

United States Senate
WASHINGTON, DC 20510

February 3, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

The Honorable Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement
Washington, D.C. 20536

Dear Secretary Mayorkas and Acting Director Johnson:

We write to express profound concern regarding the memorandum issued on January 21, 2021, entitled “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities.” The memorandum directs Department of Homeland Security (DHS) components to “conduct a review of policies and practices concerning immigration enforcement,” sets interim policies during the course of that review, and establishes a 100-day moratorium on most deportations “to enable focusing the Department’s resources where they are most needed.” Those seemingly harmless words mask what this memorandum actually does: it turns our nation of laws into a nation of loopholes. It is an insult to the men and women of DHS who have sworn to uphold those laws.

With respect to the 100-day deportation moratorium, we noted with alarm that there is **no general exception to the moratorium for criminal aliens**. Under the terms of the memorandum, unless the ICE Director determines that the law requires a specific criminal alien be removed, **most criminal aliens with final removal orders will be untouchable as long as the deportation moratorium is in place**. Given that **92%** of ICE Enforcement and Removal Operations’ (ERO) interior removals from the United States in FY2020 had criminal convictions or pending criminal charges,¹ the failure to exempt all criminal aliens from the deportation moratorium seems particularly egregious.

In 2016, DHS Secretary Jeh Johnson testified before the Senate Judiciary Committee that the recidivism rate of released criminal aliens was 35%.² In addition, what message does this send to their victims—both past and future? It should also be noted that ICE is unable to execute a final order of removal unless that order is administratively final—that is, the individual has already availed himself of all due process and been ordered removed by an immigration judge or other Congressionally-established lawful process. Ordering ICE officers to ignore a judge’s order is an untenable situation and will most certainly undercut the public’s trust in law enforcement at a time when keeping that trust is critical. It will likely lead to

¹ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report* (2020).

² *Oversight of the Department of Homeland Security*, U.S. Senate Committee on the Judiciary (June 30, 2016) (exchange with Sen. Flake).

another scandal for the agency, similar to that which happened in 2013, when thousands of criminal aliens were released from custody.³

This deportation moratorium constitutes a wholesale abandonment of law enforcement and a frustration of the will of Congress, written into the law, that aliens with final removal orders actually be removed from the country. It also does not signal the sort of respect for the rule of law that Secretary Mayorkas professed repeatedly at his confirmation hearing on January 19.

According to the memorandum, the reason for the deportation moratorium is to prioritize “DHS’s limited resources” to: “(1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact.”

With respect to the first point, ICE enforcement and removal officers are not trained to conduct immigration and asylum processing functions normally carried out by USCIS or CBP officers, or to perform border security functions carried out by CBP officers. We also note that none of these duties are ones for which ICE is appropriated funds. In fact, this memorandum directs them to stop the vast majority of functions for which they are actually appropriated funds. We have seen this in the past, when ICE’s priorities were so narrow in Fiscal Year 2015 that it reprogrammed more than \$110 million out of ICE Enforcement and Removal Operations. There is no excuse for that when ICE manages a docket of more than 2 million aliens and all those with final orders of removal haven’t been removed from our country. We’re a nation of laws. Congress appropriated that money and expected it to be used for the purpose it was appropriated.

We are also concerned that the 100-day deportation moratorium could cause a surge of releases of aliens, including many criminals, from ICE detention. In the case of *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that an alien in ICE detention generally could not be held longer than 6 months if their removal is unlikely to take place in the “reasonably foreseeable future.”

The Department’s January 21 memorandum creates, in our view, an unacceptable threat to public safety; constitutes a disregard for the rule of law and the will of Congress; and undercuts the integrity of the immigration enforcement regime. While some local jurisdictions have in recent years taken steps to establish themselves as “sanctuary cities,” at grave peril to their residents, the interim enforcement priorities and the deportation moratorium described in the January 21 memorandum are a big step towards converting the entire United States into a sanctuary *nation*. This is illogical and unacceptable.

While we are aware this dangerous policy has been temporarily enjoined by a federal district court in the Southern District of Texas, we remain concerned about its implementation in the event that injunction is lifted, as well as the impact its implementation could have on immigration enforcement in the months ahead. Therefore, we ask that you respond to the following questions by February 17, 2021. If you have any questions, please contact Drew Robinson on Senator Grassley’s Senate Judiciary Committee staff at 202-224-5225. Thank you for your attention to this important matter.

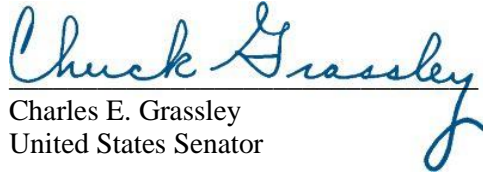
- (1) Please provide a numerical breakdown of all individuals with a final order of removal in ICE’s detained population according to their criminal convictions or pending criminal charges. Please use the same format found in Table 1 on pp. 15-16 of the U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report.

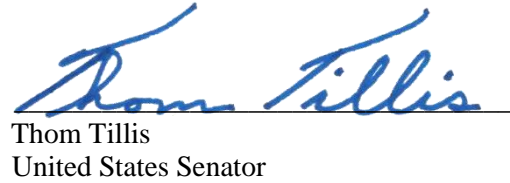
³ Rebecca Kaplan, *Report: U.S. released thousands of immigrant felons last year*, CBS NEWS (May, 15, 2014), <https://www.cbsnews.com/news/report-u-s-released-thousands-of-immigrant-felons-last-year/>

- (2) Please provide a numerical breakdown of all individuals with a final order of removal on ICE's non-detained docket according to their criminal convictions or pending criminal charges. Please use the same format found in Table 1 on pp. 15-16 of the U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report.
- (3) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for homicide continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (4) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for sexual assault continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (5) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for a sex offense continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (6) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for robbery or burglary continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (7) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for kidnapping continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (8) Will **all** criminal aliens with a final order of removal who have a criminal conviction or pending criminal charge for domestic violence continue to be eligible for deportation if the 100-day deportation moratorium is ultimately implemented according to the January 21 memorandum?
- (9) According to the January 21 memorandum, the 100-day deportation moratorium is being put in place in part to "provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently." Accordingly, please answer the following questions:
 - a. Given that ICE enforcement and removal officers are not trained to conduct immigration and asylum processing functions, to what specific functions will they be reassigned in order to "enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently?"
 - b. If DHS is ultimately able to implement the 100-day deportation moratorium as called for in the January 21 memorandum, does the Department intend to continue redeployment of ICE enforcement and removal personnel to the southwest border beyond the 100-day deportation moratorium period?
 - c. Given the ongoing need for staff and resources at the southwest border on a continuous basis, does DHS anticipate extending the deportation moratorium beyond 100 days once implemented?
- (10) With DHS advocating for removals to be suspended altogether for 100 days – and with removal policy uncertain after that – how do DHS and ICE plan to defend against habeas petitions filed by

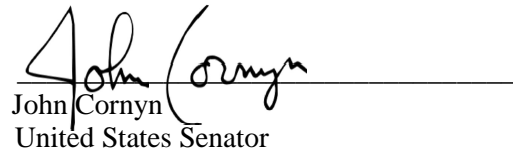
criminal aliens under *Zadvydas v. Davis* arguing that, in light of the long-term uncertainty in the U.S. government's removal policy, there is no "significant likelihood of removal in the reasonably foreseeable future"?

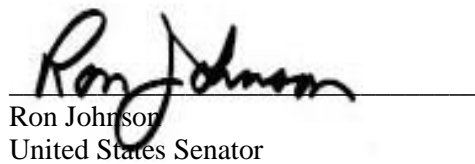
Sincerely,

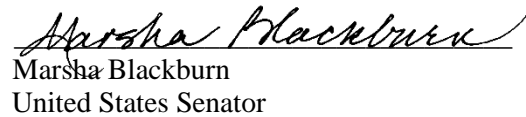

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