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Statement of the American Immigration Lawyers Association

**Submitted to the Committee on the Judiciary of the U.S. House of Representatives
Hearing on “Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws”**

February 26, 2014

The American Immigration Lawyers Association (AILA) submits this statement to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 13,000 attorney and law professor members.

This hearing examines the president’s duty to execute the law. With respect to immigration law, AILA’s assessment is that President Obama as well as his predecessor, President Bush, have gone beyond faithfully enforcing immigration law to dramatically increasing it over the past decade. The rapid expansion of immigration enforcement has not necessarily resulted in more effective enforcement, but has resulted in a decline in the accountability and consistency of enforcement practices. Of great concern to AILA is that, in the rush to expedite the deportations of large numbers of people from the country, the Department of Homeland Security has compromised fundamental constitutional values such as due process that are the core of America’s identity. Reforms should be implemented to bring these enforcement practices back on track.

In the 2013 fiscal year, overall immigration enforcement continued at unprecedented levels:

- By early 2014, DHS will have removed 2 million people during the course of the Obama administration, at a time when net migration to the U.S. is at or near zero and border crossings are at a 40-year low.
- Removals are happening quickly often at the expense of due process. DHS increasingly relies on summary procedures that allow enforcement agents to bypass immigration courts. The two most common summary procedures, “expedited removal” and “reinstatement of removal,” tripled since FY2005 rising to 312,700 in FY2012 and constituting 75% of all DHS removals that year.
- Federal criminal prosecutions of immigration-related offenses are at the highest point in history—up 468 percent from FY2003.
- Immigration detention rates continue to rise and now total about 430,000 individuals each year, at a cost of \$2 billion annually to American taxpayers.

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Prosecutorial Discretion

Critics have argued that DHS has used its current prosecutorial discretion policy to circumvent the law and decrease enforcement of immigration law. The authority of all law enforcement agencies to exercise discretion, however, is well-accepted in both the civil and the criminal arena. For decades legacy Immigration and Naturalization Service (INS) and DHS, under both Republican and Democratic administrations, have issued policies on and required the use of prosecutorial discretion. Prosecutorial discretion is such an important principle that, in 1999, twenty-eight Republican and Democratic members of Congress wrote to the Attorney General emphasizing the importance of prosecutorial discretion in the immigration field. The appropriate exercise of discretion leads to better targeting and smarter enforcement.

While prosecutorial discretion is a fully appropriate framework for immigration enforcement, implementation of the policy has been inconsistent. Customs and Border Protection (CBP), which engages in substantial removal activities, has never published a prosecutorial discretion policy. With respect to Immigration and Customs Enforcement (ICE), a recent review showed that only about 7 percent of all cases were designated for prosecutorial discretion—which is a lower rate than many statutory forms of relief that an immigration judge would grant after a full hearing. Some ICE field offices resist considering discretion at all. As a consequence, ICE continues to remove hundreds of thousands of people who have family in the U.S., contribute to our communities, have lived in the U.S. for years, and would qualify for legal status under reform legislation currently pending in Congress.

Rapid Expansion of Enforcement Has Come at the Price of Due Process

The steady increase in DHS's immigration enforcement practices has undermined basic due process and the protection of civil rights. DHS relies on summary removal procedures that bypass immigration courts and offer extremely limited judicial review.

DHS continues to hold many noncitizens, including lawful permanent residents and asylum seekers, in detention without ever providing a custody determination hearing before a judge—a fundamental deprivation of due process. Each day, thousands of noncitizens are held in DHS detention who pose no flight risk or threat to public safety and therefore should not have been detained in the first place, including asylum seekers and other vulnerable persons. Poor conditions in detention are still a problem, and every year people awaiting their court hearings die in immigration detention facilities, including one death reported on February 22 in a Houston facility. ICE has underutilized much less costly and extremely effective alternatives to detention, such as release on recognizance, bond, electronic GPS technologies, and other monitoring and



supervision methods. These alternatives are standard practice in criminal justice systems across the country. Compared to billions spent annually on detention, alternatives represent a smarter, less costly, and more humane way to ensure compliance with immigration laws.

DHS has also entangled local criminal processes and federal immigration enforcement in constitutionally suspect ways. For example, the number of civil immigration detainers issued by ICE increased dramatically, from just 15,000 in FY2007 to over 250,000 in FY2012. These detainers request that police detain individuals for possible immigration violations without a warrant or probable cause, without a hearing, often without notice, and often for a prolonged period of time.

CBP itself has grown so rapidly in recent years that concerns arise as to their adequate training, oversight, and accountability. Since 2006, Congress has funded a near-doubling of Border Patrol agents, from 12,185 to a peak of 21,444 in 2011. But accompanying this ramp-up are well-documented reports of rights violations and abusive practices, most notably the many examples of improper use of force, including lethal force by Border Patrol. Several cases of lethal force were in response to rock throwing. Last week, another individual was shot by a Border Patrol after hitting the agent with a rock. The agent sustained minor injuries. The protection and safety of law enforcement officers is paramount, but not at the cost of overlooking excessive and improper use of force. Abusive CBP detention practices—including keeping facilities at dangerously cold temperatures, verbal and physical intimidation, and lack of basic health and hygiene provisions—are routinely reported by men, women, and children held at ports of entry or in Border Patrol detention facilities. Widespread reports of racially motivated arrests, coercive interrogation tactics, and denial of the right to counsel, and misinformation or coercive tactics by CBP officers and agents leading to individuals signing voluntary departure forms – resulting in deportation of many who may have had an avenue for relief – are also of concern. These problems, which undermine the rights of both citizens and noncitizens, are made worse by the lack of any uniform or effective complaint mechanism to address misconduct by CBP officers.

Finally, in carrying out the controversial “expedited removal” procedure, Border Patrol agents often fail to ask whether an individual has a fear of returning to his or her home country before ordering them removed, and even deny individuals who do express such a fear the ability to start the asylum application process.

Biometric Entry/Exit Has Not Been Feasible

There have been concerns that the Administration has failed to implement a nationwide biometric exit system. For more than a decade, Congress has required the executive branch to the



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implement the nationwide use of a biometric entry-exit data tracking system operational at land, air, and sea ports of entry. While the entry portion has been implemented, the exit process has not been implemented due primarily to high cost and operational and infrastructure hurdles. A biometric exit system has been piloted several times, but each pilot has encountered problems with the availability of technologies, the cost and feasibility of expanded infrastructure, and the potential negative impact to business and travel. In 2013, in testimony before Congress, DHS reiterated its commitment to moving to a biometric air exit system. In the meantime, DHS has worked to develop an advanced biographic exit system in the ports that serve as a functional yet cost-effective solution.

Border Region Enforcement Showing Rapid Growth

CBP enforcement authority and activities have expanded and swept deeper into the interior of the country. In 2004, DHS extended CBP's authority to use the summary deportation practice of expedited removal to encompass individuals found without documents (or with false documents) within 100 miles of any international border. That broad authority covers the whole of the state of Florida and large swaths of the rest of the country. After this policy change in 2004, the number of expedited removals dramatically increased, nearly doubling from even the highest levels seen during the previous George W. Bush administration, to a record 163,000 in FY2012. Moreover, ICE has defined "border" removals very broadly, to include individuals who were not encountered at the border at all but were apprehended after residing in the U.S. for quite a while. For example, ICE has defined "border removals" in some places to include illegal entrants apprehended at any time within 3 years of entry – a very long time. Thus, the distinction that critics have drawn between "interior" immigration enforcement (by ICE) and "border" enforcement (by CBP) is much less meaningful than it appears at first blush. Consequently, ICE's FY 2013 data does not permit any straightforward separation of interior and border removal activities. The reality is that immigration enforcement continues at aggressive levels.

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