Recommendations to DHS to Address Record-Level Deportations

By early 2014, the Obama Administration will have deported about 2 million individuals a record for any previous administration and, on a monthly average basis, 60% more than under the Bush Administration.[1] Many of the individuals deported would otherwise be eligible for relief under the Senate-passed comprehensive immigration reform bill (S. 744) or proposals currently being considered in the House of Representatives.

In order to reach these record level deportation numbers, the Administration has engaged in a series of anti-civil liberties practices – in essence trading fair removals for more removals. Specifically, it has:

- **Relied heavily on the indiscriminate use of immigration detainers.** Under a detainer, immigration officials ask local and state law enforcement agencies to detain individuals who should never be detained at all – including U.S. citizens, lawful permanent residents (LPRs) and people with no prior criminal records – in order to give ICE the opportunity to investigate the individuals and potentially take them into custody. In FY 2012 alone, ICE issued over 270,000 immigration detainers, in large part through the controversial ICE 287(g) and Secure Communities programs.[2]

- **Detained and deported a significant number of individuals who pose no threat to public safety, without regard for equities favoring their remaining in the United States.** According to ICE data, on a single day in 2011, 45 percent of the detained population had no criminal record, and in FY 2012, excluding traffic offenses, 41 percent of deported individuals had no criminal record.[3]

- **Relied on practices that ignore basic due process protections.** The administration has deported the vast majority of individuals through the use of methods such as expedited removals, stipulated orders, stipulated removals, voluntary removals, and reinstatements that are designed to bypass a judicial hearing and other basic due process protections in favor of hasty deportations with little or no opportunity for scrutiny. In FY 2013, reinstatements, expedited removals, and voluntary removals alone comprised over 75 percent of ICE removals.[4]

As a result of these policies, hundreds of thousands of productive members of our communities are being inappropriately swept into DHS's deportation machine. Under its existing authority, DHS can amend its practices relating to (1) the civil enforcement priorities, (2) detainers, (3) deportations without hearings, and (4) prosecutorial discretion to mitigate the destructive impact of mass deportations on communities, family unity, and civil liberties. While these modifications will not resolve the fundamental constitutional and statutory problems associated with current DHS policies, the reforms below represent important first steps toward the creation of a more just and transparent immigration enforcement policy.

1. Civil Enforcement Priorities

In its March 2011 memo on civil enforcement priorities,[5] ICE conceived its priorities over-broadly, creating a dragnet effect across the nation that harms communities and families. The memo also failed to emphasize the need to consider individual equities for individuals who are a "priority," and the absence of clear and consistent priorities for other DHS components led to inconsistent practice agency-wide – including conflicting outcomes in individual cases. DHS should replace the ICE March 2011 memo with DHS-wide civil enforcement priority guidance to apply to all enforcement activity, detention decisions, budget requests and execution, and strategic planning. While amending the memo will not resolve fundamental deficiencies within the DHS enforcement rubric, it will assist in ameliorating the detrimental impact of the current prioritization. The amended DHS memo should:

- **Narrow the Priority 1 category** by eliminating Level 2 and 3 offenders.

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- **Limit Level 1 offenders** by adding the following language: "(other than a State or local conviction that relates to a non-citizen's immigration status) for which the alien served more than one year's imprisonment and which has not been expunged, set aside, or the equivalent."

- **Clarify the Priority 2 category** by defining "recent" in "recent illegal entrants" as 30 days or less and apprehended within 25 miles of the border. Add the following sentence: "Such aliens shall not be a priority if they have had any period of residence in the United States exceeding 90 days in the prior three years, or if they have U.S. citizen children, spouses, or parents."

- **Eliminate Priority 3**. Immigrants who have absconded or otherwise "obstructed immigration controls" do not inherently pose a threat to public safety or national security. For example, given deficiencies in the notice mailing system, many of the individuals included in this category have not intentionally evaded or obstructed the operation of the immigration laws. In fact, immigrants who fall into this category may be eligible for a pathway to citizenship under the Senate immigration reform bill.

- **Add language** to clarify that individual cases falling into "priority" categories must still be assessed for equities, including factors listed in the June 2011 prosecutorial discretion memo,[6] before they are pursued for removal by DHS agents, officers, or attorneys.

2. Immigration Detainers

Under current policy, ICE field officers and deputized 287(g) personnel frequently issue detainers in cases where an individual has no criminal history and is not a public safety threat, without supervisory or centralized review and without guidance specifying what evidence constitutes "reason to believe" that a person is subject to removal.[7] As a result, the agency needlessly detains tens of thousands of individuals who are not enforcement priorities, many of whom may be eligible for immigration relief, or should not be detained at all. In order to address these deficiencies, DHS should:

- **Adopt a policy of only issuing detainers against individuals convicted of criminal offenses who are classified as a Level 1 offender** and have served a criminal sentence in excess of one year that has not been expunged, set aside, or the equivalent, and who are deemed ineligible for the exercise of prosecutorial discretion as defined in ICE's Prosecutorial Discretion Memorandum of June 17, 2011.[8] ICE should amend its guidance to explicitly prohibit the issuance of a detainer against individuals who fall outside these parameters. Additionally, before issuing any detainer, ICE should determine whether the initial contact, detention, or arrest was motivated by an effort by a local agency to do immigration enforcement without federal guidance, and if so, decline to issue the detainer. Such a policy would help protect individuals who have never been convicted of a crime or who have been convicted only of minor crimes (such as traffic violations) from being subject to detainers and bring ICE's detainer policy into line with its enforcement priorities.

- **Require that all detainers, whether issued by a federal agent or a local law enforcement officer under the 287(g) program, be co-signed by a supervisory official at DHS Headquarters.** Under current policy, a single enforcement officer – not a neutral magistrate or even a supervisory ICE official – may, without consultation or review, issue a detainer that deprives a person of liberty for up to five days, or more in some cases. Under the 287(g) program, the issuing officer is not even a federal employee. Such unreviewed, warrantless detention is at odds with basic constitutional principles. Centralized review would reduce the numbers of erroneous detainers issued, enhance oversight, and increase national uniformity.

- **ICE should clarify that "reason to believe" means "probable cause"** – as multiple federal courts have held the Fourth Amendment requires[9] – and should provide guidance and training for ICE and 287(g) officers on the meaning of this legal standard. In addition, ICE should modify the detainer form to include a space where the issuing agent

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must provide, in narrative form, a detailed factual basis for finding probable cause that the person is subject to removal. Such guidance and training would help limit the number of baseless detainers issued, including against U.S. citizens and LPRs who are not subject to removal.[10]

3. Deportations Without Hearings

The Administration's increased reliance on deportations without any hearing before an immigration judge raises concerns that DHS is erroneously removing individuals, with virtually no legal process, who are not deportable or who would be eligible for relief or discretion if processed through normal removal procedures. For example, in the case of expedited removal, a single CBP officer or agent can decide to deport an individual, generally with no subsequent recourse available to challenge this determination as well as an automatic 5 or 10–year ban from the United States. This is particularly concerning given that DHS has expanded the use of expedited removal to individuals apprehended up to 100 miles away from a border. The use of expedited removal has long raised the concern that individuals potentially eligible for asylum or other relief are being erroneously being placed in expedited removal.[11] The U.S. Court of Appeals for the Seventh Circuit has explicitly noted the due process concerns associated with expedited removals, stating they are "fraught with risk of arbitrary, mistaken, or discriminatory behavior" because a CBP officer can decide to remove someone "free from the risk of judicial oversight."[12] Moreover, there have been numerous allegations across the country that ICE officials have coerced individuals, who may be eligible for relief or discretion, into "consenting" to deportation without a hearing. To address these concerns, DHS should:

- **Decline to use any form of deportation without a hearing against individuals who are prima facie eligible for relief** from removal or prosecutorial discretion unless such individuals explicitly waive their right to seek such relief or exercise of discretion. This will ensure that field officers do not continue to undermine the discretionary priorities set forth by the administration. It will also help to ensure that all individuals who may have a right to remain in the United States under existing law (or administrative policy) receive a fair chance to apply for any benefit.

- **At a minimum, limit the use of expedited removal** to cases where individuals are apprehended at a port of entry or border, consistent with DHS policy prior to 2004. DHS's expansion of expedited removal—without due process protections—well beyond the border and into the interior of the United States has resulted in the removal of individuals who have equities that warrant their remaining in the United States under DHS's stated guidelines.

- **Create an administrative appeal process** for individuals to challenge an expedited or stipulated removal order, visa waiver removal order, or voluntary departure.

- **Require all unrepresented individuals who agree to a stipulated removal to appear before an immigration judge**, so that the judge may advise the individual of his or her rights and ensure that the individual has agreed to the order knowingly, intelligently, and voluntarily.

4. Prosecutorial Discretion

In 2011, ICE issued a prosecutorial discretion memorandum designed to focus resources on individuals who pose a threat to public safety, and to ensure fairness and proportionality in immigration proceedings. The prosecutorial discretion policy has not been implemented uniformly or effectively. For example, in cases DHS reviewed in the immigration court backlog, discretion has only been exercised in 7.7% of instances since the program's inception, primarily through administrative closure.[13] This low percentage is particularly concerning given the high percentage of individuals with no criminal history who continue to be detained and deported. To ensure appropriate application of its stated prosecutorial discretion policy, DHS should:

- **Issue a DHS-wide policy** requiring all Notices to Appear (NTAs), including those issued by CBP, to be consistent with ICE's civil enforcement priorities and with the 2011 ICE prosecutorial discretion memo, and establish a review

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process at DHS Headquarters to ensure that all NTAs issued are consistent with the revised enforcement priorities (as described above) and prosecutorial discretion standards. Such a policy should require all NTA forms to include a narrative providing a specific factual basis for concluding that an individual is an enforcement priority and is deemed clearly ineligible for the exercise of prosecutorial discretion.

- **Develop an objective assessment tool**, designed to weigh and score relevant factors identified in the prosecutorial discretion memorandum, to assist DHS in determining when an exercise of discretion is warranted and to promote consistency in implementation across field offices.

- **Establish a review process** at DHS Headquarters for all cases in which ICE or CBP declines to exercise discretion, in order to assess whether the individual merits a favorable exercise of discretion. As part of this process, DHS should track and make public data regarding the number of individuals granted relief following review, as well as the criminal history, length of residence in the U.S., and demographics of those denied relief following review.

- **Require ICE to file a response** with the Immigration Court or Board of Immigration Appeal (BIA) in all cases where (a) the respondent files a notice of a request for prosecutorial discretion or a motion for administrative closure or other resolution based on Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), and (b) ICE declines to join the motion or exercise discretion. The response should explain the reason for declining to exercise discretion, referencing the specific facts of the case as they relate to the factors outlined in ICE's prosecutorial discretion memorandum.

- **Require the government to file a response** with the Court of Appeals in all cases on petition for review from the BIA where (a) the individual files a notice of a request for prosecutorial discretion, a mediation request, or a motion for remand for administrative closure or other resolution based on Matter of Avetisyan, and (b) the government declines to exercise discretion or join the resolution for administrative closure or other resolution. The response should explain the reason for declining to exercise discretion, referencing the specific facts of the case as they relate to the factors outlined in ICE's prosecutorial discretion memorandum.

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[1] "Has President Obama deported more people than any other president in US History," Tampa Bay Times, *available at* http://www.politifact.com/truth-o-meter/statements/2012/aug/10/american-principles-action/has-barack-obama-deported-more-people-any-other-pr/

[2] "Number of ICE detainers drops by 19 percent," Trac Immigration (January 2013), *available at* http://trac.syr.edu/immigration/reports/325/

[3] Human Rights First, "Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review" (2011), p. 2, *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; U.S. Immigration and Customs Enforcement, "Removal Statistics," *available at* http://www.ice.gov/removal-statistics/; Center for Immigration Studies, ERO-LESA Statistical Tracking Unit, pp. 2, *available at* http://cis.org/sites/cis.org/files/Crane%20ICE%20STU%20Removal%20Statistics.pdf.

[4] U.S. Immigration and Customs Enforcement, "FY 2013 ICE Immigration Removals," *available at* http://www.ice.gov/removal-statistics/

[5] *See* John Morton, Director of ICE, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," (March 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[6] John Morton, Director of ICE, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[7] John Morton, Director of ICE, "Civil Immigration Enforcement: Guidance on the Use of Detainers" (Dec, 21, 2012*), available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[8] John Morton, Director of ICE, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," (March 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[9] *See, e.g., Uroza v. Salt Lake County*, No. 11-713, 2013 WL 653968, *5-*6 (D. Ut. Feb. 21, 2013); *Galarza v. Szalczyk et al.*, 2012 WL 1080020, *12-*14 (E.D. Pa. Mar. 30, 2012); *see also United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010); *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971).

[10] For example, between FY 2008 and FY 2012 detainers were placed on 834 U.S. Citizens and 28,489 legal permanent residents. "ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents," Trac Immigration, *available at* http://trac.syr.edu/immigration/reports/311/

[11] United States Commission on International Religious Freedom, "Report on Asylum Seekers in Expedited Removal," (February 2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf

[12] *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010)

[13] "Immigration Court Cases Closed Based on Prosecutorial Discretion," TRAC Immigration (October 31, 2013), *available at* http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html.

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