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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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July 13, 2011

Mr. John T. Morton
Assistant Secretary
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, D.C. 20536

Dear Mr. Morton:

We write to express concern about your June 17, 2011 policy memoranda entitled, "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs" and "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," respectively. We are concerned that these memoranda create an utterly unprincipled enforcement strategy that undermines the rule of law and the authority of the United States Congress. While prosecutorial discretion is justifiable in certain cases, your directives may in practice constitute an impermissible intrusion on Congress's plenary authority over immigration law and policy.

Your first memorandum directs ICE personnel to "exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement" would have on illegal aliens who are plaintiffs in civil rights cases or have disputes "with an employer, landlord, or contractor," among others. Your directive provides illegal aliens with yet another means by which to avoid removal and may encourage the filing of frivolous lawsuits.

Your second memorandum, which purports to provide "guidance on the exercise of prosecutorial discretion" to ICE personnel, is troubling for two reasons. First, it "clarifies" that prosecutorial discretion may be used in a broad range of activities, including: deciding whom to stop, question and arrest; granting deferred action, humanitarian parole, or staying a final order of removal; settling or dismissing a proceeding; and even canceling a Notice to Appear. Second, the memorandum sets forth an array of considerations ICE Agents and Attorneys should take into account when exercising prosecutorial discretion. A number of the considerations outlined in your memorandum are almost identical to provisions of the DREAM Act (noted in parentheses), under which illegal aliens are granted a path to U.S. citizenship:

- The alien's length of presence in the U.S. (*see* Sec. 3(b)(1)(A));
- The circumstances of the alien's arrival in the U.S., particularly if the alien came to the U.S. as a young child (*see* Sec. 3(b)(1)(B));

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- The alien's criminal history (*see* Sec. 3(b)(1)(D));
- The alien's pursuit of education in the U.S., with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing college or advanced degrees at a legitimate institution of higher education in the U.S. (*see* Sec. 3(b)(1)(E));
- The alien's age, with particular consideration for minors (*see* Sec. 3(b)(1)(F));
- Whether the alien has served in the U.S. military (*see* Sec. 5(a)(1)(D)(ii)).

As you will recall, the DREAM Act failed last December due to bipartisan opposition. By including these elements as "considerations" for prosecutorial discretion, we are concerned that the practical effect of this memorandum will be to bring about many of the policy goals of the DREAM Act by administrative action, ignoring Congress's constitutional authority and the will of the American people.

Under this Administration, the Department of Homeland Security has repeatedly failed to enforce immigration laws and sought to undermine measures enacted by Congress through administrative orders and internal memoranda. The United States Senate has rejected the DREAM Act and we expect that this decision will not be undermined or circumvented by the Executive Branch by refusing to enforce the law as passed.

Accordingly, we respectfully request that you immediately rescind your two memoranda, and draft a memorandum indicating your understanding of and respect for both the rule of law and Congress's plenary authority over immigration law and policy.

We look forward to your prompt reply.

Sincerely,












