Congress of the United States

Washington, DC 20515

July 5, 2011

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

Dear Secretary Napolitano,

We are concerned that the Obama administration continues to circumvent Congress and use executive branch authority to allow illegal immigrants to remain in the United States. Our concerns have risen to a new level based on the recent issuance of two memos by John Morton, Director of U.S. Immigration and Customs Enforcement ("ICE"). As you know, the Constitution grants Congress the authority to determine our immigration policies.[1] Because decisions of such magnitude must only be made by Congress, we urge you in the strongest terms to ensure that the Department of Homeland Security ("DHS") halt any current or planned administrative actions that will result in mass legalization of illegal immigrants and that imply that immigration law should not be fully enforced.

Our concerns were first raised by the dissemination of a draft memo last year to the Director of U.S. Citizenship and Immigration Services ("USCIS"), written by top political and career agency officials.[2] The memo suggested that DHS take steps to legalize literally millions of illegal immigrants. For instance, the memo indicated that DHS could "grant deferred action to an unrestricted number of unlawfully present individuals" and suggested that it grant deferred action to illegal immigrants "who would be eligible for relief under the DREAM Act" or those who have lived in the U.S. since some particular date.

As ICE describes, "deferred action" is "not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on [removal] cases with a lower priority",

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[1] Article I, section 8, clause 4 of the Constitution provides that Congress shall have power to "establish an uniform Rule of Naturalization". The Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in Galvan v. Press, 347 U.S. 522, 531 (1954), "that the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." And, as the Court found in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)), "[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"

[2] See Administrative Alternatives to Comprehensive Immigration Reform, memo to Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, from Denise Vanison, Policy and Strategy, Roxana Bacon, Office of the Chief Counsel, Debra Rogers, Field Operations, and Donald Neufeld, Service Center Operations (undated)(A copy of the memo is contained in the files of the Judiciary Committee.).

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"such as [by] not placing an individual in removal proceedings."[3] However, DHS can grant work authorization to illegal and deportable immigrants who have received deferred action -- making it in essence a grant of administrative legalization.[4] It is not based on any specific statutory authority.[5]

The memo also suggested that parole be used to legalize illegal immigrants "who entered the U.S. as minors without inspection" or who have "lived for many years in the U.S." As you know, Congress in 1996 limited the Administration's parole authority to use "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[6] The House Report stated that this limitation was "intended to end the use of parole authority to create an ad hoc immigration policy or to supplement current immigration categories without Congressional approval."[7]

USCIS claimed that it had rejected many of the suggestions in the memo. But, more recently, a seemingly-authentic draft DHS memo was disseminated that proposed the grant of deferred action to "the entire potential legalization population" – and if that was not possible, then to DREAM Act-eligible aliens or to illegal immigrants who claim to have worked in agriculture.[8] In addition, the memo proposed to use the parole power to allow the sudden influx of over three million immigrants on extended family green card waiting lists – which would dramatically increase chain migration at a time when millions of Americans are out of work.

These memos were drafted in the context of great political pressure on the Obama administration to legalize countless illegal immigrants through administrative action.[9]

More recently, on June 17, 2011, ICE Director John Morton issued two memos expounding on the scope of DHS's prosecutorial discretion.[10] These memos were not drafts, but explicit expressions of DHS policy. These memos represent a grossly irresponsible expansion of the use of prosecutorial discretion for the apparent purpose of administrative amnesty. Ultimately, these memos could potentially make millions of deportable illegal and criminal immigrants eligible for administrative amnesty. They also violate the will of Congress as expressed through law and undermine Congress' constitutional authority.

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[3] ICE, Toolkit for Prosecutors at 4 (2011) and ICE, Continued Presence: Temporary Immigration Status for Victims of Human Trafficking (2010).
[4] See 8 C.F.R. sec. 274a.12(c)(14).
[5] See Toolkit for Prosecutors at 4.
[6] See sec. 602 of division C of title IV of Pub. L. No. 104-208 (sec. 212(d)(5)(A) of the Immigration and Nationality Act).
[7] See H.Rept. No. 104-469, part 1, at 175 (1996).
[8] A copy of the memo is contained in the files of the Judiciary Committee.
[9] See letter from Senator Harry Reid and 21 other senators to President Obama (April 13, 2011)(The letter asked that DHS grant deferred action to all illegal immigrants who would qualify for amnesty under the DREAM Act.)(A copy of the letter is contained in the files of the Judiciary Committee.).
[10] See Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, memo from John Morton, Director, ICE, to all field office directors, all special agents in charge, and all chief counsel (June 17, 2011); Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, memo from John Morton, Director, ICE, to all field office directors, all special agents in charge, and all chief counsels (June 17, 2011).

Director Morton's memo entitled *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* gives instructions to ICE personnel on how to exercise prosecutorial discretion such as by granting deferred action, "deciding whom to stop, question, or arrest", deciding "whom to detain", and "dismissing" a removal proceeding.[11] The memo states that "[w]hen weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents and attorneys should consider all relevant factors",[12] such as:

- ICE's "immigration enforcement priorities" (ICE has expressed little interest in deporting illegal immigrants who have not yet been convicted of "serious" crimes.[13]);
- the person's "pursuit of education in the United States" (The Migration Policy Institute estimates that more than two million illegal immigrants would be eligible for the DREAM Act amnesty.[14]);
- "[w]hether the person has a U.S. citizen or permanent resident spouse, child or parent. . . . "[w]hether the person or the person's spouse is pregnant . . . ." (The Pew Hispanic Center estimates that illegal immigrants have four million U.S.-born and thus U.S. citizen children.[15]);
- the person's length of presence in the U.S. (The Pew Hispanic Center has estimated that millions of illegal immigrants have been in the U.S. since the 1990s.[16] Indeed, it would be very easy for illegal immigrants to provide fraudulent evidence that they have been present in the U.S. for any particular length of time – such as with counterfeit rent receipts, etc. This was a hard lesson we learned from the 1986 amnesty.);
- long-time lawful permanent residents (In the interest of public safety, all aliens who have committed aggravated felonies are subject to deportation.[17]); and
- individuals with serious health conditions (Part of the huge fiscal drain caused by illegal immigration is the cost of uncompensated health care for illegal immigrant families. About 62% of illegal immigrants do not have health insurance – over seven million people.[18] However, federal law requires that any hospital with an emergency room must provide care to all for emergency medical conditions.[19] Consequently, the hospitals in the 24 southwest border counties in Texas, New Mexico, Arizona and California alone

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[11] Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens at 2-3.
[12] Id. at 4.
[13] See Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, memo from John Morton, Director, ICE, to all ICE employees (March 2, 2011).
[14] See Jeanne Batalova and Margie McHugh, DREAM vs. Reality: An Analysis of Potential DREAM Act Beneficiaries, 2010 Migration Policy Institute at 1.
[15] See Jeffrey Passel and D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, 2009 Pew Hispanic Center at ii (figure 3).
[16] See Jeffrey Passel, Unauthorized Migrants: Numbers and Characteristics, 2005 Pew Hispanic Center at 5.
[17] See section 237(2)(A)(iii) of the Immigration and Nationality Act.
[18] Steven Camarota, Illegal Immigrants and HR 3200: Estimate of Potential Costs to Taxpayers, 2009 Center for Immigration Studies at 3.
[19] See 42 U.S.C. sec. 1395dd.

incur a $190 million per year cost for uncompensated emergency medical treatment to illegal immigrants.[20] The president of the California Hospital Association believes that "care for illegal immigrants could tip some hospitals into bankruptcy."[21]).[22]

The other Morton memo, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, actually urges the exercise of prosecutorial discretion in the case of illegal immigrants who are plaintiffs in civil rights lawsuits or who have disputes "with an employer, landlord, or contractor."[23] We can only conclude from this statement that DHS believes that the American court system is sufficiently under-burdened that we should encourage the filing of additional lawsuits by illegal immigrants against American businessmen and women.

Prosecutorial discretion has very justifiable uses when exercised responsibly in "true hardship cases."[24] Prosecutorial discretion has very justifiable uses when exercised responsibly in "true hardship cases" or when furthering national security and law enforcement interests. However, these memos make clear that DHS plans not to use, but rather abuse these powers – to grant mass legalization without any Congressional authorization, to saddle American communities with the costs of providing medical care to illegal immigrants and with the risks of having criminal immigrants living in their midst.

Congress has repeatedly rejected mass amnesty legislation in recent years. Most recently, the Senate defeated the DREAM Act amnesty in last year's lame duck session. DHS's plans to open the door to mass administrative legalization represent a rejection of Congress's constitutional prerogatives and an utter disdain towards the wishes of the American people as expressed by their elected representatives. We urge you to abandon any plans to apply prosecutorial discretion on anything other than a case-by-case basis and withdraw these profoundly irresponsible memos.

Furthermore, we are concerned that DHS continues to use the excuse of "limited resources" as a justification for its flagrant disregard of the law. The Congress has consistently provided every dollar requested since ICE's creation for immigration enforcement efforts, particularly Enforcement and Removal Operations, in spite of poor justifications for detention bed costs. In fact, Congress provided increases above the amounts requested in fiscal year 2011 to make up for a shortfall in the DHS budget submittal, and the House-passed fiscal year 2012 bill supports no fewer than 34,000 detention beds. Further, the bill funds ICE at a level above the fiscal year 2012 request and at the highest level ever, including 600 additional beds – even in a time of fiscal restraint. We request that ICE utilize the extensive resources available to rigorously enforce the immigration laws of the United States and that ICE's future budget

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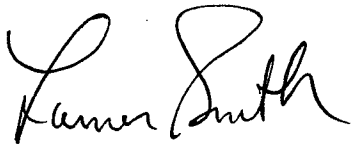
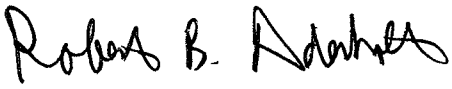
[20] See U.S./Mexico Border Counties Coalition, Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties at 26, 31 (2002)(costs are for 2000).
[21] Julia Preston, Texas Hospitals Reflect the Debate on Immigration, N. Y. Times, July 18, 2006.
[22] See Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens at 4-5.
[23] Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs at 2.
[24] See letter from Lamar Smith and 27 other U.S. Representatives to Janet Reno, Attorney General, U.S. Department of Justice, and Doris Meissner, Commissioner, Immigration and Naturalization Service, at 2 (November 4, 1999)(A copy of the letter is contained in the files of the Judiciary Committee.).

requests include the funds necessary to effectively support the men and women of ICE in executing their critical mission.

Sincerely,



Lamar Smith
Chairman
Committee on the Judiciary



Robert B. Aderholt
Chairman
Subcommittee on Homeland Security
Committee on Appropriations

CC: John Conyers, Jr., Ranking Member, Committee on the Judiciary
David Price, Ranking Member, Subcommittee on Homeland Security, Committee on Appropriations