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December 8, 2011

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20850

Dear Secretary Napolitano,

On November 18, I wrote a letter to you expressing my disappointment over your unexpected lack of production of responsive documents to the Judiciary Committee's subpoena of November 4, 2011. The subpoena followed months of fruitless discussions over my initial request for information first made last summer. In that letter, I insisted that you immediately come into compliance with the terms of the subpoena. On December 2, 2011, Nelson Peacock, Assistant Secretary for Legislative Affairs, responded to my November 18 letter. In that response, he indicated that DHS would like to continue to work with me to provide the Committee with the information I requested. I appreciate the cooperative tone of the letter. However, Mr. Peacock did not actually indicate that Department of Homeland Security (DHS) would comply with the terms of the subpoena. I must insist that you do so immediately.

I. Chain of Events

On August 22, 2011, I made a formal request to you for information about removable aliens brought to the attention of U.S. and Immigration Customs Enforcement (ICE) via Secure Communities or other means who are not removed.[1] On August 25, 2011, a Judiciary Committee staff member spoke with ICE officials, who indicated that ICE would prepare a list containing the requested information. As stated on the call, the list would include all ICE encounters that were not processed for removal and would contain alien registration numbers, fingerprint identification numbers ("FIN"), names and FBI numbers.

[1] See letter from Lamar Smith to Janet Napolitano (August 22, 2011).

I received a letter dated September 1, 2011, from ICE.[2] The letter acknowledged that I had requested a list of "low-level" criminals about whom ICE was notified but did not take custody of and declined to remove. The letter stated that while ICE could provide the Committee with a list, FBI numbers could only be provided by the FBI. ICE further stated that it would need a few weeks to prepare the data. Then, on October 4th, ICE officials informed Committee staff that the list was complete and had been sent to DHS headquarters for clearance.

The Committee then received a letter dated October 24, 2011, from Nelson Peacock, that was completely nonresponsive to my request.[3] The letter contained stock information on Secure Communities and data that is already widely available. The response did not contain the list of aliens that ICE officials told my staff had been compiled or even reference the list.

At the Committee's October 26, 2011, DHS oversight hearing, I asked you a question regarding my August request for the criminal alien data. You did not seem to know about the request, but responded that you would look into it and get back to me. I asked that you provide the Committee with the requested information by 10:00 a.m. Monday, October 31. I made clear that this was in fact a firm deadline – because, in fact, the list had already been prepared by ICE -- and that the Committee would have to issue a subpoena if it were not complied with.

DHS did not provide the list by October 31. Based on the lack of response, the Committee went forward with a resolution to authorize the issuance of a subpoena, as I told you we would. On November 2, 2011, the Subcommittee on Immigration Policy and Enforcement voted to authorize the issuance of a subpoena to you. On November 4, Elton Gallegly, the Chairman of the Subcommittee, issued the subpoena.

The subpoena required you to produce all documents sufficient to determine the name, FIN and alien registration number of any and all aliens arrested between November 1, 2008, and October 31, 2011, about whom ICE was notified through Secure Communities or otherwise but did not take custody of or declined to put in removal proceedings. The deadline set by the subpoena for compliance was 10:00 a.m. on November 10, 2011. This deadline was reasonable in light of our understanding that the information was already collected by ICE and was available for prompt production.

Once the subpoena was issued, DHS officials maintained that the Department would cooperate. Further, on a number of phone calls between DHS officials and Committee staff, DHS promised to provide the Committee with the subpoenaed information. DHS officials first told Committee staff that the Committee would receive the list of aliens and their alien registration numbers by November 4. Then, staff was told that the Department would produce that information early in the week of November 7.

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[2] See letter from Elliot Williams, Assistant Director for Congressional Relations, ICE, to Lamar Smith (Sept. 1, 2011).

[3] See letter from Nelson Peacock, Assistant Secretary, Office of Legislative Affairs, DHS, to Lamar Smith (Oct. 25, 2011).

I was surprised when on November 10, DHS sent over documents in response to the subpoena that contained none of the identifying information that DHS had promised (and that is necessary to obtain criminal histories from the FBI) – not names, not FINs, and not alien registration numbers.

On a November 10 phone call, DHS officials told Committee staff that DHS had provided the Committee with 220,955 unique identifiers of aliens not taken into custody or placed into the removal process by ICE. The list consisted of for each alien: 1) a "unique ID," 2) the date/time of the encounter, and 3) national origin (but only for the first 600 aliens). The "unique ID" created by DHS was simply a number starting at one for the first alien and ending at 220,955. This fabricated number is useless for the purpose of obtaining individual aliens' criminal histories from the FBI and for the Committee's independent analysis and verification necessary for the Committee to conduct its oversight authority to understand the nature of the problem of criminal immigrants in order to determine whether legislation is needed to address that problem.

On the November 10 call, DHS officials indicated that further information may be forthcoming to the Committee. However, they neither committed to provide the information specifically required by the subpoena nor interposed any legally cognizable, let alone sufficient, objection to the subpoena.

December 2, 2011 Letter

In the most recent response to me, Assistant Secretary Peacock writes that DHS is currently working with the FBI to compile information and criminal histories on removable aliens who have been encountered by ICE where no enforcement action has been taken. Additionally, he informs me that you would like to provide the criminal histories without personally identifiable information (at least as those aliens subsequently arrested but not yet convicted of new crimes.) Mr. Peacock requested 30 days to compile this information and provide it to the Committee.

Review of the December 2, 2011 Letter

I must be clear that the information Mr. Peacock seeks to provide is not the information required by the subpoena. To comply with the subpoena, DHS must provide the Committee with a list of aliens ICE identified but did not process for removal including Alien Registration Numbers, Fingerprint Identification Numbers, and names. But you still refuse to provide the initial list that contained this information. Instead, Mr. Peacock suggests ICE and the FBI will conduct their own analysis of 73,000 individuals that you believe fit the terms of the subpoena and would like 30 days to conduct this analysis. This is not what the Committee requested.

I appreciate your Department's willingness to cooperate and to provide information in addition to that I have subpoenaed, but I must insist that DHS comply with the terms of the subpoena and provide the list of 220,955 individual's along with identifying info – a list that has already been prepared. Full compliance with the terms of the subpoena is necessary for the Committee to be able to verify independently and cross-reference the information provided by the administration and to conduct its own analysis of the data. DHS indicates that it will work together directly with the FBI to pull the criminal histories, but only for aliens who have already been convicted of new crimes.

In addition, the December 2 letter explains that there are 73,000 potentially removable aliens that were encountered but not processed or taken into custody by ICE. No attempt is a made to reconcile this number with the 220,955 number DHS provided to the Committee earlier. As you know, legal permanent residents who commit certain crimes are subject to removal. These discrepancies alone demonstrate why the Committee would need the initial list ICE compiled.

The Committee has not yet made any formal request for the subsequent data from the FBI regarding the criminal histories. Once that request is made, the Committee would be happy to work with both agencies to determine what the time line may be in order to comply with any requests from the Committee. It is premature for DHS to try to hide behind the FBI, of whom no request for information has yet been made, as a reason to delay further it's production of the information the Committee requested which is controlled by DHS.

In the December 2 letter, Mr. Peacock cites privacy grounds as a reason not to provide the Committee with the information requested. As you are well aware, the Privacy Act does not apply to Committee investigations.[4] That being said, the Committee on numerous occasions has made it very clear that it would consider steps to address any appropriate concerns regarding the security of any personally identifiable information and we remain willing to work with you to reach such an accommodation.

During a December 7 phone call with DHS, Committee staff made clear to DHS that, at a minimum, the list that was subpoenaed must be received by close of business on Friday, December 9. Furthermore, Committee staff indicated that the information regarding the criminal histories of the aliens in question could be provided to the Committee subsequently on a schedule to be worked out once we receive the subpoenaed information, which is already long overdue. This letter now memorializes that conversation in writing.

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[4] See 5 U.S.C. sec. 552a(b)(9).

1999 Subpoena

In 1999, the Committee subpoenaed the Department of Justice ("DOJ") for information on inadmissible or deportable aliens who were released from U.S. Immigration and Naturalization Service ("INS") custody and then subsequently convicted of additional crimes. DOJ complied with the Committee's subpoena issued in 1999. The resulting information revealed that of the 35,318 criminal aliens whom INS released between 1994 and 1999, 37% had been convicted of another crime in the United States by 2000.[5] Mr. Peacock notes that personally identifiable information was only given for aliens with convictions. However, circumstances are quite different now as information is being sought on aliens who at the earliest were not arrested until November 2008. There has simply not been sufficient time for most who commit further crimes to have been convicted of those crimes. The Committee needs identifying information for all the aliens so we can periodically seek updated criminal histories in the future.

Additional Request

In my last letter, I made an additional request. DHS officials were clear that the decision not to comply with the terms of the subpoena was made at a very high level. Therefore, I reiterate my request that you inform me of whom you and other DHS officials have communicated with at the White House and elsewhere in the administration regarding my information request and the subpoena. I would like the names of these individuals. I also request you provide me with a copy of all documents, electronic and otherwise, possessed by you and other DHS officials regarding my information request and the subpoena as listed in the schedule instructions of the subpoena. This request has been neither acknowledged nor answered.

Compliance

I must insist that the subpoenaed information be provided in its entirety by Friday, December 9. The information I requested is firmly within the jurisdiction of the Committee, including the personally identifiable information. As you know, the Judiciary Committee has jurisdiction over the enforcement of our nation's immigration laws inside the United States.[6] Oversight of the executive branch is a crucial component of this responsibility.[7]

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[5] See H.R. Rept. 106-1048 at 256-57 (2001).
[6] See rule 10(1)(l) of the rules of the U.S. House of Representatives (112th Congress).
[7] See rule 10(2)(b)(1) of the rules of the U.S. House of Representatives (112th Congress).

If DHS does not comply with this demand, the Committee intends to go forward and consider a resolution to hold DHS in contempt of Congress and will proceed to a vote on such a resolution promptly. As the District of Columbia District Court recently explained, "The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement."[8] I ask that DHS provide all the information I requested and then subpoenaed by December 9, 2011. It is already in your possession and additional time is not needed to compile it. The Committee is prepared enforce the subpoena to the fullest extent allowed by the law.

Sincerely,

Lamar Smith
Chairman

cc: The Honorable John Conyers, Jr.

[8] U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 99 (D.D.C. 2008). See also, McGrain v. Daugherty, 273 U.S. 135, 175 (1927).