

Restoring Enforcement of Our Nation's Immigration Laws
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security
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Thank you, Chairman Sensenbrenner and Ranking Member Lofgren, for the opportunity to testify on the state of immigration law enforcement and how it might be improved. Obama administration policies left immigration enforcement in a state of collapse. Interior enforcement was systematically dismantled to a fraction of previous years, we experienced a surge of new illegal arrivals at the southwest border seeking to take advantage of catch and release policies and lenient rules for claiming asylum; and the size of the illegal population ticked upward again. The suppression of enforcement has imposed enormous costs on American communities in the form of lost job opportunities and stagnant wages for native workers, higher tax bills to cover increasing outlays for social services and benefits, compromised national security, and public safety threats. The Trump administration has begun using executive authority to restore enforcement in many important ways. But there is only so much that can be done by the president. Under our constitution, Congress is really the lead branch of government on immigration law, and action from Congress is necessary to fully address the most important weak spots in immigration control. Specifically, Congress needs to address the problem of illegal hiring; tackle the problem of sanctuaries; update the laws supporting gang-related enforcement; and reduce opportunities for executive abuse of authority on work permits, parole, deferred action, and other gimmicks that have been used to offer legal status to people not authorized by Congress.

Dramatic Decline in Enforcement Under Obama – Department of Homeland Security (DHS) statistics illustrate the collapse in enforcement under Obama administration policies, which became particularly acute since the set of executive actions issued in late November, 2014 that imposed severe restrictions on the immigration enforcement agencies, and exempted most illegal immigrants, including many new illegal arrivals, from being targeted for deportation.

- 1) *Catch and Release at the Border.* A variety of sources indicate that over the last several years a huge number of people have successfully entered the country without authorization or legal status, either by evading the Border Patrol or by asking for political asylum. For instance, a report commissioned by DHS found that while there has been a steep drop in total illegal entries over the past 15 years, there has not been a steep rise in the probability of apprehension over the same time period. In 2015, the estimated apprehension rate of illegal aliens between ports of entry on the southern border was only 54 percent. The report also noted that in 2015 only 39 percent of the people trying to enter illegally at land ports of entry (such as with fake IDs or hidden in vehicles) were apprehended.¹

Even many of those who were caught were allowed to stay under Obama-era catch and release policies. A recent Government Accountability Office (GAO) report found that 38 percent of the aliens apprehended by the Border Patrol along the southwest border in 2014 and 2015 may still have been in the United States as of May 2016 – totaling more than 220,000 illegal aliens allowed to stay in those years. Breaking it down by type of apprehension, the GAO found further that 93

¹ Institute for Defense Analyses, *Assessing Southern Border Security*, May 2016, <http://cis.org/sites/cis.org/files/Border-Crossing-Stats-Report.pdf>.

percent of family units apprehended and 42 percent of individuals apprehended for the first-time in 2014 and 2015 were still here as of May, 2016.²

Many of those caught attempting illegal entry or arriving without visas at the ports of entry were permitted to enter the country to pursue an asylum claim under Obama-era policies. Under these lenient policies, the number of asylum claims originating at the southern border spiked from 17,000 requests in 2009 to 170,000 requests by 2014.

Following the imposition of extreme prosecutorial discretion and prioritization policies on the Border Patrol, as first revealed at a hearing before the House Judiciary committee in early 2015, agents were told to ignore cases in which the encountered aliens said they had been in the country since 2014. Brandon Judd, president of the National Border Patrol Council has testified that about 80 percent of the aliens encountered by agents were not arrested and not processed for deportation.

- 2) *Overstays.* In 2015, an estimated 527,000 foreign visitors did not depart as required when their authorized stay expired, according to the first annual report on overstays from DHS, published about a year ago. About 416,500 apparently still had not departed as of January 4, 2016. Of these overstays, 43 percent had entered on a business or tourist visa, 29 percent had entered under the visa waiver program, and 28 percent had entered from Canada or Mexico.³ The report analyzed the records only of a small sub-set of foreign visitors -- air and sea travelers who entered for the purpose of business or pleasure. It did not examine the records of visitors who entered by land, which is more than three-quarters of all admissions to the United States. Nor did it track the records of visitors granted visas for purposes other than business or pleasure, such as students, guest workers or exchange visitors.

Little government effort is dedicated specifically to preventing or finding overstays; according to the GAO, in recent years only a tiny share of the enforcement resources of Immigration and Customs Enforcement (ICE) went for overstay enforcement. In the most recent year for which information is available, only about three percent (11,596 out of 368,485) of the aliens deported by ICE were overstays, out of a total estimated population of four to 5.5 million overstays in the United States.

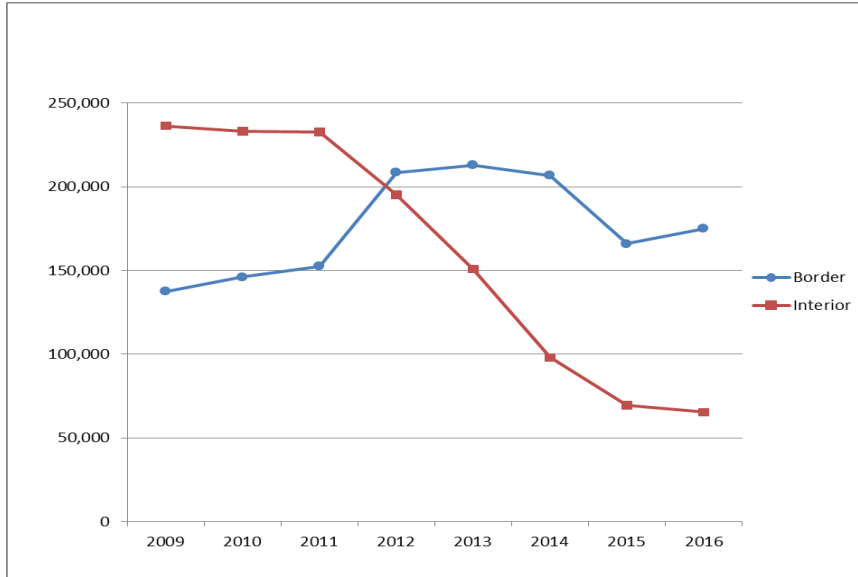
- 3) *ICE Interior Enforcement.* Under the Obama administration, ICE's deportation case load shifted from mostly aliens who were arrested in the interior to mostly aliens who were arrested by the Border Patrol and turned over to ICE for deportation. This change in case load enabled the Obama administration to claim "record" deportations while simultaneously masking the steep decline in interior enforcement.

The number of ICE deportations from the interior dropped more than 70 percent since the peak in 2009, from about 236,000 to 65,000 in 2016, and is the lowest number of deportations in 10 years.

² Government Accountability Office report GAO-17-66, *Border Patrol: Actions Needed to Improve Oversight of Post-Apprehension Consequences*, January 2017, <http://www.gao.gov/assets/690/682074.pdf>.

³ DHS, "Entry-Exit Overstay Report: 2015," <http://cis.org/sites/cis.org/files/16-0029%20FY%2015%20CBP%20Entry%20and%20Exit%20Overstay%20Report%20FINAL%2001.19.16.pdf>.

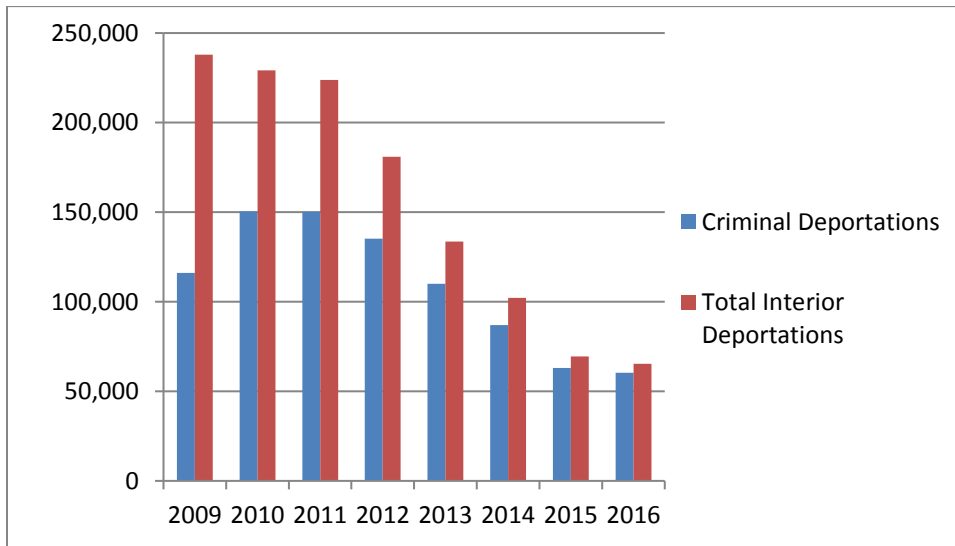
ICE Deportations: Border and Interior Cases



Source: ICE

- 4) *Criminal Deportations.* The number of criminal aliens deported from the interior declined by 60 percent from the peak in 2011, from 150,000 to 60,000 in 2016. This occurred despite the nationwide implementation of the Secure Communities program, which linked DHS databases to the national fingerprint matching system, giving ICE the ability to identify more criminal aliens than ever before.

ICE Criminal Alien Deportations: 2009-2016



Source: ICE

Some of the decline in criminal alien deportations is likely due to limitations placed the popular and effective 287(g) partnership program, which at one point was responsible for an estimated 20 percent of ICE's criminal alien arrests.⁴

- 5) *Criminal Releases.* Under the interior version of catch and release, from 2013 to 2015, ICE released from its custody more than 86,000 aliens with criminal convictions.⁵ Hundreds of these individuals had been convicted of very serious crimes including homicide, sexual assault and kidnapping. ICE released these aliens for a variety of reasons, including grants of prosecutorial discretion, court orders, experimentation with alternatives to detention, and recalcitrant countries refusing to cooperate in taking their citizens back for deportation. Thousands of these aliens were arrested and convicted again for new crimes after their release from ICE custody.⁶

As of June, 2016 there were 176,126 convicted criminal aliens who had received final orders of removal and exhausted all appeals, but who had not departed and were still at large in the United States. In addition, there were 191,161 convicted criminals with pending deportation proceedings who were at large in the United States.⁷

- 6) *Increase in Transnational Gang Violence.* The number of gang-related arrests in targeted operations by Homeland Security Investigations (HSI) agents also declined considerably under the Obama administration. According to ICE records, the number of gang arrests declined from 5,080 arrests in 2012 to 1,578 in 2014, a drop of nearly 70 percent.⁸

Hundreds of gang members have been able to avoid deportation after being granted deferred action under the Obama Deferred Action for Childhood Arrivals program. Within a year of the start of the program, there were at least 280 gang members whose DACA status had to be terminated because of gang ties. As of July 2015, only 89 of them had been removed; 10 were in custody, 77 of them had been released from ICE custody and 89 of them were never booked into ICE custody at all.⁹

The FBI and many local gang investigators have stated that there has been a noticeable increase in gang violence that coincides with the years-long surge in illegal arrivals of unaccompanied minors from Central America.

Some gang investigators have told me of instances in which gang leaders have taken advantage of the lenient catch and release policies to bring in new recruits to boost the gang's numbers in certain areas of the United States. For example, one local MS-13 clique leader, who had received a DACA work permit and was employed as a custodian at a middle school in Frederick, Md., and who was recently incarcerated for various gang-related crimes, reportedly was told by

⁴ Jessica M. Vaughan and James R. Edwards Jr., "The 287(g) Program: Protecting Home Towns and Homeland," Center for Immigration Studies, October, 2009, <http://cis.org/287greport>.

⁵ Jessica M. Vaughan, "ICE Released 19,723 Criminal Aliens in 2015," Center for Immigration Studies, April 27, 2016, <http://cis.org/vaughan/ice-releases-19723-criminal-aliens-2015>.

⁶ DHS records provided to Sen. Chuck Grassley, released on January 30, 2015, <http://www.grassley.senate.gov/sites/default/files/news/upload/Immigration%2C%2001-30-15%2C%20Breakdown%20of%20Subsequent%20Crimes%20List.pdf>.

⁷ ICE Weekly Departures and Detention Report, June 20, 2016.

⁸ Source is ICE records obtained by the author through a FOIA request.

⁹ DHS Response to Questions for the Record from Sen. Chuck Grassley, Senate Judiciary Committee, September 10, 2015.

gang leaders in El Salvador to take advantage of the lenient policies at the U.S. border to bring in new recruits, knowing that they would be allowed to resettle in the area with few questions asked. Several of these unaccompanied minors now have been arrested and incarcerated for various crimes, including a vicious random attack on a sheriff's deputy in 2015. According to local gang investigators, these gangs have been aggressively recruiting recently- arrived Central American children as young as 10 years old.

My colleague Joseph Kolb has identified 126 communities, 72 percent in suburban locations, in 24 states that in the last two years have experienced crimes attributed to MS-13, which is one of the most notorious Central American gangs, with a large share of its members who are illegal aliens or children of illegal aliens. The hot spots for this crime spree included the Washington DC suburbs, Long Island NY, greater Boston, and Houston.

Among the crimes attributed to MS-13 members were 38 homicides, numerous attempted murders, arson, extortion, drug trafficking, firearms violations, rape, robbery, and witness tampering. During the period studied, there were 42 alleged MS-13 homicide victims. Sixty-nine percent of the victims were under the age of 21. Of the 81 suspects identified, 57 percent were under age 21. Forty percent of the murder suspects have been identified in open sources or by local law enforcement agencies to be illegal aliens; for about half of the suspects, no immigration status information was made public.¹⁰

- 7) *Proliferation of Sanctuary Policies.* Currently there are approximately 300 jurisdictions (states, counties and municipalities) that have laws or policies that interfere with immigration enforcement.¹¹ These policies have resulted in the release of hundreds of deportable criminal aliens per week since 2014, according to ICE records I obtained through a FOIA request. Most of the offenders released by the sanctuaries had prior arrests, and one-fourth were already felons at the time of release. Many of these offenders committed new crimes soon after their release; during one brief time period studied, nearly one-fourth were arrested again for a criminal offense within eight months of their release. The 1,867 offenders were arrested 4,298 times during the eight-month period studied, accumulating 7,491 new charges in total, after their release.¹²

Just last week ICE began releasing information on criminal aliens released by sanctuary jurisdictions, documenting 206 cases discovered during the week of January 28, 2017. During that week, detainees were rejected by 46 different jails in 16 different states. More than two-thirds of the arrests occurred in Travis County, Texas, where a newly-elected sheriff adopted one of the more extreme policies in the country on January 20, 2017. These releases appear to have occurred in a very short period of time, amounting to a kind of sheriff-engineered jail break following adoption of the policy.

Most of the offenses associated with the released criminal aliens are serious, and include one homicide suspect released by the Philadelphia Police Department, 51 convicted or charged with Assault, Aggravated Assault or Battery; 40 for DUI; 30 for Domestic Violence; 19 for Robbery, Burglary or Auto Theft; 17 for Drugs; and 14 for Rape or other Sex Assaults.

¹⁰ Joseph J. Kolb, "UAC Footprint Leaves Criminal Trail Across the United States," forthcoming, Center for Immigration Studies, April, 2017.

¹¹ Map of sanctuary jurisdictions, Center for Immigration Studies, updated March 23, 2017, <http://cis.org/Sanctuary-Cities-Map>.

¹² Jessica Vaughan, "Rejecting Detainers, Endangering Communities," Center for Immigration Studies, July 2015, <http://cis.org/ignoring-detainers-endangering-communities>.

- 8) *The Non-Departed*. The number of aliens who have received a final order of removal, but who are still in the United States, had risen to 954,000 by June, 2015, according to ICE records. This number has grown by 50,000 in just two and one-half years. Part of the reason is that, even with the administration's mass dismissals of "non-priority" cases in lieu of immigration hearings, many of the aliens whose case are completed and who are ordered removed simply do not comply with the due process if they are not detained, or they skip out on the proceedings at some point. Under Obama policies, removal orders and enforcement actions taken before January 2014 involving "non-criminals" were specifically nullified.
- 9) *Dismantling Worksite Enforcement and Fraud Control*. Successful programs to address illegal employment (the main magnet for illegal immigration), identity theft, and benefits fraud have been de-prioritized and starved of resources. This ensures that those who make it past the Border Patrol or through visa controls have been able to work illegally, steal identities, use false documents, make false claims, avoid taxes, collect social services, and commit traffic offenses, all without much fear of deportation. There is no more powerful incentive for people to keep trying to come here illegally than the realistic understanding that your illegal presence is tolerated and crimes and infractions committed in connection with your illegal status will be ignored. Moreover, without meaningful worksite enforcement, there is no incentive for employers to maintain a legal workforce, and they will continue to hire illegal workers.
- 10) *Issuance of Work Permits*. In addition to suspending enforcement against all but the most serious criminals, the Obama administration egregiously abused its authority to issue work permits. According to USCIS records, from 2009 to 2014, the agency issued 5,461,568 *new* work permits to aliens – these are work permits issued *in addition to* legal immigrant and guest worker admissions. Of these 5.5 million new work permits, more than 3 million were issued to illegal aliens and aliens admitted on temporary business, tourist, visa waiver, or student visa statuses that do not allow employment. Some do not qualify for any legal status and are in deportation proceedings, including some arrested by ICE but released on an order of supervision; aliens seeking suspension of deportation or a stay of removal; criminal and non-criminal aliens ordered removed but whose countries will not take them back; asylum applicants; and illegal aliens paroled into the country after arriving from Central America in the border surge of 2012-14.¹³

Trump Administration Dismantling Obama Policies – The Trump administration has already taken steps to reverse some of the most problematic policies that suppressed enforcement, including:

- Ending the catch and release policies at the border;
- Discarding the strict prioritization scheme that exempted most illegal aliens from deportation;
- Deploying immigration judges and asylum officers to the border area;
- Expanding the 287(g) program;
- Beginning work on new border infrastructure, including a wall;

¹³ Jessica Vaughan, "Government Data Reveal Millions of New Work Permits Issued Since 2009," Center for Immigration Studies, February 2015, <http://cis.org/government-data-reveal-millions-of-new-work-permits>.

- Utilizing accelerated forms of due process;
- Reviving task forces focused on smuggling, gangs and other transnational crime.

The full effect of these steps cannot be fully measured yet, but there are a number of positive indicators already. DHS has reported a steep and seasonally uncharacteristic drop in apprehensions by the Border Patrol since January.¹⁴ In addition, a number of law enforcement agencies in the border area say that smuggling prices have increased significantly, which is usually taken as a sign that it has become more difficult to succeed in illegal entry.

Last week ICE reported that it had issued more than 3,000 detainers in a single week, and that field offices are expected to be issuing even more going forward. That number is twice as many as the average weekly number of detainers issued in the last two years of the Obama administration -- in 2015 and 2016, ICE issued a weekly average of 1,863 and 1,596 detainers, respectively. In contrast, in 2011, which was the peak year for interior criminal alien enforcement, when the Secure Communities program was nearing full implementation, ICE issued an average of 6,080 detainers per week, or double the recent rate. This indicates that ICE has the capacity to further increase the level of enforcement activity.

One ICE officer told me that the Trump policies are benefiting public safety on a daily basis:

“It's been a major change. We are now going by what the law says.... Obviously we're not kicking down doors to arrest grandma, but with the new orders, we can finally get the guys that have been arrested multiple times, and not convicted, or the guy that has no prior criminal history, but was charged with a horrendous crime. Under Obama they had to be convicted before we could take action. In fact, I just placed a detainer on a guy who had never been arrested before, but was charged with routinely sexually assaulting a [very young]girl... and [police are investigating other serious charges].”

Action Congress Must Take to Address Enforcement Needs – Having a president who is committed to enforcing immigration laws is of course essential to the integrity and security of our immigration system, but there are some problems that require Congressional attention as well. After all, our Constitution gives Congress the lead role in determining immigration policy, and it is time for Congress to take action.

No matter how many miles of barriers are built, or how many ICE agents are hired, or how much more rigorous our vetting system becomes, as long as employers think that they can get away with hiring illegal workers, they will keep doing it; and as long as there is someone who will hire them, people in other countries will keep trying to come or stay illegally. Now Congress needs to do its part by enacting a phased-in universal E-Verify requirement. Years of experience with E-Verify and SSNVS at the state level have demonstrated that a universal mandate is feasible and makes a big difference, especially if done in concert with other federal worksite enforcement efforts.

In addition, Congress needs to fortify a number of weak spots in the immigration law that have begun to hamper enforcement and sow confusion among local law enforcement partners and the courts. These problem areas are addressed by the Davis Oliver Act, which was passed by this committee in the last congress. The reform measures would:

¹⁴ CBP Southwest Border Total Apprehensions, <https://www.cbp.gov/sites/default/files/cbp-southwest-border-total-apps-graph-20170308.png>.

- Establish federal supremacy in immigration law, but preserve the ability of state and local governments to enact and enforce ordinances within certain parameters, allowing them to take action if the federal government does not.
- Encourages local law enforcement agencies to assist in enforcement, balancing a mandate for local agencies to cooperate with ICE with a requirement for ICE to respond to local requests to take custody of criminal aliens.
- Clarifies that local jails must not release criminals who will be deported and penalizes sanctuary jurisdictions that obstruct enforcement.
- Makes it easier to disrupt and remove terrorists, gang members, fraudsters, and other dangerous people who exploit the vulnerabilities in our system, and harder for them to receive visas, asylum, green cards, citizenship, or other benefits.
- Deals more firmly with deportable aliens arrested for drunk driving, sex crimes, gang crimes, espionage, identity theft, immigration fraud, repeat offenders, and other serious offenses by providing for expedited removal and limiting appeals and waivers.
- Permits designation of criminal street gangs, whose alien members and associates would become deportable upon designation, and updates the statutory definition of criminal gang activity.

The problem of sanctuary jurisdictions also requires special attention from Congress. In addition to clarifying the authority of ICE to issue detainers and the expectation that local law enforcement agencies can and should cooperate with ICE, the sections of the law that prohibits sanctuary policies (8 USC 1373 and 1644) should be strengthened, so as to provide additional consequences for obstructive and uncooperative jurisdictions besides potential loss of funding. This should include the possibility of criminal penalties, civil legal action, and a private right of action against officials who impose or carry out sanctuary policies. I have included suggested legislative language drafted by a colleague as an attachment to this testimony.

Further, Congress should replace the State Criminal Alien Assistance Program with a new reimbursement program that offers reimbursement to local LEAs for the expenses incurred for honoring immigration detainers (as opposed to merely incarcerating certain illegal alien inmates arrested on local charges without the expectation of cooperation with ICE). The new reimbursement program should include language that provides qualified immunity to the LEAs for holding the alien on an ICE detainer.

Finally, Congress needs to reduce opportunities for executive abuse of authority on work permits, parole, deferred action, and other gimmicks that have been used by presidents in the past to give de facto legal presence to large numbers of people who otherwise have no realistic claim to stay here.

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Attachment

**8 U.S.C., Section 1373 — Communication between government agencies and the
~~Immigration and Naturalization Service~~ **Federal Homeland Security Agencies**
 (as proposed for amendment)**

(a) IN GENERAL

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services**, information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services.**
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES

The ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services** shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

(d) CRIMINAL PENALTIES

Any employee, or any person acting for or on behalf, of a Federal, State or local government entity or official, who withholds, restricts, or refuses to provide the information described in subsection (a), or who directs or commands the withholding, restriction, or refusal to provide such information, including by policy, ordinance or statute, shall (except as further provided by subsection (e))—

- (1) For the first commission of any such offense, be fined not more than \$3,000 for each instance with respect to which such a violation occurs, imprisoned for not more than six months, or both, and,
- (2) For a subsequent commission of any such offense, be fined not more than \$10,000 with respect to which such a violation occurs, or imprisoned not more than 2 years, or both.

(e) ENHANCED PENALTIES

For withholding, restricting, or refusing to provide information that leads to the release of an alien from official custody who later commits crimes resulting in serious bodily injury (as defined in section 1365 of title 18) or the death of any person, the offender shall be fined not more than \$50,000, imprisoned not more than 10 years, or both.

(f) FEDERAL DEBARMENT

Any person convicted under this provision of law shall be barred from civilian employment by the Federal government.

(g) CEASE AND DESIST LETTER

Whenever the Secretary of Homeland Security has reasonable cause to believe that a Federal, State or local government entity is engaged in a violation of subsection (a) of (b) by means of a policy, procedure, practice, rule, ordinance or statute, the Secretary may issue a cease and desist letter to the entity. The letter shall require the entity to respond within 30 days advising what steps have been taken to rescind the policy, procedure, practice, rule, ordinance or statute. If there is no response, or if the response is deemed insufficient, the Secretary shall refer the matter to the Attorney General for action as provided in subsection (i). Such letter and subsequent actions by the Attorney General shall be in addition to, and separate from, any prosecutions taken pursuant to subsections (d) or (e).

(i) ENJOINING OF VIOLATIONS

Whenever the Attorney General receives a referral from the Secretary pursuant to subsection (g), or otherwise has reasonable cause to believe that a Federal, State or local government entity is in violation of subsection (a) or (b), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(f) NO SAVINGS CLAUSE EXEMPTION

The existence of a generalized or pro forma savings clause contained within a policy, procedure, practice, rule, ordinance or statute, which purports to assure compliance with Federal information sharing requirements, shall not act to shield such policy, procedure, practice, rule, ordinance or statute from scrutiny, nor a person from prosecution for violation of this section. The adequacy of such a savings clause will be determined by the triers of fact who shall consider, among other things, whether by actual intent or outcome, the policy, procedure, practice, rule, ordinance or statute has had a chilling effect on the unrestricted provision of information of the type described in subsection (a).

(g) PRIVATE RIGHT OF ACTION

Any person residing in the jurisdiction of a governmental entity, who has reason to believe that said entity is in violation of subsection (a) or (b), shall have standing to bring a civil action in the appropriate district court of the United States requesting relief, including a permanent or temporary injunction, restraining order, or other order against the governmental entity such as is necessary to bring that entity into compliance.

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