

Chairman Raskin, Ranking Member Roy, and distinguished Members of the Subcommittee: Thank you for the opportunity to appear before you today on this very important subject which is the appropriate exercise of prosecutorial discretion.

My name is Tom Homan and I am a veteran of our nation's immigration service. I retired in 2018 after having served our country for more than 34 years as a sworn federal law enforcement officer at U.S. Immigration and Customs Enforcement (ICE) and its predecessor, the U.S. Immigration and Naturalization Service (INS), as an officer, a special agent, and Border Patrol agent, faithfully enforcing our nation's immigration laws at the border and in the interior. As you know, I'm passionate about this issue and glad to be back to testify on a different aspect of it today.

Before I delve into the details pertaining to the subject of today's hearing, I would just like to pause to reflect on this being the 18th anniversary of the cowardly 9/11 terrorist attacks on our homeland. I was serving our country as the INS Assistant District Director for Investigations in San Antonio, Texas, on that day. I was in my office when the planes hit the twin towers. May God have mercy on those innocent victims who lost their lives and their families, and may we continue to protect this country against those that want to destroy us and the freedom we enjoy in this country. I also want to salute and

honor the fallen soldiers that have taken the fight to those that attacked us and made the ultimate sacrifice. I will never forget.

Regarding today's hearing, I would like to start by clearing up what appears to be a common misunderstanding: it is not lawful to have a deferred action "program" at any federal agency. The word "program" conjures the idea that an entire class of aliens, if they meet certain criteria, is entitled to a benefit (in this case deferred action). That is simply not the case.

When you break it down to the most basic underpinnings of the law, deferred action is an exercise of prosecutorial discretion and prosecutorial discretion (e.g., a stay of removal, deferred action, administrative closure, etc.) may only be exercised (1) on a case-by-case basis – not for a class according to a set of criteria – and (2) by law enforcement agencies. Again, prosecutorial discretion is rightly only exercisable on a case-by-case basis and, even then, only by the relevant prosecuting agency, a law enforcement agency that has the statutory authority over those laws.

I think the issue of deferred action and this latest controversy has been taken way out of context. The proposed changes within the Administration isn't really about sick or dying kids, it's about the bureaucratic jurisdiction on who should handle the review and decisions of requests for deferred action. This issue is not new. I had these same conversations with the former Director of USCIS, Francis Cissna, when I was the ICE Director two years ago. At that time,

I agreed with Director Cissna that any granting of deferred action, an example of prosecutorial discretion, should rest with a relevant law enforcement agency, which USCIS isn't.

With respect to the recent policy change that is the subject of this hearing – whether USCIS should continue running a prosecutorial discretion "program" for anyone, not just sick children – the simple answer is no. For starters, there is no such thing as a lawful prosecutorial discretion “program” and again, USCIS is not a law enforcement agency. USCIS should never have been doing this in the first place. The delegation back in 2003 by the then Secretary of DHS was done in the melee of the startup of the agency and was ill-advised. Again, in any case, the authority to exercise prosecutorial discretion resides with the law enforcement agency authorized to enforce the relevant law. In this case, we're talking about the authority to remove an alien. Where does the authority to remove an alien reside? With ICE. Accordingly, where does the authority to grant discretionary relief from removal reside? With ICE. USCIS should not be deferring ICE's action. Never should have been.

ICE has been exercising prosecutorial discretion for years, often using its authority to grant stays of removal or administratively closing cases. ICE is *the* agency that has the authority to grant an alien who has been ordered removed relief from removal. I remember cases with sick children; I also remember cases involving custody battles that were on-going when we allowed an adult alien to stay; I also remember cases of aliens with no lawful way to stay in the country, but who wanted to have their removal delayed so that their children

could finish the school year. ICE exercises prosecutorial discretion every day on a case-by-case basis – in the field and in the immigration courtroom. It's part of the job for ICE officers, agents, and attorneys.

However, we must remember that ICE does not run a "program" and I think that's what has got a lot of folks concerned at this time. I also think that some of this false narrative is intentional obfuscation and fear-mongering to foster hate for this Administration. Anyone who has been around the immigration debate long enough knows that the advocacy community regularly stirs emotions and controversy by using the most sympathetic of anecdotes, in this case "dying children" rather than telling the whole truth about the vast population for which USCIS has been issuing deferred action. Such tactics are reckless and wrong. Most of all, it is a false narrative that is driven by political ideology. That's why we're here.

There are those who would prefer for USCIS to continue running an unlawful "program" because they see it as a guarantee. USCIS mission is to lawfully grant or deny applications for immigration benefits. If the "program" stays alive there, then aliens are almost certainly guaranteed a benefit if they meet the stated criteria. That's the issue. It's not that this is the legally correct way to do this or that no other agency does it.

ICE has broad discretion and exercises that discretion, as appropriate, on a case-by-case basis throughout the immigration enforcement process in a

variety of ways. For instance, discretion may be exercised in the course of deciding which aliens to arrest; which aliens to release from custody pending their removal proceedings; what the position of ICE will be on a claim, motion, or appeal made by an alien in immigration court; and which aliens will be prioritized for removal. The issue for some is that ICE does not exercise discretion on a categorical basis to exempt entire groups of aliens from the immigration laws enacted by Congress.

The fact of the matter is that relief from removal is not guaranteed. It is an exercise of prosecutorial discretion that may only lawfully be made by a sworn law enforcement officer at ICE on a case-by-case basis. It makes sense that USCIS would cancel this unlawful “program” and return the responsibility to ICE. Having a single agency make such determinations for those who have had full process and received final orders of removal will lead to more clarity and consistency in any lawful exercise of prosecutorial discretion, and it will be a return to the faithful enforcement of the laws as passed by Congress. I am proud to have advocated for this change when I was at ICE as acting director and I’m proud to advocate for it today. USCIS should be focused on doing its job, not ICE’s. As I understand it, they’ve got plenty of their own backlogs to worry about.

Deferred action is a discretionary act of administrative convenience by which ICE may delay or decline to exercise immigration enforcement authority in a given case. It is not a legal benefit and provides no lawful immigration status in the United States. While ICE does not accept “applications” for deferred

action, consistent with federal regulations, an alien who becomes subject to a final removal order, such as when his or her INA section 240 removal proceedings conclude, may apply to ICE for an administrative stay of removal using Form I-246, Application for a Stay of Deportation of Removal. Clearly, an established path exists and it's in the regulations. This path is clearer and much less likely to change with the whim of any future administration which is better for the men and women of ICE and the public. ICE regularly considers all relevant factors in deciding whether to issue a stay of removal, including any claimed medical basis for the request. However, such stays are considered solely in ICE's discretion on a case-by-case basis.

Thank you again for inviting me today, and I look forward to answering any questions on ICE's role in this matter you may have.