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John Morton
Director
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

Dear Director Morton:

On behalf of the American Bar Association (ABA), I write to commend the Department of Homeland Security's announcement that the Department will exercise its prosecutorial discretion with respect to deportation and removal cases in a more robust manner. While we applaud this initiative, the ABA would like to recommend additional steps we believe are necessary to ensure fairness and consistency as the program is implemented.

The Department's August 18, 2011 announcement and subsequent memorandum and guidance indicate that the agency will conduct a review of cases pending removal at the Executive Office for Immigration Review (EOIR) and that, in administering this review, the agency will exercise its prosecutorial discretion to close "low priority" cases. The ABA is encouraged that in a conference call hosted by the White House senior administration officials stated that certain cases, including DREAM Act beneficiaries and same-sex partners or spouses, raise special equities and therefore are eligible for closure under this policy. The ABA understands that the Administration will rely on memoranda issued by you [hereinafter Morton Memos] as well as Principal Legal Advisor Peter S. Vincent and related guidance pertaining to ICE priorities and its principles for the exercise of this prosecutorial discretion,¹ as well as an on interagency working group, to identify cases worthy of closure under the exercise of this prosecutorial discretion, and that such cases will be eligible for work authorization under the existing legal framework.

As you know, DHS and its predecessors have exercised prosecutorial discretion in deciding which cases to prioritize for removal for more than thirty years. As with previous memoranda on this topic, the Morton Memos reaffirm the long-standing principle that prosecutorial discretion

¹ Memorandum from John Morton, U.S. Immigration and Customs Enforcement (ICE), "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, ICE, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; Memorandum from Peter S. Vincent, ICE Principal Legal Advisor, "Case-by-Case Review of Incoming and Certain Pending Cases" (Nov. 17, 2011); and "Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review" (Nov. 17, 2011).

can and should be exercised early in the enforcement process, ideally before removal proceedings are even initiated. The Morton Memos also furnish a set of factors that should mitigate in favor of a positive exercise of discretion. These factors include: length of presence in the United States; the person's pursuit of education in the United States; whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard; the person's ties and contributions to the community, including family relationships; whether the person or the person's spouse is pregnant or nursing; and whether the person or the person's spouse suffers from severe mental or physical illness, among other factors. During the August 18 press conference, the Administration stated that the referenced family relationships include same-sex couples and other families consisting of lesbian, gay, bisexual, and transgender people. The ABA encourages ICE to refine its more recent guidance to ensure that these family relationships are not overlooked.²

The ABA strongly supports the agency's decision to exercise its prosecutorial discretion to close low priority cases. Implementation of this policy will help to ensure that limited government resources are directed appropriately. As the ABA Commission on Immigration's groundbreaking 2010 report on reforming the immigration adjudication system discussed, the EOIR docket is staggering, and prosecutorial discretion plays a critical role in ensuring that resources are effectively managed.³ As a result of that report, the ABA adopted a number of recommendations, including: to increase use of prosecutorial discretion by both DHS officers and attorneys to reduce the number of Notices to Appear (NTA) served on noncitizens who are prima facie eligible for relief from removal, and to reduce the number of issues litigated; to give DHS attorneys greater control over the initiation of removal proceedings, and in DHS local offices with sufficient attorney resources, establish a pilot program requiring approval of a DHS lawyer prior to issuance of all discretionary NTAs by DHS officers; and to cease issuing NTAs to noncitizens who are prima facie eligible to adjust to lawful permanent resident status.

While the ABA applauds the agency's decision to reaffirm its long-standing practice of exercising prosecutorial discretion, we urge that a number of steps be taken to clarify the procedures and to ensure fair and consistent application of the policy. First, the ABA encourages the Department to refrain from initially issuing NTAs in cases where the triggers listed in the Morton Memos are present, including those involving persons who may become eligible for relief under the DREAM Act or same-sex couples, and to close cases that have already been initiated. Second, we urge that ICE specifically outline the procedures to be taken in the cases of unrepresented and detained individuals.

We recommend that the Administration solicit input from the private bar and experts to ensure that prosecutorial discretion is correctly applied in cases that fall within the scope of the

² The Morton memo, *Exercising Prosecutorial Discretion*, included as a positive factor "ties and contributions to the community, including family relationships." The Guidance issued with ICE Principal Legal Advisor Peter S. Vincent's November 17 memorandum, while it states that it should not be construed to prohibit or discourage consideration of all of the factors laid out in the Morton memo, lists as a positive factor "very long-term presence in the United States [and] an immediate family member who is a U.S. citizen" ICE should clarify that same-sex and other family relationships are to be included in this category.

³ ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), available at http://www.americanbar.org/groups/public_services/immigration/publications.html.

Administration's policy and invite outside review of the data that the Department gathers in the coming months. We also recommend that the data gathered regarding cases in which prosecutorial discretion is exercised include who initiated the request for an exercise of discretion; how many cases involve unrepresented noncitizens; and how many noncitizens are detained.

In addition, we suggest that a Department point of contact be identified and made easily accessible, including through a toll-free telephone number, in addition to the electronic mailboxes being established by each Office of Chief Counsel, to facilitate communication and applications for an exercise of discretion from unrepresented and detained individuals in particular.

We would like an opportunity to meet with you to discuss these and other issues related to the implementation of the prosecutorial discretion policy. Please contact Kristi Gaines, ABA Governmental Affairs Office, at 202-662-1763 with any questions or if you require additional information.

Thank you for your consideration of our request.

Sincerely,



Thomas M. Susman

cc: John R. Sandweg, Counselor to the Secretary, DHS Office of the Secretary
Seth Grossman, Deputy General Counsel, DHS Office of the General Counsel
Peter S. Vincent, Principal Legal Advisor, DHS Immigration and Customs Enforcement
Cecilia Muñoz, Director, White House Office of Intergovernmental Affairs
Juan P. Osuna, Director, DOJ Executive Office for Immigration Review