisdictional bars enacted in 1996, and because of prohibitions proposed in the new legislation, many of those suits would be difficult or impossible. Therefore, the danger I see is that while there is a huge debate over what the contours of a legalization program should be, the program itself might end up being a hollow promise if implementation is left solely to an agency that is overburdened, indifferent, or even hostile. If those implementation decisions are immune from effective and robust judicial review the program can be negated in practice. Meaningful review by the courts of both individual adjudications and systemic deficiencies is essential and must be the foundation of any legalization program.

Judicial review, in short, is the fundamental foundation for protecting the rights of vulnerable non-citizens, for preserving fundamental checks against agency excess, for ensuring faithful

implementation of any legalization program that Congress might enact, and for compelling the Executive Branch to comply with the rule of law. That recognition is the missing component in today's immigration debate.

Before I close, I promised to mention at least briefly the lawsuit that we have brought on behalf of nine individuals against Secretary Rumsfeld for the torture and abuse of detainees in Iraq and Afghanistan. The thrust of that suit is to try to impose constitutional limits on what the United States Government can do overseas to non-citizens when it has people in its custody and control. There is a huge controversy over the extent to which the Constitution applies when the United States acts overseas against foreign nationals. There may be elements of the Constitution that do not apply everywhere in the world to governmental actions. But as Justice Harlan said long ago and as Justice Kennedy has echoed more recently, the fundamental rights protected by the Constitution should apply outside our territory when it is not impracticable or anomalous to do so.⁷ Justice Kennedy expressly invoked that principle in the case of a non-citizen who sought to enforce the Constitution in a foreign country.⁸ That principle compels, in my view, applying and enforcing core constitutional rights to protect persons who are subject to the power and the control of the United States and certainly to protect someone who is in a U.S. military detention facility. And it plainly should not be impracticable or anomalous to hold that the Constitution prohibits the torture of any person detained under the authority of the United States Government.

* * *

In conclusion, let me say again, we are facing many great challenges. The question is how will we respond; will we and our successors look back on this period ten, twenty, or fifty years from now with pride or with shame? Will we repeat the mistakes of the past or will we show that we have learned from them? Will the post-9/11 period be akin to Japanese American interment or the McCarthy

7. *Reid v. Covert*, 354 U.S. 1, 65 (1957) (Harlan, J.M., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, A., concurring).

8. *Verdugo Urquidez*, 494 U.S. at 275 (Kennedy, A., concurring).

era where we engaged in practices we later renounce? Or, will we do better?

My view is that it is too soon to reach definitive conclusions. But I am optimistic. We must demonstrate to ourselves and to the world that it is possible to have democratic institutions with respect for civil liberties and protection for civil rights while preserving national security and ensuring public safety. We must show that human rights and national security are not inconsistent, that civil liberties and national security are not incompatible. Given our strength, our diversity, and our democratic values, if the United States cannot do this, how can we expect it of other countries? And one absolutely essential principle that is central to this endeavor is the preservation—not just in theory but in practice—of judicial review. The checks and balances that we learn about in grade school and all through our education are needed more than ever. It is essential to have an independent judiciary with courageous judges who are willing to fulfill the historic role of the Judiciary.

Finally, the last thing I would say to all of you, especially given that this talk is part of a public interest lecture series, is that the courts cannot function without lawyers. Courts do not sit there by themselves. As law students, you will all be practicing law very soon—much sooner than you think, I know it may not seem like that now, but the start of your career is just around the corner. You will be practicing law and you will have choices and opportunities and the chance to make important contributions to our profession and country. I do not want to diminish the crushing debt that our education system imposes on so many of you, or the family obligations you may have, or the many different interests that each of you may pursue. But I would say that whatever you do with your legal career, remember that the role of the law is to give a voice to the powerless, to protect the rights and ensure equal treatment of those who need those protections the most.

The least powerful in society are the most dependent on the rule of law. Those who lack economic and political power are the ones for whom the courts are the most important and who depend most on the law for a measure of justice. So, as you launch your legal career, remember to contribute some part of your career to the fight for equal

justice; to make this a better and more just society for those who need it the most. Be involved, be a participant, and be a citizen in the true and grandest sense of that word. Namely, be someone who helps us all collectively as a nation live up to our promise that continues to serve as a beacon of hope and opportunity for the world. This is the time to engage in that challenge.