U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: PRIORITIES AND THE RULE OF LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

OCTOBER 12, 2011

Serial No. 112–66

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

70–670 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

LAMAR SMITH, Texas, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
DENNIS ROSS, Florida
SANDY ADAMS, Florida
BEN QUAYLE, Arizona
MARK AMODEI, Nevada

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SÁNCHEZ, California
[Vacant]

SEAN MCLAUGHLIN, *Majority Chief of Staff and General Counsel*
PERRY APELBAUM, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

ELTON GALLEGLY, California, *Chairman*
STEVE KING, Iowa, *Vice-Chairman*

DANIEL E. LUNGREN, California
LOUIE GOHMERT, Texas
TED POE, Texas
TREY GOWDY, South Carolina
DENNIS ROSS, Florida

ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
PEDRO R. PIERLUISI, Puerto Rico

GEORGE FISHMAN, *Chief Counsel*
DAVID SHAHOULIAN, *Minority Counsel*

CONTENTS

OCTOBER 12, 2011

Page

OPENING STATEMENTS

The Honorable Elton Gallegly, a Representative in Congress from the State of California, and Chairman, Subcommittee on Immigration Policy and Enforcement 1
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration Policy and Enforcement 2
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary 9

WITNESSES

John Morton, Director, U.S. Immigration and Customs Enforcement
Oral Testimony 10
Prepared Statement 13
Chris Crane, President, National ICE Council
Oral Testimony 49
Prepared Statement 51
David B. Rivkin, Jr., Partner, Baker & Hostetler, LLP, Washington, DC
Oral Testimony 57
Prepared Statement 60
Ray Tranchant, Director, Advanced Technology Center, Tidewater Community College
Oral Testimony 66
Prepared Statement 68
Paul Virtue, Partner, Baker & McKenzie, LLP
Oral Testimony 71
Prepared Statement 74

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration Policy and Enforcement 4
Letter from Robert M. Morgenthau, of Counsel, Wachtell, Lipton, Rosen & Katz, submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration Policy and Enforcement 23
Memorandum from John Morton, Director, U.S. Department of Homeland Security, submitted by the Honorable Ted Poe, a Representative in Congress from the State of Texas, and Member, Subcommittee on Immigration Policy and Enforcement 28
Excerpted Material from hearing held on July 26, 2011 on the "HALT Act," submitted by the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Immigration Policy and Enforcement 89

Page

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement/Memo of Janice Kephart, former Counsel, 9/11 Commission, National Security Director, Center for Immigration Studies 100

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: PRIORITIES AND THE RULE OF LAW

WEDNESDAY, OCTOBER 12, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 3:05 p.m., in room 2141, Rayburn House Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, King, Gohmert, Poe, Gowdy, Ross, Lofgren, Jackson Lee, and Waters.

Staff Present: (Majority) Dimple Shah, Counsel; Marian White, Clerk; and (Minority) Tom Jawetz, Counsel.

Mr. GALLEGLY. Call to order the Subcommittee.

Over the past year the Obama administration has made numerous announcements seeking to grant benefits to illegal immigrants and other removable immigrants without approval from Congress. These announcements are in defiance of both the constitutional separation of powers and the will of the American public. They are part of the Administration's ongoing efforts to grant amnesty to illegal immigrants.

From the onset this Administration has failed to adequately enforce our immigration laws. What makes this worse is that the supporters of the comprehensive or targeted amnesties for illegal immigrants have consistently failed to win approval from Congress or gain support from the American people. Since comprehensive immigration reform has failed to pass in the legislative branch, the Obama administration has now decided to implement various programs that will benefit potentially millions of illegal immigrants.

What the President is doing is unfair to the 26 million American workers who are unemployed or underemployed. Amnesty is also unfair to those who are waiting to legally immigrate to the United States.

These administrative decisions will only attract more illegal immigrants looking for the same opportunity and take more jobs from American workers. This policy makes no sense during a time of economic hardship and high unemployment.

It is Congress' job to create immigration policy and it is the President's job to enforce it. The Administration's discretionary power should be used only on a case-by-case basis in compelling circumstances. In its most recent announcement the Administra-

tion opened the door to the possible amnesty of 300,000 immigrants who are currently in the process of being deported. This is a clear abuse of discretion.

I, along with other Members, have urged the Administration to reverse what we consider this misguided policy.

At this point I would yield to the gentlelady, my friend from California, the Ranking Member, who agrees with me on almost everything.

Ms. LOFGREN. Thank you, Mr. Chairman. It wasn't long ago, just 11 weeks, that this Subcommittee held a hearing on H.R. 2497, the HALT Act. That bill was a response to the series of ICE memos that laid out enforcement priorities and provided guidance on the use of agency discretion to best meet the priorities.

At that hearing we examined the memos closely and we saw that they contained nothing new, nothing surprising. The memos are actually just common sense.

We know that Congress has dramatically increased the resources available to enforce our immigration laws, broken as they are, and enforcement of those laws is at an all-time high, with respect to removals, criminal prosecution of immigration violation, worksite enforcements actions, fines, jail time and assets at the border. In fact as of 1 month ago the Administration had removed 1.06 million people from the country in just 2½ years. At that pace the Administration will remove many more people in one term than President Bush removed in his full two terms, 8 years, as President.

Still the reality is we don't have the resources to remove all 11 million undocumented immigrants even if we all agreed that that was a smart and humane response to the current situation. Given that we will always have limited resources, it just makes sense that we focus first on people who would do us harm, terrorists and serious criminals, before we turn our attention to the undocumented spouses of military personnel and innocent children who were brought here years ago through no fault of their own.

My Republican colleagues call the ICE memos administrative or backdoor amnesty. That is hyperbolic and a little bit partisan because the rhetoric may work in some of these presidential debates but it isn't really the truth. These memos setting immigration priorities are not unprecedented despite what some of my colleagues have said, and the HALT Act I believe is just more of a partisan attack. It sunsets at the end of the President's first term and would deny him the same authority that every President has always had.

The guidelines for the use of prosecutorial discretion date back to an INS General Counsel memo from 1976, a year after I graduated from law school. Additional memos have been issued in the intervening years in both Republican and Democratic administrations, and these earlier memos are the predecessors of the memos the majority is complaining about today. The majority never said anything about those earlier memos or the factors listed in those memos until now.

The guidance that most closely resembles what ICE issued earlier this year came in November of 2000, from then INS Commissioner Doris Meissner. At the HALT Act hearing we reviewed the origins of the Meissner memo, but it is worth reviewing once more.

In 1999, a bipartisan group of 28 Members of Congress sent a letter to former Attorney General Janet Reno stressing the importance of prosecutorial discretion in the immigration context and asking her to issued necessary guidance. In that letter the Congressmen cited widespread agreement that some deportations were unfair and resulted in unjustifiable hardship, and they asked why the INS pursued removal in such cases when so many other more serious cases existed. They urged for a priority of enforcement resources, asking the Attorney General to develop INS guidelines that use prosectorial discretion similar to those used by U.S. attorneys. That letter was signed by the current Chair of Judiciary Committee, Mr. Smith, as well as many other very conservative Members of the House, including former Chair Henry Hyde, former Chair Jim Sensenbrenner, Brian Bilbray, Nathan Deal, Sam Johnson and David Dreier.

During the hearing we had, Mr. Smith argued that his 1999 letter wasn't relevant because that letter asked for discretion on a case-by-case basis and even then only for lawful permanent residents. But with respect to the first point it is baffling because, as Director Morton I am sure will tell us, the prosecutorial discretion memo says that ICE officers, agents and attorneys should always consider prosecutorial discretion on a, what, case-by-case basis. The decision should be based on the totality of the circumstances. And the requirement that had the discretion be exercised on a case-by-case basis is mentioned three times in the two memos under scrutiny.

As to the second point, I have to say that any fair reading of Chairman Smith's 1999 letter would show it is in no way limited to lawful permanent residents nor should it have been. I think that it is ironic that the Chairman's 1999 letter really set in motion the chain of events that results in the memo we are discussing here today for a second time.

However, I think there is an even deeper irony. The 1999 letter argues for discretion to consider hardship when initiating or terminating removal proceedings. But the letter fails to acknowledge that the 1996 changes to the immigration law that were championed by Chairman Smith were largely responsible for the cases of hardship featured in the letter.

Since that time, we have done virtually nothing to reform our immigration laws, even though they are in need of it. Small wonder that we continue to have unjustifiable hardship and that we need to review these cases on a case-by-case basis.

And I would ask unanimous consent for my entire statement to be submitted into the record.

[The prepared statement of Ms. Lofgren follows:]

Statement of Ranking Member Zoe Lofgren
Subcommittee on Immigration Policy and Enforcement
Hearing on "U.S. Immigration and Customs Enforcement—Priorities and the Rule of Law"

Wednesday, September 12, 2011, at 3:00 p.m.

It was not very long ago—just 11 weeks—that the Subcommittee held a hearing on H.R. 2497, the HALT Act. That bill was a direct response to a series of ICE memos that lay out enforcement priorities and provide guidance on the use of agency discretion to best meet those priorities.

At that hearing, we examined the memos closely and saw that what they contain is neither new, nor surprising. The memos are actually just common sense.

We know that Congress has dramatically increased the resources available to enforce our immigration laws, broken as they are. And enforcement of those laws is at an all-time high with respect to removals, criminal prosecutions of immigration violations, worksite enforcement actions, fines, jail time, and assets at the border. In fact, as of one month ago, the Administration had removed 1.06 million people from the country in just two-and-a-half years. At that pace, the Administration will remove many more people in one term than President Bush removed in his full two terms as President.

Still, the reality is that we don't have the resources to remove all 11 million undocumented immigrants even if we all agreed that this was a smart and

humane response to our current situation. Given that we will always have limited resources, it just makes sense that we focus first on people who would do us harm—terrorists and serious criminals—before we turn our attention to the undocumented spouses of military personnel and innocent children who were brought here years ago through no fault of their own.

My Republican colleagues call the ICE memos administrative or backdoor "amnesty." That type of hyperbolic, partisan rhetoric may work in Republican presidential debates, but it couldn't be any further from the truth. They also act as though memos setting immigration enforcement priorities are unprecedented. Why else would they promote a bill like the HALT Act, which sunsets at the end of this President's first term in office and denies him the same authority that has been entrusted to every President before him?

But guidelines for the use of prosecutorial discretion date back to an INS General Counsel memo from 1976. Additional memos have been issued in the intervening years under both Republican and Democratic Administrations. These earlier memos are the predecessors of the memos the majority is complaining about today. The majority never said anything about those earlier memos, or the factors listed in those memos—until now.

The guidance that most closely resembles what ICE issued earlier this year came in November 2000 from INS Commissioner Doris Meissner. At the HALT Act hearing we reviewed the origins of the Meissner memo, but it is worth reviewing once more.

In 1999, a bipartisan group of 28 Members of Congress sent a letter to former Attorney General Reno stressing the importance of prosecutorial discretion in the immigration context and asking her to issue necessary guidance. In that letter, the Congressmen cited "widespread agreement that some deportations were unfair and resulted in unjustifiable hardship" and they asked "why the INS pursued removal in such cases when so many other more serious cases existed." They urged for a prioritization of enforcement resources, asking the Attorney General to "develop [INS] guidelines for the use of its prosecutorial discretion" similar to those used by U.S. Attorneys.

That letter was signed by the current Chair of the Judiciary Committee, Mr. Smith, as well as many other very conservative members of the House, including former-chair Henry Hyde, former-chair Jim Sensenbrenner, Brian Bilbray, Nathan Deal, Sam Johnson, and David Dreier.

During that hearing, Mr. Smith argued that his 1999 letter was not relevant to his current criticisms, because that letter asked that discretion be exercised on a case-by-case basis and even then only for lawful permanent residents.

With respect to the first point, I am honestly baffled. Perhaps Chairman Smith has overlooked the portion of Director Morton's prosecutorial discretion memo that says, "ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities." Actually, the requirement

that discretion be exercised on a "case-by-case basis" is mentioned three times in the two memos under scrutiny.

As for the second point, any fair reading of Chairman Smith's 1999 letter reveals that it was in no way limited to lawful permanent residents, nor should it have been. I would not want to believe that Chairman Smith would urge any Administration to ignore the "extreme hardship" that would result from the removal of an undocumented immigrant who is the spouse of a soldier deployed in Afghanistan and the sole caretaker for their U.S. citizen children. When asked after the hearing whether the 1999 letter applied only to lawful permanent residents, Doris Meissner herself correctly described Mr. Smith's claim as "revisionist."

It is ironic that the Chairman's 1999 letter set in motion a chain of events that resulted in memos we are now discussing for a second time. There is, however, an even deeper irony. The 1999 letter argues that the INS has the inherent prosecutorial discretion to consider hardship when initiating or terminating removal proceedings. But the letter fails to acknowledge that the 1996 changes to immigration law championed by Chairman Smith were largely responsible for the cases of hardship featured in the letter. When Congress eliminated in 1996 longstanding forms of immigration relief that could be provided by Immigration Judges on a case-by-case basis, it created much of the extreme hardship that Chairman Smith later asked the agency to use its discretion to clean up. Rather than fixing the law that was leading to these problems, Mr. Smith and others asked the agency to issue guidance for

the wider use of prosecutorial discretion. Fifteen years have passed since 1996 and we have fixed nothing. Small wonder that we continue to have unjustifiable hardship and that we need to review the cases on a case-by-case basis.

Mr. GALLEGLY. Without objection. I would just like to clarify my earlier statement; not always but I appreciate my good friend's comments. And we will move along. We have some very distinguished members, witnesses on our panels today. Each of the witnesses' written statements will be entered into the record in its entirety. And I would ask that each witness try to help us abide by the time limits so everyone will have an opportunity to ask questions and we will get to everyone today.

Our first—I see the Chairman of the full Committee has arrived. Mr. Smith, do you have an opening statement?

Mr. SMITH. Thank you, Mr. Chairman, I do. Sorry to be late, I am coming from another Committee hearing.

Immigration and Customs Enforcement's primary mission is to promote homeland security and public safety through criminal and civil enforcement of Federal immigration laws. ICE is also tasked with enforcement of U.S. intellectual property laws, and this Committee has jurisdiction over both.

While I appreciate ICE's intellectual property efforts, this Administration doesn't often take enforcement of ICE's immigration laws seriously enough.

Congress has voted against amnesty for illegal immigrants several times in recent years. But this Administration seems committed to backdoor amnesty through administrative action even if it can't get congressional approval.

Over the past year the Obama administration intentionally allowed illegal immigrants to remain in the United States.

For example, the Administration caved to pressure from liberal immigrant advocacy groups and announced "changes" to Secure Communities. This program keeps our neighborhoods safe by identifying illegal and criminal immigrants in police custody who have been arrested and fingerprinted.

The changes made to Secure Communities open the door to allow illegal and criminal immigrants to avoid deportation.

Specifically, Director Morton issued two memos to agency officials about how to exercise blanket prosecutorial discretion when illegal immigrants are apprehended. Such authority is acceptable when exercised responsibly on a case-by-case basis, but Administration officials are using this power in mass use and abusing this authority.

Two months ago the Department of Homeland Security announced they will ensure that "appropriate discretionary consideration" be given to "compelling cases with final orders of removal." According to the Administration, this review applies to 300,000 pending removal cases. This means close to 300,000 illegal immigrants could stay and work legally in the U.S. Why does the Administration continue to put the interest of illegal immigrants ahead of unemployed Americans?

The policies set forth in the ICE memos and DHS announcements claim to allow ICE to focus on immigration enforcement priorities. But that is just a slick way of saying they don't want to enforce immigration laws. ICE has shown little interest in actually deporting illegal immigrants who have not yet been convicted of what they call "serious" crimes.

With its memos and announcements, the Administration is sending an open invitation to millions of illegal immigrants. They know that if they come here illegally, they will be able to stay because immigration laws are not enforced.

Administration officials continue to brag about their "record deportation numbers." But several sources, including The Washington Post, claim the numbers are inflated. Even the President has stated that the numbers are "deceptive."

The Obama administration has all but abandoned worksite enforcement efforts. Over the past 2 years worksite enforcement efforts fell 70 percent. Their lack of enforcement allows illegal immigrants to fill the jobs that should go to unemployed American workers.

The Administration claims that they have increased the number of employer audits. But audits do little to discourage illegal hiring. And employers consider fines often to be just the cost of doing business.

Even when there is worksite enforcement action this Administration rarely arrests the illegal workers. The workers are free to go down the street to the next employer, and unemployed Americans lose out on their jobs.

While there have been successes in the area of intellectual property for ICE, the Obama administration is on the wrong side of the American people when it comes to enforcing immigration laws.

According to a recent poll, two-thirds of the American people want to see our immigration laws enforced. But the Administration continues to put illegal immigrants ahead of the interests of unemployed Americans.

Thank you, Mr. Chairman. I yield back.

Mr. GALLEGLY. I thank the Chairman. As I started to introduce our first witness today on Panel I, Mr. John Morton is Director of the Immigration and Customs Enforcement, better known as ICE, at the U.S. Department of Homeland Security. ICE is the second largest investigative agency in the Federal Government. Prior to Mr. Morton's appointment by the President, he spent 15 years at the Department of Justice and served in several positions, including Assistant U.S. Attorney, Counsel of the Deputy Attorney General and Acting Deputy Assistant Attorney General of the Criminal Division.

Welcome, Mr. Morton.

TESTIMONY OF JOHN MORTON, DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Mr. MORTON. Good afternoon, Mr. Chairman, Ranking Member Lofgren, Chairman Smith, Members of the Subcommittee. Thank you very much for the invitation to testify before the Subcommittee on the subject of ICE's recent enforcement efforts.

Let me start briefly with our fiscal year 2011 highlights. While we are still verifying the final numbers, the preliminary results of ICE's enforcement efforts for fiscal year 2011 are quite strong. I anticipate we will have removed about 397,000 people this past fiscal year with a continued emphasis on our highest priorities: Public safety, border security, and the integrity of the system. Indeed, over half of the individuals we removed this past year will have had a criminal conviction. The majority of the remainder will have been recent border violators, immigration fugitives, or illegal reentrants.

A few points of particular interest for the Subcommittee: we maintained an average of 33,400 beds a day, the highest level of detention in our history and the first time we have largely met our congressionally mandated average of 33,400. This level of detention has allowed us to remove on the order of 216,000 offenders this

year, another record and an 89 percent increase over fiscal year 2008.

Pursuant to Congress' direction to identify criminal offenders in the Nation's jails for removal, we deployed the Secure Communities Program in nearly 1,600 jurisdictions in 43 States, including every county along the Southwest border, and assuming we receive continued funding for the program from Congress, I expect we will deploy Secure Communities nationwide by 2013, marking the first time we will have a truly comprehensive system to identify criminal offenders in our Nation's jails and prisons.

We have also created a permanent partnership with the Border Patrol to significantly improve the Border Patrol's ability to deter illegal immigration along the Southwest border. Under this partnership Mexican nationals apprehended by the Patrol are transferred to ICE for detention and removal through a State other than the one in which they were apprehended. Our initial analysis suggests that this significantly disrupts smuggling flows. We have done about 37,000 of these lateral removals this year.

In addition, our felony prosecutions for illegal reentry are at an all-time high, 10,000. And on the worksite enforcement front we have conducted nearly 2,500 audits, arrested 217 employers and managers, and levied $6 million in civil penalties, all enforcement records. We have also had another strong year in terms of criminal investigations, and I think it is very important for everyone to remember that ICE is deeply involved in criminal enforcement in addition to immigration enforcement. Indeed, as the Chairman mentioned, we are the second largest investigative agency in the entire Federal Government, behind only the FBI, and we investigate everything from child pornography and sex trafficking to export and import violations, drug trafficking, counterfeiting and piracy and transnational gangs. We have 7,000 special agents throughout the United States and 47 countries overseas. We made over 30,000 criminal arrests this past fiscal year.

A few words on prosecutorial discretion. On June 17th, I issued a memorandum to our senior managers providing guidance on the exercise of prosecutorial discretion. This, as Ms. Lofgren noted an earlier memorandum issued by the agency, is not a prelude to mass amnesty. They are not an effort to suspend enforcement of immigration laws. On the contrary, they are simply a straightforward effort to ensure that our limited enforcement resources are focused on the Department's highest enforcement priorities; namely, national security cases, criminal and drug border violators and those who game the system.

Even though the agency funding sought by the President a appropriated by the Congress is at an all-time high, DHS simply does not have the resources to charge, detain and remove all of the aliens in the country unlawfully. Instead, like any other law enforcement agency, we have to focus our resources and efforts on higher priority violators. This doesn't mean that we are suspending enforcement for whole classes of individuals. We are not. We are simply exercising our discretion on a case-by-case basis in very low priority cases so that we can do more to remove criminals, secure the border and sanction those who game the system. This discre-

tion does not confer permanent status on anyone nor does it prevent the arrest, detention or removal of anyone where needed.

Let me close by noting how proud I am of the work of the men and women of ICE this past year. Not only have they achieved numerous enforcement records, we have done so in the context of an unsettled national debate on immigration. As the Secretary recently noted speech at American University, DHS is often criticized of being either a mean spirited enforcer pursuing record levels of removal or a lax enforcer engaged in administrative amnesty. Neither criticism is true. Instead, we are simply trying to pursue a thoughtful set of enforcement priorities in the context of limited resources and a law that needs reform.

With that, I thank you, Mr. Chairman.

[The prepared statement of Mr. Morton follows:]

U.S. Immigration and Customs Enforcement

STATEMENT
OF
JOHN MORTON

DIRECTOR
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

REGARDING THE HEARING
"OVERSIGHT HEARING ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: PRIORITIES AND THE RULE OF LAW"

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

Wednesday, October 12, 2011 - 3:00 p.m.
2141 Rayburn House Office Building

INTRODUCTION

Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the Subcommittee:

On behalf of Secretary Napolitano, thank you for the opportunity to address you today regarding U.S. Immigration and Customs Enforcement (ICE). As the investigative arm of the Department of Homeland Security (DHS), ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. The men and women of ICE do this every day by carrying out ICE's role in (1) protecting the borders through smart and effective immigration enforcement; (2) securing and managing our borders against illicit trade, travel, and finance; and (3) preventing terrorism and enhancing national security.

We are effectively managing our resources by carrying out our responsibilities in a smart, fair, and efficient manner. In the last two and a half years, we have made unprecedented strides across our agency, and as a result, we have made communities across America, and Americans around the world, safer and more secure. I welcome this opportunity today to share with you our successes and our opportunities as we move into a new year.

Protecting the Borders Through Smart and Effective Immigration Enforcement

There has been much discussion in recent months about the Administration's approach to immigration enforcement. The Administration's policies have been alternatively described at times as either an unprecedented effort to deport record numbers of individuals arbitrarily, or as an administrative amnesty that ignores the Government's responsibility to the enforce immigration laws. Both characterizations are inaccurate. The Administration's policy guidance governing immigration enforcement makes this clear, as does its enforcement record. ICE has worked to develop guidance to help focus ICE's enforcement efforts on our highest priorities, including: aliens who pose dangers to national security or risks to public safety; recent illegal entrants; repeat violators of immigration law; and aliens who are fugitives from justice or otherwise obstruct immigration controls.

This approach has yielded results. DHS has produced record immigration enforcement. In FY 2010, ICE removed a record 195,772 criminal aliens, more than any other year in history, and 81,000 more criminal removals than in FY 2008. Nearly 50 percent of the aliens we removed in FY 2010 had been convicted of criminal offenses. Removing these individuals helps to promote public safety in communities across the country. We expect that this trend will continue, and that this fiscal year, we will again remove a record number of criminal aliens from the country.

Of those we removed in 2010 who lacked criminal convictions, more than two thirds were either recent border entrants or repeat immigration law violators. As such, and unlike ever before, an overwhelming majority of the aliens removed fell into one of ICE's enforcement priorities. In fact, the number of individuals removed who could not definitively be placed into at least one of the priority categories -- for example, those who were not immigration fugitives, repeat immigration law violators, or removed at the border -- dropped from more than 19 percent in 2008 to less than 10 percent in 2010. We expect to see similar results in FY 2011 as well.

Prosecutorial Discretion

DHS must ensure that our immigration enforcement resources are focused on the removal of those who constitute our highest priorities, specifically individuals who pose threats to public safety such as criminal aliens and national security threats, as well as repeat immigration law violators, recent border entrants, and fugitives from justice or those who otherwise obstruct immigration controls. There are a significant number of cases currently pending before U.S. Department of Justice (DOJ) immigration courts, many of these will take years to resolve. Tens of thousands more are pending review in federal courts. Each of these cases costs taxpayers thousands of dollars, and those involving low priority individuals divert resources and attention from high priority cases. Due to the fiscal limitations, the expenditure of significant resources on cases that fall outside of DHS enforcement priorities hinders our public safety mission by consuming litigation resources and diverting resources away from higher-priority individuals.

Prosecutorial discretion has always been exercised in order to prioritize the use of immigration enforcement resources. The Immigration and Naturalization Service under the Department of Justice and later ICE under DHS has used discretion on a case-by-case basis where we feel it has been appropriate and responsible to do so, and where it enhances our ability to meet our priorities. In keeping with this practice, DHS and DOJ have recently established an interagency working group to implement existing guidance regarding the appropriate use of prosecutorial discretion in a manner consistent with our enforcement priorities.

This interagency working group will work to determine that immigration judges, the Board of Immigration Appeals, and the federal courts are focused on adjudicating high priority cases more swiftly by relieving pressure on the judicial system by identifying very low priority cases and on a case-by-case basis, setting those cases aside. This will allow for additional DHS resources to be focused on the identification and removal of those individuals who pose the greatest threats. In part, this process will accelerate the removal of high priority aliens from the country. At no point will any individuals be granted any form of "amnesty." There will be no reduction in the overall levels of enforcement and removals – only a more effective way of marshaling our resources towards our highest priority cases and thus, increasing the number of criminal aliens and repeat immigration violators removed from the country.

Likewise, it will enhance ICE's historic partnership with U.S. Customs and Border Protection (CBP). Over the past few years, ICE has worked closely with CBP to increase efforts to prevent illicit trade and travel across our borders. This partnership includes the dedication of ICE officers, agents, and detention facilities to the apprehension and detention of recent border crossers. The record-setting results achieved along the Southwest Border are attributable, in part, to this unprecedented partnership. Notably, this process will allow DHS to free up additional resources that will be dedicated to the Southwest border.

Secure Communities

As I have stated, the Administration has established the identification and removal of public safety and national security threats as a top priority. To aid in this effort, we have expanded the use of the Secure Communities program, which identifies individuals arrested and booked into jail for a violation of a state or local criminal offense, convicted criminals, gang members, and other enforcement priorities in our jails and prisons.

ICE has acknowledged that it faced challenges in rolling out the Secure Communities program initially, including in explaining how the program works and which entities are required to participate. Nevertheless, Secure Communities has proven to be one of our best tools to help

focus our immigration enforcement resources on our highest enforcement priorities, including convicted criminals and egregious immigration law violators, and ICE remains fully committed to the program.

Since its inception on October 27, 2008, through September 18, 2011, more than 97,600 aliens convicted of crimes, including more than 35,500 convicted of aggravated felony offenses were removed from the United States after identification through Secure Communities. These removals significantly contributed to a 71 percent increase in the overall percentage of convicted criminals removed by ICE, with 81,000 more criminal alien removals in FY 2010 than in FY 2008. As a result of the increased focus on criminals, removals of non-criminals fell by 23 percent during the same time period. In addition, over 25,000 aliens who were previously removed and reentered or who failed to leave the United States following the issuance of a final order of removal, deportation or exclusion, who are also DHS enforcement priorities, were removed through Secure Communities over the past two years.

Earlier this year, as part of the Administration's continued commitment to smart, effective immigration enforcement, ICE announced key improvements to the Secure Communities program. They included:

- Establishing a task force, comprised of law enforcement, state and local government officials, prosecutors, and immigration advocates, as part of the Homeland Security Advisory Council to develop recommendations on how to improve Secure Communities so that it can better focus on identifying and removing individuals who pose true public safety threats. ICE is currently reviewing recommendations submitted by the Task Force;
- Developing a new policy to protect victims of and witnesses to crimes, to ensure that the crimes continue to be reported and prosecuted;
- Revising the detainer form that ICE sends to local jurisdictions to emphasize longstanding guidance that state and local entities are not to detain an individual for more than 48 hours pursuant to the detainer;
- Working with the DHS Office for Civil Rights and Civil Liberties (CRCL) on regular and in-depth statistical monitoring of the program;
- Creating a series of training sessions in collaboration with CRCL designed primarily for use by front line state and local law enforcement agency personnel to address civil rights and civil liberties issues that may be relevant when Secure Communities is activated for a jurisdiction; and
- Agreeing to a protocol for CRCL to take the lead in investigating complaints of alleged civil rights violations for jurisdictions where Secure Communities is activated.

We are confident these changes will aid in our continued efforts to strengthen and improve Secure Communities. We will continue to expand Secure Communities to additional jurisdictions, and we look forward to nationwide deployment by the end of 2013. We will also continue to examine the program's effectiveness and invest in additional training and education efforts.

Worksite Enforcement

As part of its immigration enforcement efforts, ICE has been pursuing a comprehensive worksite enforcement strategy to deter unlawful employment and drive a culture of compliance with the nation's immigration-related employment laws. The Administration is focused on conducting criminal investigations and prosecuting employers who exploit or abuse their

employees and those who have a history of knowingly and repeatedly employing an illegal workforce.

Our strategy has been designed to: (1) penalize employers who hire illegal workers; (2) deter employers who are tempted to hire illegal workers; and (3) encourage all employers to take advantage of easy to use and well-crafted compliance tools.

The success of our approach is evident in the statistics. As of September 17, 2011, ICE has initiated 3,015 investigations, which is 154 percent more than in all of FY 2008. In FY 2010, ICE arrested 196 employers for criminal worksite-related immigration violations, surpassing the previous high of 135 arrests in FY 2008. So far in FY 2011, ICE has also issued a record 2,393 notices of inspection, a more than a 375 percent increase from the number issued in all of FY 2008. This year, ICE has issued 331 final orders totaling $9 million in fines levied on employers compared to 18 final orders issued totaling $675,000 in FY 2008. In addition, FY 2010 worksite investigations resulted in a record $36.6 million in judicial fines, forfeitures, and restitutions.

Enforcing our immigration priorities and obligations is neither simple nor easy, and we are committed to getting it right. We all agree that we need fair, consistent, and enforceable immigration laws that encourage the free flow of commerce while respecting both security and the rights of individuals. We are committed to making changes within the immigration system that make sense and are achievable. While we are committed to being smart and tough with our enforcement, it remains the Administration's position that Congress needs to take up immigration reform. We look forward to working with Congress to this end.

Securing and Managing our Borders Against Illicit Trade, Travel, and Finance

Southwest Border Initiative

In March 2009, the Administration launched the Southwest Border Initiative to bring unprecedented focus and intensity to Southwest border security, coupled with a reinvigorated, smart and effective approach to enforcing immigration laws in the interior of our country. In support of this initiative, ICE has targeted considerable resources at the Southwest border to address the activities associated with transnational criminal organizations, including the interdiction of contraband such as firearms, ammunition, bulk cash currency, stolen vehicles, human smuggling, and the detection of tunnels and other border crime at and between ports of entry along the Southwest border. Under this initiative, ICE has doubled the personnel assigned to Border Enforcement Security Task Forces (BESTs); increased the number of intelligence analysts along the Southwest border focused on cartel violence; and quintupled deployments of Border Liaison Officers to work with their Mexican counterparts. At the end of the third quarter of FY 2011, ICE deployed special agents to high risk locations, including Tijuana and Monterey, Mexico. ICE so far this year has initiated 9,748 investigations along the Southwest border, and is on pace to surpass FY 2010 totals.

Additionally, with the aid of $80 million provided in the 2010 Southwest Border supplemental appropriations, ICE has deployed 241 special agents, investigative support personnel, and intelligence analysts to the border. Indeed, ICE now has one quarter of all its special agents assigned to the Southwest border, more agents and officers along the border than ever before.

Border Enforcement and Security Task Forces (BESTs)

In FY 2011, ICE also continued to bolster border security through the efforts of its BESTs, which bring together federal, state, local, territorial, tribal, and foreign law enforcement. Thus far in FY 2011, ICE-led BESTs have made 1,565 criminal arrests, 814 administrative arrests, and obtained 757 indictments; seized 200,278 pounds of illegal drugs and $11.4 million in U.S. currency and monetary instruments. Some 733 defendants have been convicted thus far in FY 2011.

Illicit Finance Investigations

One of the most effective methods for dismantling transnational criminal organizations is to attack the criminal proceeds that fund their operations. In coordination with public and private partners, ICE works to seize illicit proceeds derived from and used for criminal activities, and to shut down the mechanisms used to retain and transfer these funds by countering bulk cash smuggling within the U.S. financial, trade, and transportation sectors targeted by criminal networks.

ICE's bulk cash smuggling investigations are coordinated through the ICE-led Bulk Cash Smuggling Center, from which we provide real-time operational and tactical support to federal, state, and local officers involved in bulk cash smuggling seizures. In 2010, ICE, in partnership with the Drug Enforcement Administration, utilized the El Paso Intelligence Center (EPIC) to tackle bulk cash smuggling. This partnership ensures improved collaboration across the federal government for bulk cash smuggling investigations 24 hours a day, 7 days a week.

International Partners and Cooperation

ICE works closely with our international partners to disrupt and dismantle transnational criminal organizations. As part of these efforts, ICE currently maintains nine vetted units worldwide. These units are composed of highly trained host country counterparts that have the authority to investigate and enforce violations of law in their respective country. Because ICE officials working overseas do not possess law enforcement or investigative authority in host countries, the use of vetted units enables ICE to dismantle, disrupt, and prosecute transnational criminal organizations while respecting the sovereignty of the host country.

In FY 2010, Transnational Criminal Investigative Units (TCIUs) in Mexico, Colombia and Ecuador played a central role in Operation Pacific Rim–an ICE-led investigation that dismantled one of the most powerful and sophisticated bulk cash and drug smuggling drug trafficking organizations in the world. As a result of international cooperation, this operation resulted in ten guilty pleas, 21 indictments, and 22 arrests along with seizures totaling over $174 million in currency, 3.8 tons of cocaine, $37 million in criminal forfeitures, and $179 million in property. During 2011, two more TCIUs became operational and ICE plans to expand additional TCIUs in FY 2012.

Preventing Terrorism and Enhancing National Security

As the largest investigative arm of DHS, ICE enhances national and border security by interrupting the illicit flow of money, merchandise, and contraband that supports terrorist and criminal organizations. As of the end of the third quarter of FY 2011, ICE has seized $363 million in currency, 1.4 million pounds of narcotics and other dangerous drugs, and $272 million worth of contraband and other illegal merchandise. In addition, ICE agents and officers

responded to 1.1 million inquiries and calls for assistance from other federal, state, and local law enforcement agencies through ICE's Law Enforcement Support Center (LESC).

ICE leads efforts in national security investigations through interconnected programs that prevent criminals and terrorists from using our nation's immigration system to gain entry to the United States. This includes: investigating terrorist organizations and their actors; preventing criminal and terrorists from obtaining U.S. visas overseas; preventing criminal and terrorist organizations from acquiring and trafficking weapons and sensitive technology; and identifying and removing war criminals and human rights abusers from the United States, while protecting children from exploitation.

Joint Terrorism Task Force (JTTF)

The FBI-led JTTFs are a part of a joint counterterrorism partnership between U.S. law enforcement agencies. Since 2007, ICE agents assigned to JTTFs have initiated 5,564 cases, resulting in approximately 1,119 criminal arrests and 2,010 administrative arrests. In FY 2011, ICE special agents in Louisville, Kentucky, assisted in a JTTF investigation which ultimately led to the arrest of Waad Ramadan Alwan and Mohanad Shareef Hammadi. Both of these Iraqi refugees were indicted on federal terrorism charges, as well as the murder of a U.S. person engaged in official duties. They both had allegedly conspired to have money and weapons shipped to Iraq to support the activities of al-Qaeda. In FY 2012, ICE will continue to collaborate with our law enforcement colleagues through the FBI-led JTTFs.

Visa Security Program

The Visa Security Program (VSP) deploys ICE special agents to diplomatic posts worldwide to conduct visa security activities and identify potential terrorists or criminal threats before they reach the United States. By working closely with the Department of State, this program enhances national security by providing an additional level of review of persons of special interest before they enter the United States. ICE conducts visa security operations at 19 high-risk visa adjudication posts in 15 countries.

Counter proliferation Investigations

ICE leads the U.S. Government's efforts to prevent foreign adversaries from illegally obtaining U.S. military products and sensitive technology, including weapons of mass destruction and their components. In FY 2011, ICE initiated 1,780 new investigations into illicit procurement activities, made 583 criminal arrests, obtained 419 indictments, achieved 262 convictions, and made 2,332 seizures valued at $18.9 million.

In 2010, ICE, in coordination with the World Customs Organization (WCO), launched "Project Global Shield," an unprecedented multilateral law enforcement effort aimed at combating the illicit cross-border diversion and trafficking of precursor chemicals used by terrorist and other criminal organizations to manufacture improvised explosive devices by monitoring their cross-border movements. On March 22, 2011, Global Shield was endorsed by the WCO Enforcement Committee and converted from a pilot project to a permanent program. It currently has 83 participating countries and has led to 19 arrests, 24 seizures, and chemical seizures totaling over 33 metric tons.

Human Trafficking and Human Smuggling Investigations

ICE works with our interagency and international partners to extend our borders and disrupt and dismantle international human smuggling and trafficking networks and organizations along their entire routes. ICE holds the directorship of the Human Smuggling and Trafficking Center (HSTC), an interagency information and intelligence fusion center and clearinghouse. The HSTC was established to facilitate the broad dissemination of anti-smuggling and trafficking information and help coordinate the US Governments efforts against human smuggling, human trafficking and criminal facilitation of terrorist mobility.

In 2010, ICE's Office of Intelligence established its Human Trafficking Unit to develop intelligence and identify potential human trafficking investigative targets. In the coming fiscal year, ICE plans to expand coordination with the Departments of Justice and Labor to initiate additional investigations of human trafficking violations.

Sadly, a significant number of human trafficking victims are children. ICE takes these cases very seriously. ICE's "Operation Predator" targets and investigates human smugglers and traffickers of minors, as well as child pornographers, child sex tourists and facilitators, criminal aliens convicted of offenses against minors, and those deported for child exploitation offenses who have returned illegally. Since its launch in 2003, Operation Predator has resulted in the arrest of over 13,594 sexual predators, of which 10,975 were non-citizens.

In FY 2012, ICE will expand operations of our Child Exploitation Section by establishing the Child Exploitation Center and deploying Child Sex Tourism Traveler Jump Teams to conduct investigations of U.S. citizens traveling in foreign counties for the purpose of exploiting minors. ICE will also continue working to end human trafficking and smuggling alongside the Department's "Blue Campaign"— a DHS initiative to combat human trafficking through enhanced public awareness, victim assistance programs, and law enforcement training and initiatives.

CONCLUSION

Thank you so much for the opportunity to share with you the good work of Immigration and Customs Enforcement. I'm proud of the work our ICE teams do each and every day all around the world to help strengthen and secure our homeland; we're engaging in record-breaking immigration enforcement strategies, and I am confident we will continue to do so. ICE's broad authority to enforce the nation's trade, travel, finance, and immigration laws has made American communities safer. On behalf of the men and women of ICE, I thank you again for the opportunity to testify on these efforts. I would now welcome any questions you may have.

Mr. GALLEGLY. Thank you very much, Mr. Morton, and for watching the light. It gives us all a chance at the plate.

Mr. Morton, you mentioned, I believe the first start of your statement, this year you have removed 397,000 illegal immigrants.

Mr. MORTON. That is correct.

Mr. GALLEGLY. Can you give me your definition of removal?

Mr. MORTON. Yes, the agency counts formal removal, that is, people removed pursuant to a formal order either issued by an immigration officer or by an immigration judge; and since the previous Administration we also count voluntary returns.

Mr. GALLEGLY. Well, the thing I want to make sure that we are clear on is that, to start with, isn't it true that without counting the voluntary returns the actual removal numbers dropped dramatically?

Mr. MORTON. If you would remove voluntary returns from the total, obviously the total would be less.

Mr. GALLEGLY. Those removed voluntarily, are they physically escorted out of the country or are they given a notice to just leave?

Mr. MORTON. No. In most instances voluntary returns are under the control of the government.

Mr. GALLEGLY. Does that mean that they are physically taken to the border or to the interior or put on the plane and verified that that is the case?

Mr. MORTON. In most instances, yes, the law does allow both, particularly in the context of formal removal, people to be removed without being under——

Mr. GALLEGLY. You mean voluntarily?

Mr. MORTON. Well, there is two. There is voluntary return and what is known as voluntary departure. Two different things, same basic concept. Certainly instances.

Ms. LOFGREN. Mr. Chairman, that microphone is not working. I wonder if we could use—there is something wrong with it.

Mr. GALLEGLY. Of the 397,000 removed—to me removed means they are no longer in country—of the 397,000, can you give me your best estimate of how many physically left the country and how many physically remained in the country at least without verification that they had left?

Mr. MORTON. All of those individuals, Mr. Chairman, have been removed from the country under government control of one kind or another, departure has been verified. In most instances it was done literally under the government's physical control; in certain instances they left on their own.

Mr. GALLEGLY. On these job site—I was going to go back here and look—you cited numbers of how many actual job site inspections you did this year.

Mr. MORTON. Yes, sir.

Mr. GALLEGLY. And you mentioned how many employers had been fined. And I think you mentioned how many actual people had been removed. I want to make sure we get to that number removed and physically—how many employers were fined?

Mr. MORTON. The total number of the fines was 6—a little over $6 million.

Mr. GALLEGLY. How many individuals?

Mr. MORTON. I don't know the answer to that.*

Mr. GALLEGLY. We have $6 million that we received in fines.

Mr. MORTON. In civil penalties levied by the agency.

---

*The Subcommittee received the following reply from ICE in response to Mr. Gallegly's question:

ICE response: In fiscal year 2011, 499 Notices of Intent to Fine were issued.

Mr. GALLEGLY. And how many did that represent in actual removals from the country?

Mr. MORTON. We removed, we arrested about 1,500 workers from worksites this year.

Mr. GALLEGLY. Of the 1,500 that were arrested, how many were removed?

Mr. MORTON. Some of them are still in proceedings, so I can't give you a hard answer on that because when we arrest somebody obviously we have to put them in immigration proceedings.

Mr. GALLEGLY. You remember the Chipotle incident?

Mr. MORTON. I do.

Mr. GALLEGLY. And there were significant fines.

Mr. MORTON. That case is still ongoing.

Mr. GALLEGLY. Okay. How many people that were—I understand 37 percent or some fairly significant percentage of the employees at the job site investigated were illegally working in the country; is that correct?

Mr. MORTON. I need to be careful on that case because it is still ongoing, but, it would be better to pick another example.

Mr. GALLEGLY. During that raid were these folks arrested or were they just cited and released?

Mr. MORTON. Um, let me speak more generally, not speak to Chipotle if I can, Mr. Chairman, because that is an ongoing case.

Mr. GALLEGLY. When you do a job site inspection and you determine in your inspection that the names and numbers don't match, how many are cited and how many are taken into custody?

Mr. MORTON. So the emphasis this year and in past years since this Administration has taken over has been on the inspection process and that we have increased tremendously. We continue to arrest workers that we encounter at work sites, but not at the same volume as we had before.

Mr. GALLEGLY. Released and given a date to appear?

Mr. MORTON. It depends on the availability of resources and detention space at that point. So——

Mr. GALLEGLY. One last question because my red light came on. Of the 397,000 that you know were physically removed from the United States, do you have any indication of any recidivism or any rearrest of the 397,000 that were removed?

Mr. MORTON. Not with regard to those 397,000, but recidivism is a serious concern. We prosecuted 10,000 people this year for illegal reentry alone and that is obviously an incomplete figure.

Mr. GALLEGLY. And of those 10,000 prosecuted how many subsequently removed?

Mr. MORTON. All of them will be removed, many of them in Federal prison.

Mr. GALLEGLY. Very good. Ms. Lofgren.

Ms. LOFGREN. Before I ask my questions I would like to ask unanimous consent to place into the record a letter from Robert Morgenthau, who was the prosecutor in New York City for 35 years and prior to that a member of the U.S. Attorney's Office in New York, on this issue.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

October 6, 2011

Hon. Elton Gallegly, Chairman
Subcommittee on Immigration Policy and Enforcement
of the Committee on the Judiciary
2309 Rayburn HOB
Washington, DC 20515

Hon. Zoe Lofgren, Ranking Member
Subcommittee on Immigration Policy and Enforcement
of the Committee on the Judiciary
1401 Longworth HOB
Washington, DC 20515

Hon. Candice Miller, Chair
Subcommittee on Border and Maritime Security
of the Committee on Homeland Security
1034 Longworth HOB
Washington, DC 20515

Hon. Henry Cuellar, Ranking Member
Subcommittee on Border and Maritime Security
of the Committee on Homeland Security
2463 Rayburn HOB
Washington, DC 20515

Dear Members of Congress:

I write to address the subject of prosecutorial

discretion, the topic of an October 4 hearing before the Border and Maritime Security Subcommittee and an upcoming hearing before the Immigration Policy and Enforcement Subcommittee on October 12.

For 35 years, I was District Attorney of the County of New York. Prior to that service, I was the United States Attorney for the Southern District of New York. In both positions, like federal immigration authorities, I faced a daily deluge of cases. I quickly learned to set priorities: to focus resources on the most serious cases, to exercise leniency where it was merited, and to dismiss those cases that were unprovable.

The same principles should apply to prosecution of deportation cases. This is nothing new, and it is no secret. For at least the last three presidential administrations, immigration officials have openly acknowledged the impossibility of arresting, processing, and deporting every undocumented immigrant. Recently, the Director of ICE estimated that his agency has the capacity to prosecute successfully something less than four percent of the potential caseload.

The challenge, then, is to use our resources wisely. That means that the top priority should be to detain and deport undocumented immigrants who are terrorists or convicted criminals who pose an actual threat to public safety. A policy that insists on indiscriminate detention and deportation reduces our ability to focus resources on those dangerous offenders.

You are wise to cast attention upon the Administration's use of prosecutorial discretion, and I would respectfully suggest that Congress plays its most effective role in holding the Administration to its word.

WACHTELL, LIPTON, ROSEN & KATZ

-3-

The head of ICE has directed his staff to give top priority to detaining criminals and suspected terrorists. Making sure the Administration delivers on its promise of targeting those who present real threats to our safety should be a contribution that all could support, and that would make us all safer.

Sincerely,

ROBERT M. MORGENTHAU

Ms. LOFGREN. As I read through the memo and recalling back to the time even before the Department of Homeland Security, it seemed to me that every law enforcement agency makes some decision about what is a priority and what isn't. For example, today the Mayor of San Jose is quoted as saying there are people camping on the plaza in front of City Hall. That is against the municipal code but the police are now chasing down some murderers. They have got something else that is a higher priority than the camping violation. It seems to me that is kind of what you are doing here.

I want to explore why that is necessary, and I remember when we had the Attorney General before us some time ago I asked him about staffing levels in the immigration—among the immigration

judicial ranks as well as prosecutors. It is my understanding, and I guess this is a question, not a statement, that more than 300,000 cases are currently pending in the immigration docket and that immigration judges are now setting deportation hearings for the year 2014; is that correct to your knowledge?

Mr. MORTON. That is correct.

Ms. LOFGREN. And so we have got a situation where we have got hundreds of thousands of people waiting and that is not a good situation from a law enforcement point of view. If some of those people are dangerous criminals, others may be the wives of American soldiers in Iraq, you would want to make a distinction between those two, isn't that correct?

Mr. MORTON. Of course.

Ms. LOFGREN. I am concerned about the testimony of the union, and I just read the written testimony, so we will have a chance to explore it further with the union representative. But they suggest that there are down times where they could go out and just pick up anyone without regard to the priority. But isn't it true that the arrest cost represents about 4 percent of the total cost of removal, removing an individual?

Mr. MORTON. Yeah, so the point there is that ICE is but one operator of many in a very complex system that goes from a point of identification and arrest all the way through removal. Obviously you have the immigration judges, you have the Department of Justice's role, you have CBP, you have CIS. All of these things come together in a fairly complicated way to form the immigration enforcement system. From our perspective, this is about how do we maximize the resources that Congress has appropriated. And in our experience in a given year we can remove about 400,000 people. And the question comes down to, who are those 400,000 going to be? And could you have an approach that said it is the first 400,000 people you encounter on the street and they are here unlawfully, and you have the power and responsibility to enforce the law, so remove those first 400,000.

We have taken a different approach, which is in a world where there are far more than 400,000 people that we could remove, we want to focus those limited resources on the ones that make most sense, and that is criminals, national security cases, people at the border, reentrants, people who are gaming the system, fugitives, fraudsters.

Ms. LOFGREN. Now I want to explore further the kind of focusing in on the worst and the cost issues which can strain everything that government does. It is about $120 a day and if we are setting things for year 2014, it is a little shy of $200,000 that we are going to spend to hold somebody in custody for their hearing. So I am just wondering, certainly the drunk drivers and the criminals and the felons you are going to keep those people in custody, would that be correct, waiting for their hearing?

Mr. MORTON. Yes, what you point out is if—because we can't possibly hold somebody for 2 years for their hearing because it costs so much so we have a non-detained docket and we have a detained docket. The detained docket moves relatively quickly, roughly $120 a day for detention, that doesn't count officer salary and removal expenses. That moves fairly quickly.

On the other hand, the non-detained docket can take—as you have already noted, can go out to 2014, 2015 simply for the administrative hearing, let alone what happens in the Federal court system. So in that kind of setting we have got to prioritize our detention resources, our enforcement resources on those cases that we can move quickly. It is why it makes no sense to put somebody into detention who requires very expensive medical treatment or is terminally ill. It just doesn't make sense, and that is what the prosecutorial discretion memo is about, is trying to make good calls and judgment when it comes to allocating very expensive and limited resources.

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

Mr. GALLEGLY. I thank the gentlelady. Mr. Poe.

Mr. POE. Thank you, Mr. Chairman. Thank you for being here, Mr. Morton. I am over here. I appreciate what ICE does. My nextdoor neighbor is an ICE agent, he works all the time. I admire him and all of you all for what you do.

I have the 20 factors that you have issued through lawyers saying that they should consider all relevant factors including, but not limited to these 20 factors. I would like to make this part of the record, Mr. Chairman. I ask unanimous consent.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

Policy Number: 10075.1
FEA Number: 306-112-0026

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement[1]. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

[1] The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director[2] and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

[2] Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

communication with represented individuals[3] and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[3] For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

Mr. POE. These 20 factors that should be considered, were you directed by the President to issue these guidelines?

Mr. MORTON. No, this was——

Mr. POE. Who told to you issue these guidelines?

Mr. MORTON. This was issued by me.

Mr. POE. So you decided to issue these guidelines?

Mr. MORTON. I did.

Mr. POE. Was anyone in the White House—the questions are not that complicated. Did anyone in the White House direct you to issue these?

Mr. MORTON. Again, if your question is was the White House and the Department involved in the formulation of this memorandum, the answer is yes. Who issued it? I issued it.

Mr. POE. Who from the White House was involved in this then?

Mr. MORTON. I don't know all of the individuals who were involved. I do know the Director of Intergovernmental Affairs handled the principal policy review for——

Mr. POE. Who would that be?

Mr. MORTON. That is a woman named Cecelia Munoz.

Mr. POE. What is the statutory congressional authority for prosecutorial discretion?

Mr. MORTON. The principal authority is actually a Supreme Court case.

Mr. POE. So there is no legislative authority for prosecutorial discretion, correct?

Mr. MORTON. I wouldn't go so far as to say that. Congress routinely recognizes in our appropriation the need to prioritize. Indeed, in our most recent appropriation, which is 2010, there is an explicit instruction to us from the Appropriations Committee to prioritize certain cases over another. So Congress has long recognized this power and it is a bedrock principle of Federal law.

Mr. POE. But there is no statutory authority that you can cite to me; it is a Supreme Court decision, correct?

Mr. MORTON. It is, that is right.

Mr. POE. Primarily *Heckler*.

Mr. MORTON. *Heckler v. Chaney*.

Mr. POE. I will read one statement to you in the *Heckler* decision. It says, prosecutorial discretion generally is nonreviewable, "except where the agency conscientiously and expressly adopts a policy that is so extreme that it represents an abdication of its statutory responsibilities." That is in the case of *Heckler v. Chaney*. My opinion is that that comes into play in this case.

There are 900,000 drunk drivers arrested in the United States a year, approximately, arrests. Would you agree with me or not if we decided, well, that is just so many people we just can't get around to prosecuting all those drunk drivers, we are just going to use our discretion and prosecute only drunk drivers who kill people? Would that encourage drunk driving or would it diminish the drunk driving in this country? Do you think that would have any factor on anybody else out there who wants to drive drunk?

Mr. MORTON. I think that analogy works only if you take it to an extreme, and I don't think that is the case here.

Mr. POE. I am just asking about drunk drivers. Do you that I would encourage more drunk driving if we just gave them all a pass?

Mr. MORTON. I think—listen, Mr. Poe, I was a career Federal prosecutor.

Mr. POE. I know your background. I just want you to answer my question. I only have limited time so don't just keep talking so that we don't get an answer. Do you think that would encourage—there are a lot folks who like to drink and drive and one reason they don't do it is because somebody might just arrest them and put them in jail. But if we told them, hey, you are not going get arrested unless you kill somebody, that would encourage drunk driving in the United States, just like it would encourage, if you gave a pass on these 20 conditions of people who are here illegally, you can stay if your wife a pregnant for example. If we gave them a pass on all of that, that would encourage more people to come here and try to fit in one of these categories so if they got arrested they would meet the discretion of your office and let them go.

That is my problem with this memo, and I think it encourages the unlawful conduct, whether you want to call it criminal or civil, it encourages people to come here and stay here illegally. So I would hope that Congress would deal with this issue. I think Congress has to legislatively deal with the issue of prioritizing if we do, rather than expecting the Director like yourself to decide who wins, who loses, who gets to stay, who is got to go home.

I wish we had more time to talk, I yield back.

Mr. MORTON. Could I just, Mr. Chairman, just address two quick points? On the question of statutory authority for prosecutory discretion I would refer you to Title VI, section 202, that does empower the Secretary of Homeland Security to set enforcement priorities and policies for the Department.

And on your other point of if something is a pass, I agree if it gets to an extreme, yes, that could be the case, but that is not what we are doing here, none these people are—this is not about giving anybody who falls within a particular category a complete pass or pardon.

Mr. POE. Well, if I may, one question, it is 300,000 people. That sounds like a lot of folks to me that we are talking about.

Mr. MORTON. But a very important point is we are not going to be administratively closing 300,000 cases. All we have said is that we will review the pending docket for cases that might warrant prosecutorial discretion. I think it is going to be a far, far smaller number than 300,000.

Mr. POE. In 6 months give us back the statistics.

Mr. MORTON. Be happy to.*

Mr. GALLEGLY. The Chair yields to the gentlelady from California, Ms. Waters—Ms. Jackson Lee of Texas.

Ms. JACKSON LEE. Mr. Morton, this is an important hearing and I always take comfort or at least delight in acknowledging your prosecutorial background and history and also your heritage of understanding the history of immigrants and that immigrants by and

*The Subcommittee received the following reply from ICE in response to Mr. Poe's question: **ICE response:** ICE will provide the statistics to the Committee in April 2012.

large come to the United States for better opportunity. And even in 2011 I think we still have the values that many around the world admire.

So I think it is important that we have a thoughtful, firm and forceful policy. Needless to say, every time I have an opportunity I am going to suggest that we have comprehensive immigration reform. We are the instructors, we provide the guidance for the Administration, any Administration, whether it be Republican or Democrat, we certainly work together. But you cited a congressional provision that talks about discretion that is tied it our laws and I say our, the laws that are written by the United States Congress signed by the President of the United States.

So we would be all better off if we had a road map such as the comprehensive immigration reform and allow people to access citizenship, and of course had a pathway for enforcement that dealt with the issues you deal with every day.

Let me ask some pointed questions if you can give me some pointed answers. It has come to my attention that the present Administration, Mr. Obama's administration, has deported over a million individuals. Can you answer that, sir?

Mr. MORTON. To date, yes, that is right.

Ms. JACKSON LEE. I understand that may be the largest number since a number of presidencies and Administrations, is that not correct?

Mr. MORTON. It is. Our overall enforcement efforts are at their highest as we have ever had as an agency.

Ms. JACKSON LEE. Are you using a lot of resources? When I say that, of course the ICE officers' compensation, overtime, this takes a lot of money.

Mr. MORTON. It does, our overall appropriation is $5.8 billion. For the enforcement and removal operations it is 2.8 billion, of which Congress directs us to spend $1.5 billion of that, over half of it, the identification and removal of criminal offenders.

Ms. JACKSON LEE. And the memorandum that was written, do you consider it a thoughtful memorandum?

Mr. MORTON. I do.

Ms. JACKSON LEE. Do you at the same time as the memorandum was issued engage with your regional ICE officers, those who head the regional officers, engage them all the time and listen to either their concerns or their input on this policy and other policies?

Mr. MORTON. Of course.

Ms. JACKSON LEE. And does the memorandum have an open door, is there a key that is given that literally says leave all—leave, everyone, is that—you take keys to the detention centers and provide an open door or the jail houses, provide an open door for everyone to leave; is that what the memorandum says?

Mr. MORTON. It doesn't.

Ms. JACKSON LEE. When your memorandum was issued, a family and those of us who feel passion for this issue see a lot of tragic stories. And one in particular was a gentleman who was in a detention facility in Houston who was crying when he heard the news on the television. Obviously he was not a criminal defendant. He was teacher who had been hauled away from his classroom. I have said to many others before you about my concern about raids and

that kind of thing. He was crying because he thought had he a opportunity. Unfortunately, someone decided to be swift on their actions and a man who taught for 20 years, whatever his misstep was, no past priors, et cetera—this was a teacher—was swished out of the detention center, and now he is in a different light and different position in terms of having to get him back. I would say to you that that aggravates me because I believe in a discretion situation that case could have been reviewed.

So I ask the question of the vitality of our security under this memorandum. We just saw the tragedy regarding the Saudi ambassador. Do you feel in any way that you are diminishing our responsibility on the issue of criminal aliens or the protection of the homeland under this memorandum?

Mr. MORTON. I don't. National security and criminal offenders remain our highest priorities, as I think is very clear from our efforts to date. Whatever criticisms you may have of the agency, our focus on criminal offenders isn't one of them. And we, as I mentioned in my opening remarks, will have removed about 216,000 criminal offenders this past fiscal year. That is by far the highest number of criminal offenders ever removed by the agency. We are going to remain focused on that, and again it is not something that—it is common sense, it is good policy, but it is not something that the agency cooked up out of thin air. It is a direction from the Congress to us in both our 2008 and 2010 appropriations.

Mr. GALLEGLY. The time of the gentlelady has expired. Mr. Ross.

Mr. ROSS. Thank you, Mr. Chairman. My tact on this is a little different. Back in Florida where I come from there was the case of Abel Arango, you may remember, the gentleman from Cuba who came over in the nineties and committed an armed robbery and was sentenced and because of the Supreme Court case in *Zadvydas* they couldn't keep him for any longer than 6 months and he was released. Subsequently a couple of years later he shot and killed a police officer in Fort Myers, and they won't take him back to Cuba.

My concern about this is that you are obviously aware of these types of cases. In fact you are so much aware it is in one of your criteria factors to consider. It says one of the ones, probably the 16th one, whether the person's Nationality renders removal unlikely. So when you run across somebody whose Nationaliy, whether they be from Cuba or Iran or Cambodia or wherever, is it an automatic prosecutorial discretion because you can't do anything with them anyway?

Mr. MORTON. These are the hardest cases we have because, you know, we—the answer to your question is we err on the side of public safety. And so we will detain if the person is a big danger, even we can't remove. But your point of do we get to a point where we have to release that person as a matter of Supreme Court law, the answer is yes, we do. I wish that weren't the case, but that is the case, particularly with countries we have no diplomatic relations with.

Mr. ROSS. When you do, do you put them under an order of supervision?

Mr. MORTON. We do.

Mr. ROSS. And how does that work; is it like probation?

Mr. MORTON. It is. We ask people to come in—some people that we will put on a form of intensive supervision, others that we order to come in and report.

Mr. ROSS. If they violate the order, what is the downside? They are still not going to be deported, they will still be here.

Mr. MORTON. That is right. We have an inability with certain countries to effect removal. Cuba, the example you give, is the prime one.

Mr. ROSS. So what is the solution to that?

Mr. MORTON. Well, With recalcitrant countries; that is; countries who delay but ultimately it is a constant push to try to get them to take their people back. It is diplomatic pressure.

Mr. ROSS. What if we say we no longer allow visas from those countries, period?

Mr. MORTON. The law provides for that and that is the most useful sanctions with countries with whom we have relations. Cuba, however, is different story.

Mr. ROSS. How many of those would you say that are out there, of the total numbers that their countries won't take them back?

Mr. MORTON. There is about I would say 20 countries that are slow to take their nationals back and about four or five where it is close to impossible. Somalia, for example, a war torn country, it is next to impossible to carry out a removal to Somalia, extremely difficult. Cuba won't take them back. Vietnam will not take people back.

Mr. ROSS. And we continue to issue visas from those countries?

Mr. MORTON. In limited circumstances we do. We have launched an initiative, however, with the State Department on this exact point, to get to the point where certain countries, if we can't get an improvement, we are going to recommend to the State Department that visas cease to be issued.

Mr. ROSS. Your memo with regard to the exercise of prosecutorial discretion, is that as a result of a declining amount of appropriation that your agency is receiving? What is it a function of?

Mr. MORTON. No, our appropriation is at an all-time high. Both the President's request and the Congress' appropriation is at an all-time high. So it is not a function——

Mr. ROSS. You said it is the President's request to exercise prosecutorial discretion.

Mr. MORTON. No, the President's budget request was the highest ever requested and Congress' appropriation was the highest ever given.

Mr. ROSS. But you have more cases than you have ever had.

Mr. MORTON. That is right. But even with the appropriations we have, there are, depending on whose estimate you believe, there are between 10 and 11 million people here unlawfully. We can remove about 400,000.

Mr. ROSS. If we had a more secure border, if we had a more secure border, it would limit the amount of cases logically that you would be having?

Mr. MORTON. It would and I would note the Border Patrol's apprehension this year would be around 330,000 along the Southwest border, which is the lowest number in a very long time, and that is why in my opening remarks I highlighted the partnership that

we formed with the Border Patrol to improve border security. So for the first time we are working hand in hand with the Border Patrol to detain and remove a number of people that they apprehend, to bring ICE's power to bear along the border to improve border security.

Ms. LOFGREN. Would the gentleman yield.

Mr. ROSS. Yes.

Ms. LOFGREN. I had a question on the assertion you made. In the case where you have someone who cannot be deported because the country of origin will not accept return and you have got them on a probation scheme and they violate probation, can't you arrest them for the probation?

Mr. MORTON. We can bring people back into detention, but we are going to come back, we are going to constantly face the same set of requirements.

Ms. LOFGREN. What would it take to initiate a criminal prosecution in such cases?

Mr. MORTON. We can initiate criminal prosecution where people fail to comply. It is possible, and we do do that on occasion. I should note that in a very limited—if you are a schizophrenic murderer who is a danger no matter what, we will go to the extraordinary length of detaining. Even under the Supreme Court precedent we can do that. But what it means is that ICE detains and we have people in our detention literally for year after year after year and many of the——

Ms. LOFGREN. I thank the gentleman for yielding.

Mr. GALLEGLY. The time of the gentleman has expired. Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman. There is so much to learn about this system as it relates to undocumenteds and how we handle them. As I understand it, there are nearly 300,000 cases that are currently in removal proceedings, is that right?

Mr. MORTON. The active docket at the Executive Office for Immigration Review is over 300,000 cases.

Ms. WATERS. And if you did not set priorities and determine low priority, how long would it take you to take care of all these 300,000 cases, to—I guess it would be to adjudicate them.

Mr. MORTON. To adjudicate them—the adjudication is done at the Department of Justice but we are the prosecutors. For the non-detained docket the backlog is such that you are looking at many, many years before a non-detained case is heard and adjudicated.

Ms. WATERS. Five years, 6 years, 7 years, 8 years, 9 years?

Mr. MORTON. If you factor in the appeals to the Federal court which under the law can go all the way to the Supreme Court, it can take many, many years.

Ms. WATERS. Now help me to understand. Meanwhile the taxpayers are paying the cost for retention of everybody in these removal proceedings.

Mr. MORTON. The taxpayers pay for all removal proceedings, and for those detained they also pay for the cost of detention.

Ms. WATERS. So in setting priorities what could happen to low priority cases, how would they be disposed of?

Mr. MORTON. Very low under—a few things, if they are on the non-detained docket they just take many, many, many years to be adjudicated. In the instance where we would exercise prosecutorial discretion and not put them in the proceedings at all and administratively close their case, they would be in a legal limbo.

Ms. WATERS. It would be what?

Mr. MORTON. In a legal limbo. They would have no status. They would simply be like many of the 11 million people who are here unlawfully without permanent status, but not a priority for immediate removal.

Ms. WATERS. So how does—unless I missed something, how does determining that one falls in the low priority category, how does it help us to reduce the cost of the system and the time in the system?

Mr. MORTON. What it does is it allows us to focus more of our limited resources on the high priority cases. We have more cases than we can handle. That is the fundamental challenge that we are facing. And when we prioritize our efforts on criminals and border cases and people who are gaming the system and don't put as many low priority cases into the process, it is a zero sum game. We are able to remove more of the high priority cases. It comes at the expense of the low priority cases.

Ms. WATERS. I don't know if this has been discussed already. While we see that we have a problem with the numbers and how we are able to have the kind of proceedings that would do exactly what you want to do, dealing with the high priority cases, has there been discussion about expansion of the court to deal with these cases and what does it cost and who has demonstrated a willingness to pay that cost?

Mr. MORTON. This has been the subject of quite a bit of discussion and you note a very important point, which is ICE is but one part of the removal process. The Department of Justice is a critical part of it. You obviously have to have immigration judges to hear the cases, and there aren't sufficient resources to hear all of the cases that are in proceedings, which is why you have cases that go on for many, many years before they are even adjudicated as an administrative matter let alone go through the Federal court system for a hearing. But I would—although that is under the jurisdiction of this Committee, because the Department of Justice is under the jurisdiction of this Committee, the immigration judges and the adjudication function is not part of ICE or the Department of Homeland Security.

Ms. WATERS. So have you heard any discussion at all from either side of the aisle about the expansion of resources to deal with?

Mr. MORTON. I cannot speak to the Department of Justice's appropriation. I just don't know it well, so I don't want to make a misstep there. I will tell you that we have been discussing with the Department of Justice a reallocation of their resources so that more of the Department of Justice judge time is focused on the detained docket so that we can remove more people who are detained, and those typically are the people that are—I think we would all share a view—the high priority cases; namely, criminal offenders and people who have reentered the country illegally, border cases.

Ms. WATERS. With the expansion of resources, for those people who don't like the idea of setting priorities and determining the higher priorities and all of that, expansion of resources would be the alternative?

Mr. MORTON. That is right. I mean if you are talking about expansion to all 11 million people here in the United States unlawfully, it is a considerable expansion of resources. ICE's budget for enforcement and removal operations is about $2.5 billion for about 400,000, and that is not to count the other resources at CBP, CIS or DOJ.

Mr. GALLEGLY. The time of the gentlelady has expired. Ms. Lofgren for 30 seconds.

Ms. WATERS. I yield.

Ms. LOFGREN. I just wanted to briefly stand up for the immigration judges because they have a crushing caseload, and they—I know my former law partner in fact is—it is unbelievable workloads. I don't want anybody to assume from this discussion the immigration judges are dogging it. I mean there just aren't enough. If you compare the number of cases they are hearing with any other judge in any system you would see they are incredibly overloaded. I just thought it was important to note that.

Mr. MORTON. I agree with that in full.

Mr. GALLEGLY. I will stick with regular order. I can't let that statement go without at least making a comment on it. A lot of this is self-inflicted with all due respect. I can give you list of cases that have been continued 9, 10, 11 times arbitrarily and that in and of itself is justice delayed and we know what that means.

Ms. WATERS. Would the gentleman yield for a moment?

Mr. GALLEGLY. This will be the last time we get out of order. Yes, I would yield.

Ms. WATERS. You made a very serious accusation, you just said——

Mr. GALLEGLY. I didn't make an accusation. I made a statement.

Ms. WATERS. Okay, whatever, it was a statement, but your statement said that judges without due consideration arbitrarily make decisions to delay.

Mr. GALLEGLY. Yes, that is correct.

Ms. WATERS. That is what you are saying.

Mr. GALLEGLY. That is correct.

Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Director Morton, when you all conduct work site enforcement actions, and they are down 70 percent since the last Administration you seldom detain or remove the illegal workers. What is to keep them from walking down the street and getting another job?

Mr. MORTON. First of all, I don't completely agree with your initial statement. You are right that the number of administrative arrests is down considerably. The number of our work site inspections——

Mr. SMITH. I am going by administrative arrests because that, if it doesn't occur, it allows individuals, as I just said, to walk down the street and get jobs.

What is to prevent under your policies where you don't really remove or detain very many illegal workers, what is to keep them from walking down the street and getting another job?

Mr. MORTON. They can obviously—as you note, they can continue to try to find employment but what our response to that is what is keeping them from doing that is we are going after employers hammer and tong.

Mr. SMITH. You are going after employers but not the illegal workers. And as you just said they can get other employment. My point is those jobs should be going to unemployed Americans, not to illegal immigrants who happen to walk down the street. I assume you agree with that.

Mr. MORTON. I think where you and I—the difference is that I am trying to figure out how best to allocate the 400,000 or so removals I have, and I think it is better to focus on the criminals.

Mr. SMITH. That is not my question. I am simply pointing out the result of your policy is that a lot of unemployed Americans are not getting jobs that they otherwise might secure because illegal immigrants are walking down the streets and taking those jobs.

Next question, do deferred action—under your memos as I understand it, thousands or perhaps hundred of thousands of illegal immigrants might be eligible for deferred action. To the extent that they are granted deferred action, aren't they then eligible to get work authorization as well?

Mr. MORTON. A few things, under the prosecutorial discretion memo, particularly for the cases in court, it would be a different form of prosecutorial discretion. That would be in the form of administrative closure. But to your basic point, my understanding is that present law under regulations does allow someone to apply for work authorization?

Mr. SMITH. Isn't it reasonable to assume that a lot of those individuals will be granted work authorization.

Mr. MORTON. I don't think so. I think it will be quite narrow. But, as you know, ICE does not grant work authorization. That power is with a different part of the Department of Homeland——

Mr. SMITH. Do you think it will be a very small percentage who are granted work authorization of the individuals who receive deferred action?

Mr. MORTON. I think so. I think that is right.

Mr. SMITH. Well, I hope you more than think, that you can make sure that——

Mr. MORTON. Again, we do not have that power. That is not my responsibility. But, from what I understand, you can apply, but it is on a case-by-case basis, and I don't think CIS——

Mr. SMITH. I will take your word, and I hope you are right about a very small percentage that will get work authorization. Otherwise, they will be taking jobs that should go to unemployed Americans.

My last question is this: When you have individuals who have been detained in local jails, you all are called and asked if you want to continue to detain them. Most of the time—or many times—you do not seek a detainer, and these individuals are released into our communities. Do you have an idea how many people are released because of that decision?

Mr. MORTON. First of all, I think in most instances, we try to detain, and that is why we have removed so many people. Are there instances in which, for whatever reason, we do not issue a detainer or we don't follow through on a detainer? Of course, we don't pick up every single person. Can I give you an exact number here today? No, but I am happy to try to figure that out for you.

Mr. SMITH. If you could get that for me, that would be good.

Another figure I would like for you to confirm for me, the GAO says that approximately 25 percent of all Federal prisoners are illegal immigrants. I assume that that figure is accurate. If so, it is very disturbing because that is about five times their proportion of the population. So if you will confirm the second figure and then get me the estimated number of individuals who are released back into our communities. I think it is going to be in the hundreds of thousands and perhaps more. But I will wait for your figure on that as well.

Mr. MORTON. Might I offer—so just for the full context, I do think we have pretty good estimates on how many people are released from the prison system to the streets. That is different than a notice to ICE and then released. In many instances, we have no notice.

Mr. SMITH. Do you know what that figure is?

Mr. MORTON. I know that we have it. I think it is in the order——

Mr. SMITH. Do any of these people sitting behind you have the answer to the question?

Mr. MORTON. I don't think so. But we have a whole presentation on this. We spent a lot of time trying to figure it out because of our interest in secure communities, and I think we can give you a full——

Mr. SMITH. I look forward to that figure as well.*

Thank you, Mr. Chairman.

Mr. GALLEGLY. Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Director Morton, what input did the White House provide you in drafting the so-called prosecutorial discretion memos?

Mr. MORTON. My principal interaction was with the Department of Homeland Security, so I did not have a regular interaction with the White House on this.

Mr. GOWDY. Did you have an irregular interaction?

Mr. MORTON. No. As I noted earlier, there was involvement by the White House in this. This is Administration policy. And, as such, obviously, there was coordination between the departments.

Mr. GOWDY. So the memos would have been approved by the White House before you——

Mr. MORTON. The White House reviewed the memos.

Mr. GOWDY. Who else did you talk to?

---

*The Subcommittee received the following replies in response to questions asked by Mr. Smith:

Response: As discussed with Committee staff, DHS is in the process of responding to the Committee's November 4, 2011, subpoena. To the extent possible, DHS will provide a response to the Chairman's inquiries in its responses to the subpoena.

and,

Response: Please see DHS's December 12, 2011, submission in response to the Committee's November 4, 2011, subpoena.

Mr. MORTON. The usual—folks at the Department of Homeland Security, the Secretary, and her senior staff.

Mr. GOWDY. Any outside groups?

Mr. MORTON. Me, personally, no.

Mr. GOWDY. Do you have any knowledge of anyone——

Mr. MORTON. I don't. This was Administration policy. This was developed by ICE, Department of——

Mr. GOWDY. Who developed it?

Mr. MORTON. I did with the Secretary and the White House.

Mr. GOWDY. Well, now I am confused. So it was you, the White House, and the Secretary that developed this policy and drafted the memo. Who at the White House helped you draft the memo?

Mr. MORTON. No. We drafted the memo. And, as I indicated, this is Administration policy. There was involvement by the Department of Homeland Security and the White House.

Mr. GOWDY. Were any outside groups, any immigrant right groups consulted?

Mr. MORTON. Not to my knowledge.

Mr. GOWDY. Did you consult special agents within ICE before you issued——

Mr. MORTON. This particular policy is largely focused on the enforcement and removal operations. But the answer to that question on individual special agents, no. Obviously, the leadership of the Homeland Security Investigations, yes.

Mr. GOWDY. Why didn't you pursue a legislative remedy?

Mr. MORTON. I am not sure what you mean by that.

Mr. GOWDY. Did you talk to any Members of Congress and ask them to change the law to help you order your priorities?

Mr. MORTON. Well, Congress already gives us a fair amount in the way of instruction in our appropriation, as you may——

Mr. GOWDY. That is kind of my point. They did. And then it was ignored.

Mr. MORTON. No. Congress, in fact, told us very clearly that we were to focus first and foremost on the identification and removal of criminal offenders and gave us a direction on——

Mr. GOWDY. Do you think that was to the exclusion of everyone else?

Mr. MORTON. But that is not what we are doing. We remove—about half of the people we remove are criminals, and that is about what Congress told us to do. And the other half are noncriminals.

Mr. GOWDY. Do you think the head of the Drug Enforcement Administration has the legal authority to decriminalize certain categories of drugs?

Mr. MORTON. I don't believe that the head of the Drug Enforcement Administration has the power to change a Federal law.

Mr. GOWDY. Does she have the authority to just not pursue certain categories of drugs?

Mr. MORTON. Whole classes and categories, no. Does Michele Leonhart have the authority to emphasize certain kinds of drug prosecutions over others? Absolutely. Does she have individual discretion? Absolutely.

Mr. GOWDY. I am talking about just blanket immunity for certain categories of offenders.

Mr. MORTON. I don't believe the DEA would ever assert that authority, and we certainly don't.

Mr. GOWDY. Do you think the Bureau of Prisons has the authority to release certain inmates that are near the end of their time or even if they are not near the end of their time because they have budget constraints?

Mr. MORTON. I wouldn't say for budget restraints. From my past life as a prosecutor, in fact, they do have authority with regard to people who are very elderly, but that is pursuant to Federal law.

Mr. GOWDY. Right. You also have a memo about victims, witnesses, and plaintiffs. And if I understand that memo correctly, if you are a plaintiff in certain categories of civil litigation, you can escape prosecution and removal, is that correct?

Mr. MORTON. Not escape, no. It is simply on whether or not we would put you into proceedings during the pendency of your litigation. It is not a pass on deportation.

Mr. GOWDY. What if you were a defendant in a civil case?

Mr. MORTON. It is primarily focused on litigants pursuing legitimate civil rights complaints.

Mr. GOWDY. What if an American citizen has a legitimate complaint against someone who is a defendant in a civil case?

Mr. MORTON. And we were seeking to remove that person and their presence was necessary?

Mr. GOWDY. Yes. Is that covered by your memo?

Mr. MORTON. The memo doesn't specifically address that, although our practice—we will work with people to maintain someone in the country——

Mr. GOWDY. So your memo specifically addresses plaintiffs.

Mr. MORTON. It does.

Mr. GOWDY. And you say there might be an exception for civil defendants.

Mr. MORTON. I am not sure what you are getting at.

Mr. GOWDY. Well, what I am getting at is if one illegal immigrant sues another, can you avoid removal? Because then you have both a plaintiff and a——

Mr. MORTON. Under neither circumstance can you avoid removal. There is nothing in the memorandum that is about avoiding removal. It simply says, don't put someone who is the immediate victim of a crime, a necessary witness to a crime—

Mr. GOWDY. Or a plaintiff.

Mr. MORTON [continuing]. Or someone who is a plaintiff in a legitimate civil rights suit.

Mr. GOWDY. It is not just a civil rights suit. Is it not also landlords?

Mr. MORTON. What is that?

Mr. GOWDY. Is it just civil rights suits? It is not landlord-tenant disputes?

Mr. MORTON. No. It could be a landlord-tenant——

Mr. GOWDY. Right. So it is not just civil rights. It is other forms of civil litigation as well.

Mr. MORTON. That have to deal with vindicating personal rights that are recognized either by Federal or State law, that is right.

Mr. GOWDY. What about a medical malpractice case? Would that be covered also?

Mr. MORTON. No.

Mr. GOWDY. Why not?

Mr. MORTON. Because that is not what we are trying to cover.

Mr. GOWDY. What is the difference between landlord-tenant cases and personal injury cases?

Mr. MORTON. This was largely focused on trying to allow people to vindicate important civil rights.

Mr. GOWDY. Well, let me say this in conclusion, Mr. Chairman. Mr. Morton, I have great respect for what you do. I have great respect for your former job. The thing that disappoints me the most is, whether it is real or perceived, it is the politicization of the criminal justice system. That is what frustrates me. I hope that is not what is happening here.

Mr. GALLEGLY. The time of the gentleman has expired.

Mr. King.

Mr. KING. Thank you, Mr. Chairman; and, Director, I appreciate your testimony here.

Just to pick up a little bit, one of my curiosities that has emerged as I listen to your testimony and you talked about how the idea of prosecutorial discretion was developed by you, by the White House, and also by the Secretary. And so I would see that then as a new name at the White House, Cecilia Munoz. And also then I am going to say you, Cecilia Munoz, and Janet Napolitano would be the three principals I have in mind when I hear that testimony.

What was the genesis of the idea? Did one of the three of you present this? Or where did it come from originally?

Mr. MORTON. Well, first of all, it is important to remember the agency has issued prosecutorial discretion memoranda for as long as it has been around, including its predecessor agency. So the idea that this is something that we cooked up, is brand new, wouldn't be fair.

Mr. KING. Let me just suggest then—and I will pull this out of my memory. It seems about a year ago I remember reading news articles about the subject of this discretion, but it was addressed as the Department of Homeland Security looking to find a way to grant this as a blanket discretion rather than an individual discretion that you have spoken to today. Do you recall that dialogue being in the media roughly a year ago?

Mr. MORTON. I do. It wasn't about ICE in particular. But, yes, I do.

Mr. KING. Then so taking you back to that period of time, I would say that might be something new to talk about, a blanket prosecutorial discretion proposal. But where did the genesis of that idea come from?

Mr. MORTON. Well, I don't think that there was ever discussions at the Department of Homeland Security at the secretarial level for blanket amnesty or——

Mr. KING. Nor from the White House, Cecilia Munoz?

Mr. MORTON. Or from the White House that I am aware of. In fact, my understanding and my direct knowledge is that the Secretary is opposed to it. I am opposed to it, that we don't support administrative amnesty.

Mr. KING. There was a personality that was a driving force behind this concept. Is that yours? Or is it—you are a driving force

and then Cecilia Munoz came into this in that fashion? Or was it then initiated out of the White House and reflected back to you?

Mr. MORTON. No. I felt that we needed to clarify our prosecutorial discretion memoranda to support the earlier memorandum that I issued on our civil enforcement priorities. But this is Administration policy; and, obviously, as such, this was important to the Secretary and the Department and to the White House. And as the Secretary's letter——

Mr. KING [continuing]. Recognizes Administration policy, why?

Mr. MORTON. The Secretary's letter to the various Senators on this subject makes it clear that this Administration's policy is about coming up with a set of rational enforcement priorities when it comes to immigration enforcement. And that is what this is all about.

Mr. KING. Let me go in a little bit different way. And that is there was some discussion, questions from the other side about the resources needed to bring about enforcement. And your response was back to, if we were going to deport 11 or so million people, the resources that it would take.

But if we were just going to apply the resources at the border so that every interdiction that we come across could actually be prosecuted, have you looked at the resources necessary to have the judges, the prosecutors, and the prison beds in order to follow through with an ability to do 100 percent enforcement on the southern border?

Mr. MORTON. I have not, largely because the immediate responsibility for border control is with my sister agency, Customs and Border Protection. We support them with detention and administrative removal powers, but the basic responsibility is with CBP, not with ICE.

Mr. KING. Yes. And, as you said, you support and you are in that area and they do look to you as a—let me just say your connection that has to do with the national policy standpoint.

Have you come before Congress? Have you or are you aware of the Border Patrol asking for those resources to provide 100 percent enforcement on the border? I would think you would have to collaborate to come up with that number.

Mr. MORTON. I have not testified or come before Congress on CBP's appropriation. As I note in my earlier testimony, the President's request for ICE's budget is the highest it has ever been, and Congress has appropriated that money.

Mr. KING. If we had the ability to actually leverage full enforcement at the border, then it would be actually a deterrent effect.

Mr. MORTON. Absolutely.

Mr. KING. And we hear some testimony that goes all over the map, but we know we are not interdicting half of those that come across.

Another question: Illegal drugs that are interdicted at the border, are they up or down over the last 2, 3, 4 years?

Mr. MORTON. I believe the seizures that CBP is making are up.

Mr. KING. And deaths in the Arizona desert?

Mr. MORTON. I can't speak to that. That is really a CBP issue. I do know that CBP's apprehensions along the border are at record lows.

Mr. KING. So I would just suggest this question is in my mind, and that is that there are two ways to interpret the interdictions of CBP on the border. One of them is that there are fewer people crossing the border, and the other one is that they are stopping fewer people that are crossing the border in similar numbers. And I would ask you if you would pay close attention to the volume of the drugs that are being interdicted at the border as a better indicator of how much illegal border crossing is going on and looking at the deaths in the Arizona desert as another measure on that, those things are not—they aren't affected directly by whether or not there is a real focus on the interdiction at the border. I mean, the drugs are. The drugs are. And they are doing I think a lot of work to enforce the illegal drugs that are transported across the border. But I would suggest that that is a reliable indicator, and the deaths in the Arizona desert are a reliable indicator, and the interdictions of individuals just for border crossing may not be.

Thank you, Mr. Director.

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

Mr. Morton, thank you for your testimony today and thank you for coming in. I am sure we will be working together. At least as it relates to the issues you are dealing with, you have job security.

At this time, we will call up the second panel.

Mr. MORTON. Thank you, Mr. Chairman.

Mr. GALLEGLY. Our witnesses on panel two:

First, Mr. Chris Crane currently serves as the President of the National Immigration and Customs Enforcement Council, 118 American Federation of Government Employees. He has worked as an immigration enforcement agent for the U.S. Immigration and Customs Enforcement, known as ICE, at the Department of Homeland Security since the year 2003. In his capacity as an immigration enforcement officer, he has worked in the criminal alien program for approximately 5 years and has also served as a member of the ICE Fugitive Operations Team. Prior to his service at ICE, Mr. Crane served for 11 years in the United States Marine Corps.

Our second witness is Mr. David Rivkin. He is a partner at Baker & Hostetler here in Washington, D.C. Mr. Rivkin has a lengthy career, distinguished service under Presidents Ronald Reagan and George Herbert Walker Bush in the U.S. Department of Justice and the U.S. Department of Energy. He is a member of the Council on Foreign Relations. Prior to embarking on a legal career, Mr. Rivkin worked as a defense and foreign policy analyst. Mr. Rivkin earned his BSFS and M.A. at Georgetown University and his J.D. from Columbia.

Our third witness is Mr. Ray Tranchant. Mr. Tranchant is currently a Director at the Advanced Technology Center for Tidewater Community College located in Virginia Beach. His advocacy to reform or enforce immigration laws has achieved national attention. Mr. Tranchant graduated from the United States Naval Academy and flew the F-4J and F-14A aircraft during multiple operations, including the Iranian hostage crisis and the war in Lebanon. After retirement, Mr. Tranchant became an educator in the public schools of Virginia and an adjunct professor at Cambridge College. Mr. Tranchant received his B.S. and master's degree from Old Dominion University.

And our fourth witness today, Mr. Paul Virtue, is partner at Baker & McKenzie here in Washington. Prior to his law firm, he served as executive associate commissioner and general counsel of the U.S. Immigration and Naturalization Service. He also participated in drafting the immigration provisions of the North American Free Trade Agreement. Mr. Virtue earned his B.S. from West Virginia University and his J.D. from West Virginia University College of Law.

Welcome, gentlemen.

We have a situation here where we are likely to be called for votes in about a half hour, 35 minutes. So we will be particularly careful to try to stay within our time limits, and I appreciate all of you being here.

Mr. Crane.

TESTIMONY OF CHRIS CRANE, PRESIDENT, NATIONAL ICE COUNCIL

Mr. CRANE. Good afternoon, Chairman Gallegly, Members of the Committee.

While many of ICE's policies and practices concerning—I have chosen to devote my time today discussing the best practices——

Mr. GALLEGLY. Mr. Crane, is your microphone on?

Mr. CRANE. Thank you. Sorry about that.

When I last testified before the Subcommittee on July 25, 2011, I reported, among other things, that ICE enforcement removal officers and agents in the field alleged that unwritten directives from ICE headquarters had been issued nationwide ordering officers not to arrest aliens unless it was confirmed that the alien had received a prior conviction for a criminal offense. Aliens who cannot be arrested included but were not limited to ICE fugitives who had been ordered deported by a Federal immigration judge as well as aliens who had illegally reentered the United States after deportation, a Federal felony.

ICE officers and agents also allege that they were not permitted to arrest or even speak to confirmed or suspected illegal aliens encountered in the field during operations and were prohibited from running standard criminal records checks for wants and warrants.

First, I would like to thank Chairman Smith and his staff for working with the union regarding this matter after the July 25th hearing. Chairman Smith provided us with the opportunity to bring officers forward as witnesses. We were also able to turn over several internal ICE documents which appear to not only verify that these activities did in fact take place but also named several senior level ICE managers allegedly involved in issuing the directives nationwide.

Second, I would like to address the impact and effectiveness of these types of orders. I have never heard of any law enforcement agency in the Nation that prohibits its officers from even speaking to or interviewing individuals who are inside a house in which the officers are attempting to effect an arrest. From a law enforcement standpoint, what could be the possible benefit? The only purpose of an order such as this is to prevent officers from making arrests, which ICE leadership has allegedly stated is its goal.

However, these directives not only prevent the arrest of non-criminal aliens but also prevent the identification and arrest of very dangerous criminals, potentially individuals involved in terrorist activities. It not only prevents officers from talking to and arresting persons who may be wanted for crimes but also individuals who are being victimized and in need of assistance.

Certainly anyone can see that these practices are contrary to effective law enforcement practice and place the public at risk. Many officers will tell you that the majority of their best arrests, the arrests that most benefit public safety, come from unintended encounters with criminal aliens in the course of looking for a different target in the field.

Of course, these practices also place our officers at risk. Nothing that I could ever say here today can capture the dynamics as they unfold when a door opens and our officers enter a house that they have never been in before. It is dangerous. Officers don't know who is in the house or what they are capable of doing.

Problems often arise that require officers to remain in a house for extended periods. Officers on the scene must have the ability to provide for their own safety. They should never be prohibited from talking to people at the scene, conducting interviews as needed, running appropriate background checks, or even making additional arrests.

In terms of better utilizing limited resources, these types of practices clearly do not achieve that goal. As discussed earlier, arrest numbers for serious offenders will fall well below the potential as ICE prohibitions on speaking to aliens or running criminal records checks in the field will prevent the identification and arrests of many of the serious offenders. Ordering officers to walk away from and not arrest ICE fugitives and prior deports who have been located in the field is obviously a blatant waste of officer resources and undermines ICE's mission to enforce warrants of deportation and the Nation's immigration laws.

In conclusion, the inability of ICE officers and agents to perform their duties reaches far beyond the officer allegations that I have cited today. During the last 3 years, ICE officers and agents describe what many call a roller coaster of arrest authority that has changed from month to month, week to week, and, at times, from day to day. Officers, agents, and field managers express concern that effective law enforcement and public safety have taken a back seat to attempts to satisfy immigrants' advocacy groups.

We commend this Committee's efforts to bring oversight to the activities of this troubled agency and unconditionally commit our resources to this or any future inquiries made by this honorable body. Thank you for allowing me to speak on behalf of ICE employees.

This concludes my testimony, and I will answer any questions.

[The prepared statement of Mr. Crane follows:]

Statement by Chris Crane, President,

National Immigration and Customs Enforcement Council 118

of the

American Federation of Government Employees

Before the

Judiciary Subcommittee on Immigration and Policy Enforcement

October 12, 2011

Chairman Smith and Members of the Subcommittee:

Good afternoon. My name is Chris Crane and I am the President of the National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees (AFGE). The National ICE Council is the union representing approximately 7,200 ICE employees who work primarily in the Office of Enforcement and Removal Operations. I have been an ICE Immigration and Customs Enforcement Officer since 2003. During that time, I have observed many plans developed by this agency fail due to a lack of proper planning, resources, commitment and leadership.

In my capacity as an ICE Immigration Enforcement Agent (IEA), I have worked the Criminal Alien Program (also known as CAP) for approximately five years. CAP is a program within ICE which targets criminal aliens who were first arrested by local police or other Federal law enforcement agencies and charged criminally. I have also served as a member of an ICE Fugitive Operations Team whose primary function was to apprehend foreign nationals who had not departed the United States after receiving an Order of Deportation from a Federal immigration judge.

Union Vote of No Confidence

On June 25, 2010, ICE union leaders across the nation publicly issued a unanimous vote of no confidence in ICE Director John Morton. It is the only time that I am aware of in the history of ICE or the history of the legacy Immigration and Naturalization Service that officers, agents and employees of Enforcement and Removal Operations issued a no confidence vote in their leadership. To be clear, the no confidence vote has never been rescinded; we remain committed to it now more than ever before.

Mr. Morton's term as director also marks the first time that ICE employees have ever taken their personal vacations to stand in picket lines publicly protesting the actions of the Agency. ICE union leaders are in the papers and on television like never before in full public view speaking out about gross mismanagement and matters of public safety; warning that ICE and DHS are misleading the public.

It is my hope that these unprecedented acts by ICE employees across the nation have sent a loud, clear message that something is seriously wrong at ICE, and that the concerns voiced are not simply those of a small group of disgruntled employees, but instead reflective of thousands of men and women working at ICE who are committed to public safety and national security, and who by the very nature of their jobs are uniquely qualified to speak regarding problems within the agency and among its leadership.

As I stated in my congressional testimony on December 10, 2009, ICE is broken. Law enforcement and public safety are no longer the priority at ICE; politics are the priority at ICE.

Immigrant's advocacy groups are now brought in by ICE and DHS leadership to create ICE's law enforcement practices in the field as well as security protocols for ICE detention centers. ICE agents and officers in the field are excluded from essentially all pre-decisional involvement involving changes to law enforcement policies in the field. While we applaud public outreach, input from special interest groups and outside agencies cannot replace sound law enforcement practices and input from ICE officers and agents in the field.

Prosecutorial Discretion

The prosecutorial discretion memorandum issued by ICE Director John Morton on June 17, 2011 cannot be effectively applied in the field and has the potential to either completely overwhelm ICE's limited manpower resources or result in the indiscriminate and large scale release of aliens encountered in all ICE law enforcement operations. ICE and DHS appear to be scrambling to issue policies and press releases intended to satisfy complaints from immigrant's advocacy groups. ICE's new policies do not appear to improve law enforcement practices or better utilize ICE's resources. The prosecutorial discretion memorandum was written and issued to the field in such a rush that the actual training and guidelines for officers and agents in the field, which should always be issued prior to the implementation of new policy, haven't even been developed by ICE. However, by prematurely issuing the prosecutorial discretion memorandum, ICE met its true goal of putting out a public statement intended to satisfy immigrant's advocacy groups pressuring the Administration. No attempt was made by ICE Director John Morton to effectively implement the new law enforcement policy in the field leaving officers, agents and field management confused regarding how to apply the policy's directives in the field. This failure by ICE leadership has created uncertainty among its own agents and officers with regard to making arrests in the field, a situation that cannot exist in any law enforcement organization if it is to be effective.

The prosecutorial discretion memorandum sets forth approximately nineteen criteria for ICE agents and officers in the field to use in determining if an alien can be arrested or detained. Important to note, ICE Director John Morton will make the determination, not ICE officers and agents in the field, as to which aliens are to be arrested and detained. Director Morton's guidance will be enforced by ICE supervisors in the field, who will take disciplinary actions against officers and agents who do not adhere to the Director's guidelines. ICE agents and officers will follow orders, not exercise any true discretion. Claims by ICE that this memorandum gives field agents more discretion in the field are false. The purpose of ICE's prosecutorial discretion memorandum is to prohibit officers and agents from arresting individuals from certain groups, not to provide officers with additional law enforcement options in the field.

From an enforcement standpoint the biggest dilemma facing ERO officers and agents in the field may be how to apply the policy to the hundreds of thousands of aliens encountered each year, as

the prosecutorial discretion memorandum clearly implements a far more extensive and time intensive investigative process than has ever been utilized before by ERO. That is, if it can be assumed that ICE and DHS leadership actually intend to allow ERO agents and officers to properly investigate claims before an arrest is declined or a subject is released.

If responsible law enforcement focused on public safety is truly the goal, the approximately nineteen criteria established by the prosecutorial discretion memorandum must be investigated regarding any alien encountered by ICE who claims to meet one or more of the criteria, as each claim may prevent the alien's arrest or detention. Each investigation could require hours or days. Currently approximately 5,800 ICE Enforcement and Removal officers and agents nationwide man ICE detention centers across the country as guards; provide security and transportation to immigration courts nationwide; arrest, process and deport hundreds of thousands of aliens annually, removing approximately 370, 000 aliens from the U.S each year. The number of aliens encountered by ERO each year is staggering. No other law enforcement group handles more cases with fewer resources. These operations have already stretched ERO officers, agents and employees too thin; ERO does not have the resources to effectively support the new ICE prosecutorial discretion memo as it written. While ICE has informed the union that that the Agency has not conducted planning with regard to how ERO agents and officers will effectively apply the prosecutorial discretion memorandum in the field, ICE has been clear that the policy will be applied by its officers in every case. With removal numbers alone approaching 400,000 annually, this will be a daunting task for the handful of already overwhelmed ERO employees performing this mission.

If only one-quarter of the aliens removed each year by ICE claimed to meet one of the criteria outlined in the prosecutorial discretion memo and each claim required only one hour to investigate, this would require approximately 100,000 additional man hours each year. Of course ICE officers and prosecutors will tell you that investigations of this sort can at times require weeks, and that an estimate of one hour per case is probably unrealistic. ICE has not issued any type of direction to the field supporting an officer or agent's ability to hold a subject in custody until an investigation can be properly conducted and closed. Additionally, the question as to how officers and agents will substantiate these claims remains unanswered. For example, if an alien claims to be a high school graduate or attending college, ICE officers will need documentation substantiating those claims. However, schools will not provide ICE with high school diplomas or transcripts for students attending colleges or universities, so ICE will be dependent on the alien making the claim to provide supporting documentation. It is not known what protocols ICE will use to ensure diplomas, transcripts or other documentation provided as evidence are not fraudulent. As the usage of fraudulent birth certificates, immigration documents, social security cards and driver's licenses is prevalent among those illegally in the U.S., this task could prove especially difficult and time consuming. The prosecutorial discretion memorandum creates many complex obstacles for officers, agents and managers in the field,

many of which will never be effectively overcome. It is the union's opinion that this policy will drastically reduce the ability of agents and officers to effectively enforce U.S. immigration law and provide for public safety, and will only serve to increase the negative aspects of America's current immigration problems.

ICE Call-in letters

According to ICE it has implemented a pilot program in certain areas which mandates that ICE agents and officers not arrest or detain certain aliens arrested by local police. Instead, ICE agents and officers are required to mail letters to the aliens at the jail asking the aliens to self report to an ICE office after their release from jail. As no charging documents have been issued by ICE in this scenario, any alien who does not self report to ICE cannot in any way be held accountable for failure to report. As the only negative consequence results from actually reporting to ICE, as a rule aliens will not self report to ICE after their release from jail. If implemented nationwide, the use of call-in letters has the potential to result in the release of hundreds of thousands of criminal aliens with absolutely no accountability.

Claiming it is a better use of ICE's limited resources, ICE proposes that cases involving aliens who do not report to an ICE office after receipt of a call-in letter will be turned over to an ICE task force which will then attempt to locate and arrest the alien on the street. These claims are disingenuous at best as ICE managers know the resources do not exist to conduct manhunts of thousands of criminal aliens who did not self report, most of whom provided fake names and addresses during their initial encounter with local police and ICE officers, and who most certainly will be keenly aware of the need to allude law enforcement following their release from jail. The call-in letters will effectively serve only as a warning to aliens to run, and in doing so clearly disadvantages enforcement. As an enforcement policy it will obviously be completely ineffective and merely represents another attempt by ICE to avoid enforcing violations of U.S. immigration laws for political reasons, while simultaneously attempting to convince the public that ICE is taking some type of legitimate law enforcement action.

New ICE Detainers

Traditionally, ICE detainers were used by ICE officers and agents to alert prisons, local jails, courts and police to contact ICE before releasing specified aliens from jails or prisons to allow ICE the necessary time to take custody of the prisoner or inmate and process them for deportation. ICE reports that it has implemented a new pilot program in certain areas directing jails to simply release aliens not yet convicted of crimes, stating that ICE will now only take custody of aliens who have been convicted of a crime. As with the call-in letters, large numbers of criminal aliens will be released from jails into U.S. communities if these policies continue and are eventually implemented nationwide. Under previous policy, these same aliens would have been processed, charged, and at minimum required to appear before an immigration judge.

Field arrest procedures

Increasingly, ICE headquarters leadership refuses to put directives to supervisors, agents and officers in the field regarding law enforcement operations in writing. Orders and directives are given orally to prevent the activities of ICE's leadership from becoming public. Agents and officers in the field are frequently under orders not to arrest persons suspected of being in the United States illegally. At times, orders not to arrest certain groups include ICE fugitives, who have been ordered deported by an immigration judge, as well as individuals who have reentered the U.S. following deportation, which is a federal felony.

Agents and officers report that they are ordered not to run criminal or immigration background checks or even speak to individuals whom they reasonably suspect are in the U.S. illegally. These directives prevent officers and agents from enforcing U.S. immigration laws and prevent the apprehension of fugitives, felons and other individuals who may present a threat to public safety. Situations in which officers and agents are ordered not to run criminal background checks or ordered not to speak to suspect individuals create an especially high risk to public safety as agents may unknowingly walk away from individuals who pose a significant public threat such as murderers, rapists and individuals with terrorist ties.

Resources

While none of ICE's new policies claiming to better utilize the agency's resources actually seem to make any improvements in that area, it is important to note that ICE and DHS have grossly oversimplified ICE's resource shortages to support the Administration's focus on providing protections from arrest for many aliens illegally present in the U.S.

An accurate understanding of ICE's resources and their best usage cannot be captured by looking only at the number of aliens ICE is funded to remove each year – as ICE and DHS have done repeatedly in the media. ICE's workload can be highly unpredictable and fluctuates dramatically from office to office and from day to day. In conjunction with these increasing and decreasing workloads, the availability of ICE's resources and manpower also fluctuate from office to office and change from day to day. ICE agents and officers focus on the "worst of the worst," and make those cases a priority. However there are those days and situations in which time is available to process less significant cases and on those occasions it is in fact the most effective use of resources to do so. Every day will not lead to the apprehension of the nation's most wanted criminals for each and every ICE officer and agent nationwide. Those periods of time in which individual officers or agents only encounter lower priority cases cannot be captured in a bottle and saved for use on a different date when more high priority cases are abundant. Under those circumstances it is a highly efficient use of resources for that particular officer or agent on that particular date to process cases of lower priority. This type of prioritization maximizes work

performed by officers, maintains the proper focus and best utilizes ICE's day to day flow of changing resources; it also provides balanced enforcement of U.S. immigration laws.

Conclusion

In conclusion, if left unchecked, it is the opinion of ICE officers and agents in the field that the Administration's policies will lead to victimization and death within the U.S. that was otherwise preventable. These policies are not an exercise of prosecutorial discretion, but instead an absence of prosecutorial discretion and accountability. They are not law enforcement actions, but the opposite. These policies take away officers' discretion and establish a system that mandates that the Nation's most fundamental immigration laws are not enforced.

We commend this Committee's efforts to bring oversight to the activities of this troubled agency, and unconditionally commit our resources to this or any future inquiries made by this honorable body. Thank you for allowing me the opportunity to speak on behalf of our ICE employees.

This concludes my testimony, and I welcome any questions that you may have.

Mr. GALLEGLY. Mr. Rivkin.

TESTIMONY OF DAVID B. RIVKIN, JR., PARTNER, BAKER & HOSTETLER, LLP, WASHINGTON, DC

Mr. RIVKIN. Mr. Chairman, Members of the Committee, it is a pleasure to appear before you.

I think we can all agree that no President, no Administration can hope to expel every undocumented alien present in the United

States now, which is perhaps upwards of 11 million individuals. Human and financial resources to identify, apprehend, process, and probably deport millions of illegal aliens have been lacking for years; and, to some extent, so has also been the case of political will to do so. Now, in this environment, immigration enforcement, entities in both Democrat and Republican administrations performed as well as they could, given the available resources. Still, I think records show that millions of illegal aliens have been deported over the years. While many of them were persons convicted of serious nonimmigration-related criminal offenses, most deportees were not in that category.

The Administration's new policy unveiled in various ways, in addition to the memos that were discussed earlier, a number of letters from Secretary Napolitano to different Members of Congress, in my view is fundamentally different from this imperfect enforcement record of previous Administrations. This Administration has basically stated that, henceforth, deportation efforts would be focused solely on aliens with nonimmigration-related criminal records and no enforcement resources will be expended on other types of cases. That means, of course, that undocumented individuals who have avoided apprehension at the border and have not been convicted of serious nonimmigration offenses arriving into the United States will no longer face the prospect of deportation.

Far from merely prioritizing the use of limited resources, the Administration's policy effectively rewrites the law. It means that the vast majority of undocumented aliens no longer need to fear immigration law enforcement. It applies even to illegal aliens who are now in deportation proceedings.

Not to use defense of a term, but the President has, in effect, suspended operation of those laws with regard to a very large identifiable class of offenders. And my primary concern is not even the policy impact of that. But it clearly exceeds his constitutional authority and sets an extremely unfortunate record.

Now we have heard a lot about enforcement priorities; and, of course, we all recognize that Federal agencies do establish enforcement priorities because of a lack of resources. And particularly the case with law enforcement agencies, they do exercise prosecutorial discretion and the President can properly inform the exercise of such discretion. But that authority is not boundless.

While the President, for example, can legitimately decide in a post-9/11 environment most of the FBI's limited resources should be dedicated to the investigation and prosecution of terrorism cases, he cannot very well decree that no enforcement resources whatsoever, for example, be allocated to securities fraud or counterfeiting. The reason for it is very simple. Because the executive branch has exclusive license to enforce Federal criminal laws on our constitutional system, the President to say so would effectively decriminalize securities fraud and counterfeiting, derogating from the Federal statutes. And of course that is fundamentally violative of the constitutional requirements the President has to take care of, that the laws be faithfully executed.

And, by the way, the Framers did not include that imperative language by accident. Exactly 100 years before the Constitution came into effect in 1788, King James II of Britain was deposed in

large part because he claimed the legal right to suspend generally, or dispense with in individual cases, laws enacted by Parliament. The Framers knew this history very well and gave the President no discretion but to execute laws passed by Congress.

And as the Supreme Court has stated in a case called *Kendall v. United States* in 1838—quite a long time ago—the power to dispense with laws enacted by Congress has no countenance for its support in any part of the Constitution.

So, in my view, the Administration has effectively announced its intent to suspend and dispense with the immigration law. That suspension is every bit as broad as any attempted by the British monarchy and is equally illegal. The President is entitled to establish enforcement priorities, but his ultimate goal must be the implementation of a law enacted by Congress. If a President disagrees with this law, his sole recourse is to convince Congress to change it.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Rivkin follows:]

Written Statement

Oversight Hearing on

"U.S. Immigration and Customs Enforcement:

Priorities and the Rule of Law"

Before the

Committee on the Judiciary,

United States House of Representatives

David B. Rivkin, Jr., Partner
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

October 12, 2011

Rayburn House Office Building, Room 2141, 3:30 p.m.

Introduction

My name is David B. Rivkin, Jr. I am an attorney specializing in constitutional law at the firm of Baker Hostetler LLP and co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy.

I have a particularly keen interest in the structural separation of powers and have been involved professionally in a number of cases, both in and out of government, that have implicated these important issues. As the most recent example of my engagement with federalism matters, my colleagues at Baker Hostetler and I serve as outside counsel to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010. I am testifying today on my own behalf and do not speak either on behalf of my law firm or any of our clients.

Discussion

Immigration policy has been a much-debated issue, both at the national and state level, for a number of years now. The George W. Bush Administration tried, but failed, to enact a comprehensive immigration reform bill. The Obama Administration, while talking much about the need for reform, has not mounted a serious legislative effort in this area. Unfortunately, it has chosen a different path, whereby the President, solely on his own authority, sought to revise the existing immigration laws. In our constitutional system, however, it is Congress that has plenary constitutional authority to establish U.S. immigration policy and fundamental reform requires legislative action. The President cannot revamp immigration laws on his own, and his Administration's recent effort to do so, by announcing that it will seek deportation only for undocumented aliens who have committed non-immigration crimes in the United States, violates the separation of powers and is unconstitutional.

Of course, no President can hope to expel each and every undocumented alien now in the United States – perhaps upwards of 11 million individuals. Human and financial resources to identify, apprehend, process, and promptly deport millions of illegal aliens have been lacking for years and, arguably, so has been the political will to do so. In this environment, immigration enforcement authorities, under both Democratic and Republican administrations, have performed as best they could, given the available resources. Still, millions of illegal aliens have been deported over the years and, while many of them were persons convicted of serious criminal offenses, most deportees were not in that category.

But Obama's new policy, announced over the last several months, is fundamentally different from the admittedly imperfect immigration enforcement records of previous Presidents. The Administration has stated that, henceforth, deportation efforts will be focused solely on

aliens with criminal records and no enforcement resources will be expended on other types of cases. Undocumented individuals who have avoided apprehension at the border and not been convicted of a serious offense since arriving to the United States will no longer face the prospect of deportation, the most basic means of immigration enforcement.

Far from merely prioritizing the use of limited resources, the Administration's policy effectively rewrites the law. It means that the vast majority of undocumented aliens need no longer fear any immigration law enforcement. This applies even to those illegal aliens who are now in deportation proceedings. Limiting the possibility of deportation in this manner eliminates entirely any deterrent effect the immigration laws have, and also states plainly that those laws can be ignored with impunity. The President has, in effect, suspended operation of those laws with respect to a very large and identifiable class of offenders. This clearly exceeds his constitutional authority.

Federal agencies can, of course, establish enforcement priorities because Congress rarely appropriates adequate monies to allow perfect enforcement of any federal scheme, which may not be possible in any case. Law enforcement agencies like Immigration and Customs Enforcement ("ICE") therefore properly exercise "prosecutorial discretion" in deciding which offenses to investigate and prosecute. That discretion ultimately resides in the President and allows him to establish priorities – properly informed by his own policy preferences – on at least two levels. First, a President can determine to devote more resources to a particular problem – human trafficking or white collar crime, for example – with the inevitable result that other federal statutes or areas of concern – organized crime, say – will be less vigorously pursued and enforced. This is entirely lawful and appropriate. Presidents are elected for the very purpose of establishing such priorities.

Second, law enforcement officials must make determinations in particular cases whether and how to direct their efforts. For example, under the manual governing United States Attorneys, federal prosecutors must consider whether there is a sufficient federal interest before pursuing a particular case. This involves considerations such as the nature and seriousness of the offense, the potential deterrent effect on others, the defendant's previous record, alternatives to criminal prosecution, overall likelihood of success, and established law enforcement priorities. This enforcement discretion is also fully supported by the President's constitutional authority.

That authority, however, is not boundless. While the President can, for example, legitimately decide that, in the post-9/11 environment, most of the FBI's resources should be dedicated to the investigation and prosecution of terrorism cases, he cannot decree that no enforcement assets whatsoever would be allocated to securities fraud or counterfeiting cases. Because the Executive Branch has the exclusive license to enforce federal criminal laws in our constitutional system, this would effectively decriminalize securities fraud and counterfeiting, derogating from the federal statutes that prescribed such activities.

In this regard, the Constitution provides that the President "shall take care that the laws be faithfully executed," and the Framers did not include this imperative language by accident. Exactly one hundred years before the Constitution came into effect in 1788, Britain's king James II was deposed in no small part because he claimed the legal right to suspend generally, or dispense with in individual cases, laws enacted by Parliament.

King James was a Roman Catholic and hoped to benefit his co-religionists by issuing a "declaration of indulgence" suspending operation of the religious penal laws Parliament had enacted against Roman Catholics and non-Anglican Protestants. James pressed the point in the

face of near universal opposition throughout the English political nation, and he was promptly turned out in favor of his Protestant daughter and son-in-law, William and Mary.

Parliament's anger was not merely a product of religious bigotry. Admitting of a suspending or dispensing power would fatally warp any balance between executive and legislative authority. A legislature has no power to speak of if the Executive, whether king or President, can simply decide not to enforce the laws that it has enacted. Thus, both the suspending and dispensing powers were declared illegal in the English Bill of Rights. The Framers knew this history well and gave the President no choice but to execute laws passed by Congress. As the Supreme Court stated in 1838, in a case called *Kendall v. United States*, the power to dispense with laws enacted by Congress "has no countenance for its support in any part of the constitution."

President Obama has effectively announced his intent to suspend or dispense with the immigration law. This is a suspension as broad as any attempted by the British monarchy, and it is equally illegal. The President is entitled to establish enforcement priorities, but the ultimate goal must always be implementation of the law enacted by Congress. If the President disagrees with that law, he must convince Congress to change it.

Mr. GALLEGLY. Thank you very much, Mr. Rivkin.
Mr. Tranchant.

TESTIMONY OF RAY TRANCHANT, DIRECTOR, ADVANCED TECHNOLOGY CENTER, TIDEWATER COMMUNITY COLLEGE

Mr. TRANCHANT. Thank you.

As I can tell, the current position on illegal immigration by the Obama administration—and I am gleaning this from press releases and all that I can read about it—is that there are three things. He is for amnesty with a secured border to slow down the flow; promotion of the DREAM Act that somehow translates to a 14th Amendment right for children; and amnesty with a path to citizenship that is undefined at this time. This all sounds like a plan with no details or like a wish list until another election.

The American leadership must either continue to enforce the laws that the current executive branch selectively ignores or encourage a movement to change them. After all, laws are nothing. Enforcement is everything.

Amnesty diminishes the allegiance of the immigrants who follow the legal process. It questions our approach to national security, increases crime, promotes tax evasion, and has public health challenges, of course. Currently, there are millions of people with no fingerprints on record, no IDs, birth records, health records, visas, passports. This causes confusion and worry during a great recession.

During the Great Depression in 1932, more people left the country than immigrated. Hopefully, history doesn't repeat itself again.

It hurt the U.S. when my hero, Ronald Reagan, favored amnesty for illegal immigrants during the Cuban boat crisis in 1986. But let me finish. It caused all the havoc that Castro intended in a much smaller scale than today. Fidel cleaned out the jails and allowed Cubans to board boats, encouraged them to leave in a risky attempt to gain a better life 90 miles away. After all, times were tough in Cuba back then. There were a million immigrants that we took in in 1986, a number far less than the estimated 14 million—I disagree with the other figures—14 million today that seek amnesty.

Once we waved that magic wand, they were not required to speak English. They did not have to have knowledge of our government. Reagan's rationale then was covered under the 1980 Refugee Act. They were boat people. They were "refugees." He couldn't just let them die. I agree. If they were sent back to Cuba, who knows what would have happened.

So in the past few years, former President Fox of Mexico promoted a similar move. He encouraged the northern part of Mexico to "seek their fortune" by crossing the border. Today, President Calderon is more cooperative with the United States—we know that from hearings—to stop the flow, but narco terrorism is his biggest challenge and ours as well. Last year, 3,000 Mexicans were murdered no more than 300 feet from the U.S. border. It gravely affects the United States as well, not to mention the Border Patrol agent who was shot and killed during the last Christmas holiday.

These agents risk their lives daily protecting a broken system. I watch TV, just like you. I watch shows like Border Wars on Nat Geo and other reality shows, and I am shocked at how undermanned these people are.

Can the United States Government do a better job securing the border? Listen, sure it can. For example, take Area 51 in Nevada. It is a secure governmental site the size of a small state. I have seen it, and it is impenetrable. Unwelcome visitors there will be stopped and arrested in the name of national security.

My parents were immigrants. They had to speak English for safety reasons in the factories and coal mines. They had to pass a citizenship test, stay out of trouble, have a public health record, birth record to verify their age and lineage, pay taxes on all their earnings, and had total buy-in on the American Dream.

People who break in and come illegally don't possess the same buy-in. I just don't believe it.

Immigration and Customs Enforcement continues to prioritize enforcement of the laws by the hottest crisis of the moment. They are getting support deporting more criminals, sure, but are still unable to keep on top of these numbers.

My late daughter Tessa and her friend Allison Kunhardt were killed in Virginia Beach by a repeat DUI offender, an illegal with a fake driver's license from Florida. He was handed off many times and was not a priority call to ICE for deportation. Tessa has a grandmother as well. Her name is Anita Carson from Chihuahua, Mexico. Tessa's "Noni" was an immigrant who worked on B-17s during World War II in San Diego. And I will tell you this. She is appalled that migrants would get the same rights to citizenship by sneaking across the border. She is Hispanic. The Hispanics I know generally are concerned about their America as well and worry that the current Administration focuses on potential Hispanic boats and not about American Hispanic safety and prosperity.

Once again, these and many more victims of crimes committed by illegals were lost in the justice system, sometimes invisible or awaiting under a deportation order. There are many, many more stories like this. In sanctuary cities, ICE doesn't even get a call, which is another problem driven by politics. So how long will it be until America finds a fair solution to this?

Just one mention, finally, Sunday, on November 6th, there will be a national day of remembrance for victims of illegal immigrants in cities all over America. The gatherings will pay homage to those who have lost their lives to the hands of illegal foreigners to show in silence in candlelight vigils that they will never be forgotten.

I want to quote one thing before I close. In 1965, the United States Congress enacted a law that stopped putting a ceiling on immigration. 1965. It was in conjunction at the same time with the civil rights movement. After all, why would we put a limit on bringing people into our country? That was the whole idea of the law.

And here is what Senator Kennedy said, God rest his soul: The bill will not flood our cities with immigrants. It will not upset the ethnic mix of our society. It will not relax the standards of admission. It will not cause American workers to lose their jobs.

Well, I am sorry. He was wrong. So we are in a little bit of a pickle here, aren't we? We can't send them back. It costs too much to keep them. It costs $100 a day. Of course, a plane ticket would cost $200, wouldn't it? Back home.

Thank you, and I will answer any questions that you have.

[The prepared statement of Mr. Tranchant follows:]

Statement by Mr. Ray Tranchant
Director
Advanced Technology Center
Tidewater Community College

Can Amnesty Solve America's Immigration Woes?

As I can tell, the current positions on Illegal Immigration by the Obama Administration are:

- Amnesty with a secured border to slow down the flow,
- Promotion of the Dream act that somehow translates to 14th amendment rights for children,
- Amnesty with a path to citizenship that is undefined at this time.

This all sounds like a plan with no details; a "wish list" until another election. American leadership must either continue to enforce the laws that the current Executive Branch selectively ignores, or encourage a movement to change them. After all, laws are only as effective as our commitment to enforcement them. How long can we wait?

Amnesty diminishes the allegiance of the immigrants who followed the legal process. It questions our approach to National Security, increases crime, promotes tax evasion, and has public health challenges. Currently, there are millions of people with no fingerprints on record, have false or no ID's, birth records, health records, visas or passports. This causes confusion and worry during a Great Recession.

During the Great Depression in 1932, more people left the country than immigrated. Hopefully history doesn't repeat itself!

It hurt the US when my hero, Ronald Regan favored amnesty for Illegal Immigrants during the Cuban Boat Crisis of 1986. It caused all of the havoc that Castro intended in a much smaller scale than today. Fidel cleaned out the jails and allowed Cubans to board boats, encouraging them to leave in a risky attempt to gain a better life, just 90 miles away. After all, times were tough in Cuba.

There were a million immigrants in 1986, a number far less than the estimated 14 million Illegals seeking amnesty today. Once we waived a magic wand, they were not required to speak English or even have knowledge of how our government works. Regan's rationale then was covered under the 1980 Refugee Act; boat

people were "refugees." He couldn't just let them die, and if they were sent back to Cuba, who knows what would have happened.

In the past few years, former President Fox of Mexico promoted a similar move, encouraging the Northern part of Mexico to "seek their fortune" by crossing the border. Today, President Calderon is more cooperative with the United States to stop the flow, but Narcoterriorism is his biggest challenge. Last year 3,000 Mexicans were murdered no more than 300 feet from the US border. It gravely affects the United States as well, not to mention a Border Patrol agent who was shot and killed during the past Christmas holiday.

These agents risk their lives daily protecting a broken system. I watch TV reality shows like "Boarder Wars" on National Geographic and am shocked at how undermanned they are. Can the United States Government do a better job securing the boarder? Sure it can.

For example, take Area 51 in Nevada. It is a very secure government sight the size of a small State. I've seen it and it is impenetrable. Unwelcome visitors there will be stopped and arrested in the name of national security.

My parents were immigrants. They had to speak English (for safety reasons in the factories and coal mines), pass a citizenship test, stay out of trouble, have a public health and birth record to verify their age and lineage, pay taxes on all of their earnings, and had total buy-in to the "American Dream". People who "break in" and come illegally can't possibly have the same "buy in".

Immigration and Customs Enforcement (ICE) continues to prioritize enforcement of the laws by the hottest crisis of the moment. They are getting more support, deporting more criminals, but are still unable to keep on top of the numbers.

My late daughter Tessa and her friend Allison Kunhardt were killed in Virginia Beach by a repeat DUI offender, an Illegal with a fake driver's license. He was handed off many times and was not a priority call to ICE for deportation. Tessa has a Grandmother, Anita Carson from Chihuahua, Mexico. Her "Noni" was an immigrant who worked on B-17's during WWII in San Diego. She is appalled that migrants would get the same rights to citizenship by sneaking across the border. *The Hispanics I know generally are concerned about their America as well, and*

worry that the current administration focuses on potential Hispanic votes, and not about American Hispanic safety and prosperity.

Once again, these and many more victims of crimes committed by illegal immigrants are lost in the justice system, sometimes invisible or waiting under a deportation order. There are many, many more stories like this. In Sanctuary Cities, ICE doesn't even get a call, which is another problem driven by politics. So how long will it be until America finds a fair solution?

Ray Tranchant lives in Virginia Beach and is a Professor at Cambridge College and an Administrator at Tidewater Community College.

Mr. GALLEGLY. Thank you Mr. Tranchant.
Mr. Virtue.

TESTIMONY OF PAUL VIRTUE, PARTNER, BAKER & McKENZIE, LLP

Mr. VIRTUE. Thank you, Mr. Chairman, Ranking Member Lofgren, Members of the Subcommittee. Thank you for the opportunity to appear before you today to share my perspective on the important role prosecutorial discretion plays in the enforcement of

our Nation's immigration laws. The views I express today and in my written testimony are my own. I am not speaking on behalf of my law firm or any of its clients.

Having witnessed immigration enforcement firsthand from the Reagan administration to the Obama administration, I have to say that the emphasis on removal of noncitizens and the dedication of the officers responsible for immigration enforcement have never been higher. But even with the impressive statistics recited by Director Morton here today, immigration enforcement resources are not limitless. To get the most of those resources in terms of protecting the border, promoting national security, and ensuring public safety, the executive branch has to establish enforcement priorities. Every Administration has done so.

The process of establishing enforcement priorities necessarily involves identifying characteristics that makes some cases a higher priority than others. There are trade-offs. For example, the decision by INS during the 1990's to focus on the removal of aliens who have been convicted of crimes resulted in a lower priority and fewer resources being applied to work site enforcement operations.

Even at the seemingly high rate of 400,000 removals per year that we heard today, judgments have to be made on a case-by-case basis and under reasonable guidelines to ensure that the goals of homeland security border protection and public safety are met. The uniform application of those guidelines law through enforcement decisions is, in my view, as important to good government as the authority to arrest, detain, charge, and remove noncitizens.

The authority of law enforcement agencies to exercise discretion in deciding what cases to investigate and prosecute under existing civil and criminal law is fundamental to the American legal system. Every prosecutor and police officer in the Nation makes daily decisions about how to allocate enforcement resources based on judgments about which cases are the most egregious, which cases have the strongest evidence, which cases should be settled, and which cases should be brought forward to trial, for example. Border Patrol agents, immigration officers, and DHS attorneys must do the same every day.

The Supreme Court has made it clear that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion.

In *Heckler v. Chaney,* the Supreme Court said: An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the executive branch not to indict, a decision which has long been regarded as the special province of the executive branch, inasmuch as it is the executive who is charged by the Constitution to take care that the laws be faithfully executed.

On June 17 this year, John Morton, Director of Immigration and Customs Enforcement, issued two memoranda to agency personnel clarifying the role of prosecutorial discretion and immigration agen-

cy enforcement actions. Neither document represents in any respect a change to existing law or a departure from permissible policy but instead they clarify responsibilities inherent in the exercise of prosecutorial discretion.

The first memorandum, entitled Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, builds upon and cites prior prosecutorial discretion guidance reaching back to 1976 and outlines the nature of prosecutorial discretion, the personnel in power to exercise that discretion, and both positive and negative factors to consider in deciding whether to proceed with immigration enforcement action.

The second memorandum, which is essentially a reminder that the prosecution of certain victims, witnesses, and plaintiffs is against ICE policy.

On August 18, 2011, in a letter to Senator Dick Durbin and 21 other Senators, DHS Secretary Janet Napolitano announced a new process for implementation of the June 17, 2011, prosecutorial discretion memoranda. The letter included a background two-pager that summarized DHS efforts to date of establishing enforcement priorities and described the role of a new interagency working group tasked with reviewing individual cases in removal proceedings.

None of these memoranda established categorical decision to refrain from enforcement, and each of them cites the need to make these decisions on a case-by-case basis.

Thank you again for this opportunity. I welcome your questions.

[The prepared statement of Mr. Virtue follows:]

STATEMENT OF
PAUL W. VIRTUE, ESQ.

PARTNER, BAKER & MCKENZIE, LLP

OVERSIGHT HEARING ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT:
PRIORITIES AND THE RULE OF LAW

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

Wednesday, October 12, 2011 – 3:00 p.m.
Room 2141 Rayburn House Office Building

Introduction

Chairman Smith, Ranking Member Conyers and Members of the House Judiciary Committee, I am honored to testify before you today on the important issue of immigration enforcement priorities. Having served as Deputy General Counsel, Executive Associate Commissioner and General Counsel, respectively, of the United States Immigration and Naturalization Service (INS) I have a good understanding of the challenges facing United States Immigration and Customs Enforcement (ICE) in managing its resources to promote homeland security and public safety through the enforcement of federal laws governing border control, customs, trade and immigration.

In June 2010, John Morton, the director of ICE, explained that given present funding levels, the maximum capacity of the removal system is about "400,000 aliens per year, less than 4 percent of the illegal alien population in the United States."[1] Recognizing that resources are finite, the Department of Homeland Security (DHS) and ICE, like their predecessor agencies before them, must prioritize the use of those resources in order to fulfill their mission.

The process of establishing enforcement priorities necessarily involves identifying characteristics that make some cases a higher priority than others. In other words, there are necessarily some trade offs. For example, the decision by INS during the 1990s to focus on the removal of aliens who have been convicted of crimes resulted in a lower priority and fewer resources being applied to worksite enforcement operations. The same is true today. Even at the seemingly high rate of 400,000 removals per year, judgments have to be made on a case-by-case basis to ensure that the goals of homeland security, border protection and public safety are being met.

My testimony will focus on the legal authority for the exercise of prosecutorial discretion in the removal of noncitizens and the reasonableness and legality of the recent DHS guidelines for the exercise of that discretion. While the focus of this hearing is the memoranda issued last summer by ICE and DHS, these guidelines are only the latest in a long tradition of outlining the factors to be considered in exercising prosecutions discretion. The uniform application of such guidelines to law enforcement decisions is, in my view, as important to good government as the authority to arrest, detain, charge and remove non-citizens.

[1] *See* Memorandum From John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf. This memo was reissued in March 2011, to include a disclaimer that it does not create any enforceable rights or benefits. *See* Memorandum From John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement (March 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf

Prosecutorial Authority

The number of criminal aliens who have been removed has risen sharply in recent years. According to the DHS Office of Immigration Statistics presented in Table 1, the number of criminal aliens removed from the United States has gone from 73,298 in 2001 to 168,532 in 2010. These numbers constitute a 138% increase in the removal of criminal aliens over the past decade. Criminal aliens made up 44% of all removals in 2010, the largest portion of removals since 2002.[2]

Despite the significant allocation of resources Congress has dedicated to immigration enforcement activities, the funding has limits and the agency must make thoughtful decisions about prosecutorial priorities in order to make effective use of available resources. The President has repeatedly announced that the Administration's interior enforcement priority is the prosecution and removal of immigrants who have committed serious crimes. To ensure that this and other prioritization decisions are followed and implemented, it is not uncommon for law enforcement agencies within and outside of the immigration context to provide clear guidance and training to its officers about the exercise of prosecutorial discretion. This type of guidance is not unusual. In fact, numerous memos have been issued by the DHS and its predecessor INS over the years setting forth agency priorities and seeking to provide officers with clear guideposts for carrying out those priorities. The challenge is often in ensuring that such guidance is understood and followed on the frontlines of immigration enforcement.

The authority of law enforcement agencies to exercise discretion in deciding what cases to investigate and prosecute under existing civil and criminal law, including immigration law, is fundamental to the American legal system. Every prosecutor and police officer in the nation makes daily decisions about how to allocate enforcement resources, based on judgments about which cases are the most egregious, which cases have the strongest evidence, which cases should be settled and which should be brought forward to trial. Border Patrol agents, Immigration officers and DHS attorneys must do the same every day.

The Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[3] The Court writes:

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and,

---

[2] See testimony of Ruth Ellen Wasem, Specialist in Immigration Policy, Congressional Research Service, October 4, 2011, Committee on Homeland Security, Subcommittee on Border and Maritime Security, data from DHS Office of Immigration Statistics Yearbook, 2010, table 38.
[3] Heckler v. Chaney 470 U.S. 821, 831 (1985).

> indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S.Const., Art. II, § 3.

[470 U.S. 831, 832]. It bears noting that the Supreme Court cares so deeply about administrative discretion and expertise in this area that it invoked it in a case involving the FDA's decision to not regulate at all the drugs used to execute a human being.

Since its enactment in 1952, the Immigration and Nationality Act has given the Attorney General and more recently the Secretary of Homeland Security prosecutorial discretion to exercise the power to remove foreign nationals. In 1959, a major textbook of immigration law wrote, "Congress traditionally has entrusted the enforcement of its deportation policies to executive officers and this arrangement has been approved by the courts."[4] Generally, prosecutorial discretion is the authority that an enforcement agency has in deciding whether to enforce or not enforce the law against someone. In the immigration context, prosecutorial discretion exists across a range of decisions that include: prioritizing certain types of investigations; deciding whom to stop, question and arrest; detaining an alien; issuing a notice to appear (NTA); granting deferred action; agreeing to allow the alien to depart voluntarily; and executing a removal order.

Prosecutorial discretion is normally exercised on a case-by-case basis with respect to individuals who have come into contact with law enforcement authorities. The government can also exercise prosecutorial discretion by allowing individuals from explicitly defined groups that it does not consider to be enforcement priorities to ask affirmatively that discretion be applied in their case. Examples include Temporary Protected Status and Deferred Enforced Departure. This exercise of executive authority is not contrary to current law, but rather a matter of the extension and application of current law to contemporary national needs, values and priorities.

Guidance for the Exercise of Prosecutorial Discretion

As early as 1975, legacy INS issued guidance on a specific form of prosecutorial discretion known as deferred action, which cited "appealing humanitarian factors." The initial guidelines used by INS to grant deferred action status, originally known as "nonpriority enforcement status," came to light in the midst of INS attempts to remove

[4] Charles Gordon and Harry N. Rosenfield, *Immigration Law and Procedure*, Albany, New York: Banks and Company, 1959, p. 406.

former Beatle John Lennon for a British drug conviction.[5] Those granted deferred action may obtain work authorization upon a showing of need, 8 C.F.R. § 274a.12(c)(14), but they receive few other benefits. They have no family reunification rights, and the status is subject to withdrawal at any time. Significantly, a grant of deferred action will not allow a person to adjust their status to that of a lawful permanent resident and also will not cure any prior accrual of unlawful presence for purposes of the three- and ten-year bars on future admission imposed by INA § 212(a)(9)(B).

The executive branch, through the Secretary of Homeland Security, can exercise discretion not to prosecute a case by granting "deferred action" to an otherwise removable non-citizen. The former INS had guidelines in the form of "Operations Instructions" regarding the granting of deferred action. These guidelines provided for deferred action in cases where "adverse action would be unconscionable because of the existence of appealing humanitarian factors."[6] Currently, deferred action is considered to be "a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process."[7]

DHS has also described deferred action as an exercise of agency discretion that authorizes an individual to temporarily remain in the U.S. Regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority" (for enforcement action).[8] DHS has stated in recent correspondence with the Hill that factors to be considered in evaluating a request for deferred action include the presence of sympathetic or compelling factors.

Deferred action does not confer any specific status on the individual and can be terminated at any time pursuant to the agency's discretion. DHS regulations, however, do permit deferred action recipients to be granted employment authorization upon establishing an economic necessity to work.[9]

Deferred action determinations are made on a case-by-case basis, but eligibility for such discretionary relief can be extended to individuals based on their membership in a discrete class. For example, in June 2009, the Secretary of DHS granted deferred action to individuals who fell in to the following class: widows of U.S. citizens who were unable to adjust their status due to a statutory restriction (related to duration of marriage

---

[5] *See* Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L. Rev. 42, 42–49 (1976). Lennon escaped deportation (but based on judicial interpretation of the removal ground with which he was charged) and eventually became a lawful permanent resident. *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975).

[6] *See* (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii)(1975).

[7] *(See "Response to Recommendation #32, Deferred Action", August 7, 2007, at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

[8] 8 C.F.R. 274a.12(c)(14).

[9] *Id.*

at time of sponsor's death).[10] Congress subsequently enacted a change in the law to address this particular problem.

Another recent example of the exercise of such executive authority to a class is the grant of deferred action to VAWA (Violence Against Women Act) applicants whose cases were awaiting the promulgation of regulations by DHS. Nearly 12,000 individuals were granted deferred action in 2010 under this exercise of executive authority.

Another specific form of prosecutorial discretion is a stay of removal, which would be issued at a later step in the process, after a removal order. In practical effect, it can provide the same type of relief to noncitizens as deferred action. Though a discretionary stay of removal was traditionally used to give the noncitizen a reasonable amount of time to make arrangements prior to removal, or to forestall removal pending the outcome of a motion to reopen removal proceedings, it can be used more broadly, as rough equivalent to deferred action for persons who already have an order of removal.

In 1986, Congress made deporting aliens who had been convicted of certain crimes an enforcement priority. The Immigration Reform and Control Act of 1986 (IRCA) required the Attorney General "In the case of an alien who is convicted of an offense which makes the alien subject to deportation … [to] begin any deportation proceeding as expeditiously as possible after the date of the conviction."[11] Between 1988 and1996, Congress enacted a series of measures, including the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), expanding the definition of aggravated felons, creating additional criminal grounds for removal and substantially cutting back on relief from removal.[12]

Publicity surrounding a number of highly sympathetic cases that earlier would have generated a grant of relief prompted some 28 members of the House to write a letter to the Attorney General and INS Commissioner Doris Meissner calling attention to the existence of cases where removal was "unfair and resulted in unjustifiable hardship." The signatories included some of the leaders in adopting the restrictive 1996 legislation. They urged the adoption of guidelines for the use of prosecutorial discretion to avoid the hardship inflicted in such cases. 76 Interp. Rel. 1720 (1999).

In November 2000, Meissner issued a memorandum to INS field offices[13] with guidance on prosecutorial discretion, explaining:

---

[10] *See "Guidance Regarding Surviving Spouse of Deceased U.S. Citizens and their Children", June 15, 2009, at http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf.*

[11] P.L. 99-603, §701.

[12] Anti-Drug Abuse Act of 1988 (P.L. 100-690); Immigration Act of 1990, P.L. 101-649 (1990); Immigration and Nationality Technical Correction Act of 1994, P.L. 103-416 (1994); Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 (1996); Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Div. C (1996).

[13] Doris Meissner, Commissioner of the Immigration and Naturalization Service, *Exercising Prosecutorial Discretion*, memorandum to regional directors, district directors, chief patrol agents, and the regional and district counsels, November 7, 2000.

> Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders. * * * [Furthermore] INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.

77 Interp. Rel. 1661 (2000). The memo, a first draft of which I authored while INS General Counsel, identified factors to be considered in the exercise of prosecutorial discretion, including immigration history and status, length of stay in the United States, criminal history, humanitarian concerns, likelihood of ultimately removing the alien, likelihood of achieving the enforcement goal by other means, the effect on future admissibility, cooperation with law enforcement officials, community attention, U.S. military service, and available INS resources.

Meissner further stated that prosecutorial discretion should not become "an invitation to violate or ignore the law." She concluded by citing the "substantial federal interest" principle governing the conduct of U.S. Attorneys when determining whether to pursue criminal charges in a particular instance, and claimed that this principle was pertinent to immigration removal decisions as well. According to the memorandum, immigration enforcement officers "must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities?"

In an October 24, 2005 memorandum, then-ICE Principal Legal Advisor William Howard cited several policy factors on needs to exercise prosecutorial discretion. Another issue Howard raised was resources, as he pointed out that the Office of Principal Legal Advisor (OPLA) was "handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board) and 12,000 motions to re-open each year." He further stated:

> Since 2001, federal immigration court cases have tripled. That year there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000.

AILA InfoNet Doc. No. 11100463. (Posted 10/04/11).

Howard offered examples of the types of cases to consider for prosecutorial discretion, such as someone who had a clearly approvable petition to adjust to legal permanent resident status, someone who was an immediate relative of military personnel, or

someone for whom sympathetic humanitarian circumstances "cry for an exercise of prosecutorial discretion."[14]

In November 2007, then-DHS Assistant Secretary Julie L. Myers issued a memorandum in which she clarified that the replacement of the "catch and release" procedure with the "catch and return" policy for apprehended aliens (i.e., a zero-tolerance policy for all aliens apprehended at the border) did not "diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health-related cases and caregiver issues."

Current DHS Guidelines

On June 17, 2011, John Morton, Director of Immigration and Customs Enforcement, issued two memoranda to agency personnel clarifying the role of prosecutorial discretion in immigration agency enforcement actions. The two memoranda serve to clarify the role of prosecutorial discretion in immigration enforcement actions. Neither document represents in any respect a change to existing law or departure from permissible policy, but instead clarifies responsibilities inherent in the exercise of prosecutorial discretion.

The first memorandum, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," builds upon prior prosecutorial discretion guidance reaching back to 1976 and outlines the nature of prosecutorial discretion, the personnel empowered to exercise discretion, and both positive and negative factors to consider in deciding whether to proceed with an immigration enforcement action against an individual. The memorandum provides, in pertinent part, as follows:

> In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:
>
> • deciding to issue or cancel a notice of detainer;
> • deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
> • focusing enforcement resources on particular administrative violations or conduct;
> • deciding whom to stop, question, or arrest for an administrative violation;
> • deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
> • seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
> • settling or dismissing a proceeding;

[14] William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion*, memorandum to all Office of the Principal legal Advisor Chief Counsel, October 24, 2005.

• granting deferred action, granting parole, or staying a final order of removal;
• agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
• pursuing an appeal;
• executing a removal order; and
• responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

*****

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

• the agency's civil immigration enforcement priorities;
• the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
• the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
• the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
• whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
• the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
• the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
• whether the person poses a national security or public safety concern;
• the person's ties and contributions to the community, including family relationships;
• the person's ties to the home country and condition~ in the country;
• the person's age, with particular consideration given to minors and the elderly;
• whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
• whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
• whether the person or the person's spouse is pregnant or nursing;
• whether the person or the person's spouse suffers from severe mental or physical illness;
• whether the person's nationality renders removal unlikely;

• whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
• whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
• whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

• veterans and members of the U.S. armed forces;
• long-time lawful permanent residents;
• minors and elderly individuals;
• individuals present in the United States since childhood;
• pregnant or nursing women;
• victims of domestic violence; trafficking, or other serious crimes;
• individuals who suffer from a serious mental or physical disability; and
• individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

• individuals who pose a clear risk to national security;
• serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
• known gang members or other individuals who pose a clear danger to public safety; and
• individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

The second memorandum, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," locates the use of prosecutorial discretion within specific enforcement situations involving witnesses or victims of crimes who may be eligible for immigration benefits. This memo largely serves as a reminder to ICE personnel that it is generally against ICE policy to initiate removal proceedings against such persons, even if they are encountered as a result of programs such as Secure Communities.

As noted, neither memorandum changes any law, nor does either provide any new form of relief to persons here in violation of the immigration laws. The first, more general memo simply emphasizes that the exercise of discretion in determining whether to initiate or terminate an action must be guided by an understanding of existing agency priorities. The memo explains that limited agency resources require ICE personnel to consider whether prosecution of an individual case is consistent with the agency's priorities of promoting national security, border security, public safety, and the integrity of the immigration system. The memo does not dictate a particular result in any case or category of cases; instead it encourages ICE personnel to consider a wide range of positive and negative factors, to review charging decisions made by other agencies as appropriate, and to act affirmatively in appropriate cases. Thus, the primary effect of the memo, if followed by ICE personnel, will be to empower individual officers and attorneys to act in the best interests of the agency by limiting the prosecution of cases that do not fit within the agency's stated priorities, allowing the agency to focus more specifically on individuals who do fit within those priorities.

Similarly, the second memo on treatment of victims and witnesses creates no new requirements or obligations for ICE personnel. Instead, the memo serves as a reminder of the special immigration benefits authorized by Congress for victims or witnesses of crime who cooperate with law enforcement and the possible conflict with Congress's purposes in authorizing those benefits that may occur if removal proceedings are initiated against such individuals.

On August 18, 2011, in a letter to Senator Dick Durbin and 21 other Senators, DHS Secretary Janet Napolitano announced a new process for implementation of the June 17, 2011, prosecutorial discretion memorandum. The letter included a background two-pager that summarized DHS efforts to date at establishing enforcement priorities and described the role of a new interagency working group tasked with reviewing individual cases currently in removal proceedings as well as issuing guidance for the introduction of new cases:

> On August 18, 2011, DHS unveiled a new interagency process to ensure that resources are focused on the Administration's highest enforcement priorities. As part of this process, an interagency team of DHS and Department of Justice (DOJ) officers and attorneys, including representatives from throughout DHS and from the Executive Office for Immigration Review (EOIR) and the Office of Immigration Litigation at DOJ, will identify low-priority removal cases that should be considered for an exercise of discretion. This review will be conducted on a case-by-case basis and will consider cases that are at the various stages of

Mr. GALLEGLY. Thank you, Mr. Virtue.

Mr. Crane, in testimony that you made back on June 25 of this year, ICE union leaders issued a vote of no confidence in ICE Director John Morton. You state now that the ICE union remains more committed than ever in no confidence. Can you explain that in brief detail?

Mr. CRANE. Yes, sir. I think there are a lot of issues that don't necessarily pertain to this hearing, but I think there are probably things that maybe the Members should know.

ICE is 208th in employee job satisfaction and morale. It is a horrific place to work. Retaliation is rampant. The treatment of U.S. citizens that work for that agency in terms of my experience is worse than what illegal aliens have ever alleged. I mean, literally, you know, acting like bullies to females, pregnant mothers, putting children in hospitals, you know, pregnant mothers. It is an ugly place to work.

And Director Morton has done zero to make that change, to turn that around. It is just an awful place to work.

Now in terms of measures such as this, there is definitely a feeling in the field amongst our officers and agents that he does not have our back, that his intentions are not to create an agency with the intention of having stronger law enforcement but, instead, catering to special interest groups.

And if you look at practically every single significant enforcement policy ICE has put out in the last 3 years, the union has been excluded from every single policy. That means our officers and our agents and our employees, they are excluded from everything. Performance-based detention standards alone, the agencies worked on for 3 years, but they have refused to bring the union in to bring our expertise to the table; and the end result has been, 3 years later, we don't have a performance-based detention standard. And the one that we do have is more dangerous perhaps than anything that we have had in the past. It places the lives of detainees at more risk as well as officers at more risk than our previous standards did. So we have a lot of reasons why we still stand behind that vote of no confidence.

Mr. GALLEGLY. Thank you, Mr. Crane.

Mr. Rivkin, the 3- and 10-year bars—something I am very well aware of from 1995—to the admissions of aliens who had formerly been in the U.S. illegally were designed to combat visa overstays and provide a real sanction for the violation of our immigration laws. The Administration is now trying to get around the 3- and 10-year bars that were signed into law by President Clinton by simply paroling in place illegal immigrants with Green Card applications so they never have to leave the U.S. Do you consider this a blatant attempt by the Administration to disregard an act of Congress?

Mr. RIVKIN.That is correct, Mr. Chairman. And, again, particularly undertaken in the broader context.

And it is interesting—we had a lot of discussions again earlier about prosecutorial discretion. What troubles me the most on not just the memos but clear statements by the Administration that amount to a proposition that lower-priority cases—I am mostly cit-

ing the letter by Secretary Napolitano—no resources would be spent on lower-priority cases.

And, again, it is easy to fix this problem. All the Administration would have to do is to step forward and say, no, it is not true. That could be done by the President. It could be done by Secretary Napolitano. We are going to spend most of our enforcement priorities on these high-priority cases, but enough would be spent on other categories. That is a legitimate prosecutorial discretion.

Saying we will spend no resources—going back to my analogy about decriminalizing counterfeiting and securities frauds—saying we are going to spend no resources on lower-priority cases is not any kind of prosecutorial discretion I can recognize. It is a suspending power and is profoundly unconstitutional and very troubling.

Mr. GALLEGLY. Thank you very much, Mr. Rivkin.

Mr. Virtue, if you were at ICE, would you have approved the Morton memo? And why didn't the Clinton administration issue such memos, opening up administrative amnesty to millions of illegal immigrants?

Mr. VIRTUE. Mr. Chairman, I don't necessarily agree with the premise that this is opening up amnesty for millions of illegal immigrants. There was a memorandum establishing parameters for prosecutorial discretion that was issued during the Clinton administration. It was issued by Commissioner Meissner in 2000, in fact, in response to a letter from Members of Congress, asking that such parameters be developed in order for discretion to be exercised in appropriate cases.

Mr. GALLEGLY. Well, I see my red light is on, and I am going to respect it. But I have to respectfully question the definition of amnesty, with all due respect.

Ms. Lofgren.

Ms. LOFGREN. Yes. Thank you.

I think I will take up where Mr. Gallegly left off.

Mr. Virtue, you were—and it is good to see you again. I remember when you were with the Department and Ms. Meissner was the Commissioner and we had a lot of back and forth at the time, not always a positive one on the part of the Committee.

But you have heard the testimony, that the suggestion is that no enforcement resources will be expended on these cases and, therefore, this is very different than past efforts that didn't cause any problem. Is that your reading of Mr. Morton's memo?

Mr. VIRTUE. No, it is really not. I just respectfully disagree with that representation about the three memos, actually. But I just have to question why the Morton memo would include some 20 different factors for consideration if the decision had been made by the Administration simply to focus all resources on the removal of criminal aliens and none on any other removal actions. That could have been a one-page, a half-page memorandum.

Ms. LOFGREN. In your written testimony, you talk about the 1996 immigration law that expanded the grounds of removal and substantially eliminated the ability of immigration judges to grant a relief from removal on a case-by-case basis. Do you think it is fair to say that the elimination of the judicial authority to grant relief was responsible for the kinds of cases of so-called unjustifiable

hardship that was referenced in the letter, the bipartisan letter that Congressman Smith signed when you were general counsel?

Mr. VIRTUE. Yes. I have no doubt about that, that it was, in fact—the restrictions were a product of the 1996 act that created exactly some of those compelling cases that we were being asked to address.

Ms. LOFGREN. So it would be correct then—or you will tell me if this is incorrect—that the letter that Mr. Smith signed and Mr. Sensenbrenner signed asking the Administration when you were general counsel to issue prosecutorial discretion guidance was actually asking the Administration to use its inherent authority to alleviate unacceptable hardship that resulted from those 1996 changes in the law?

Mr. VIRTUE. Well, that is right. There would seem to have been a clear understanding on the part of Mr. Smith and the authors of the letter that the Administration did have—that the executive does have that prosecutorial discretion and that there are appropriate cases in which it should be exercised.

Ms. LOFGREN. Now since I have been a Member of the Judiciary Committee the entire time I have been in Congress and certainly since 1996, I don't recall that we have made any changes to the act that provides meaningful discretion to the immigration judges since the 1996 act. Are you aware of any?

Mr. VIRTUE. No, I am not.

Ms. LOFGREN. So the widespread agreement that some deportations were unfair and resulted in unjustifiable hardship—that is a direct quote from the letter—would not be changed in terms of what the judges could do about those cases.

Mr. VIRTUE. No, that is right. The law simply hasn't changed in that regard since 1996.

Ms. LOFGREN. Now one of the things that I was interested in—and I am someone who has expressed concern, frankly, about the level of removals when we have failed to reform the system that everybody says is broken—and I think most people do—that it would be better instead of just barreling down on enforcement to actually fix the problems in the law that are creating some of these problems.

But the memo actually talked about fairness to the immigrant—I mean the letter that Mr. Smith sent. But the memo that Mr. Morton sent doesn't talk about fairness to the immigrant at all. It just talks about public safety and priorities from a law enforcement point of view. Isn't that correct?

Mr. VIRTUE. Yes. And that is my understanding of the purpose of the memo, was to exactly establish those priorities for—on the enforcement side.

Ms. LOFGREN. So they would not actually—this memo wouldn't be responsive to Mr. Smith's request for leniency. It is actually a law enforcement priority memo.

Mr. VIRTUE. Exactly. And in keeping with a relatively long tradition, dating back to 1976, of issuing such guidance to officers, yes.

Ms. LOFGREN. Well, I think that is very helpful.

I am just going to make one comment. I see my time is almost through, but I would like to ask unanimous consent to put into the record the transcript from our hearing on the HALT Act.

And I note that, at that time, Mr. Crane promised me twice to get me names of individuals in the Department who he had alleged had ordered the law not to be followed.

I heard today in his testimony that he had had meetings—and I am calling them secret meetings because it was the first that I heard about them, was during the testimony with the majority.

Honestly, since I was promised and we called over to the union yesterday to find out where was this information and was told it wasn't forthcoming, I don't believe you, Mr. Crane, because you did not live up to what you said you would do. And I would just ask the majority—not on the spot because, obviously, this isn't the right forum—but if there is information that is being kept, that is inappropriate. And I would certainly hope that after this hearing we might have our counsels sit down and see what kind of secret documents have allegedly been provided.

And with that, I yield back Mr. Chairman.

Mr. GALLEGLY. Without objection, that will be part of the record of the hearing.*

[The information referred to follows:]

*The inserted material is excerpted from the printed record of the Subcommittee's hearing held on July 26, 2011 on the "HALT Act." The hearing, in its entirety, can be accessed at: http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67575/pdf/CHRG-112hhrg67575.pdf.

Excerpted Material from hearing held on July 26, 2011 on the "HALT Act"

With that, I would yield to the gentleman from Texas, the Chairman of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Gallegly.

Mr. Crane, let me direct a couple of questions to you. You mentioned the unprecedented vote, I think, 13 months ago. It was a vote of no confidence in the ICE officials. Have you seen any action by this Administration since that vote of no confidence to change your mind about this Administration and its apparent unwillingness or intentional desire to not enforce some immigration laws?

Mr. CRANE. No, sir. I think, from our perspective, things are actually getting worse. I think that the most recent policies kind of point that out.

Mr. SMITH. What do you mean, specifically? Why are things even worse than 13 months ago?

Mr. CRANE. Well, I think, you know, issues like the prosecutorial discretion memo, I think those, you know, present some real obstacles for us. We see them as being purely political in nature. The agency, when they issued that policy, didn't even issue guidelines or training to the field to let people know how to enforce it. It was just kind of a knee-jerk reaction to satisfy certain groups.

Mr. SMITH. Now you mentioned that you feel that there are, in fact, orders not to arrest some individuals, some illegal immigrants. Why do you think that is the case? Do you have evidence of that?

Mr. CRANE. I don't know if we can actually give you physical evidence of it. We could possibly give you witness statements, officer statements from the field. ICE has gone to a system where they hardly put anything in writing. Everything is done verbally, even the directives coming from headquarters, because they don't want anything slipping out to the media. They don't want the public to see what they are doing behind closed doors.

So our officers are absolutely being told on operations you can't run background checks. You can't run criminal checks. You can't run immigration checks. You can't talk to anyone when you go out in the field.

If you have a target to arrest and you walk into a house—and this individual was convicted of drug distribution and you walk into a house, and he is in there with five other individuals, all sleeping on the floor, all with pockets full of cash, you can't talk to anybody. Get your target and get out of the house.

Mr. SMITH. Do you think there are some ICE agents who would be willing to testify as to what you have just said before a hearing of this Subcommittee, or would they lose their job?

Mr. CRANE. They will definitely ruin their careers if they do it. ICE is a horrific place for retaliation. That is something that we have been talking about since 2009 when I gave my first testimony. The internal investigations are corrupt. Our management officials, they really lack integrity, and I don't think—I would certainly be willing to ask, sir. But we would be asking a lot for them. They would be putting their whole careers on the line.

Mr. SMITH. Okay. Perhaps there will be some way for us to get their testimony and still protect their identity. And if so, we will pursue that with you because I think that is incredibly damaging comment about this Administration and certainly reinforces the need for us to pass legislation to try to counter that mindset, that

unwillingness to enforce the laws or unwillingness to deport individuals.

Because the result of all that is that a lot of Americans may lose their lives, may be injured. You don't know what the consequences are. And that actually takes me to my next question to Ms. Vaughan.

Do you feel that Administration policy has already resulted in some innocent Americans losing their lives and in other innocent Americans being unnecessarily injured or maimed?

Ms. VAUGHAN. Yes, I do. I feel quite confident that that is the case, not just Americans, but also immigrants as well. There was one case up near where I live in Massachusetts of a woman and her 4-year-old son who were murdered by an illegal alien who had been arrested and charged with acts of violence on more than one occasion before, both in New York State and in Massachusetts, and who was not detected because he used false names.

If the Secure Communities Program, for example, had been in place, he would have been detected. And I have heard from individuals who are in a position to know that that is a case that they would have prioritized, if they had known that he had been arrested.

But ICE is allowing States, effectively, to not participate in Secure Communities for political reasons. They have not required Massachusetts to participate, even though they have both the mandate and the authority to do so. So I believe that her life and her son's life, as does the district attorney, who is now trying to extradite that former illegal alien from Ecuador, also believes that it would have saved two lives in that situation.

Mr. SMITH. And I assume that there are dozens, if not hundreds or thousands, of similar cases across the country where crimes were committed by individuals who should not have been allowed to remain in our country.

Ms. VAUGHAN. Definitely. Their family members often write to me and ask what can be done.

Mr. SMITH. Okay. Thank you all for your testimony.

I yield back, Mr. Chairman.

Mr. GALLEGLY. I thank the Chairman.

From Puerto Rico, my good friend Mr. Pierluisi?

Mr. PIERLUISI. I will yield my time, my turn to Congresswoman Sheila Jackson Lee.

Mr. GALLEGLY. Ms. Jackson Lee?

Ms. JACKSON LEE. Let me thank my very——

Ms. LOFGREN. If I may, Mr. Chairman? That was my mistake, and I don't think Mr. Pierluisi needs to yield his time. Ms. Jackson Lee should be recognized before Mr. Pierluisi.

That is my mistake.

Mr. PIERLUISI. I appreciate that very much.

Mr. GALLEGLY. Very good.

Ms. LOFGREN. My error.

Ms. JACKSON LEE. Well, I thank both of my colleagues, and I thank Mr. Pierluisi for being such a distinguished colleague and friend. We all have overlapping Members, and I thank the Ranking Member for his courtesies.

And I thank the Chairman for his courtesy, and I yield back.

Mr. GALLEGLY. I thank the gentlelady.

The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman.

With all due respect to Pedro Pierluisi, I am going to yield some time to Zoe Lofgren.

Thank you, sir.

Mr. GALLEGLY. The gentlelady from California?

Ms. LOFGREN. Well, thank you, Mr. Conyers.

I did have a question, Mr. Crane, for you. You are under oath, of course, and you indicated that unnamed individuals would be fearful of coming forth to identify orders that might constitute misconduct. But you are here today, and I am wondering if you can tell the Committee who in ICE gave those directions?

Mr. CRANE. I am not prepared to give you those names right now, ma'am. I could not. But——

Ms. LOFGREN. Well, if you won't give us the names, I don't believe what you are saying is true. I mean, you are here——

Mr. CRANE. I will get you the names, ma'am.

Ms. LOFGREN. You are known.

Mr. CRANE. I will get you the names.

Ms. LOFGREN. I have another question for you. We are conducting not an oversight hearing, but a hearing on this bill. In your testimony, you specifically comment on the actions of the Secure Communities Advisory Committee.

Now it is my understanding that the bylaws of this Committee require confidentiality of the proceedings to ensure fair process and debate of these issues. How is it that you are able to publicly comment on these activities, when all the other Members of the Committee are prohibited from doing so?

Mr. CRANE. I don't know that that is completely true, ma'am. I know that there were——

Ms. LOFGREN. So you are saying the bylaws permit you to talk about what is going on?

Mr. CRANE. What I would like to say is that there was actually at the last meeting that we attended, there was some very strong language about our ability to go out and talk publicly about what was being said, that we couldn't give out the actual recommendations and findings.

So that is my understanding of the process. They have——

Ms. LOFGREN. Okay. Well, we will look into this further then and not in the Committee, as that is not my understanding. But we will come to an understanding of it.

I would like to ask you, Colonel Stock, you know, I come from Silicon Valley, and we have a tremendous number of really amazing inventors, engineers. Some of them come from countries where there is tremendous backlog in petitions, for example, India or China. And because Silicon Valley and the technology world is multinational, if you are going to be successful in business, you sometimes have to travel.

Many of these individuals get advance parole if they have to go over to Europe or someplace to do something for their company. If the HALT Act was passed, how would these scientists and engineers go and attend to the business overseas and get back in?

Mr. GALLEGLY. Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I would turn first to Mr. Crane and ask you, thinking of the exchange with Director Morton as the previous panel, do you know of cases that are open-and-shut cases down in the near border area

that aren't prosecuted due to a lack of prosecutors, judges, and prison beds?

Mr. CRANE. I am sorry, sir. I had a problem hearing you. Could you repeat the question?

Mr. KING. Yes. Do you know of cases that are essentially open-and-shut made cases that are not prosecuted on the southern border because of a lack of the ability to prosecute, lack of judges, or a lack of prison beds?

Mr. CRANE. Are you talking about criminal prosecution for entry and re-entry?

Mr. KING. And also for illegal drug smuggling.

Mr. CRANE. The drug smuggling, I can't really speak to, sir. But as far as entry and illegal re-entry, absolutely. They don't have the judges down there to support it, nor do we anywhere in the United States.

If I may, most of the cases that Director Morton spoke of out of those—I believe he quoted 10,000 prosecutions that we did last year. At least in our district, it pretty much has to be an aggravated felon for us to prosecute them. So while any person that re-enters the United States gets a felony and they can be prosecuted, we are not prosecuting those people. They are only convicted aggravated felons, for the most part.

Mr. KING. And would you have an estimate as to what percentage we are prosecuting?

Mr. CRANE. No, sir.

Mr. KING. Does anyone have that data?

Mr. CRANE. I do not, sir.

Mr. KING. Does anyone have that data?

Mr. CRANE. They are pretty stingy with the numbers for us.

Mr. KING. I am going to suggest that that data has to exist, that we would have the interdiction numbers, and those interdiction numbers would be a strong indicator.

I know that there are prosecutorial discretion cases involved here, too, a little bit off of what the primary subject has been. But I am boring in on this, that if we have such an ineffective prosecution that the perpetrators first get the message from ICE that if you aren't a threat to—let's say the political viability of the Administration is what it seems like to me—if you aren't a threat, we are not going to prosecute you. If you are committing a felony, we likely don't have the resources to prosecute you. So in both of these categories we hardly have any deterrent at all.

Would you agree with that statement generally?

Mr. CRANE. I absolutely agree with that. And, as I have said in my previous statements, when we go into jails oftentimes, illegal aliens approach us, volunteering, begging us to deport them from the United States because they know that they will avoid prosecution. They will avoid jail time. We will send them back to Mexico or Central America, South America, wherever they came from, and they will be back in our communities within a week or two committing the same crimes that they were before. That border is not shut down, I can promise you that, not when those folks are able to come back a week later and be in the middle of the United States, committing crimes and apprehended by the police again.

Mr. KING. And the deterrent effect. I remember standing in a border station on the Arizona border and asking the question, how many times do you see a unique individual come through here? The answer I got back was 37—actually, 38. We ran the numbers, and it came out of the database at 27 in either case, 27 times through the border and not having any enforcement. Does that number surprise you?

Mr. CRANE. No, sir. Not at all.

Mr. KING. Do you know of any bigger numbers than that?

Mr. CRANE. I don't know of any bigger numbers than that, but I definitely know about comparable numbers. I work on the interior of the country. We run the fingerprints. We get the recidivist hits. And they do. They come up with 20, 25 times that they have been apprehended at the border elsewhere and never even put into administrative proceedings and officially deported and only given voluntary removals.

Mr. KING. Do you ever get the sense when you go to work each day that you are handed a shovel to dig a hole and then fill it back up and punch out and go home?

Mr. CRANE. Yes, sir.

Mr. KING. I appreciate those answers to that.

And as the clock is ticking, I would just comment that my frustration is I don't know how you have morale with that kind of a scenario if you can't measure success. But I will turn to Mr. Rivkin; and thank you, Mr. Crane.

I will turn to Mr. Rivkin, your testimony about the constitutional question of this discretionary amnesty or administrative amnesty that we have. And your arguments are very clear to me and I think strong, that it is unconstitutional. What would you think of the prospects of litigating this?

Mr. RIVKIN. Unfortunately, most of the structural violations of separation of powers, I am not—it is not easy to gain standing. There are certainly insurmountable obstacles, but it doesn't mean that that is the right way to behave. And, again, it sets a horrible precedent.

Let me just say briefly again, in many respects, it is a self-inflicted wound. It is not just those documents that you were talking about which, with all due respect to Mr. Virtue, if you look at it, it clearly excludes more or less categorically whole segments of illegal alien population.

But when you read in every major newspaper that the Administration has given briefings, combined with letters by Napolitano, to various immigration rights groups which basically say the following categories of people would not be deported, that is a remarkable—I cannot think of any other instance in our history that the Administration has acted——

You think about, can you have an environment section of the Justice Department say, because of resource constraints, we are not going to enforce the Clean Water Act, we are not going to enforce the Clean Air Act? That would be unprecedented.

And, again, I would say the easiest way to fix it, at least in my opinion, is for the Administration to say, no, that is not what we are doing. We are going to deport individuals, maybe in small,

fewer numbers, who have not committed criminal—nonimmigration related criminal law violations. But they are not saying it.

So, in some sense, with all due respect to everybody here, it is in the open. You don't need to wait for a couple of years to see what the track record is. They are quite open about it, and I find it terribly disturbing.

Mr. KING. I thank you, Mr. Rivkin. And just in short conclusion, I would say that I appreciate all the witnesses' testimony and I would like to have time with Mr. Tranchant and we don't have, but your story is compelling as is your testimony. Thank you all, gentlemen, and I yield back.

Mr. GALLEGLY. I thank the gentleman. Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Tranchant, I was a prosecutor in my former life and I want to tell you how much my heart broke at your testimony. And the real cost is impossible to measure, as you so eloquently put it, and I will continue to think of you and your family.

Mr. GOWDY. Mr. Crane, were you here when Director Morton testified?

Mr. CRANE. Yes, sir.

Mr. GOWDY. Were you given, as the White House was, an opportunity to provide input into the so-called prosecutorial discretion memos?

Mr. CRANE. None, sir, whatsoever. We actually met with the agency the day before they released the memo and they didn't even tell us it was coming out. So we heard about it from the news like everyone else.

Mr. GOWDY. And what was the reaction of the line agents?

Mr. CRANE. Well, I think it is the same as it is today, sir. There is still a lot of confusion in the field. I know that Director Morton said that he had discussed this with field office directors. But I can promise you that that information is not making it to most of the rank and file officers out in the field as to what exactly we are supposed to do with this memo and how we are supposed to enforce it. So overall a lot of confusion and frustration.

Mr. GOWDY. I shared with him as I will with you, and I will also thank you for your service as I did him, you know, politics is in everything. You can't—you can try to avoid it. You can run from it, but it is in almost everything. I just wonder if it is not too much to ask that we keep it out of the criminal justice system as best we can. It just strikes me that there is a political undertone to these memos. Am I wrong? Is it devoid of any politization; is this strictly a law enforcement resource priority issue or are there some political undertones that perhaps haven't been addressed?

Mr. CRANE. Well, as a union I can tell you on behalf of our officers and agents that we definitely believe this has political overtones. When you exclude your law enforcement officers, the folks that have the technical expertise in the field from, any kind of development of policies and you bring in special interest groups, which I know Director Morton said that groups weren't brought in for this, or at least to his knowledge, but I know they have been for previous policies, that has been the environment that we have existed in, and it seems very evident to us that it is about satisfying those groups and not developing sound law enforcement poli-

cies. We could be an important part of that. We could make that happen, but the Administration and Director Morton and Secretary Napolitano are not interested in that. And when we look at things like the discretionary—I'm sorry, the prosecutorial discretion memo, it is not good law enforcement, especially when you put it out in the field and don't even tell us how to enforce it or give us any guidance.

Mr. GOWDY. I want to ask you about two things specifically. I was struck that there was a second memo that carved out exceptions for certain categories of civil litigants. That struck me as—"ironic" may not be the right word but I probably can't use the right word in a public hearing. So let me ask you about part of your testimony. You created a fact pattern by which you could be executing a search warrant, executing an arrest warrant, and you are forbidden by policy from interacting with certain categories of people that are on the scene.

Did I hear that correctly? Surely I did not.

Mr. CRANE. That is correct, sir. Actually we did provide some internal documents to Chairman Smith. He had actually invited me during the last testimony to do that. He was concerned about protecting the identities of our agents that might come forward because of the fear of retaliation.

I am sorry, I lost my train of thought there for a second.

Mr. GOWDY. We are talking about the execution and search warrants and whether or not you can interact with certain categories of people who are present at suspected crime scenes or whether you are forbidden by policy from being able to do that.

Mr. CRANE. Correct. Actually I have some statements written down on a piece of paper here that came from some of those documents. These are deputy associate directors, so they are at ICE headquarters, you know, top of the food chain. If the aliens you encounter are not criminals, they will not be arrested. I am telling you to walk away from a non-criminal fugitive—or am I telling to you walk away from a criminal or non-criminal fugitive reinstatement? Yes. Why are you wasting your time talking to everyone else in the house? Only targets will be arrested. There will be no collateral arrests of any sort.

So when our officers go into the house at least during some of these operations they are being told, you will not talk to anyone in that house, you will get the target and you will get out. As I said in my testimony, that is where we make some of our most significant arrests with regard to public safety. I can't tell you how many times we go in a house even to get a non-criminal and end up walking out with two serious bad guys because in the past we really had prosecutorial discretion and we had the ability to do our jobs and question people and talk to people. And by doing so, like every other law enforcement in the country can, we were able to identify far more serious bad guys than we could ever do just looking for simple targets.

Mr. GOWDY. Thank you, Special Agent. Thank you, Mr. Chairman.

Mr. GALLEGLY. Thank you, Mr. Gowdy. The gentleman from Tyler, Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Chair. I just want to continue on that train of thought. With regard to information about instructions, if you go into a home to get someone, you are not to arrest anyone else in the home, was that information known in Arizona when they passed the law they did allowing local law enforcement to inquire of people whether or not—their legal status when they were detained for other reasons? Do you know when this first became public?

Mr. CRANE. I do not know the answer to that, sir.

Mr. GOHMERT. It seems like it ought to be a commendable thing when a State seeks to enforce the law. Because you know, the founding of the country was such that they thought people should be treated equally under the law, nobody was too good, nobody was too bad, everybody was to be treated equally under the law. And it seems like really we have degenerated into a Third World country where it is all about who you know. It is all about who is in power at the time as to who is going to be treated what way. And what disturbs me in the prosecutorial discretion, of course there is a million things that do, but particularly the term "the person's criminal history, including arrests, prior convictions or outstanding arrests warrants." All of you understand that just in that one little phrase there is one of the factors that could be utilized to use discretion. There are all kinds of scenarios, there is all kinds of room for abuse here and you are talking to a guy who is a former judge.

And Mr. Tranchant, my heart has gone out to you. I had as a judge presiding over felonies one case where a guy was in the courtroom and he had been indicted for a felony for driving while intoxicated, and when we get around to his case, turns out he had many DWIs or DUIs in some jurisdictions. But he finally got to me after he hit somebody, thank God he didn't kill them, and because he had been in jail so many times for DWI and had never been removed and because I am supposed to consider safety of the public, it seemed like he needed to be in prison, the man couldn't stop himself from drinking and driving. So I sent him to prison. And it was a matter of months he was back in my courtroom for another felony DWI. And when I inquired through the interpreter how he got back so fast, he said he was taken to the Texas-Mexico border and ordered to walk across and he did. And he waited around on the other side until those folks left, and then he went around the bridge and came back across immediately, came back to our county and got drunk and drove again.

Now, I am really curious who would ultimately, Mr. Crane, if you know, anybody else knows, make the kind of call, gee, there is only nine DWIs so let's don't go after this guy yet. I sent the man to prison and it was only after he went to prison that within I think it was like 3 months he said they came and got him out of prison, took him to the border and told him to walk across and then he comes back later. Who makes those calls? Well, he's been in jail nine times, but now he is in prison so let's go get him out of prison so he can come back down to their county down the road. Who makes those calls? Anybody know?

Mr. CRANE. Those calls are made within the office generally by management officials. As officers we really don't have that power, and it tends to be a roller coaster from week to week, month to

month as to whether or not we can actually apprehend them. I can tell you this. As officers we have been screaming bloody murder about this for years. We wasn't every one of those guys at least put into proceedings for deportation.

Mr. GOHMERT. Do you know how people are taken to the Texas-Mexico border when they are not put on a flight somewhere else? Have you seen those deportations take place?

Mr. CRANE. Have I seen them take place at the border?

Mr. GOHMERT. Yeah.

Mr. CRANE. No, sir, I have not. I don't work on the border.

Mr. GOHMERT. Okay. Are you familiar with how it normally works on the border?

Mr. CRANE. Yes.

Mr. GOHMERT. How long to do they wait after someone is deported or taken to the border and sent across? Do you know how long they normally wait?

Mr. MORTON. It varies with the individual. Some of them literally tell us, thanks for the paid vacation, I am going to go see my mom and then come back. Some say see you guys next week. So some of them turn right around that night and they come back, others literally stay for a couple of weeks and come back to the U.S. at their leisure.

Mr. GOHMERT. I see my time has expired.

Mr. GALLEGLY. The time of the gentleman has expired. I want to thank all the witnesses. And I particularly want to associate myself with the comments of Mr. Gohmert and Mr. Gowdy as it relates to you and your family, Mr. Tranchant. As a father of four and a grandfather of 10, I can't imagine. And my thoughts and prayers are with you.

Thank you all for your testimony today. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask that the witnesses respond to as promptly with their answers as they will be made a part of the record of the hearing. And without objection, all Members will have 5 legislative days to submit any additional material for inclusion in the record.

Again, thank you for being here today and the Subcommittee stands adjourned.

[Whereupon, at 5:18 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Submission of Testimony for the Record

Before the

Committee on the Judiciary

Subcommittee on Subcommittee on Immigration Policy and Enforcement

Oct. 12, 2011

Oversight Hearing on: "U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law"

Memo by Janice Kephart

Former Counsel, 9/11 Commission

National Security Director, Center for Immigration Studies

"Obama Administration Memos Show Evolution of Administration Policy of Amnesty by Any Means"

Expertise

I am currently the Director of National Security Policy at the Center for Immigration Studies and a former counsel to the 9/11 Commission, where I co-authored the monograph *9/11 and Terrorist Travel* alongside recommendations that appear in the *9/11 Final Report*. Prior to 9/11, I was counsel to the U.S. Senate Judiciary Subcommittee on Technology and Terrorism where I specialized in foreign terrorist activity in the United States and worked to draft and pass the federal criminal code and redress system in place today for identity theft. Today I focus on issues pertaining to border and identity security and its nexus to national security issues. In the last two months I have issued backgrounders on the current state of watchlisting ten years after 9/11; a border "To-Do" list ten years after 9/11, including how to achieve operational control of the southwest border; and blogs on the State Department's attempt to do away with visa interviews and return to pre-9/11standards. My most recent piece is this memo on the evolution of the administration strategy on achieving amnesty by what I term, "any means."

I have testified before the U.S. Congress fourteen times. I am privileged to submit this memo for the file to Subcommittee Chairwoman Candice Miller, before whom I was privileged to testify in

July 2010 on the issue of alien smuggling. In that hearing, I presented my third mini-documentary on illegal activity on the southwest border, *Hidden Cameras on the Arizona Border 3: A Day in the Life of a Drug Smuggler*, providing a reality check on claims by Department of Homeland Security Secretary Janet Napolitano that our border was "more secure than it ever was."

Obama Administration Memos Show Evolution of Administration Policy of "Amnesty by Any Means"

Introduction

Analysis of a series of leaked immigration memos from within the Department of Homeland Security's highest ranks shows that the Obama Administration has sought for the last year and a half to form a "winning" strategy to achieve amnesty for the illegal population. The goal? Ultimately, according to a June 2010 memo, the Administration seeks to "reduce the threat of removal for certain individuals present in the United States without authorization." Well aware of the potential political fallout among both Congressional Members and the American people, the Administration provided internal briefs on the pros and cons of varying strategies to gain an administrative amnesty.

The eventual course decided upon appears to be the now infamous June 2011 "prosecutorial discretion" memo issued by Immigration and Customs Enforcement Director John Morton. This memo, embraced by the White House a few weeks ago, sets a course that prevents the enforcement of immigration law, provides a de facto amnesty, and is effectively geared towards worker authorization for much of the current illegal population. The current course of non-enforcement is in juxtaposition to the initial proposed strategies of proactive immigration law rewrites.

In this memo is a thorough analysis of the extent the Obama Administration is willing to go to deceive America into accepting unprecedented executive branch immigration law rewrites and changes in immigration processing to get around their federal responsibility to enforce immigration law. Obama Administration actions taken to peel back visa interviews abroad, reduce enforcement on our physical borders, replace worksite enforcement to worksite audits, take actions against states seeking to enforce the law but no action against sanctuary cities, and support of only two immigration enforcement programs- Secure Communities and E-Verify--make sense when placed against the backdrop of these memos. On September 29, 2011, more evidence that this agenda is on track came in a Washington Post front page story describing the Obama Administration's overt actions to discourage states from attempting to get their illegal populations under control:

Obama Administration Escalates Crackdown on Tough Immigration Laws

The Obama administration is escalating its crackdown on tough immigration laws, with lawyers reviewing four new state statutes to determine whether the federal government will take the extraordinary step of challenging the measures in court.

Justice Department attorneys have sued Arizona and Alabama, where a federal judge on Wednesday allowed key parts of that state's immigration law to take effect but blocked other provisions. Federal lawyers are talking to Utah officials about a third possible lawsuit and are considering legal challenges in Georgia, Indiana and South Carolina, according to court documents and government officials. The level of federal intervention is highly unusual, legal experts said.

None of these actions have been pursued without a foundational goal of "amnesty by any means." That is why 9/11 findings of fact and recommendations have been peeled back or purposefully misconstrued; our national security flies in the face of these policies, as does our economic security. Below is a detailed account of a DHS/White House pursuit of amnesty.

Background

Four administration memos, taken together, show the evolution of the immigration law enforcement meltdown currently underway. The story begins in February 2010 with proactive proposals to amend immigration law categories and policies through a series of regulatory rewrites. In addition, the memos consider expanding bureaucracy quickly by prying open narrow immigration exceptions into wide cross-cutting remedies to permit the entry and legalized stay of large classes of illegal immigrants through a "registration process." "Political Considerations" riddle the first two memos, with chief concerns including "The Secretary would face criticism that she is abdicating her charge to enforce immigration laws" and "A program that reaches the entire population targeted for legalization would" be characterized by opponents as amnesty.

The first memo, drafted in February 2010, is authored—according to good sources—by the DHS Secretary's office. This draft memo sets the tone for subsequent memos authored by leadership at DHS components. The next was drafted by the General Counsel's office at US Citizenship and Immigration Services in June 2010. The next two are the "Enforcement Priorities" and "Prosecutorial Discretion" memos authored by Immigration and Customs Enforcement Director John Morton and published in March and June 2011. The early memos propose proactive legal changes which list the political pros and cons of a variety of avenues to achieve administrative amnesty, while the latter two focus on simply restraining ICE from enforcing law against the illegal alien population as a whole.

The malfeasance in subverting immigration law evident in the early memos evolved into a strategy of nonfeasance evident in Morton's memos. Immigration law has no bearing if it is not enforced, and thus it is clear that the tactic became one of assuring that ICE simply not enforce the law rather than subjecting administration attorneys to conduct regulatory immigration law rewrites, which were considered (1) time consuming; (2) difficult; and (3) capable of a much greater negative political fallout.

If DHS had pursued a policy of immigration law rewrites, a likely result could have been a cry of malfeasance; a legitimate allegation that DHS- with White House support-- was subverting Congressional authority to draft and pass immigration law and set the tone for immigration policy. Regulations gone awry could easily be pinpointed on President Obama, and if a failure, another source of negative political fallout for the President. Nonfeasance is much harder to prove. The administration, smartly, has chosen nonfeasance by simply telling ICE agents they are not to do their job. However, by asserting active support at the White House for the Morton "Prosecutorial Discretion" policies, the President remains on the hook for his public statements tying together ICE non-enforcement with stated proactive policies of amnesty. In addition, his speech on May 10, 2011 in El Paso, Texas poking fun of those seeking border security by joking that those serious about the border will not be satisfied until there are alligators in moats along the border, underlines a policy that is unserious about border security. Legal actions against the states seeking to mimic federal immigration law (and sometimes more) are also evidence that the President is actively seeking non-enforcement of immigration law not just on a federal level, but in states as well.

Thus, despite months of strategizing on the issue to avoid negative fallout and assure political cover in part with Administration support of a mandatory E-Verify, the President has little coverage to distance himself from a policy goal of using any means to achieve amnesty. The ICE memos, with legal actions against states, and White House amnesty measures, all add up to the "abdication" of enforcing immigration law, just as the early memos feared would be the fallout. Amnesty efforts can no longer be pinned just on the Secretary of Homeland Security. The White House endorsement of the most recent "prosecutorial discretion" memo has changed the seriousness of the concern over the administration's interest in amnesty from tacit approval to active support.

Below is a chronology of the memos and their key content. Each memo is linked.

The Four Memos

DHS Headquarters Draft Memo "Administrative Options" (February 26, 2010)

In this first memo drafted by individuals in the Secretary of Homeland Security's office, staff details various options for achieving amnesty, under the following headings: (1) "Registration

Program and Deferred Action for Current Unauthorized Populations;" (2) "Clearing Family-Based Visa Backlogs;" (3) "Parole Immediate Relatives of U.S. Citizens Who Entered Without Inspection and Would Otherwise be Ineligible for Adjustment of Status;" (4) "Allow Beneficiaries of Approved Family-Based Visa Petitions to Wait in the U.S.;" (5) "Expanded E-Verify;" and (6) "Political Considerations."

The memo highlights the use of a "quick" registration program using "deferred action" granted to as large a portion of the illegal population in order that their employment be legalized as easily and quickly as possible. "Deferred action" is not law, but an administrative remedy inferenced by current regulation. A 2007 memo by the USCIS Ombudsman (an internal watchdog) explains deferred action as follows:

> There is no statutory basis for deferred action, but the regulations reference this form of relief and provide a brief description: "[D]eferred action, an act of administrative convenience to the government which gives some cases lower priority...." Where USCIS grants a request for deferred action, the foreign national is provided employment authorization. According to informal USCIS estimates, the vast majority of cases in which deferred action is granted involve medical grounds.

This February 26, 2010 DHS headquarters draft memo begins by describing how, in the "absence of legislation... the Secretary of Homeland Security [could] grant eligible applicants deferred action status." The only individuals excluded would be those "individuals who pose a security risk." On the second page, the "pros" and "cons" of using deferred action to provide a baseline for a "registration program" are laid out. Key items in both categories include:

> Pros: Transform the political landscape by using administrative measures to sidestep the current state of Congressional gridlock and inertia.
>
> Cons: Internal complaints of abdicating our charge to enforce immigration law from career DHS officers are likely and may be used in the press to bolster such arguments.
>
> Cons: Reaching an entire population for legalization would use deferred action way beyond a scale it has ever been used for before, and Congress may respond by trimming back our deferred action authority, or simply negating it, since deferred action is temporary and revocable by its nature.

These cons were stricken in the draft, but incorporated elsewhere in politically softer language:

> Unilateral action by the Administration could be viewed as an end run around Congress, angering both Republicans and Democrats
>
> Legal challenges are possible and could halt implementation of the program.

> Congress may disagree with the deferred action policy and seek to undermine it through legislation or by using its appropriations authority to prohibit the expenditure of funds for such a program.

The memo allocates an entire section on the need to supporting a mandatory E-Verify, explaining that E-Verify provides reasonable credibility of the administration's legitimate attempt to enforce immigration law. A mandatory E-Verify would also assure businesses using E-Verify safe harbor, a more protective standard from the prior ICE policy that voluntary E-Verify use provides reasonable deniability of wrong-doing. More importantly, a mandatory E-Verify would pose as "political space" to achieve administrative amnesty:

> Expansion and improvement of E-Verify are enforcement-related measures that would give us the most political space to propose significant benefits-related administrative changes… By providing a safe harbor for employers who properly use E-Verify, DHS could give employers a significant incentive to participate in the program.

In the "Political Considerations" section which concludes the memo, DHS headquarters staff review the best time to attempt to persuade America with their "carefully crafted" message that help the President, hurt Republicans and help fellow Democrats, while wooing Latino voters:

> The right time for administrative action will be late summer or fall-- when midterm election season is in full swing… The administration would have to boldly drive the narrative. President Obama and the Administration would assert that they are stepping into the breach created by congressional gridlock and moving aggressively to solve a vexing problem that three consecutive Congresses have tried by failed to fix. Flanked by Secretaries Napolitano, Solis, Locke, Holder, and Vilsac, the President could make the case that the nation's economic and national security can wait no longer for Congress.
>
> …
>
> This message would have to be carefully crafted to avoid being met with hostility by Democratic members of Congress who are trying to defend their seats in midterm elections. A potential strategy to sell the most ambitious administrative proposal would be to combine them (all the proposals above) with a call for a vote on a mandatory E-Verify. The President could join Reid and Pelosi to challenge Congress to enact such legislation. The legislative strategy would give Democrats who fear the administrative amnesty charge the opportunity to say they disagree with the President on amnesty, but as legislators are ready to crackdown on illegal workers. It would also help insulate Democrats from the charge of being a "do-nothing Congress" on the issue. This also places Republicans in a difficult position: a vote for enforcement helps endorse the President's overall strategy while a vote against is a vote for the status quo.

> In this scenario, the Administration and Congressional leadership would be viewed as breaking through Washington gridlock in an effort to solve tough problems. Giving nervous Members of Congress something tough to vote for while providing Latino voters with something they could support would be a win-win for all.

The memo's last paragraph, however, suggests that the plan is too ambitious, and could put the administration in a worse position to achieve amnesty than doing nothing at all:

> If the American public reacts poorly to an administrative registration effort, Congress could be motivated to enact legislation tying the Administration's hands. This could result, in the worst case scenario, in legislation that diminishes the Secretary's discretion to use parole or deferred action in other contexts. A heated fight could also poison the atmosphere for any future legislative reform effort.

USCIS General Counsel Memo to Director Alejandro "Administrative Alternatives to Comprehensive Immigration Reform" (June 20, 2010)

This 11-page memo from the four major sections of USCIS to USCIS Director Alejandro focuses on legal how-to's of extending and widening existing statutory immigration benefits to "reduce the threat of removal" for most illegal aliens. Perhaps most disturbing is a strategy whereby the administration would cherry pick when to use certain remedies or traditional enforcement tools, building on the discussion of "deferred action" in the DHS Headquarters memo. Where "no relief appears available based on an applicant's employment and/or family circumstances, but removal is not in the public interest, USCIS could grant deferred action" which would allow the illegal alien "to live and work in the U.S. without fear of removal."

The memo lists a series of options which "used alone or in combination – have the potential to result in meaningful immigration reform absent legislative action." These options focus on (1) family unity; (2) economic growth; (3) process improvements; and (4) "protection of certain individuals or groups from the threat of removal." In the last section on protecting illegal groups from the threat of removal, "deferred action" tops the list and infers ICE's role in supporting amnesty by doing nothing, defining it as follows: "Deferred action is an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time." The value? "Individuals who have been granted deferred action may apply for employment authorization." Moreover, most immigration components can invoke deferred action, widening its application: "within DHS, USCIS, Immigration and Customs Enforcement, and Customs and Border Protection all possess authority to grant deferred action."

However, once more, deferred action has its negatives: "While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive."

The memo concludes with specificity on how to grant amnesty on a case-by-case basis in a "corollary" scenario during the removal process by the use, or non-use, of Notice to Appear (NTAs) court orders. To date, NTAs are a mainstay of the removal/deportation process:

> If relief is potentially available in removal, USCIS should consider issuing the NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS should avoid using its limited resources to issue an NTA.

While couched in enforcement terms, what this section of the memo relates is that NTAs should only be issued if the facts indicate that in court the illegal will win, and be able to stay legally. If, however, there is reason to believe that the facts indicate a court should remove the illegal alien, agents are directed to not issue the NTA, thus denying the court the opportunity to remove the illegal. Thus, by cherry picking when to use and not use NTAs, all immigration components— with ICE being affected the most—can support achieving amnesty on a case-by-case basis.

ICE Director Morton Memo "Priorities for the Apprehension, Detention, and Removal of Aliens" (March 2, 2011)

With this third memo, nearly a year later, and no real movement or support for amnesty in Congress or in the public, ICE begins to emerge as shouldering amnesty in a thinly veiled memo to agents in the field. In this March 2011 memo, ICE Director Morton makes clear that only a small percentage of illegal aliens will be prioritized for removal-- terrorists, violent criminals, felons and repeat offenders. Even fugitives from the law are prioritized in regard to whether they have been convicted of a violent crime, or not. In this memo, Morton states that apprehensions listed as "low priority"-- such as illegal aliens convicted of drunk driving-- are still available for prosecution, but the lowest priority. The next memo negates even these cases.

In addition, as of March 2011, mandatory detention no longer exists; large swaths of the illegal population are not to be detained at all. This memo makes clear that another memo on prosecutorial discretion guidance is "forthcoming."

ICE Director Morton Memo "Exercising Prosecutorial Discretion with Civil Immigration Priorities for Apprehension, Detention and Removal of Aliens" (June 17, 2011)

The most recent memo by Director Morton, issued in June 2011 as the promised follow-up to the March "enforcement priorities" memo, provides a non-exhaustive list of 19 exemptions to enforcement provided in full here. Even with this list, the Director concludes that "The list provided is not exhaustive and no one factor is determinative." In addition, ICE agents are to consider enforcement on a time-consuming case-by-case basis with no further guidance,

requiring agents to seek out information from every illegal encountered and give that information high credence while not allowed to conduct further background checks in most instances.

Equally disturbing is that "ICE officers, agents, and attorneys" now have the discretion to dismiss and close cases "at any stage of the proceedings." In juxtaposition, no guidance is provided on bringing deportation or removal cases. In fact, attorneys should proactively remove immigration cases from dockets. Furthermore, ICE is not to request law enforcement information, but simply ask the alien for relevant information sought: "In cases where… an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative."

So what does this do to Secure Communities? It means that even when a local police officer arrests an individual for a legal violation and gets a "hit" on immigration databases, the call to the local ICE office will likely not result in any immigration enforcement action unless that individual is a terrorist or violent criminal, and even then the immigration action will only take place after other charges are dispensed. Thus, like E-Verify being viewed as an enforcement rather than a compliance tool by the administration in order to justify not conducting worksite enforcement, Secure Communities is an enforcement tool that will be sparingly used in practice, but justifies another "tough on immigration" assertion by the administration. This means that both programs are being used as political cover for perceived enforcement, rather than developed and harnessed as strong, helpful enforcement tools.

When former INS Commissioner Doris Meissner issued her memo on prosecutorial discretion in 2000 which Morton relies upon, she stated that her memo "does not lessen INS commitment to enforce immigration laws nor is it an invitation to violate the law." Director Morton, however, in a footnote, clarifies that the Obama administration version of "prosecutorial discretion" is different from Meissner's; Morton states Meissner's standard "turned principally on whether a substantial federal interest was present." Morton's standard, on the other hand, has nothing to do with a "substantial federal interest" (priorities determined by federal immigration law), but rather "pursuing those cases that meet the agency's priorities for federal immigration enforcement generally" (priorities determined by the Obama administration, not law). The Obama administration is actively working to use ICE to act outside the law and not enforce immigration law under the guise of "prosecutorial discretion."

ICE Agents Speak Up

The upshot of Morton's "prosecutorial discretion" memo was another vote of No Confidence by the ICE Union on June 23, 2011. On July 26, 2011, Chris Crane, President of the ICE Union, testified before the House Judiciary Subcommittee on Immigration and Policy Enforcement. He stated that Morton's "prosecutorial discretion" memo forced ICE agents in the field to: (1)

knowingly not enforce the law against those in jail upon completion of their sentences; (2) knowingly not enforce law against fugitives and convicted criminals; and (3) knowingly not conduct criminal background checks for fear of reprisals, including losing their jobs. The insistence in the Morton memo that prosecutorial discretion is "held by the Director" means, in practice, that "ICE agents and officers will follow orders, not exercise any true discretion. Claims by ICE that this memorandum gives field agents more discretion in the field are false. The purpose of this policy is to prohibit officers and agents from arresting individuals from certain groups."

Crane discusses how ICE now is preventing agents from issuing "detainers" to allow ICE to take delayed custody of illegal aliens who have finished their sentences in jails or prisons or awaiting trial when ICE needs additional time for deportation. The purpose of detainers is to keep the individual from being released back into a community. Instead, ICE has:

> A new pilot program … directing jails to simply release aliens not yet convicted of crimes, stating that ICE will now only take custody of aliens who have been convicted of crimes… Large numbers of aliens will be released from jails. Under the previous policy, these same aliens would have been processed and required to appear before an immigration judge.

Crane then explains "field arrest procedures" now being given orally, with a refusal to do so in writing:

> Agents and officers in the field are frequently under orders not to arrest persons suspected of being the United States illegally. At times those no arrest orders include ICE fugitives, who have been ordered deported by an immigration judge, as well as individuals who have reentered the U.S. following deportation which is a federal felony.
>
> Agents and officers report that they are ordered not to run criminal or immigration background checks or even speak to individuals whom they reasonably suspect are in the U.S. illegally…. Situations in which officers and agents are ordered not to run criminal background checks or speak to individuals create an especially high risk to public safety as agents may unknowingly walk away from individuals who pose a public threat.

Interestingly, these field operations procedures are strangely parallel to what Alcohol, Tobacco, and Firearm (ATF) officers testified before Congress in June 2011 pertaining to "Operation Fast and Furious." In that operation, ATF agents were told to stand down when known Mexican drug cartel members, and their proxies, were using bulk cash to buy weapons at U.S. gun shops. The officers in both instances have complained of gross malfeasance on the part of their superiors in ordering them to not enforce the law, and in some cases, make direct sales to cartels undercover without those sales resulting in stings or further surveillance. Here, ICE agents are told to stand

down when they have known fugitives before them and not enforce the law, knowingly releasing them back into society.

Yet despite the public outcry over the Morton memo, the White House has followed on the initial "Political Considerations" strategy set out by DHS headquarters in the first February 2010 memo. It is the autumn of midterm elections and as planned, the White House is supporting a congressional push for a mandatory E-Verify. Meanwhile, the strategy of using E-Verify as a cover for the White House to lead on "sidestepping Congressional gridlock" was followed when the White House recently issued a press release on behalf of President Obama endorsing the Morton prosecutorial discretion memo as a first step towards amnesty and de facto worker authorization. Perhaps seeking to protect the President from potential—even likely—political fallout from the announcement, former La Raza director Cecelia Munoz penned the release instead, as outlined in detail here. "Amnesty by any means" is moving forward.

Conclusion

Current Obama administration immigration and enforcement standards are a purposeful subversion of the law in an effort to gain Latino voters; provide a 'get out of jail free' card to most illegal immigrants in our prison system; assure most of the illegal population worker authorization with or without E-Verify; and sidestep Congress. The current administration's support for a mandatory E-Verify law is not really about the value of E-Verify in solidifying a legal work force, but more centered on the program's value as a political "enforcement" mask to distract voters from an admitted de facto amnesty. This conclusion is based on evidence throughout high level administration memos that spanned the past year and a half.

These memos reflect an outright strategy to undermine federal immigration law and its enforcement in order to legalize large swathes of the illegal population, including those about whom we know little and are serving in jails pending court appearances. Many of these individuals are not being checked at all, potentially granting arrested terrorists and violent criminals, legality. Thus, nearly the entire illegal population will gain amnesty alongside many potentially pose a threat to public safety.

America is not safer when its laws are ignored and the balance of power created by the Constitution between the executive and representative branch is undermined by political agendas that reverse both economic and national security. The Obama administration in these memos does little more than invite illegality and insecurity, creating "mission meltdown" for not only ICE, but across our immigration and border security system. Now that the "amnesty by any means" policy is in force with the backing of President Obama, and those that stand in the way at the federal or state level are being bullied with lawsuits or threats of job loss, we are officially distracted as a nation from achieving the homeland security that was such an obvious and necessary goal after 9/11.

Amnesty by any means: an unfortunate Obama Administration legacy in the making, for our Constitution as well as our economic and national security.

○