

What DHS Can Do Right Now

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Currently, much attention is focused on the possibility that federal immigration reform legislation being considered in Congress will resolve many of the problems created by our broken immigration system. In the meantime, however, the U.S. Department of Homeland Security (DHS) has many practical options for ensuring that its detention and deportation system does not separate families and force the removal of the members of our communities who, ultimately, should benefit from federal immigration reform legislation.

DHS should do three things:

- Follow existing policies and promises.
- Ensure due process of law and fairness for noncitizens.
- Stop scapegoating and criminalizing noncitizens as “criminal aliens.”

I. Follow existing policies and promises

U.S. Immigration and Customs Enforcement (ICE) has announced policies that:

- Set priorities for immigration enforcement so that noncitizens who do not pose a national security or public safety threat are considered the lowest priority for detention and deportation.¹
- Authorize ICE to recognize a wide range of factors—such as family relationships, time spent in the U.S., contributions to the community, or status as victims or persons protecting their civil and labor rights—in exercising prosecutorial discretion with respect to all detention and deportation decisions.²

¹ See *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, a memorandum to all ICE employees from John Morton, Director, U.S. Immigration and Customs Enforcement, Mar. 2, 2011, www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

² See *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf, and *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf, memorandums to all ICE field office directors, special agents in charge, and chief counsel from John Morton, Director, U.S. Immigration and Customs Enforcement, both dated June 17, 2011.

LOS ANGELES (Headquarters)
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax



WASHINGTON, DC
1121 14th Street, NW, Suite 200
Washington, DC 20005
202 216-0261
202 216-0266 fax

- Protect parents' interests in the context of the detention and deportation process.³
- Set rules for issuing immigration holds (also known as "detainers") to reflect ICE's detention and deportation priorities.⁴
- Limit enforcement actions in sensitive locations.⁵

DHS should make all of its existing policies applicable throughout the whole agency, not just within ICE, and should ensure that it exercises prosecutorial discretion fully, fairly, and consistently in accordance with all of the policies. To make existing policies meaningful and effective, DHS should:

- Provide trainings on prosecutorial discretion, including a training on the "reasonable cause" standard for issuing detainers.
- Require recordkeeping, reporting, and evaluations (including an evaluation of detainer-issuance policy promised by the Dec. 2012 Morton memo⁶) so that agency compliance with the policies can be measured and verified.
- Make agents who do not follow these policies accountable in concrete ways.
- Make public quarterly reports documenting how and when prosecutorial discretion is exercised. This would lessen the need for Freedom of Information Act requests.

DHS should make sure that the full range of prosecutorial discretion mechanisms is employed. DHS should:

- Use *all* the mechanisms of prosecutorial discretion at *all* stages of the detention and deportation process.
- Not make the administrative closing of cases, which does not make work authorization available to the people whose cases are closed, the default mechanism.
- Make clear to all agency personnel that deferred action is not the administrative remedy of last resort, but rather an appropriate remedy in the exercise of prosecutorial discretion at any time.

³ See *Directive 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*, issued by John Sandweg, Acting Director, U.S. Immigration and Customs Enforcement, Aug. 23, 2013, www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.

⁴ See *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, a memorandum to all ICE field office directors, special agents in charge, and chief counsel from John Morton, Director, U.S. Immigration and Customs Enforcement, Dec. 21, 2012, <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

⁵ See *Enforcement Actions at or Focused on Sensitive Locations*, a memorandum to all ICE field office directors, special agents in charge, and chief counsel from John Morton, Director, U.S. Immigration and Customs Enforcement, Oct. 24, 2011, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

⁶ See note 4.

- Make exercise of prosecutorial discretion the means of keeping families intact in the U.S., not just a means of allowing U.S. citizen or lawful permanent resident children to join their parents when they are deported.
- Create educational materials informing the public of the process for requesting prosecutorial discretion.
- Make sure that the exercise of prosecutorial discretion provides eligibility for work authorization, rather than a state of limbo, uncertainty, and vulnerability to being detained once again.

II. Ensure due process of law and fairness for noncitizens

DHS should ensure due process and fairness in the detention and deportation process by:

- Ending the practice of relying on profiling based on race, ethnicity, or country of origin in deciding whom to question about immigration status.
- Refusing to allow criminal arrests in localities that engage in racial profiling or pretextual arrests to be the means by which immigrants enter the immigration enforcement pipeline, especially in jurisdictions where the U.S. Department of Justice is investigating or suing local law enforcement authorities for such conduct or where private civil rights lawsuits have been brought against such conduct.
- Conducting the analysis promised by the DHS Office of Civil Rights and Civil Liberties and ensuring that DHS's "Secure Communities" immigration enforcement program does not rely on racial profiling and pretextual arrests.
- Ensuring that agents do not pressure detained persons into agreeing to be deported, and holding agents that engage in such conduct accountable.
- Requiring that detained people are given in-person hearings before immigration judges to ensure that, if they have agreed to a stipulated order of removal, they have done so voluntarily.
- Advising people of their rights, including telling them that anything they say may be used against them in subsequent proceedings, before they are questioned, and ensuring that any individual interviewed by a federal immigration official voluntarily consents to the interview before it begins.

III. Stop mischaracterizing and criminalizing noncitizens as "criminal aliens"

DHS should stop mischaracterizing and treating noncitizens who have committed minor traffic offenses or have convictions for other minor offenses as "criminal aliens" in order to boost its enforcement statistics. DHS should:

- Not sweep people with traffic convictions, convictions for minor offenses, and old convictions into the detention and deportation system.
- Not begin removal proceedings against people based on convictions they have that would not have made them deportable at the time they were convicted.

- Not claim that people who are deported for being unlawfully present are “criminal aliens,” just because they committed a traffic offense or other crime in the past that was not even the basis for their having been deported.
- Eliminate criminal prosecutions through Operation Streamline, in line with the U.S. attorney general’s announcement that he has instructed U.S. attorneys to no longer charge nonviolent, low-level offenders with crimes that carry mandatory sentences.
- Recognize, when making decisions about enforcement and prosecutorial discretion, that the desire to rejoin one’s family, not criminality, drives people to return to the U.S. after they have been deported.

FOR MORE INFORMATION, CONTACT

Shiu-Ming Cheer, Immigration Attorney, 213.674.2833, cheer@nilc.org