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Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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September 12, 2011

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

Dear Secretary Napolitano,

We last wrote to you expressing our serious reservations about new guidance directing wanton use of prosecutorial discretion in immigration enforcement. As we continue to pursue additional information regarding implementation of that guidance by U.S. Immigration and Customs Enforcement (ICE), our concerns have only been compounded by the latest announcement. On August 19, 2011, the Department of Homeland Security (DHS) announced that it will initiate a "case-by-case review" of removal cases of aliens already placed in proceedings and ensure that "appropriate discretionary consideration" be given to "compelling cases with final orders of removal."

According to information provided to Judiciary staff on August 19, 2011 by DHS, the purpose of these changes is to limit cases initiated for removal in the future. Specifically, DHS indicated that one of its main reasons for the new procedures is to "tweak who we are putting in the removal process in the first place." In addition to our concerns about the administration's apparent abandonment of immigration enforcement, we also have significant concerns about how this new policy was developed. Accordingly, we write to request information and documents about the development and operation of these new policies.

This announcement by DHS seemingly represents the culmination of the administration's plans to shield millions of illegal immigrants from removal. The initial release on June 17 of two memos by ICE Director John Morton took the historically unprecedented step of relying on "prosecutorial discretion" to justify the abandonment of immigration enforcement against millions of illegal immigrants deemed a "low priority." The memos dealt with the charging phase of the immigration removal process, i.e. before individuals are placed in removal proceedings. Now, DHS has expanded this policy to cover not only individuals already charged with violating the immigration laws and placed in removal proceedings, but even to illegal immigrants who already have final orders of removal issued by an Immigration Judge.

This new policy is a perversion of our immigration laws. It is alarming that a significant percentage of the 300,000 aliens currently in removal proceedings can now avoid removal despite being present in the United States in violation of the law. In this manner, the Obama administration again chooses to ignore immigration laws under the guise of prosecutorial discretion. Despite the administration's claims that there is nothing new with respect to this policy, it represents a drastic and unprecedented shift.

No previous administration, irrespective of political party, has chosen, en masse, to place restrictions on the types of removable aliens that may be processed (or, in this case, not be processed) for removal before the immigration courts. Previous administrations have processed for removal those removable aliens who came to the attention of law enforcement. In other administrations, prosecutorial discretion was properly implemented on a case-by-case basis for a small number of aliens under especially compelling circumstances, but it was never used to circumvent the Immigration and Nationality Act (INA).

The Obama administration recognizes that it cannot sell amnesty for illegal immigrants to a skeptical Congress. Hence, it continues to circumvent Congress and immigration law by implementing administrative changes. The administration chooses not to enforce the law under the guise of its "priorities" while pointing to its possibly suspect removal numbers. The Judiciary Committee has asked numerous questions about the administration's removal numbers and how they were calculated. Some of these requests were submitted in writing. Not one of these requests has yet been answered. Additionally, as Chairman of the Judiciary Committee, I question whether the various memos introduced by the administration comport with the requirements of the Administrative Procedure Act. This issue has also been raised previously, and once again the administration has failed to respond.

One of the most disturbing aspects of the August 19, 2011, announcement is that it allows for deferred action on illegal immigrants. We are well aware that deferred action is not a form of immigration relief, but simply puts an alien's case on hold for a potentially indefinite period of time. We support the use of prosecutorial discretion under compelling circumstances, as intended in the INA. Like prosecutorial discretion, administrative closure of removal proceedings is not a form of immigration relief. However, the administration's actions allow illegal immigrants en masse to remain in the United States. The new policy undermines the rule of the law and intrudes on the role of Congress to make the law, while denigrating the role of the executive to carry out the laws enacted by Congress.

As we know, aliens who receive deferred action are eligible to receive work authorization. Ultimately, these memos may allow millions of illegal immigrants to remain in the United States in violation of existing law and regulations and compete with unemployed American and legal immigrant workers for scarce jobs. In the current environment, this effect is unconscionable. The new policy demonstrates the administration's apparent contempt for American workers, despite the President's repeated, if empty, calls for more jobs.

The recent announcement also allows for administrative closure for cases in proceedings. Like deferred action, administrative closure was never meant to be used for the mass abandonment of viable cases. Specifically, the Board of Immigration Appeals (BIA) has encouraged DHS to administratively close cases in appropriate circumstances where there is a pending visa petition that is prima facie approvable.[1] This means that administrative closure should be utilized when the alien is actually eligible for statutory immigration relief. For instance, DHS previously utilized administrative closure where the respondent is prima facie eligible for Temporary Protected Status.[2]

Additionally, this new policy fails to take into account the large appellate body that is available to determine whether an alien is correctly in removal proceedings. As such case-by-case review by DHS is unnecessary. The BIA has nationwide jurisdiction to review decisions of IJs.[3] Furthermore, pursuant to INA §242, aliens can appeal adverse decisions to a federal appeals court.

According to DHS, an interagency working group has been created consisting of DHS and Department of Justice attorneys (including the Executive Office of Immigration Review (EOIR)) to review which cases are to be dismissed from removal proceedings and which final orders of removal are to be executed. There is a possible conflict of interest for EOIR, i.e., the immigration courts, to a have a role in determining the cases that are filed before it. Such involvement undermines the impartiality of the courts and makes them an interested party in the scope of the litigation before them.

Following DHS's recent announcement, our staffs asked several questions of DHS regarding the process for implementation that could not be answered by agency officials. These officials deferred to the prospective and unknown decisions of the interagency working group. When asked why a policy was announced without implementation plans, officials could not provide an adequate response. Thus, please provide the following information no later than Friday, September 30, 2011:

1. All correspondence electronic or otherwise, regarding this new policy between DHS officers and employees (including all its components), and between the White House and DHS officers and employees.
2. All DHS documents and memorandum regarding this new policy and its formulation.
3. All documents, electronic or otherwise, to be issued by the interagency working group as guidance to DHS components, attorneys, and employees.
4. When will the first case be subject to this process?
5. Who are the members of this interagency working group by name?

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[1] *See Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) and *Matter of Hashmi*, 24, I&N Dec. 785.
[2] *See* Memo, Carpenter, Deputy Gen. Co. HQCOU 120/12.2 (Feb. 7, 2002, reported in 79 No.15 Interpreter Releases 524, 530-38.
[3] *See* 8 C.F.R. § 1003.1.

6. A monthly report on cases that are deferred/administratively closed under this process. Please provide separate information on deferred actions and administrative closure and provide the rationale for why each case has been deferred or administratively closed. According to DHS, this process will apply to "low hanging fruit" such as nursing mothers, pregnant women, minors, people with serious health conditions, veterans, those with physical or mental disabilities, etc.
7. A monthly report of all cases that receive work authorization under this process.
8. A monthly report of any individuals who have been paroled into the country based on this policy. We were informed that individuals already ordered removed could be paroled back into the country in order to benefit from this new process.
9. A monthly report of individuals who are not put into proceedings based on this process.

If you have any additional questions or concerns about this issue please contact Judiciary Committee Counsel Dimple R. Shah at 202-226-1978 or Appropriations Professional Staff Member Kathy Kraninger at 202-225-5834. Thank you for your attention to this request.

Sincerely,

Lamar Smith
Chairman
House Judiciary Committee

Robert A. Aderholt
Chairman
Appropriations Subcommittee on
Homeland Security

Cc: The Honorable John Conyers, Jr.