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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
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June 12, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Jeh Johnson
Secretary of Homeland Security

The Honorable John Kerry
Secretary of State

The Honorable Loretta Lynch
Attorney General

Dear Secretary Johnson, Secretary Kerry, and Attorney General Lynch:

According to information provided by Immigration and Customs Enforcement (ICE), up to 121 homicides in the U.S. could have been avoided between Fiscal Year 2010 and FY 2014 had this administration removed from our borders aliens with criminal convictions instead of releasing them back into society where they could commit more crimes.¹ This disturbing fact follows ICE's admission that, of the 36,007 criminal aliens it released from ICE custody in FY 2013, 1,000 have been re-convicted of *additional crimes* in the short time since their release.² I am writing to ask whether the Department of Homeland Security (DHS), the State Department, and the Justice Department are fully leveraging existing tools and resources to prevent these dangerous outcomes.

Please provide written responses to the following questions by July 6, 2015:

1. Attorney General Lynch:

- a. According to ICE, of the 121 criminal aliens who were charged with homicide in the U.S. *following* their release from ICE custody between FY 2010 and FY 2014, 33 were released on a bond set by DOJ's Executive Office of Immigration

¹ Letter from the Hon. Sarah Saldaña, Director, U.S. Immigration and Customs Enforcement, to Sen. Jeff Flake, and Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary (May 28, 2015), at 3 [hereinafter "Saldaña Letter"]. Specifically, according to ICE: "Between FY 2010 and FY 2014, there were 121 unique criminal aliens who had an active case at the time of release and were subsequently charged with homicide-related offenses. Of these 121 individuals who were bonded out, 33 were released on a bond set by DOJ EOIR and 24 were released pursuant to the Supreme Court decision in *Zadvydas v. Davis*."

² Letter from Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. on the Judiciary (Dec. 1, 2014), at 2 [hereinafter "Winkowski Letter"].

Review (EOIR) despite then having a criminal conviction.³ For each of these 33 releases, please provide (i) the court of jurisdiction that ordered the release; (ii) a detailed description of the original offense(s) committed prior to release, including a statement as to whether any of such offenses subjected the alien to mandatory custody under section 236(c) of the Immigration and Nationality Act (INA), as amended (8 U.S.C. § 1226(c)), and whether the alien had previously been determined to have been properly classified as being subject to mandatory custody pursuant to a *Matter of Joseph* hearing;⁴ (iii) a detailed description of the offense(s) committed after being released; and (iv) the specific amount of the bond granted by the immigration judge.

- b. At your confirmation hearing, you noted the importance of exercising prosecutorial discretion in enforcing immigration laws, given limited resources.⁵ According to a whistleblower, EOIR received funds that were appropriated for the express purpose of hiring additional immigration judges and related expenses. However, the whistleblower claims that EOIR diverted these funds for unapproved use, including the purchase of \$1 million of furniture that was allegedly not tied to the hiring of additional immigration judges. To assess these allegations, please provide EOIR's operating plans for the past five years.
2. Secretary Kerry: According to ICE, under *Zadvydas v. Davis*, 533 U.S. 678 (2001), "ICE has very limited authority to detain an alien who is subject to a final order of removal for more than 180 days in the absence of a significant likelihood of removal in the reasonably foreseeable future. Where [this is the case] and the alien does not fit within ICE's narrow authority to continue detention on account of special circumstances, ICE does not have a lawful basis to continue detention beyond 180 days. *This can occur when a country refuses to issue a travel document for the individual . . .*"⁶
 - a. In FY 2014, ICE released 2,457 convicted criminal aliens due to *Zadvydas*, and, 1,107 such aliens in FY 2015, as of May 9, 2015.⁷ Most of these aliens are nationals of one of twelve countries – with nearly a third of them (1,183) coming from Cuba.⁸ Each of these twelve countries had a national who was *convicted* of homicide in the U.S. but was nevertheless released from ICE custody in FY 2013, due to *Zadvydas*.⁹ For each of the twelve countries listed below in footnote seven, please describe the specific steps you have taken to incentivize cooperation with ICE removal efforts.

³ Saldaña Letter, at 3.

⁴ *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

⁵ U.S. Senate Committee on the Judiciary, Attorney General Nomination Hearing, Jan. 28, 2015.

⁶ Letter from the Hon. Sarah Saldaña, Director, U.S. Immigration and Customs Enforcement, to Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary (Mar. 18, 2015), at 1-2 (emphasis added).

⁷ U.S. Immigration and Customs Enforcement, "Zadvydas Releases by Fiscal Year and Citizenship," Responses to Follow-Up Questions: April 14, 2015 House Judiciary Committee Hearing.

⁸ *Id.* Of the 2,457 aliens released under *Zadvydas* in FY 2014, more than half were nationals of the following 12 countries: Cambodia (51), China (63), Cuba (787), El Salvador (41), Gambia (11), Guatemala (39), Honduras (47), India (45), Jamaica (102), Laos (198), Mexico (81), and Vietnam (331).

⁹ Winkowski Letter, at 2-3.

- b. Cuba is perpetually on ICE's list of recalcitrant countries because it refuses to take back people who are not identified in the repatriation agreement negotiated between the U.S. and Cuba in 1984. As a result of this policy, it is my understanding there are over 30,000 Cuban nationals, including many criminals, with final orders of removal who are freely walking the streets of the United States. In the ongoing talks between the U.S. and Cuba, does the administration plan to make repatriation of *all* of those 30,000+ Cuban nationals, and not just some subset of that group, a condition precedent of granting diplomatic recognition to Cuba? If not, why not?
- c. Under section 243(d) of the INA (8 U.S.C. § 1253(d)), the federal government can promote compliance with ICE removal efforts by denying diplomatic visas or other categories of visas to nationals of recalcitrant countries that deny or delay accepting the return of one or more aliens.¹⁰ Do you think imposing visa sanctions against any of the twelve countries referenced above is appropriate? If so, which countries, and under what circumstances? If not, why not, and what would it take for you to consider such sanctions against these countries?
- d. Have you considered withholding foreign aid to any of the twelve countries referenced above until the country cooperates on repatriation? If so, which countries? If not, why not?
- e. Has Secretary Johnson requested your help in promoting recalcitrant countries' cooperation with ICE removal efforts? If so, when, and what was requested, with respect to which country, and what was your response?
- f. Has the Department of State ever communicated to DHS, either formally or informally, that the use of visa sanctions under section 243(d) of the Immigration & Nationality Act (INA) against a recalcitrant country is not appropriate? If so, when and regarding which country?

3. Secretary Johnson:

- a. In order to promote compliance with ICE removal efforts among recalcitrant countries, have you leveraged programs, such as the Visa Waiver program, Treaty Trader and Investor programs, Trusted Traveler programs, and Air Pre-clearance programs? If so, which countries, what program, and when? If not, will you?
- b. In order to promote compliance with ICE removal efforts among recalcitrant countries, have you considered requesting the withholding of foreign aid? If so, which countries, what form and amount of aid, and when? If not, will you?

¹⁰ In 2001, these sanctions proved effective when issued against Guyana: within two months, 112 of the 113 travel document requests that were pending with that country were completed.

- c. Are there any visa-related sanctions that could be imposed on recalcitrant countries that would not necessarily involve the imposition of a ban under INA 243(d) on issuance of visas in one or more categories?
- d. According to ICE, "ICE's ability to report accurately on pending travel document applications and on issuance times is severely limited . . . [because] participation in ICE's Electronic Travel Documents (eTD) system . . . is low."¹¹ What have you done to incentivize or aid countries' participation in the eTD system?
- e. According to ICE, "[O]nly four participating governments—the Dominican Republic, El Salvador, Guatemala, and Honduras—have written agreements to use and issue travel documents within the eTD system."¹² For each criminal alien from these four countries who was released from ICE custody due to *Zadvydas* in FY 2013 and thereafter, please provide (i) the specific offense(s) for which the alien was convicted, (ii) the country of origin, and (iii) the number of days that a travel document request for the purpose of repatriation had been pending with that country prior to the alien's release.
- f. According to ICE, of the 121 criminal aliens who were charged with homicide in the U.S. *following* their release from ICE custody between FY 2010 and FY 2014, 24 were released due to *Zadvydas*. For each of these 24 aliens, please provide (i) the jurisdiction into which they were released, (ii) the country of origin, (iii) the number of days that a travel document request for the purpose of repatriation had been pending with that country prior to the alien's release, (iv) a detailed description of the original offense(s) committed prior to release, and (v) a detailed description of the offense(s) committed after being released.
- g. Of the 121 criminal aliens who were charged with homicide in the U.S. *following* their release from ICE custody between FY 2010 and FY 2014, 64 of them were released pursuant to ICE's discretion – i.e. not due to *Zadvydas* and not ordered by an immigration judge in DOJ EOIR. For each of these 64 aliens, please provide (i) a case-specific, detailed description of why the alien was released, (ii) the jurisdiction into which they were released, (iii) a detailed description of the original offense(s) committed prior to release, and (iv) a detailed description of the offense(s) committed after being released.
- h. For each of the 121 criminal aliens who were charged with homicide in the U.S. *following* their release from ICE custody between FY 2010 and FY 2014, please describe (i) the specific conditions that were imposed on each release and (ii) whether and how many times those conditions were violated prior to the homicide charge.

¹¹ Winkowski Letter, at 3.

¹² *Id.*

- i. According to testimony from Gary Mead, former Executive Associate Director for Enforcement and Removal Operations at ICE, ICE and the Department of State concluded a memorandum of understanding (MOU) in April 2011 “establishing ways in which [the Department of State] and the Department of Homeland Security will work together to ensure that other countries accept the return of their nationals in accordance with international law.”¹³ According to Mr. Mead’s testimony, the MOU provides that ICE and the State Department will pursue the following steps, in the order set forth below, in an attempt to increase compliance among countries that systematically refuse or delay repatriation of their nationals:
 - i. issuing a demarche or series of demarches at increasingly higher levels;
 - ii. holding joint meetings with the Ambassador to the United States, DOS Assistant Secretary for Consular Affairs and the Director of ICE;
 - iii. considering whether to provide notice of the U.S. government’s intent to formally determine that the country is not accepting the return of its nationals and that the U.S. government intends to exercise the provisions of Section 243(d) of the INA to gain compliance;
 - iv. considering visa sanctions under Section 243(d) of the INA; and
 - v. calling for an interagency meeting to pursue withholding of aid or other funding.¹⁴

With respect to each of the twelve countries referenced above, at what point is the U.S. Government in the series of steps set forth in the MOU? Please give specific dates when each of steps (1)-(5) set forth in the April 2011 MOU, and reproduced above, were accomplished for each of these twelve countries.

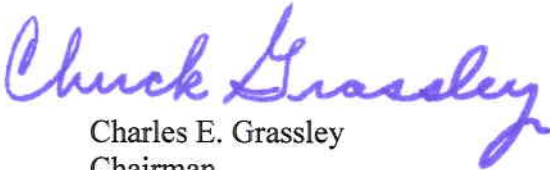
- j. In your testimony before the Senate Judiciary Committee on April 28, 2015, you said, with respect to imposing visa sanctions under section 243(d) of the INA: “I don’t necessarily believe that we ought to suspend immigration, travel from any of these countries because of this particular issue.” Does your comment mean that you have ruled out ever imposing INA 243(d) sanctions on a recalcitrant country? If so, why would such a sanction be ruled out if such a move has worked in the past (e.g. Guyana in 2001)?

Please number your responses according to their corresponding questions. If you have any questions, please contact Jay Lim at (202) 224-5225 or Gene Hamilton at (202) 224-7572. Thank you for your attention to this important matter.

¹³ Statement of Gary Mead, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, before the House Judiciary Committee, Subcommittee on Immigration Policy and Enforcement, “H.R.1932, the ‘Keep Our Communities Safe Act of 2011’,” <http://www.dhs.gov/news/2011/05/24/statement-gary-mead-executive-associate-director-enforcement-and-removal-operations>.

¹⁴ *Id.*

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary



Jeff Sessions
Chairman
Subcommittee on Immigration & the
National Interest
Senate Committee on the Judiciary

cc:

The Honorable Juan P. Osuna
Director
Executive Office of Immigration Review
U.S. Department of Justice

The Honorable Alfonso E. Lenhardt
Acting Administrator
United States Agency for International Development