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Memorandum

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Amnesty by Any Means

Memos Trace Evolution of Obama Administration Policy

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Introduction

Analysis of a series of leaked memos from within the Department of Homeland Security's highest ranks shows that the Obama administration has sought for the last year and a half to form a strategy to achieve amnesty for the illegal population without input from Congress. The goal? Ultimately, according to a June 2010 memo, the administration seeks to "reduce the threat of removal for certain individuals present in the United States without authorization." Well aware of the potential political fallout among both Congress and the American people, the administration provided internal briefs on the pros and cons of varying strategies to gain an administrative amnesty.

The course eventually decided on appears to be the now infamous June 2011 "prosecutorial discretion" memo[1] issued by Immigration and Customs Enforcement (ICE) Director John Morton. This memo, embraced by the White House[2] a few weeks ago, sets a course that prevents the enforcement of immigration law, provides a de facto amnesty, and is effectively worker authorization for much of the current illegal population. The current course of non-enforcement is in contrast to the initial proposed strategies of proactive immigration law rewrites.

In this memo is a thorough analysis of the extent the Obama administration is willing to go to deceive America into accepting unprecedented executive branch immigration law rewrites and changes in immigration processing to get around their federal responsibility to enforce immigration law. Obama administration actions taken to peel back visa interviews abroad, reduce enforcement on our physical borders, replace worksite enforcement to worksite audits, take actions against states seeking to enforce the law but no action against sanctuary cities, and support of only two immigration enforcement programs — Secure Communities and E-Verify — make sense when placed against the backdrop of these memos. On September 29, 2011, more evidence that this agenda is on track came in a *Washington Post* front-page story[3] describing the Obama administration's overt actions to discourage states from attempting to get their illegal populations under control:

> **Obama Administration Escalates Crackdown on Tough Immigration Laws**
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> "The Obama administration is escalating its crackdown on tough immigration laws, with lawyers reviewing four new state statutes to determine whether the federal government will take the extraordinary step of challenging the measures in court.
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> "Justice Department attorneys have sued Arizona and Alabama, where a federal judge on Wednesday allowed key parts of that state's immigration law to take effect but blocked other provisions. Federal lawyers are talking to Utah officials about a third possible lawsuit and are considering legal challenges in Georgia, Indiana and South Carolina, according to court documents and government officials. The level of federal intervention is highly unusual, legal experts said."

None of these actions have been pursued without a foundational goal of "amnesty by any means." That is why 9/11 Commission findings of fact and recommendations have been rolled back or purposefully misconstrued;

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these policies fly in the face of our national security and our economic security. Below is a detailed account of a DHS/White House pursuit of amnesty.

Background

Four administration memos, taken together, show the evolution of the immigration law enforcement meltdown currently underway. The story begins in February 2010 with proposals to amend immigration law categories and policies through a series of regulatory rewrites. In addition, the memos consider prying open narrow immigration exceptions into wide cross-cutting remedies to permit the entry and legalized stay of large classes of illegal immigrants through an expensive "registration process." "Political Considerations" riddle the first two memos, with chief concerns including "The Secretary would face criticism that she is abdicating her charge to enforce immigration laws" and "A program that reaches the entire population targeted for legalization would" be characterized by opponents as amnesty.

The first memo, drafted in February 2010, is authored — according to good sources — by the DHS Secretary's office. This draft memo sets the tone for subsequent memos authored by leadership at DHS components. The next was drafted by the General Counsel's office at U.S. Citizenship and Immigration Services (USCIS) in June 2010. The next two are the "Enforcement Priorities" and "Prosecutorial Discretion" memos authored by Immigration and Customs Enforcement Director John Morton and published in March and June 2011. The early memos propose proactive legal changes that list the political pros and cons of a variety of avenues to achieve administrative amnesty, while the latter two focus on simply restraining ICE from enforcing law against the illegal alien population as a whole.

The malfeasance in subverting immigration law evident in the early memos evolved into a strategy of nonfeasance evident in Morton's memos. Immigration law has no bearing if it is not enforced, and thus it is clear that the tactic became one of ensuring that ICE simply not enforce the law rather than subjecting administration attorneys to conducting regulatory immigration law rewrites, which were considered (1) time consuming; (2) difficult; and (3) capable of a much greater negative political fallout.

If DHS had pursued a policy of immigration law rewrites, a likely result would have been a cry of malfeasance; a legitimate allegation that DHS — with White House support — was subverting congressional authority to draft and pass immigration law and set the tone for immigration policy. Regulations gone awry could easily be pinned on President Obama and, if a failure, another source of negative political fallout for the president. Nonfeasance is much harder to prove. The administration, smartly, has chosen nonfeasance by simply telling ICE agents they are not to do their job. However, by asserting active support at the White House for the Morton "Prosecutorial Discretion" policies, the president remains on the hook for his public statements tying ICE non-enforcement to stated proactive policies of amnesty. In addition, his speech on May 10, 2011, in El Paso, Texas[4] poking fun of those seeking border security by joking that they will not be satisfied until there are alligators in moats along the border, underlines a policy that is unserious about border security. Legal actions against the states seeking to support federal immigration law are also evidence that the president is actively seeking non-enforcement of immigration law not just on a federal level, but in states as well.

Thus, despite months of strategizing on the issue to avoid negative fallout and assure political cover in part with administration support of mandatory E-Verify, the president has no real way to distance himself from a policy goal of using any means to achieve amnesty. The ICE memos, with legal actions against states, and White House outspoken support for amnesty, all add up to the abdication of enforcing immigration law, just as the early memos feared would be the fallout. Amnesty efforts can no longer be pinned just on the Secretary of Homeland Security. The White House endorsement of the most recent "prosecutorial discretion" memo has changed the seriousness of the concern over the administration's interest in amnesty from tacit approval to active support.

Below is a chronology of the memos and their key content.

The Four Memos

DHS Headquarters Draft Memo "Administrative Options" (February 26, 2010)[5]

In this first memo drafted by individuals in the Secretary of Homeland Security's office, staff detail various options for achieving amnesty, under the following headings: (1) "Registration Program and Deferred Action for Current Unauthorized Populations;" (2) "Clearing Family-Based Visa Backlogs;" (3) "Parole Immediate Relatives of U.S. Citizens Who Entered Without Inspection and Would Otherwise be Ineligible for Adjustment of Status;" (4) "Allow Beneficiaries of Approved Family-Based Visa Petitions to Wait in the U.S.;" (5) "Expanded E-Verify;" and (6) "Political Considerations."

The memo highlights the use of a "quick" registration program using "deferred action" granted to as large a portion of the illegal population in order that their employment be legalized as easily and quickly as possible. "Deferred action" is not law, but an administrative remedy inferred from current regulation. A 2007 memo by the USCIS Ombudsman[6] (an internal watchdog) explains deferred action as follows:

> "There is no statutory basis for deferred action, but the regulations reference this form of relief and provide a brief description: "[D]eferred action, an act of administrative convenience to the government which gives some cases lower priority…." Where USCIS grants a request for deferred action, the foreign national is provided employment authorization. According to informal USCIS estimates, the vast majority of cases in which deferred action is granted involve medical grounds."

This February 26, 2010 DHS headquarters draft memo begins by describing how, in the "absence of legislation … the Secretary of Homeland Security [could] grant eligible applicants deferred action status." The only individuals excluded would be those "individuals who pose a security risk." On the second page, the "pros" and "cons" of using deferred action to provide a baseline for a "registration program" are laid out. Key items in both categories include:

> "Pros: Transform the political landscape by using administrative measures to sidestep the current state of Congressional gridlock and inertia.
>
> "Cons: Internal complaints of abdicating our charge to enforce immigration law from career DHS officers are likely and may be used in the press to bolster such arguments.
>
> "Cons: Reaching an entire population for legalization would use deferred action way beyond a scale it has ever been used for before, and Congress may respond by trimming back our deferred action authority, or simply negating it, since deferred action is temporary and revocable by its nature."

These cons were stricken in a "track changes" version of the draft, but cut and pasted elsewhere in politically softer language:

> "Unilateral action by the Administration could be viewed as an end run around Congress, angering both Republicans and Democrats
>
> "Legal challenges are possible and could halt implementation of the program.
>
> "Congress may disagree with the deferred action policy and seek to undermine it through legislation or by using its appropriations authority to prohibit the expenditure of funds for such a program."

The memo has an entire section on the need to support an E-Verify mandate for all employers, explaining that support for such a mandate would lend credibility to the administration's claim that it is sincerely trying to enforce immigration law. An E-Verify mandate would also provide safe harbor to businesses using the system, a more

protective standard from the prior ICE policy that voluntary E-Verify use provides reasonable deniability of wrongdoing. More importantly, mandatory E-Verify would provide "political space" to achieve administrative amnesty:

> "Expansion and improvement of E-Verify are enforcement-related measures that would give us the most political space to propose significant benefits-related administrative changes… By providing a safe harbor for employers who properly use E-Verify, DHS could give employers a significant incentive to participate in the program."

In the "Political Considerations" section which concludes the memo, DHS headquarters staff review the best time to attempt to persuade America with their "carefully crafted" message that helps the President and fellow Democrats and hurts Republicans, while wooing Latino voters:

> "The right time for administrative action will be late summer or fall — when midterm election season is in full swing… The administration would have to boldly drive the narrative. President Obama and the Administration would assert that they are stepping into the breach created by congressional gridlock and moving aggressively to solve a vexing problem that three consecutive Congresses have tried by failed to fix. Flanked by Secretaries Napolitano, Solis, Locke, Holder, and Vilsac, the President could make the case that the nation's economic and national security can wait no longer for Congress….
>
> "This message would have to be carefully crafted to avoid being met with hostility by Democratic members of Congress who are trying to defend their seats in midterm elections. A potential strategy to sell the most ambitious administrative proposal would be to combine them (all the proposals above) with a call for a vote on a mandatory E-Verify. The President could join Reid and Pelosi to challenge Congress to enact such legislation. The legislative strategy would give Democrats who fear the administrative amnesty charge the opportunity to say they disagree with the President on amnesty, but as legislators are ready to crackdown on illegal workers. It would also help insulate Democrats from the charge of being a "do-nothing Congress" on the issue. This also places Republicans in a difficult position: a vote for enforcement helps endorse the President's overall strategy while a vote against is a vote for the status quo.
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> "In this scenario, the Administration and Congressional leadership would be viewed as breaking through Washington gridlock in an effort to solve tough problems. Giving nervous Members of Congress something tough to vote for while providing Latino voters with something they could support would be a win-win for all."

The memo's last paragraph, however, suggests that the plan is too ambitious, and could put the administration in a worse position to achieve amnesty than doing nothing at all:

> "If the American public reacts poorly to an administrative registration effort, Congress could be motivated to enact legislation tying the Administration's hands. This could result, in the worst case scenario, in legislation that diminishes the Secretary's discretion to use parole or deferred action in other contexts. A heated fight could also poison the atmosphere for any future legislative reform effort."

USCIS General Counsel Memo to Director Alejandro Mayorkas on "Administrative Alternatives to Comprehensive Immigration Reform" (June 20, 2010)[7]

This 11-page memo from the four major sections of USCIS to USCIS Director Alejandro Mayorkas focuses on legal methods of extending and widening existing statutory immigration benefits to "reduce the threat of removal" for most illegal aliens. Perhaps most disturbing is a strategy whereby the administration would cherry pick when to use certain remedies or traditional enforcement tools, building on the discussion of "deferred action" in the DHS Headquarters memo. Where "no relief appears available based on an applicant's employment and/or family circumstances, but removal is not in the public interest, USCIS could grant deferred action" which would allow the illegal alien "to live and work in the U.S. without fear of removal."

The memo lists a series of options which "used alone or in combination — have the potential to result in meaningful immigration reform absent legislative action." These options focus on (1) family unity; (2) economic growth; (3) process improvements; and (4) "protection of certain individuals or groups from the threat of removal." In the last section on protecting illegal groups from the threat of removal, "deferred action" tops the list and infers ICE's role in supporting amnesty by doing nothing, defining it as follows: "Deferred action is an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time." The value? "Individuals who have been granted deferred action may apply for employment authorization." Moreover, most immigration components can invoke deferred action, widening its application: "within DHS, USCIS, Immigration and Customs Enforcement, and Customs and Border Protection all possess authority to grant deferred action."

However, once more, deferred action has its negatives: "While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive."

The memo concludes with specificity on how to grant amnesty on a case-by-case basis in a "corollary" scenario during the removal process by the use, or non-use, of Notice to Appear (NTA) court orders. To date, NTAs are a mainstay of the removal/deportation process:

> "If relief is potentially available in removal, USCIS should consider issuing the NTA. On the other hand, where no relief exists in removal for an applicant without any significant negative immigration or criminal history, USCIS should avoid using its limited resources to issue an NTA."

While couched in enforcement terms, what this section of the memo relates is that NTAs should only be issued if the facts indicate that in court the illegal will win, and be able to stay legally. If, however, there is reason to believe that the facts indicate a court should remove the illegal alien, agents are directed to not issue the NTA, thus denying the court the opportunity to remove the illegal. Thus, by cherry picking when to use and not use NTAs, all immigration components — with ICE being affected the most — can support achieving amnesty on a case-by-case basis.

ICE Director Morton Memo "Priorities for the Apprehension, Detention, and Removal of Aliens" (March 2, 2011)[8]

With this third memo, nearly a year later and with no real movement or support for amnesty in Congress or in the public, ICE begins to emerge as shouldering amnesty in a thinly veiled memo to agents in the field. In this March 2011 memo, ICE Director Morton makes clear that only a small percentage of illegal aliens will be prioritized for removal — terrorists, violent criminals, felons, and repeat offenders. Even fugitives from the law are prioritized with regard to whether they have been convicted of a violent crime. In this memo, Morton states that apprehensions listed as "low priority" — such as illegal aliens convicted of drunk driving — are still available for prosecution, but the lowest priority. The next memo negates even these cases.

In addition, as of March 2011, mandatory detention no longer exists; large swaths of the illegal population are not to be detained at all. This memo makes clear that another memo on prosecutorial discretion guidance is forthcoming.

ICE Director Morton Memo "Exercising Prosecutorial Discretion with Civil Immigration Priorities for Apprehension, Detention and Removal of Aliens" (June 17, 2011)[9]

The most recent memo by Director Morton, issued in June 2011 as the promised follow-up to the March "enforcement priorities" memo, provides a non-exhaustive list of 19 exemptions to enforcement.[10] Even with this list, the Director concludes that, "The list provided is not exhaustive and no one factor is determinative." In addition, ICE agents are to consider enforcement on a time-consuming case-by-case basis with no further guidance, requiring agents to seek out information from every illegal encountered and give that information high credence while not allowed to conduct further background checks in most instances.

Equally disturbing is that "ICE officers, agents, and attorneys" now have the discretion to dismiss and close cases "at any stage of the proceedings." In contrast, no guidance is provided on bringing deportation or removal cases. In fact, attorneys should proactively remove immigration cases from dockets. Furthermore, ICE is not to request law enforcement information, but simply ask the alien for relevant information sought: "In cases where … an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative."

So what does this do to Secure Communities? It means that even when a local police officer arrests an individual and gets a "hit" on immigration databases, an immigration enforcement action will not be likely unless that individual is a terrorist or violent criminal, and even then the immigration action will only take place after other charges are dispensed. Thus, like E-Verify being viewed as an enforcement tool rather than a compliance tool by the administration in order to justify not conducting worksite enforcement, Secure Communities is an enforcement tool that will be sparingly used in practice, but justifies another "tough on immigration" claim by the administration. This means that both programs are being used as political cover to create the perception of enforcement, rather than their being developed and harnessed as strong, helpful enforcement tools.

When former INS Commissioner Doris Meissner issued her memo on prosecutorial discretion in 2000, which Morton relies on, she stated that her memo "does not lessen INS commitment to enforce immigration laws nor is it an invitation to violate the law." Director Morton, however, in a footnote, clarifies that the Obama administration version of "prosecutorial discretion" is different from Meissner's; Morton states Meissner's standard "turned principally on whether a substantial federal interest was present." Morton's standard, on the other hand, has nothing to do with a "substantial federal interest" (priorities determined by federal immigration law), but rather "pursuing those cases that meet the agency's priorities for federal immigration enforcement generally" (priorities determined by the Obama administration, not law). The Obama administration is actively working to use ICE to act outside the law and not enforce immigration law under the guise of "prosecutorial discretion."

ICE Agents Speak Up

The upshot of Morton's "prosecutorial discretion" memo was another vote of No Confidence by the ICE Union[11] on June 23, 2011. On July 26, 2011, Chris Crane, President of the ICE Union, testified[12] before the House Judiciary Subcommittee on Immigration and Policy Enforcement. He stated that Morton's "prosecutorial discretion" memo forced ICE agents in the field to: (1) knowingly not enforce the law against those in jail upon completion of their sentences; (2) knowingly not enforce law against fugitives and convicted criminals; and (3) knowingly not conduct criminal background checks for fear of reprisals, including losing their jobs. The insistence in the Morton memo that prosecutorial discretion is "held by the Director" means, in practice, that "ICE agents and officers will follow orders, not exercise any true discretion. Claims by ICE that this memorandum gives field agents more discretion in the field are false. The purpose of this policy is to prohibit officers and agents from arresting individuals from certain groups."

Crane discusses how ICE management now is preventing field agents from issuing "detainers" to allow ICE to take delayed custody of illegal aliens who have finished their sentences in jails or prisons or are awaiting trial when ICE needs additional time for deportation. The purpose of detainers is to keep the individual from being released back into a community. Instead, ICE has:

> "A new pilot program … directing jails to simply release aliens not yet convicted of crimes, stating that ICE will now only take custody of aliens who have been convicted of crimes… Large numbers of aliens will be released from jails. Under the previous policy, these same aliens would have been processed and required to appear before an immigration judge."

Crane then explains "field arrest procedures" now being given orally, with a refusal to do so in writing:

> "Agents and officers in the field are frequently under orders not to arrest persons suspected of being the United States illegally. At times those no arrest orders include ICE fugitives, who have been ordered deported by an immigration judge, as well as individuals who have reentered the U.S. following deportation which is a federal felony.
>
> "Agents and officers report that they are ordered not to run criminal or immigration background checks or even speak to individuals whom they reasonably suspect are in the U.S. illegally…. Situations in which officers and agents are ordered not to run criminal background checks or speak to individuals create an especially high risk to public safety as agents may unknowingly walk away from individuals who pose a public threat."

Interestingly, these field operations procedures are strangely parallel to what officers from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) told a Congressional hearing[13] in June 2011 pertaining to "Operation Fast and Furious." In that operation, ATF agents were told to stand down when known Mexican drug cartel members and their proxies were using bulk cash to buy weapons at U.S. gun shops. The officers in both instances have complained of gross malfeasance on the part of their superiors in ordering them to not enforce the law, and in some cases, make direct sales to cartels undercover without those sales resulting in stings or further surveillance. Here, ICE agents are told to stand down when they have known fugitives before them and not enforce the law, knowingly releasing them back into society.

Yet despite the public outcry over the Morton memo, the White House has followed a modified version of the initial "Political Considerations" strategy set out by DHS headquarters in the first February 2010 memo that focused on promoting E-Verify for political purposes. An example of this came when the White House recently issued a press release on behalf of President Obama endorsing the Morton prosecutorial discretion memo as a first step toward amnesty and de facto worker authorization. Perhaps seeking to protect the president from potential — even likely — political fallout from the announcement, former La Raza director Cecelia Munoz penned the release instead.[14] "Amnesty by any means" is moving forward.

Conclusion

Current Obama administration immigration and enforcement standards are a purposeful subversion of the law in an effort to gain Latino voters; provide a "get out of jail free" card to many illegal immigrants in our criminal justice system; assure most of the illegal population work authorization with or without E-Verify; and sidestep Congress. The current administration's rhetorical support for mandatory E-Verify is not really about the value of E-Verify in ensuring a legal work force, but more centered on the program's value as a political "enforcement" mask to distract voters from a de facto amnesty. This conclusion is based on evidence throughout high level administration memos that spanned the past year and a half.

These memos reflect an open strategy to undermine federal immigration law and its enforcement in order to legalize large swathes of the illegal population, including those about whom we know little and are in detention pending court appearances, potentially granting legality to arrested terrorists and violent criminals. Thus, nearly the entire illegal population could gain amnesty, including many who may pose a threat to public safety.

America is not safer when its laws are ignored and the balance of power created by the Constitution between the executive and representative branch is undermined by political agendas that run contrary to both economic and national security. The Obama administration in these memos does little more than invite illegality and insecurity, creating "mission meltdown" not only for ICE, but across our immigration and border security system. Now that the "amnesty by any means" policy is in force with the backing of President Obama, and those that stand in the way at the federal or state level are being bullied with lawsuits or threats of job loss, we are officially distracted as a nation from achieving the homeland security that was such an obvious and necessary goal after 9/11.

End Notes

[1] http://www.iceunion.org/download/283-284-mortons-prosecutorial-discretion-memo.pdf%5d.

[2] http://cis.org/Kephart/Cecilia-Munoz-Embraces-Amnesty.

[3] http://www.washingtonpost.com/politics/obama-administration-widens-challenges-to-state-immigration-laws/2011/09/28/gIQA8HgR7K_story.html?wpisrc=al_national.

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[5] http://media.washingtonpost.com/wp-srv/politics/documents/dhs_draft_memo_09222010.pdf.

[6] http://docs.google.com/viewer?a=v&q=cache:8JSaKDyM1xMJ:www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf+definition+of+%27deferred+action%27+in+us+immigration+law&hl=en&gl=us&pid=bl&srcid=ADGEESg9q4PUMPir0f8zJERA8fE5Pv35dGzJdatr.

[7] http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf.

[8] http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[9] http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[10] http://www.cis.org/Kephart/ICE-prosecutorial-discretion.

[11] http://www.iceunion.org/download/286-287-press-release-pd-memo.pdf.

[12] http://judiciary.house.gov/hearings/pdf/Crane07262011.pdf.

[13] http://www.cis.org/kephart/napolitano-border-strategy-7-11.

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