



December 9, 2015

United States Senate
Washington, DC 20510

United States House of Representatives
Washington, DC 20510

RE: IJN's Opposition to Immigration Policy Riders in FY 2016 Appropriations Legislation

Dear Member of Congress:

We write on behalf of the Immigrant Justice Network (IJN), a collaboration between the Immigrant Defense Project in New York, the Immigrant Legal Resource Center in San Francisco, and the National Immigration Project of the National Lawyers Guild in Boston, to urge Congress to pass Fiscal Year (FY) 2016 legislation free of immigration policy riders that restrict the exercise of prosecutorial discretion, undermine community trust policies, and restrict refugee processing. Currently, appropriators are debating provisions that would restrict the U.S. Department of Homeland Security's (DHS) ability to exercise prosecutorial discretion for noncitizens who fall within the top two priorities of DHS's civil enforcement priorities. Additionally, appropriators are also considering restricting federal funding to state and local jurisdictions that limit cooperation with federal law enforcement authorities through community trust policies, colloquially known as "sanctuary city" policies.¹ Finally, Congress is also contemplating restricting the ability of refugees who are fleeing persecution and oppression to settle in the United States. Incorporating these ideological and partisan immigration riders into the appropriations process represent a direct attack on the immigrant community and serves as a painful reminder of Congress's failure to modernize our immigration system through the enactment of a just and comprehensive immigration reform.

I. RESTRICTIONS ON PROSECUTORIAL DISCRETION

On November 20, 2014, Secretary Jeh Johnson released *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Enforcement Priorities Memorandum), which prioritized immigrants for removal based on certain conduct and convictions.² Notably, the Enforcement Priorities Memorandum provided narrow exceptions for the removal of immigrants in all three categories. Specifically, under the first tier and second tiers, DHS excepted the deportation of immigrants who "qualify for asylum or another form of relief" or where there are "compelling and exceptional factors

¹ Amendment to Homeland Security Appropriations Bill Offered by Mr. Yoder of Kansas, prohibiting a "sanctuary city" from receiving "any Department of Homeland Security Grant funded under the heading 'Federal Emergency Management Agency—State and Local Programs'" (STAFF OF H. COMM. ON APPROPRIATIONS, 114TH CONG., REP. ON AMENDMENTS ADOPTED TO THE HOMELAND SECURITY APPROPRIATIONS BILL FOR FY 2016 11-12 (Comm. Print 2015), available at <http://appropriations.house.gov/uploadedfiles/hmkp-114-ap00-20150714-sd004.pdf>.

² Memorandum from Jeh C. Johnson, Secretary, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants to Thomas S. Winkowski et. al (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

that clearly indicate the alien is not a threat to national security, border security, or public safety.”³ This language, and subsequent guidance released by DHS, which clarified how subcomponents should implement the enforcement priorities,⁴ represents an acute acknowledgement that immigrants who fall within Priority one or two may have strong factors that should exclude them from deportation. While the concept of prioritizing “good” immigrants versus “bad” is inherently flawed and problematic, the memorandum at the very least represents some attempt to reduce the Administration’s unacceptably high number of deportations.

The House Appropriations Committee adopted language that would restrict the use of funds for the “release from custody, other than for removal from the United States, any alien described in the Priority 1 or Priority 2 category” in the Enforcement Priorities Memorandum. This restriction tramples on DHS’s universally recognized authority to exercise prosecutorial discretion based on a case-by-case analysis of an immigrant’s background, including positive equities such as military service and ties to their family and community. Moreover, such language essentially guts DHS’s subsequent efforts to refine and narrow the enforcement priorities through collateral guidance such as the U.S. Immigration and Customs Enforcement (ICE) Frequently Asked Questions.⁵

For example, restricting the exercise of prosecutorial discretion in these tiers would lead to the unfettered deportation of individuals with old drug convictions such as Rodolfo Padilla, a lawful permanent resident who has lived in the United States for 37 years, possesses extensive family ties, and rehabilitated while in prison.⁶ Mr. Padilla paid his debt society and a federal judge determined that he was not a threat to public safety, deeming him eligible for early release under the Bureau of Prisons efforts to release non-violent drug offenders. Yet, the House appropriations language would mandate Mr. Padilla’s deportation without allowing DHS to engage in an individualized examination of his circumstances and history. Ultimately, micromanaging DHS’s internal removal policies through the appropriations process is an ineffective, wasteful process and runs counter to the Administration’s stated efforts to enforce our immigration laws in a more humane manner.

II. COMMUNITY TRUST POLICIES

Appropriators also adopted an amendment that would restrict federal disaster preparedness grant funding to jurisdictions that implement community trust policies. Penalizing state and local jurisdictions that limit cooperation between local law enforcement and federal immigration officials would reduce—not enhance—public safety by further undermining community trust in local law enforcement; disregarding local efforts to promulgate effective community safety policies; and raising serious constitutional concerns.

³ *Id.* at 3-4.

⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, Frequently Asked Questions Relating to Executive Action on Immigration (June 17, 2015), <https://www.ice.gov/immigrationAction/faqs>.

⁵ *Id.*

⁶ Pamela Constable, *Mexican prisoner awaits deportation to nation he barely recalls*, THE WASHINGTON POST, Dec. 5, 2015, available at https://www.washingtonpost.com/local/social-issues/mexican-prisoner-awaits-deportation-to-country-he-can-barely-remember/2015/12/05/2ec49428-9934-11e5-94f0-9eeaff906ef3_story.html.

Local cooperation with federal law enforcement authorities discourages community members from contacting local law enforcement. Fearing referral to ICE, victims or witnesses of crime are significantly less likely to communicate with local law enforcement. For example, a study by the Department of Urban Planning and Policy at the University of Illinois-Chicago found that 70 percent of undocumented immigrants were less likely to report a crime for fear of referral to immigration authorities.⁷ Local law enforcement authorities have repeatedly echoed this sentiment, acknowledging that community trust policies are paramount to enhancing public safety.⁸ Withholding critically-needed federal funding would, paradoxically, severely cripple the ability of state and local jurisdictions to satisfy the public safety needs of their communities.

In recognition of the unique and localized needs of each jurisdiction, over 350 state and local jurisdictions have enacted community trust policies limiting compliance with immigration detainers and other collusion with ICE. These jurisdictions carefully and thoughtfully assessed the contours and needs of their communities and enacted community trust policies through popular vote, elected officials, and other democratic mechanisms. Localities engaged in an extensive consultation process with police, courts, and other community stakeholders to establish these policies. We are deeply troubled that officials in Washington, DC are proposing a one-size-fits all measure without consulting the very jurisdictions that promulgated these policies in the first place. A federal mandate demanding that these localities discard these carefully crafted policies at the behest of distant federal lawmakers is not only counterproductive, but flagrantly contravenes the principles of local governance.

Courts have regularly called into question the constitutionality of state and local jurisdictions detaining an individual without probable cause and in violation of the Fourth Amendment. These courts have repeatedly held that localities with policies that honor detainers, absent probable cause, a judicial warrant, or new criminal offense, violate the constitution.⁹ Moreover, courts have noted that those localities are liable for damages as a result of that unconstitutional detention. Even if appropriations legislation attempts to insulate state and local actors from liability through an explicit grant of immunity, such provision does not cure the inherent unconstitutionality—and likely future injunctions from courts—of violating an individual’s Fourth Amendment rights.

Holding federal funding ransom to coerce state and local jurisdictions to enforce immigration law also raises Tenth Amendment concerns. The Supreme Court, as recently *National Federation of Independent Business v. Sebelius*, held that when legislation “threatens to terminate . . . grants as a means of pressuring the States to accept” a federal program or regulation, then the legislation is

⁷ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* i, Department of Urban Planning and Policy, University of Illinois at Chicago, May 2013, available at http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

⁸ Letter from the Law Enforcement Immigration Task Force, et. al, to Chairman Chuck Grassley, Chairman of Committee on the Judiciary, et. al, (July 20, 2015), available at <http://immigrationforum.org/blog/chiefs-and-sheriffs-oppose-immigration-enforcement-policies-undermining-community-policing/>; Richard S. Biehl, *Communities are safer when law enforcement roles are clear*, THE HILL, July 15, 2015, available at <http://thehill.com/blogs/congress-blog/homeland-security/247880-communities-are-safer-when-law-enforcement-roles-are>.

⁹ See *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST (holding that detainers, absent probable cause, a judicial warrant, or new criminal charges, violate an individual’s Fourth Amendment right to be free of unreasonable seizure); *Morales v. Chabourne*, No. 14-1425 (1st Cir. 2015) (holding that detainers require probable cause).

unconstitutional.¹⁰ Here, Congress established various federal funding mechanisms for state and local law enforcement and these jurisdictions entered into these cooperatives “voluntarily and knowingly.”¹¹ Restricting pre-existing collateral federal funding, however, dramatically alters that dynamic by adding additional, burdensome requirements in the form of state and local cooperation with federal immigration enforcement. Particularly in the case of the disaster preparedness grant funding, there is a cognizable legal argument that states would not have voluntarily and knowingly accepted this funding if they believed that Congress would later contingent continued receipt with mandatory local immigration enforcement. The scope of the grants and intersection with non-law enforcement related areas, such as disaster preparedness, leave “[s]tates with no real option but to acquiesce” and constitutes an unconstitutional coercion under the Tenth Amendment.¹²

III. Restrictions on refugee processing

Although specifics on policy riders that would restrict our country’s refugee screening and admission practices are not yet available, we urge Congress to reject provisions that would close or further restrict refugee processing or programs. Refugee processing is already extremely rigorous, and the United States must not abrogate its human rights obligations. Instead, the United States should consider expanding its refugee programs to protect individuals fleeing persecution and war.

Instead of passing discredited enforcement-only legislation, Congress should move forward on enacting just immigration reform legislation that provides a roadmap to citizenship for the nation's 11 million aspiring Americans and eliminates mass detention and deportation programs that undermine fundamental human rights. Legislation that infringes on the Executive’s inherent ability to exercise prosecutorial discretion, erodes public safety, and turns away the most vulnerable represents an abdication of the Congress' responsibility to enact fair, humane, and just immigration policy. In light of the above, IJN strongly urges you to oppose any of the above immigration policy riders in any FY 2016 legislation.

Please contact Jose Magana-Salgado, of the Immigrant Legal Resource Center, at jmagana@ilrc.org or (202) 777-8999 if you have any questions regarding this letter. Thank you for your time and consideration.

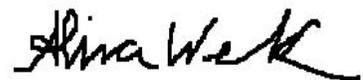
Sincerely,



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¹⁰ 132 S.Ct 2566, 2566-67 (2012).

¹¹ *Id.*

¹² *Id.*