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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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November 18, 2011

The Honorable Janet Napolitano  
Secretary  
U.S. Department of Homeland Security  
Washington, DC 20850

Dear Secretary Napolitano,

I write to express my profound disappointment over your unexpected lack of production of responsive documents provided in response to the Judiciary Committee's subpoena of November 4, 2011, and insist that you immediately come into compliance with the terms of the subpoena.

### **I. Judiciary Committee Authority**

The Judiciary Committee has jurisdiction over the enforcement of our nation's immigration laws inside the United States.<sup>1</sup> Oversight of the executive branch is a crucial component of this responsibility:

In order to determine whether laws and programs addressing subjects within the jurisdiction of a committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated, each standing committee . . . shall review and study on a continuing basis—(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction; (B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction; (C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction . . . .<sup>2</sup>

<sup>1</sup> See rule 10(1)(1) of the rules of the U.S. House of Representatives (112<sup>th</sup> Congress).

<sup>2</sup> See rule 10(2)(b)(1) of the rules of the U.S. House of Representatives (112<sup>th</sup> Congress).

## **II. Immigration Oversight**

The Committee has no more important oversight responsibility than to ensure that U.S. Immigration and Customs Enforcement (“ICE”) does its utmost to effectuate the removal of criminal aliens. The recidivism rate of such aliens who are not removed or detained is extremely high. In 1999, the Committee subpoenaed the Department of Justice (“DOJ”) for information on inadmissible or deportable aliens who were released from U.S. Immigration and Naturalization Service (“INS”) custody and then subsequently convicted of additional crimes. DOJ complied with the Committee’s subpoena issued in 1999. The resulting information revealed that of the 35,318 criminal aliens whom INS released between 1994 and 1999, 37% had been convicted of another crime in the United States by 2000.<sup>3</sup>

In fact, the Supreme Court has stated that “Congress [is] justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime . . . .”<sup>4</sup> The Court noted that “deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least one more and 45% -- nearly half -- were arrested multiple times before their deportation proceedings even began.”<sup>5</sup> As Justice Kennedy has stated, “[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist . . . .”<sup>6</sup> Given the clear consensus that the failure to remove criminal aliens presents a clear risk to public safety it is reasonable that the Committee would seek to conduct oversight on the effectiveness of the executive branch’s enforcement policies related to their removal in order to determine whether legislation is necessary to more effectively address the issue.

## **III. Purpose of the Committee’s Request**

Thus, in furtherance of our oversight responsibility, the Committee is investigating ICE’s Secure Communities program. Under Secure Communities, ICE leverages an existing information sharing capability between DHS and the Department of Justice to quickly and accurately identify aliens who are arrested for a crime by local law enforcement. With this capability, the fingerprints of persons arrested and booked are checked against Federal Bureau of Investigation (“FBI”) criminal history records and are also checked against DHS immigration records. When fingerprint submissions match immigration records, local ICE officers are notified and determine if immigration enforcement action is required. ICE may issue a “detainer” to a local jail or correctional facility when it seeks to take custody of an alien in that facility for purposes of instituting removal proceedings or processing for administrative removal.

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<sup>3</sup> See H.R. Rept. 106-1048 at 256-57 (2001).

<sup>4</sup> Demore v. Kim, 538 U.S. 510, 513 (2003).

<sup>5</sup> Id. at 518.

<sup>6</sup> Zadvydas v. Davis, 533 U.S. 678, 714 (2001)(Kennedy, J., dissenting).

During your tenure as Secretary, ICE has developed a “risk-based strategy” that prioritizes as part of Secure Communities and otherwise the identification and removal of the criminal aliens that ICE believes pose the greatest threat by developing classification levels for all immigrant criminals based on the seriousness of their crimes and the totality of their criminal history.<sup>7</sup> ICE may decline to place detainees on identified criminal aliens who do not fit these priorities. In fact, the Congressional Research Service has reported that since fiscal year 2009, ICE has declined to issue detainees 58% percent of the time -- in 309,454 instances.<sup>8</sup>

#### **IV. Timeline of the Committee’s request**

In order for our nation’s policy makers to be informed on the problem of criminal aliens and their affect on public safety, it is critical to know the recidivism rate of criminal aliens for whom ICE has decided not to seek detainees. Therefore, on August 22, 2011, I made a formal request to you for information about removable aliens brought to the attention of ICE via Secure Communities or other means who are not removed.<sup>9</sup> My letter requested that you provide the Committee with a list of all the "low-level" criminal aliens about whom ICE was notified, whether notification was through Secure Communities or other means, but did not take custody of and declined to remove. The letter also requested their FBI numbers. This was done so that the Committee could then seek from the FBI the criminal history records of these aliens in order to fully understand the nature of the problem of criminal aliens.

On August 25, 2011, a Judiciary Committee staff member spoke with ICE officials, who indicated that ICE would prepare a list containing the requested information. The list would include all ICE encounters that were not processed for removal and would contain alien registration numbers, fingerprint identification numbers (“FIN”), names and FBI numbers. This was consistent with the information the Committee received under subpoena from the Department of Justice in 2000 (including names, dates of birth, alien registration numbers and FBI numbers, among other identifying information).

Thereafter, I received a letter dated September 1, 2011, from ICE.<sup>10</sup> The letter acknowledged that I had requested a list of “low-level” criminals about whom ICE was notified but did not take custody of and declined to remove. The letter stated that while ICE could provide the Committee with a list, FBI numbers could only be provided by the FBI. ICE further stated that it would need a few weeks to prepare the data. Then, on October 4th, ICE officials informed Committee staff that the list was complete and had been sent to DHS headquarters for clearance.

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<sup>7</sup> See memo from John Morton, Director, ICE, DHS, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, June 30, 2010.

<sup>8</sup> See Marc Rosenblum and William Kandel, Interior Immigration Enforcement: Programs Targeting Criminal Aliens, 2011 Congressional Research Service at 24 (table 6).

<sup>9</sup> See letter from Lamar Smith to Janet Napolitano (August 22, 2011).

<sup>10</sup> See letter from Elliot Williams, Assistant Director for Congressional Relations, ICE, to Lamar Smith (Sept. 1, 2011).

Distressingly, the Committee then received a letter dated October 24, 2011, from Nelson Peacock, Department of Homeland Security (“DHS”) Assistant Secretary, that was completely nonresponsive to my request.<sup>11</sup> The letter contained stock information on Secure Communities and data that is already widely available. The response did not contain the list of aliens or even reference the list.

When confronted with the discrepancy between the Committee’s good-faith and productive discussions with ICE and the DHS response, DHS officials stated that they had no knowledge of the ICE response. This statement is not credible because DHS uses a database to track all external requests such as my August 22<sup>nd</sup> letter. DHS calls requests like mine a “tasking.” Once a request clears ICE, it is sent to DHS headquarters and the responsible DHS official receives a notification that they have a task to review. Additionally, my letter was assigned from the onset by DHS to ICE so DHS would have had notice that ICE was working on the request.

## **V. Circumstance Leading to Subpoena**

At the Committee’s October 26, 2011, DHS oversight hearing, I asked you a question following up on my August request for the criminal alien data. You did not seem to know about the request, but responded that you would look into it and get back to me. I asked you that DHS provide the Committee with the requested information by 10:00 a.m. Monday, October 31st. I made clear that this was in fact a firm deadline – since, in fact, the list had already been prepared by ICE -- and that the Committee would have to issue a subpoena if it were not complied with.

DHS did not provide the list on October 31<sup>st</sup>. Based on the lack of response, the Committee had no choice but to go forward with a resolution to authorize the issuance of a subpoena. On November 2, 2011, the Subcommittee on Immigration Policy and Enforcement voted to authorize the issuance of a subpoena to you. On November 4<sup>th</sup>, Elton Gallegly, the Chairman of the Subcommittee, signed and issued the subpoena.

The subpoena required you to produce all documents sufficient to determine the name, FIN and alien registration number of any and all aliens arrested between November 1, 2008, and October 31, 2011, about whom ICE was notified through Secure Communities or otherwise but did not take custody or declined to put in removal proceedings. The deadline set by the subpoena was 12:00 p.m. on November 10, 2011.

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<sup>11</sup> See letter from Nelson Peacock, Assistant Secretary, Office of Legislative Affairs, DHS, to Lamar Smith (Oct. 25, 2011).

The Committee had been assured before issuance of the subpoena that such a step was not necessary in order to obtain the requested information. John Conyers, ranking Democrat on the Judiciary Committee, argued against the need for the subpoena, stating that:

[DHS] has worked diligently to provide us with a full response to Chairman Smith's questions. Two hours ago [DHS] informed my staff and Chairman Smith's staff that although the [FBI] is not permitting [DHS] to release [FBI] numbers, [DHS] is, at this time, now generating a response that will provide the Committee with nearly all the information requested.<sup>12</sup>

## **VI. Actions taken by DHS after Issuance of the Subpoena**

Once the subpoena was issued, DHS officials maintained that the department would cooperate. Fox News reported that DHS spokesman Matthew Chandler said that the department did not need to be subpoenaed in order to comply. Chandler is reported to have said that "DHS has stated to the committee it would provide the data requested without being compelled by subpoena to do so. DHS is in the process of gathering the data and will provide it when complete."<sup>13</sup> Further, on a number of phone calls between DHS officials and Committee staff, DHS promised to provide the Committee with the subpoenaed information. DHS officials first told Committee staff that the Committee would receive the list of aliens and their alien registration numbers by November 4<sup>th</sup>. Then, staff was told that the Committee would have that information early in the week of November 7<sup>th</sup>.

Thus, you can imagine my surprise when on November 10<sup>th</sup>, DHS sent over documents in response to the subpoena that contained none of the identifying information that DHS had promised (and that is necessary to obtain criminal histories from the FBI) – not names, not FINs and not alien registration numbers.

On a November 10<sup>th</sup> phone call, DHS officials told Committee staff that DHS had provided the Committee with 220,955 unique fingerprint matches of aliens not taken into custody or placed into the removal process by ICE. The list consisted of for each alien: 1) a "unique ID", 2) the date/time of the encounter and 3) national origin (but only for the first 600 aliens). The "unique ID" created by DHS was simply a number starting at one for the first alien and ending at 220,955. This is useless for the purpose of obtaining individual aliens' criminal histories from the FBI and the Committee's independent analysis and verification to understand the nature of the problem of criminal aliens.

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<sup>12</sup> Meeting of the Subcommittee on Immigration Policy and Enforcement of the House Judiciary Committee, Nov. 2, 2011.

<sup>13</sup> Fox News report Nov. 2, 2011.

On the call, DHS officials indicated that further information may be forthcoming to the Committee. However, they did not commit to providing the information required by the subpoena – they in fact made clear that your agency may never provide information such as names or alien identification numbers. This is astounding – both because the information had been promised to the Committee on multiple occasions, before and after the issuance of the subpoena, and because the Department of Justice provided the very same identifying information to the Committee in 2000.

DHS officials had the audacity to ask Committee staff to justify the need for the information required to be provided by the subpoena. The information is clearly within the oversight jurisdiction of the Committee. And, as I am sure you are aware, the Privacy Act does not apply to Committee investigations.<sup>14</sup> That being said, the Committee has made clear that it would consider steps to ameliorate any concerns regarding the security of any personally identifiable information.

I can come to only two possible conclusions. Either DHS officials never planned to comply with the Committee’s information request, despite its manifest reasonableness, justification under the Committee’s oversight jurisdiction and similarity to information provided to the Committee during the Clinton Administration. Or, DHS’s plans to comply with the request were vetoed by the White House for political reasons – to prevent the American people from learning the damage to public safety caused by ICE’s current policy of allowing the release of criminal aliens onto our streets.

## **VII. Additional Request**

DHS officials were clear that the decision not to comply with the terms of the subpoena was made at a very high level. Therefore, I make the additional request that you inform me of whom you and other DHS officials have communicated with at the White House and elsewhere in the administration regarding my information request and the subpoena. I would like the names of these individuals. I also request you provide me with a copy of all documents, electronic and otherwise, possessed by you and other DHS officials regarding my information request and the subpoena as listed in the schedule instructions of the subpoena.

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<sup>14</sup> See 5 U.S.C. sec. 552a(b)(9).

## VIII. Compliance

As the District of Columbia District Court recently stated, “The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement.”<sup>15</sup> I ask that you immediately comply with the terms of the Committee’s subpoena. If you do not, the Committee will be forced to seek enforcement of the subpoena to the fullest extent allowed by the law; including as an initial matter a formal determination of DHS’s contumacious conduct.

Sincerely,



Lamar Smith  
Chairman

cc: The Honorable John Conyers, Jr.

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<sup>15</sup> U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 99 (D.D.C. 2008). See also, McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. . . . [T]he constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”); Watkins v. United States, 354 U.S. 178, 187-88, 194-95 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”; “It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees, and to testify fully with respect to matters within the province of proper investigations.”; further noting “danger to effective and honest conduct of the Government is the legislative power to probe corruption in the Executive Branch were unduly hampered”); and Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 504-05 (1975) (“The power to investigate and to do so through compulsory process plainly falls within [the] definition [of Congress’s legislative function].”).