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April 6, 2011

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (AIC) write to express our concerns and to offer our assistance and perspective with respect to implementing a well-balanced policy on the exercise of prosecutorial discretion. As you know, the principle of prosecutorial discretion is well established in all areas of law enforcement, including the enforcement of our nation's immigration laws. Historically, immigration officials have exercised prosecutorial discretion not only to conserve limited enforcement resources, but more importantly to prevent injustice and to uphold the value of humanitarian assistance. Past administrations have produced several written policies and guidance to implement this practice.¹ In 1999, 28 members of Congress from both Republican and Democratic parties sent a letter to Attorney General Janet Reno strongly reaffirming the importance of the exercise of discretion in immigration enforcement.

We are concerned that in your testimony on March 9 before the Senate Judiciary Committee regarding prosecutorial discretion, you highlighted that the number of cases where discretion was favorably exercised was very small, suggesting that your department is discouraging and limiting its exercise. In contrast, we were encouraged by comments you made during the March 18th meeting with us and other advocates, where you recognized DHS's authority to exercise discretion.²

Prosecutorial discretion should be proactively and consistently exercised at all levels within ICE, USCIS, and CBP—from the rank-and-file officer and trial

¹ Doris Meissner, Commissioner, INS, "[Exercising Prosecutorial Discretion](#)" (Nov. 17, 2000); William Howard, Principal Legal Advisor, ICE, "[Prosecutorial Discretion](#)" (Oct. 24, 2005); Julie L. Myers, Assistant Secretary, ICE, "[Prosecutorial and Custody Discretion](#)" (Nov. 7, 2007).

² Other DHS officials have also affirmed the importance of prosecutorial discretion. *See, e.g.*, Declaration of Daniel H. Ragsdale, Executive Associate Director for Administration and Management, ICE, in support of Plaintiff's Motion for Preliminary Injunction, *United States v. State of Arizona, et al.*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order granting preliminary injunction), *appeal docketed*, No. 10-16645 (9th Cir. July 29, 2010).

counsel up to high-level senior management. Based on our experience, that is not currently happening.

In March, we polled AILA's membership of 11,000 attorneys and asked them to describe their experiences with DHS's exercise of discretion. We received more than 200 responses and now provide to you detailed examples involving 37 individuals whose cases illustrate the types of cases appropriate for favorable exercise of prosecutorial discretion. Most of the individuals in these cases are still in active removal proceedings in jurisdictions across the country.³ Many of these cases involve people who, if deported, would be separated from U.S. citizen and Lawful Permanent Resident immediate family members who depend on their noncitizen relatives for care and support. Several cases involve people who suffer from severe medical conditions; who are victims of domestic violence, trafficking or other serious crimes; or who are serving as valuable witnesses in criminal prosecutions. Many are students whose academic performance shows great promise for their ability to contribute to this nation in the future.

None of the noncitizens in these cases poses a risk to national security or public safety, and none have been convicted of crimes of the kind that would place them within DHS's stated priorities for enforcement. Many are upstanding and contributing members of our communities. In fact, a Notice to Appear (NTA) should never have been issued in many of these cases given the extremely compelling circumstances. All have requested the exercise of discretion—be it deferred action; the termination of proceedings; an administrative closure of the case; reissuance of a new NTA to enable an application before an immigration judge; or the withdrawal of an unnecessary appeal by the government from a judge's grant of asylum or other relief.

We are troubled that prosecutorial discretion does not appear to be exercised consistently within DHS, and in some cases it appears that coordination could be improved between the Field Office Director and the Office of Chief Counsel. We are also concerned that in those instances where discretion was exercised, the favorable decision came only after extensive advocacy by counsel or media coverage. As a matter of principle, the exercise of discretion should not occur only when experienced legal counsel represents the respondent and pursues the case up to high levels within DHS or brings the case to the attention of the public. Whether or not a respondent has counsel, DHS officers and counsel should be actively reviewing all their cases to determine whether discretion is warranted. Only when such a policy is implemented will this Administration be able to assure the public that it is enforcing immigration law in a sensible, effective, and just manner.

We recommend the following steps to help ensure that a robust policy regarding the favorable exercise of prosecutorial discretion is functioning consistently and effectively at all levels in the various agencies of DHS:

- Issue a public statement clarifying that you have the authority and the responsibility to exercise prosecutorial discretion as a critical component of your executive authority.

³ The initiation of removal proceedings does not foreclose the government's use of prosecutorial discretion. See Howard memorandum at 3.

- Issue written guidance setting forth detailed criteria on the favorable exercise of prosecutorial discretion. (The June 30, 2010 memorandum issued by Assistant Secretary John Morton indicated that such guidance would be forthcoming.) The criteria enumerated in the November 2000 memorandum of former INS Commissioner, Doris Meissner, would be a good starting point. In addition, we recommend that particular consideration be given to victims of crimes and individuals who have contributed significantly to their communities or society.
- The guidance should also operationalize the policy on prosecutorial discretion with implementing procedures that give clear instruction to all officers and counsel in ICE, USCIS, and CBP engaged in the enforcement of immigration law. This should include a training program for the field, establishment of a point of contact in each local ICE office to facilitate implementation, and development of procedures for record-keeping regarding decisions on prosecutorial discretion.
- Assign a high-level official within your office to monitor implementation of the policy and ensure coordination within the relevant agencies.

AILA and AIC would be pleased to work with you in the development and implementation of such a prosecutorial discretion policy. We look forward to hearing back from you. Please contact Gregory Chen, AILA's Director of Advocacy, gchen@aila.org, 202-507-7615.

Sincerely,



David Leopold
President
AILA



Crystal Williams
Executive Director
AILA



Kirsten Schlenger
Chair, Board of Trustees
AIC



Ben Johnson
Executive Director
AIC

Attachment: AILA – AIC Prosecutorial Discretion Examples – April 8, 2011

cc: Noah Kroloff, Chief of Staff, DHS
Brian de Vallance, Senior Counselor to Secretary Napolitano, DHS
John Sandweg, Counselor to the Secretary and Deputy Secretary, DHS
Esther Olavarria, Counsel to the Secretary, DHS

Seth Grossman, Acting Chief of Staff, Office of the General Counsel, DHS
Kelly Ryan, Acting Deputy Assistant Secretary, Office of Policy, DHS
Margo Schlanger, Officer for Civil Rights and Civil Liberties, OCRCL
Beth Gibson, Assistant Deputy Director, ICE
Peter Vincent, Principal Legal Advisor, ICE
Dea Carpenter, Acting Chief Counsel, USCIS
Denise Vanison, Director of Policy, USCIS

Cecilia Munoz, Director of Intergovernmental Affairs, The White House
Felicia Escobar, Senior Policy Advisor, Domestic Policy Council, The White House
Stephanie Valencia, Associate Director, Office of Public Engagement, The White House