WASHINGTON LEGISLATIVE OFFICE

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ACLU Recommendations to DHS to Address Record-Level Deportations
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The Obama Administration has conducted about 2 million deportations, a record for any previous administration. On a monthly average basis, the Obama Administration has deported 60 percent more people than 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. The vast majority do not present risks to either national security or public safety.

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

- **Over-relied on removals without hearings, ignoring basic due process protections.** The administration has deported the vast majority of individuals via expedited removals, stipulated removals, "voluntary" removals, and reinstatements that are designed to bypass a hearing before an immigration judge. Without basic due process protections, these hasty deportations take place with little or no opportunity for scrutiny. In FY 2013, reinstatements, expedited removals, and "voluntary" removals alone comprised over 75 percent of ICE removals.[2]

- **Relied heavily on the indiscriminate use of immigration detainers or "holds."** Under a detainer, immigration officials regularly ask local and state law enforcement agencies to detain individuals without a warrant. Detainers have been issued indiscriminately, affecting 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 2008, ICE issued roughly 80,000 detainers;[3] in FY 2012 this number jumped to over 270,000, in large part through the controversial 287(g), Secure Communities, and Criminal Alien programs.[4]

- **Detained and deported a significant number of individuals who pose no threat to public safety, without regard for their equities to remain in the United States.** According to ICE data, on a single day in 2011, 45 percent of the detained population had no criminal record. In FY 2013 over 65 percent of removals were people with no criminal history or those convicted only of minor misdemeanors such as driving without a license.[5][6] For many of those with criminal histories, the only conviction on their record is for crossing the border without authorization; according to the New York Times, removals relating to illegal entry or illegal re-entry in the past five years have numbered 188,000.[7]

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) civil enforcement priorities, (2) deportations without hearings, (3) prosecutorial discretion, and (4) immigration detainers, in order to mitigate the destructive impact of mass deportations on communities, family unity, and civil liberties. While these modifications will not fully 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, humane, and transparent immigration enforcement policy.

1. Civil Enforcement Priorities

In its March 2011 memo on civil enforcement priorities,[8] 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 – especially CBP – has led to inconsistent practice agency-wide, including conflicting outcomes in similar individual cases. DHS should replace ICE's March 2011 memo with DHS-wide civil enforcement priority guidance to apply

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to all enforcement activity, detention decisions, budget requests and execution, and strategic planning. While amending the memo will not resolve all 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.

- **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. Convictions for illegal entry and re-entry, convictions where the term of imprisonment was completed over three years ago, and convictions for which the individual has demonstrated substantial evidence of rehabilitation, shall be excluded."

- **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 five years, or if they have U.S. citizen, LPR, or DACA -beneficiary 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 for immigration hearings, 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, since prior removal orders are not a bar to legalization.

- **Add language** to clarify that individual cases falling into "priority" categories must still be assessed for equities, including factors listed in ICE's June 2011 prosecutorial discretion memo,[9] before they are pursued for removal by DHS agents, officers, or attorneys.

2. Deportations Without Hearings

In FY 2013, deportations without hearings comprised over 75 percent of DHS removals. This high proportion raises concerns that DHS is erroneously removing individuals, with virtually no legal process, who are not deportable or who might be eligible for relief or discretion if processed through normal removal procedures. For example, in FY 2013, over 150,000 people were removed through reinstatement proceedings, whereby DHS deports individuals without a hearing based on a prior removal order, without considering the individual's current situation, age of the prior order, reasons for returning to the United States, or flaws in the original removal proceedings. A person whose order is reinstated is barred from applying for relief and, in the vast majority of cases, from reopening the prior order. This process raises the concern that individuals with significant U.S. ties and families, who may be eligible for discretion or relief and/or have lived in the country for years, are erroneously deported simply because the government denies them the opportunity to be heard by an immigration court.

Similarly, in the case of expedited removal, a single CBP official 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. 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.[10] Despite this concern, in 2004, DHS expanded the use of expedited removal to individuals apprehended up to 100 miles away from a land border.[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] Finally, extensive evidence suggests that DHS officials have

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coerced individuals, who may be eligible for relief or discretion, into "consenting" to deportation without a hearing through stipulated removals[13] or "voluntary" departures[14]. To address these concerns, DHS should:

- **Decline to deport anyone without a hearing in front of an immigration judge, unless expressly required by statute. At the very least, DHS should not 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 (in front of an immigration judge in the case of stipulated removal). This will ensure that the discretionary priorities set forth by the administration are implemented. 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 physical 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 current law and/or DHS policy.

- **At a minimum, decline to deport an individual through a reinstatement procedure** where an individual has a U.S. citizen or LPR child, spouse, or parent or has a colorable claim to cancellation of removal; or where the prior removal order was issued prior to the individual's 21st birthday, in absentia, more than five years prior to apprehension, or was not issued by an immigration judge.

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

- **Inform all individuals of their right to consult with counsel** and provide them a current, regularly updated list of local pro bono and low cost legal service providers. All information should be in a language and form the person understands. In the case of represented individuals, counsel or accredited representatives should be notified at least two business days *prior* to deportation—and no person should be deported with a stay request pending.

3. 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.[15] This low percentage is particularly concerning given the high percentage of individuals with no or minor criminal histories who continue to be detained and deported. In addition, DHS has failed to ensure that *all individuals deported*, included those denied an immigration hearing, are screened to determine potential eligibility for discretion or whether they are a removal priority. To ensure appropriate application of its stated prosecutorial discretion policy, DHS should:

- **Prior to deportation, require all individuals, including those who do not receive an immigration court hearing, to be screened by DHS Headquarters** to determine whether they should receive prosecutorial discretion, have a colorable claim to immigration relief, and/or are not a removal priority and should therefore not be deported. DHS

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should ensure that fear of providing information that may be used for removal purpose does not inhibit individuals from bringing their equities to light. As part of this process, DHS should track and make public data regarding the number of individuals granted relief following Headquarters review, as well as the criminal history, length of residence in the U.S., and demographics of those denied relief following review.

- **Provide guidance and training to clarify that prosecutorial discretion should be presumptively granted to** parents, spouses, and children of U.S. citizens; lawful permanent residents; recipients of Deferred Action for Childhood Arrivals; individuals who have resided in the U.S. for at least the last three years; and persons for whom removal would cause significant personal or family hardship.

- **Revise CBP's consequence delivery system** in an open and consultative process, to reflect revised enforcement priorities, sharply reduce the use of deportations without hearings, and minimize criminal penalties.

- **In light of the Department of Justice's recent reforms recognizing that the lengths of some controlled-substance convictions' sentences are excessive**, DHS should provide guidance clarifying that state convictions for controlled substance offenses that result in time served of one year or less, should not adversely impact whether an individual is eligible for prosecutorial discretion.

- **Issue a DHS-wide policy** requiring all Notices to Appear (NTAs), including those issued by CBP, to be consistent with revised civil enforcement priorities (as described above)**,** and with ICE's June 2011 prosecutorial discretion memo, and establish a review process at DHS Headquarters to ensure that all NTAs issued are consistent with the revised enforcement priorities and prosecutorial discretion factors. 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 ineligible for the exercise of prosecutorial discretion.

- **Develop, and make public, 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.

- **Require ICE to file a response** with the Immigration Court or Board of Immigration Appeals (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 reasons 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 relevant 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 to remand for administrative closure or other resolution based on *Matter of Avetisyan*, and (b) the government declines to exercise discretion or join the motion for administrative closure or other resolution. The response should explain reasons 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.

4. Immigration Detainers or "Holds"

Through the expansion of the flawed Secure Communities, Criminal Alien, and 287(g) programs, DHS has dramatically increased the use of immigration detainers, which effectively act as a funnel to transfer individuals from communities into the DHS deportation machine. 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

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subject to removal.[16] As a result, the agency needlessly prolongs the detention of 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 eliminate the Secure Communities, Criminal Alien, and 287(g) programs and conduct a reexamination of existing detainer practices.[17]

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

[3] NIJC Data, *available at* https://immigrantjustice.org/ICEdetainerdata#.UzrTZvRDs1K.

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

[5] 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/

[6] According to a recent New York Times analysis: "[N]early two-thirds of the nearly two million deportation cases involve people who had committed minor infractions, including traffic violations, or had no criminal record at all." Ginger Thompson and Sarah Cohen, "More Deportations Follow Minor Crimes, Records Show," *New York Times* (Apr. 6, 2014), *available at* http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?src=rechp&_r=0 (hereinafter "*New York Times*." In addition, Syracuse University's Transactional Records Access Clearinghouse has found that only 12 percent of people deported in FY 2013 had committed a serious criminal offense. TRAC, "Secure Communities and ICE Deportation: A Failed Program?", *available at* http://trac.syr.edu/immigration/reports/349/

[7] Thompson, *supra.*

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

[9] 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.

[10] 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

[11] Hetfield, Mark, "The *Wall Street Journal* Misplays the 'Asylum Card'," *Huffington Post,* November 13, 2013, *available at* http://www.huffingtonpost.com/mark-hetfield/the-wall-street-journal-misplays_b_4158840.html.

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

[13] Koh, Jennifer, et al. "Deportation without Due Process," (September 1, 2011), *available at www.nilc.org*

[14] *See "*ACLU Class Action Lawsuit Challenges Immigration Enforcement Agencies' Practices of Tearing Families Apart*," available at* http://www.aclusandiego.org/aclu-class-action-lawsuit-challenges-immigration-enforcement-agencies-practices-of-tearing-families-apart/

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

[16] 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.

[17] Detailed detainer recommendations will be provided in a separate document.

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