Congress of the United States
Washington, DC 20515

March 1, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Janet Napolitano
Secretary
Department of Homeland Security
Washington, DC 20528

Dear Attorney General Holder and Secretary Napolitano:

We write to express our concerns about a recent order issued by the United States Court of Appeals for the Ninth Circuit and the government's forthcoming response, which is due by March 19, 2012. The Ninth Circuit's decision to put several deportation cases on hold is an overreach of judicial authority and shows the inherent danger in this administration's backdoor amnesty policies.

On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases[1] fit into the administration's immigration enforcement priorities announced via agency memorandum. The order in each case says:

> In light of Immigration and Customs Enforcement (ICE) Director John Morton's June 17, 2011 memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing.

Instead of deciding these cases under the law of the land, the Ninth Circuit has asked the Obama administration whether it intends to grant the illegal immigrants amnesty under the prosecutorial discretion initiative announced last year.

The orders appear to be the court's attempt to suspend its everyday review of immigration cases due to the administration's plans to close tens of thousands of cases for the 300,000 aliens who are in removal proceedings. The Ninth Circuit has acted beyond the bounds of its judicial role and is inserting itself into an area – prosecutorial discretion - reserved solely to the executive branch. Using prosecutorial discretion to justify the stay of deportation is an outrageous overreach by the court and shows the danger inherent in the administration's policy.

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[1] *Rodriguez v. Holder*, Nos. 06-74444, 06-75524, 2012 WL 360759, at *1 (9th Cir. Feb. 6, 2012); *San Agustin v. Holder*, No. 09-72910, 2012 WL 360761, at *1 (9th Cir. Feb. 6, 2012); *Jex v. Holder*, No. 09-74038, 2012 WL 360764, at *1 (9th Cir. Feb. 6, 2012); *Pocasangre v. Holder*, No. 10-70629, 2012 WL 360774, at *1 (9th Cir. Feb. 6, 2012); *Mata-Fasardo v. Holder*, No. 10-71869, 2012 WL 360776, at *1 (9th Cir. Feb. 6, 2012).

From the onset, we note that the administration's prosecutorial discretion policy is circumvents our immigration laws. Alarmingly, a significant percentage of the 300,000 aliens currently in removal proceedings can now seek to have removal suspended despite being present in the United States in violation of the law, removable for violating the terms of their visas, or committing removable acts. In this manner, the Obama administration again chooses to ignore immigration laws under the guise of prosecutorial discretion. Despite the administration's claim that there is nothing new with respect to this policy, it represents a drastic and unprecedented shift.

No previous administration, irrespective of political party, has chosen, en masse, to place restrictions on the type of removable aliens that may be processed (or, in this case, not be processed) for removal before the immigration courts. Previous administrations have processed for removal those removable aliens who came to the attention of law enforcement. In other administrations, prosecutorial discretion was properly implemented on a case-by-case basis for a small number of aliens under especially compelling circumstances, but it was never used to circumvent the Immigration and Nationality Act.

Line attorneys from the DOJ and DHS spend a considerable amount of time and resources working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend time and resources adjudicating these cases. Millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges, and court staff. It makes no sense to squander these efforts by abandoning cases that have already generated removal orders.

In all immigration cases pending before the immigration courts, BIA and federal courts of appeals, the government should do what it has always done irrespective of administration: advocate for the entry of or affirmance of deportation orders or the equivalent. Upon receiving a removal order, the government should promptly carry out the deportation. The personal dictates of the administration should not trump the rule of law.

In responding to the Ninth Circuit's question, the administration will be required to reveal whether it intends to manipulate our legal system and waste taxpayer dollars, as part of it efforts to grant amnesty to illegal immigrants.

Accordingly, your response to the Ninth Circuit's order must clearly and unequivocally indicate that the government will enforce the immigration laws, including promptly deporting all removable aliens who lose their cases in the federal courts of appeals.

If the administration responds to the Ninth Circuit orders by indicating that the illegal and other removable aliens will be granted relief via amnesty, then it must explain to the American people what that answer means for the integrity of our legal system and why their tax dollars are being spent on prosecutions that the Obama administration has no intention of enforcing with deportation.

We are seriously concerned that the Ninth Circuit's order ignores the rule of law and confounds constitutional principles, and we would like to know who how you plan to respond to the Court's actions. Additionally, we ask that you please respond to the following requests for information:

1. For each of the cases that is subject to the order(s) issued by the Ninth Circuit on February 6, 2012, identify the following: (a) the date the case was commenced before an immigration judge or trial judge, (b) the date the appeal to the Ninth Circuit was filed, (c) the date the government's merits brief in the Ninth Circuit was filed, (d) the status of the case in the Ninth Circuit, (e) whether the government has argued that the Ninth Circuit should affirm a removal order, (f) the number of hours worked on the case by government attorneys before the case reached the Ninth Circuit, (g) the number of hours worked on the case by government attorneys since the case was filed in the Ninth Circuit, (h) an estimate of the number of hours worked on the case by immigration judges, BIA judges and federal judges and (i) the amount of tax payer dollars spent on the case to date, including the portion of the salaries of the government attorneys, judges and court staff who have worked on the case.

2. Does the government seek to have immigration judges enter removal orders even though those orders may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the immigration judges presiding over the cases?

3. Does the government seek to have the BIA affirm removal orders even though the affirmances may subsequently be disregarded pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the BIA judges presiding over the cases?

4. Does the government seek to have federal courts of appeals affirm removal orders, even though those orders may subsequently be disregard pursuant to prosecutorial discretion? If so, how does the administration justify wasting millions in taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the federal judges presiding over the cases?

The answer to these questions should be readily available and should have been resolved before the implementation of the prosecutorial discretion initiative last year. Accordingly, we ask that you provide written answers to us by March 12, 2012.

Sincerely,

Charles E. Grassley
Ranking Member
Senate Judiciary Committee

Lamar Smith
Chairman
House Judiciary Committee