

RESTORE THE PROMISE OF PROSECUTORIAL DISCRETION

**An Assessment of DHS' Prosecutorial Discretion Initiative and its Impact on Families on
the Anniversary of its Announcement**

The Fair Immigration Reform Movement, June 2012

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Executive Summary

After a growing outcry by immigrants, allies, and Members of Congress who were outraged at the record number of deportations carried out by the Obama Administration, last June the Department of Homeland Security (DHS) announced a new policy that was supposed to focus limited immigration enforcement resources on public safety threats and spare individuals who have been in the U.S. for years, raising families.

These policy changes, detailed in memos from ICE Director John Morton and DHS Secretary Janet Napolitano beginning in June 2011, involved an unprecedented review of hundreds of thousands of pending deportation cases. The Department pledged to close the cases of individuals who didn't meet their enforcement "priorities" and allow those whose cases were closed to apply for work authorization.

In 2011, the Fair Immigration Reform Movement (FIRM) played an important role in advocating for administrative relief through its 'Change Takes Courage' campaign. FIRM and its allies welcomed these changes and hoped they would be implemented fairly, finally allowing long-time U.S. residents, parents of U.S. citizen children, and young people eligible for the DREAM Act to live their lives with less fear.

Unfortunately, a year has passed since the policy was announced, and very little has changed. In some cases, the situation has even gotten worse.

By failing to properly implement the year-old Prosecutorial Discretion (PD) policy for immigrant deportations, the Department of Homeland Security is threatening to undermine the credibility of President Obama's policies and standing with Latino and immigrant communities nationwide.

DHS Still Tearing Families Apart, Despite Its Stated Focus on "High Priority" Cases:

The Case of Cayla Roberts of Grand Haven, Michigan: After Cayla Roberts' mother died when she was only 14 years old, her own biological father sold her to human trafficking smugglers who brought her from China to the United States. She was soon arrested, and spent 10 months in detention. She was then



fortunate enough to be placed with a foster family in Michigan, who have raised her since as their own daughter. Cayla, now 24, has been a straight-A student throughout high school and college in Michigan.

She is now married to her high school sweetheart, Seth Roberts, a United States Air Force veteran. Inexplicably, Cayla was denied special immigrant juvenile status and later she was denied asylum. Now, in a clear violation of the spirit of the administration's stated policies, ICE is refusing to invoke prosecutorial discretion in her case.

Cayla's story is one example of thousands and thousands across the country which exemplify why advocates

consider the prosecutorial discretion policy, as implemented by DHS and ICE a failure.

The Case of Marvin Corado of Florida: Marvin came to this country from Guatemala 12 years ago when he was still only a teenager. Marvin's life now revolves around his 5-year old daughter Madelyn, a U.S. Citizen. Marvin and his wife, Leslie, have been married since 2009 and are active members of their church. In October 2011, Marvin was stopped by a police officer and detained because he didn't have a driver's license because it is illegal for him to obtain one. Marvin has now been in detention for 7 months; his daughter and wife are suffering emotionally and financially without Marvin at home with them. With two U.S. Citizen sisters as well as his daughter, his strong ties to his community, and many years here, Marvin is also a clear example of the kind of person and family for whom the prosecutorial discretion policy was supposed to provide relief. But ICE continues to keep him from his family and try to deport him.



The full report describes the stories of Cayla and Marvin and their families, and three others, in detail.

The Facts: How Prosecutorial Discretion Is Failing, By the Numbers

This report outlines several shocking statistics about the scale of the failure of DHS' implementation of prosecutorial discretion one year after it was announced. After the Congressional demise of comprehensive immigration reform, one of President Obama's signature promises in his landmark 2008 campaign, this new effort by DHS under Secretary Janet Napolitano threatens to become another big disappointment for Latino and immigrant communities. This disappointment is palpable in communities like the ones where Cayla Roberts and Marvin Corado live in Michigan and Florida, respectively. Here are some vital statistics through which immigrant families are viewing the Obama Administration and how DHS is implementing the prosecutorial discretion policy:

- In Fiscal Years 2009, 2010 and 2011, over one million immigrants were deported - vastly outstripping the scale or pace of deportations in previous years.
- As described in the Applied Research Center's November 2011 report, "Shattered Families," over 46,000 mothers and fathers of U.S. Citizen children were deported in the first six months of 2011.
- Under the DHS' Prosecutorial Discretion initiative, begun in Summer 2011, almost 300,000 individuals' cases have been reviewed. Out of these, an abysmal 1.5% (or fewer than 5,000) cases have actually been administratively closed.
- Despite widely announced new priorities of the administration to re-focus immigration enforcement resources on deporting individuals who posed a threat to public safety, a recent analysis by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University shows the reality has been very different. According to TRAC, "...official court records show that rather than increasing, the number of deportations ordered on the basis of criminal activity has continued to decrease. Evidence from the most recent quarter show that the agency continues to be headed in the opposite direction from its stated goal."

DHS Must Utilize Prosecutorial Discretion to Bring Administrative Relief

In the coming weeks, DHS has an opportunity to improve how it implements its own prosecutorial discretion policy. The following broad steps are critical to restoring the credibility of this program for concerned communities and constituencies expecting the program to bring relief to immigrants and their families. More detailed recommendations are outlined toward the end of this report.

KEY RECOMMENDATIONS TO MAKE PROSECUTORIAL DISCRETION A SUCCESS

- The authority and responsibility to exercise prosecutorial discretion must be clarified and enforced to ensure that families are protected from separation and those who stand up for their labor and civil rights are not punished.
- Ensure favorable treatment of all young people entering the system through use of Deferred Action, Parole-in-Place or Deferred Enforced Departure, and issuing employment authorization.
- Stop the so-called “Secure Communities” program, which condones racial profiling, outsources federal immigration enforcement to local police and undermines public safety by fostering distrust of those same police by local low-income immigrant communities.
- The Department of Justice (DOJ) must take a number of important steps to ensure immigrants’ civil, due process, and labor rights are protected by providing adequate legal representation for all individuals facing action in immigration courts; monitoring activities involving state and local law enforcement of immigration law; and strengthening the Racial Profiling Guidance by eliminating the border and national security loophole, to include profiling based on religion and ethnic origin, and ensuring that the guidance is enforceable.

RESTORE THE PROMISE OF PROSECUTORIAL DISCRETION

An Assessment of DHS' Prosecutorial Discretion Initiative and its Impact on Families on the Anniversary of its Announcement

After a growing outcry by immigrants, allies, and Members of Congress who were outraged at the record number of deportations carried out by the Obama Administration, last June the Department of Homeland Security (DHS) announced a new policy that was supposed to focus limited immigration enforcement resources on public safety threats and spare individuals who have been in the U.S. for years, raising families.

These policy changes, detailed in memos from ICE Director John Morton and DHS Secretary Janet Napolitano in the summer of 2011, involved an unprecedented review of hundreds of thousands of pending deportation cases. The Department pledged to close the cases of individuals who didn't meet their enforcement "priorities" and allow those whose cases were closed to apply for work authorization.

The Fair Immigration Reform Movement (FIRM) played an important role in advocating for administrative relief through its 'Change Takes Courage' campaign. FIRM and its allies welcomed these changes and hoped they would be implemented fairly, finally allowing long-time U.S. residents, parents of U.S. citizen children, and young people eligible for the DREAM Act to live their lives with less fear. Unfortunately, a year has passed since the policy was announced, and very little has changed. In some cases, the situation has even gotten worse.

By failing to properly implement the year-old Prosecutorial Discretion (PD) policy for immigrant deportations, the Department of Homeland Security is threatening to undermine the credibility of President Obama's policies and standing with Latino and immigrant communities nationwide.

This failure is further compounded by other significant concerns identified throughout the DHS immigration enforcement regime not detailed in this report.

For example, the controversial Secure Communities program has created a vast deportation dragnet in those jurisdictions where it is active. This dragnet intrudes on the lives of immigrants and citizens alike, with a minority of cases applying to actual criminal activity. Even the term 'criminal activity' must be further analyzed, as described in the data-section of this report, since minor traffic violations may be deemed a criminal offense by ICE and its officers. A report by the Chief Justice Earl Warren Institute on Law and Social Policy at the University of California found that more than 3,600 US citizens had been detained by ICE through the Secure Communities program. That report also found that Latinos comprise 93 percent of individuals arrested through Secure Communities though they comprise 77 percent of the estimated undocumented population in the United States. Such programs put greater pressure on DHS to effectively implement the goal and purpose of prosecutorial discretion.

STORIES OF IMMIGRANTS AND THEIR FAMILIES STRUGGLING FOR RELIEF UNDER DHS' PROSECUTORIAL DISCRETION POLICY

Recent data demonstrate that less than 2 percent of cases reviewed by DHS under its prosecutorial discretion policy have had their cases closed administratively. DHS has also deemed that 7 percent of cases reviewed to date are eligible for the use of prosecutorial discretion. By defending this abysmal rate of case eligibility and closure, DHS is essentially arguing that 93 percent of all immigrants reviewed to date are potential security threats or are otherwise categorically ineligible for the use of prosecutorial discretion. The experience of immigrant families and organizations acting on their behalf demonstrate otherwise. Here are 5 stories representing thousands of families facing imminent separation due to DHS' failure to effectively implement its own policies.

CAYLA ROBERTS was born in China and at age 14, her biological mother died. Her biological father sold her to smugglers to work in the US and send him money. Smuggled in through San Diego, CA, she was arrested there and spent 10 months at a detention center for children. While there, Cayla says, "My



biological father threatened to kill me over the phone if I returned to China because I had dishonored him." She also received threats from the smugglers at the detention center. Cayla eventually was placed into foster care through Bethany Christian Services in Grand Haven, Michigan to live with the people who accepted her as their daughter, raised her and became her family.

Cayla is now 24 years old and is graduating from Western Michigan University with a 3.97 GPA,

graduating with honors just as she had done in high school. She constantly volunteers in the community, going on mission trips to Kentucky and New York City to work at vacation bible school summer camps for children, rebuilding houses in Lake Charles after Hurricane Katrina, volunteering at Occupational Therapy clinics for adults and children, working at a homeless shelter, and an assisted living facility. She has done this without the benefit of being able to work, or drive a car. Cayla is now married to Seth Roberts, her high school sweetheart, who is an Air Force veteran.

Although Cayla is a survivor of human trafficking and has been represented by an attorney, she has spent the last ten years trying to remedy her immigration status. What was formerly known as Immigration and Naturalization Services (INS) and its successor, Immigration and Customs Enforcement (ICE), denied Cayla an opportunity to apply for Special Immigrant Juvenile status, which would have solved her status problems a decade ago. The court denied her application for asylum, and now, she faces being uprooted from her adopted home, returning to China to face a hostile father and the smugglers seeking repayment. Furthermore, she is considered a defector by the Chinese government because she left without permission, leaving her stateless.

Cayla is a clear example of a person deserving of a favorable exercise of prosecutorial discretion. In fact, she is in deportation proceedings because of an INS legacy that left many young victims of trafficking without protection. She poses no public safety threat, is married to a U.S. Citizen who has served our country in time of war, has a stellar academic record and has been a victim of trafficking. As the Alliance for Immigration Reform and Rights in Michigan has supported her case questions, Why would the U.S. Government turn their back on someone who has so much to offer our country and so much at stake in remaining here?

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MARVIN CORADO is 29 years old and originally from Guatemala. He has been living in the United States for the past 12 years. He arrived as a teenager to live with his mother and his stepfather. Marvin reunited with his high school sweetheart, Leslie, in Florida and got married in 2009. Their life as a family with their 5 year-old daughter, Madelyn, is very happy. They are all very active in their church, Segadores de Vida and during church services, Marvin plays a leadership role, welcoming members and coordinating activities for the day.



In October of 2011, Marvin was on his way to work to remodel a house, when he was stopped by a police officer. Marvin asked the police officer for an interpreter, but the officer told him to shut up and asked him for his driver's license. When Marvin said he didn't have one, the police officer handcuffed him right away. Marvin had never been arrested before, and Florida does not permit him to have a driver's license because he is out of status. His bail was set at \$125, but an ICE hold was immediately placed on him, so his wife sought an attorney's services.

His wife, Leslie, paid a defense attorney \$3000 to get Marvin released with promises he would be home soon. Marvin was eventually released for time served, but into ICE custody and has been in detention at Broward Transitional Center in Florida ever since. Leslie paid another \$4,000 to an immigration attorney that did not yield better results. It turns out that an attorney working for Marvin's mother many years ago had filed an asylum petition for Marvin instead of the family petition the attorney had promised further complicating Marvin's case.

Leslie and Madelyn have been devastated by Marvin's absence. Leslie has had to rent out her daughter's bedroom and sell some of her belongings just to pay the rent. She reports that her daughter's personality has totally changed. A once happy little girl has become angry and rebellious, asking, "Where is my daddy? It's your fault he's gone away!" The conditions at the detention center are harsh. Marvin complained of a toothache for two months before he finally got to see a dentist and by then, they had to

pull the tooth out. Officers at the detention center consistently intimidate him, saying he should not waste his time fighting his case and have tried to trick him into signing a voluntary departure.

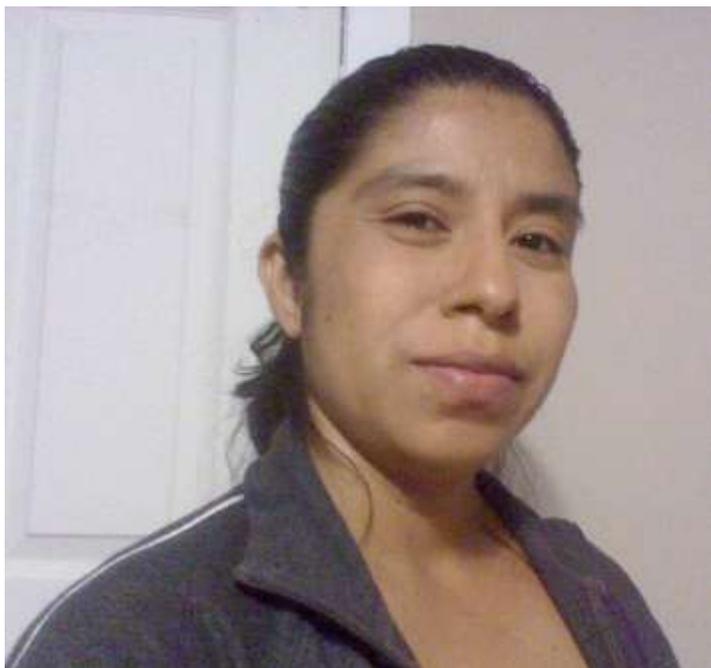
Marvin and Leslie are now working with the Florida Immigrant Coalition to fight his deportation. Marvin is a low priority as defined by the prosecutorial discretion memo. He has two siblings who are American citizens, as well as his daughter. He has deep ties to the community. But ICE officials have continued to try to deport him.

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HELIA DE LA CRUZ PALENCIA came to this country 16 years ago as a young woman, attempting to start a new life after being mistreated by her family. She has three U.S. Citizen children. The oldest is 14 and from a previous union, and the younger ones from her current marriage are 13 and 10 years old. She sought to adjust her status through her legal permanent resident husband. Her marriage was difficult. Her husband was very controlling and violent when he did not get his way. The police were called on at least two occasions, but the police only spoke to her husband because she did not speak English well. In 2004 she separated from her husband and learned that he had sexually abused her eldest daughter. Devastated, she filed a police report, but the police failed to locate her husband. Six months later, her husband came to their church and repented. Outside of her home her church has been her main source of strength and comfort. She agreed to give him another chance.

During this time, Helia was called to her country due to a medical emergency with her father. While she was there, her husband cut off communication. Helia ended up stranded outside of the country and separated from her three children. She could not bear to be separated from them so she decided to re-enter the country in order to fight to regain custody of her children.

On December 16, 2012 CASA de Maryland attorneys requested a Stay of Removal on behalf of Helia as a victim of abuse and abandonment in her attempts to obtain permanent residence through her now US citizen spouse. ICE officials in Baltimore have been informed of her circumstances, but nonetheless have been slow and callous in their response. Informed that her passport had been lost from her removal case file, she had to obtain another at her own expense, despite having no source of income. Her attorneys also asked that her check-in date in May be postponed because she had just given birth to her baby. Multiple communications attempts went



unanswered and she went to her check-in with her five-day old baby, only to have it postponed to six months later, with no decision in her case.

Helia is resolved to gain custody of her children and obtain justice for herself. She poses no public safety threat, has four U.S. Citizen children, and is also a survivor of domestic violence. Yet, as is all too common with meritorious prosecutorial discretion requests, ICE officials have made it very difficult for Helia to pursue relief. Her tremendously traumatic experience has been made that much more difficult through added hurdles required by ICE. The government's unresponsiveness has left her in a state of limbo at this incredibly difficult time. As a result, Helia's effort to gain custody of her children is at risk, since she may be removed from the US at any time.

For each story like Helia's there are thousands more who have not had the luck of encountering competent legal services to help them navigate the system.

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HUMAYUN KABIR CHOWDHURY is a native of Bangladesh who has been living in the United States for nearly twenty years, working as a cab driver and raising a family. He was paroled into the country so that he could file his claim for asylum because of the persecution he experienced in Bangladesh. Despite the fact that he had been beaten and tortured, an immigration judge callously denied his asylum claim stating that "everybody should break some bone at some point in their lives just to know what it's like". On appeal, the judge in the case was criticized for his "sarcastic" and "offensive" remarks. Yet incredibly the Board of Immigration Appeals found that the outcome of Mr. Chowdhury's case was not prejudiced. Mr. Chowdhury was arrested by ICE in his home in June 2011 because he had an outstanding deportation order from a decade ago. Since that time, he has been transferred to nine different detention facilities in seven states across the country.

For the past twenty years, Mr. Chowdhury has been a model member of his community. He works hard as a taxi driver in New York City, owns his own home, and pays his taxes. He volunteers and donates to charity and is an active member of his mosque. He has been a devoted husband to his wife, Dilruba and a devoted father to his thirteen-year-old U.S. citizen son, Maheen. He cared for Dilruba when she faced crippling depression after the couple's newborn daughter passed away. He is extremely close with Maheen and has been a motivating force in his son's education. With his father's encouragement and support, Maheen has become a top student and has won many academic honors and awards.

Despite all this, ICE came to Mr. Chowdhury's house around 5:00 AM one morning last year. He had just gotten off his shift and his wife was awake, although Maheen was sleeping. He took his medication for his high blood pressure and was about to go to bed when they heard a knock. Three ICE agents came through the door. Maheen was roused by the commotion and saw the agents with his father. They told him that they just wanted to talk to him and to go back to sleep. He listened and went back to his room. He hasn't seen his father since.

Sadly, Dilruba and Maheen are struggling while Mr. Chowdhury is in detention. Dilruba does her best to support the family, but Mr. Chowdhury has always been the family breadwinner. Without his taxi driver's salary, they have been forced to borrow money from family members and to sell the family car in order to pay the mortgage and other expenses. Dilruba's depression has returned. She cries often and rarely sleeps. Maheen has been suffering from symptoms of PTSD as a result of witnessing his father's arrest. Recently

he has had several episodes during which he “yells uncontrollably, his body shakes and he pulls his hair. These episodes last fifteen to twenty minutes.” Maheen is terrified that his mother will be taken away by ICE, too, and that he may never see his father again. The emotional strain that Maheen is under as a result of being separated from his father is severe.

ICE has the ability to end the Chowdhury family’s suffering; but the agency repeatedly has denied his requests for prosecutorial discretion. Mr. Chowdhury has a strong support network fighting for him, including the New York Immigration Coalition, which has taken up his case. He has no criminal history and is not a public safety threat. He is raising his thirteen-year-old U.S. citizen son and providing for his wife. He has longstanding ties to his community and makes valuable contributions to society. However, Mr. Chowdhury has an outstanding removal order dating back to January 14, 2000 so ICE claims that he is a “high priority” for deportation. His lawyer has moved to reopen his case and his appeal is pending before the 2nd Circuit Court of Appeals.

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CARMEN has resided in the United States for over 20 years, has 2 US Citizen children, Brian, age 13 and Angelo, age 9. Carmen¹ has no criminal record. She had paid a fraudulent immigration advisor, a *notario*, over \$10,000 in order to regularize her status, believing she was going to be able to legally stay in the country. After the *notario* defrauded her of her hard-earned income, he filed a petition for her that she was ineligible for. Instead of the promised immigration benefits, unbeknownst to her, she was ordered deported in absentia in May 1996. And all Carmen received was the cold, hard knock of ICE’s hand at her door.

On January 6, 2012, Carmen and family were having dinner and getting ready to cut the Rosca de Reyes, the King’s Cake. The occasion was to mark the end of the holiday season on the Day of Kings (Epiphany), her two boys and her husband were beaming with anticipation. Suddenly, the thunderous thumping of armed ICE officers interrupted the family gathering. Carmen’s oldest son was terrified, and the younger of the two boys sat in front of his dinner plate paralyzed and speechless. She ran towards the back door following her son’s instructions that she run and hide in the next door neighbor’s back yard. When ICE finally entered the house, Carmen was gone.

Carmen is a dedicated mother and partner, and this devotion to her children and her husband was eventually used against her. When ICE finally caught up to her next door, she tried to protect her husband and told the arresting officers she was a single mother. From that moment forward, ICE labeled Carmen a liar, and therefore deportable. But Carmen’s response to ICE in those terrifying moments was one of panic, fear and utter powerlessness.

Following her arrest, Carmen was detained for over 7 months. Her concern was mostly over the well-being of her boys. She has become shaken and fearful, and this has added to the traumatic stress of Brian and Angelo. Both boys are currently in counseling with a therapist due to the trauma of separation. Like many children whose parents are threatened with deportation, their mental health deteriorates in line with that of their parents, which has been similarly documented in a 2010 report published by the law schools

¹ Carmen has requested that we not use her last name.

of The University of California Berkeley and The University of California Davis, called “In the Child’s Best Interest.”.

Carmen’s attorney Jessica Dominguez filed a motion for a stay of deportation in February 2012, and an extension was filed in March. After a press event with the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) in commemoration of Mother’s Day, ICE granted a stay until June 1st, 2012. Just before this new fleeting deadline passed – riding the scariest roller coaster of emotions imaginable – Carmen obtained a form of stay of deportation after a further legal motion, based on newly obtained evidence that was filed with the Board of Immigration Appeals. It is hard to understand why all these hoops had to be jumped through – putting Carmen and her family through this pain – before this decision was reached. It should have been reached independent of the media’s attention and outside intervention.

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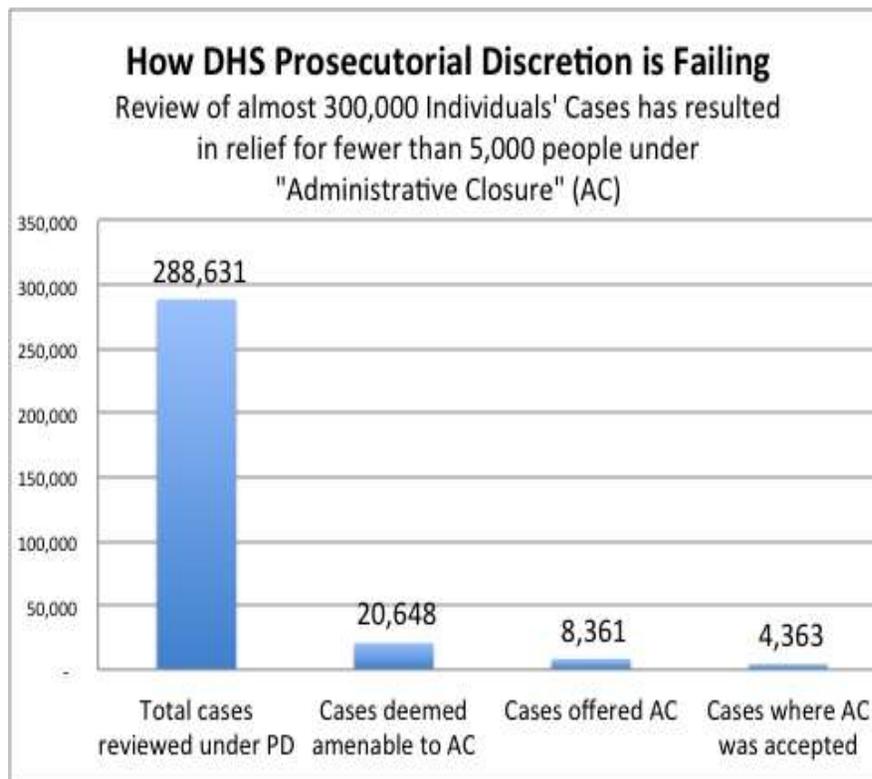
THE FACTS: HOW PROSECUTORIAL DISCRETION IS FAILING SO FAR

The stories of the immigrants and their families described in this report are by no means exceptional. Many thousands of families across the country are facing similar challenges and far too few of them are receiving any relief under DHS' prosecutorial discretion initiative. The failing implementation of prosecutorial discretion is tearing apart untold numbers of families, while DHS resources continue to be misdirected, targeting upstanding contributors to our communities.

As reported in the [New York Times](#) on June 7, 2012, the Department of Homeland Security has reviewed nearly 300,000 pending deportation cases over the past seven months in search of low-priority cases deserving prosecutorial discretion. While immigrant communities cheered the policy when it was announced in June 2011, figures just released by DHS suggest that the program is failing.

Despite Big Expectations, DHS' Prosecutorial Discretion Has Offered Very Little Relief

- To put this analysis and these few statistics about prosecutorial discretion in proper context, it is important to remember that in just the last 3 years (fiscal years 2009, 2010 and 2011) a total of more than 1 million immigrants have been deported by DHS.
- As described in the Applied Research Center's November 2011 report, "Shattered Families," over 46,000 mothers and fathers of U.S. Citizen children (more than 20 percent of deportations during that period) were deported in the first six months of 2011 alone.²



² "Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System." Applied Research Center, November 2011. <http://arc.org/shatteredfamilies>

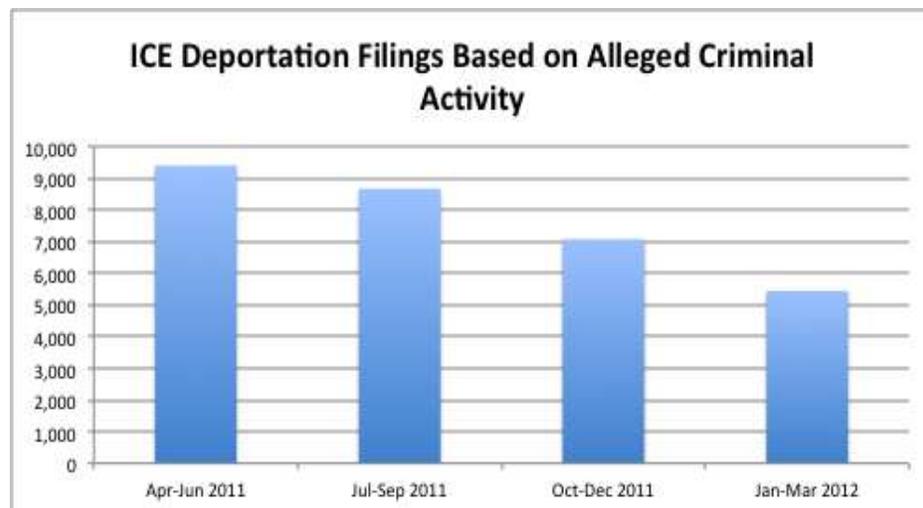
- Under the current prosecutorial discretion initiative, 288,631 individuals' cases have been reviewed. Of these cases reviewed so far (according to analysis from the Immigration Policy Center³):
 - ONLY 7.2% (or 20,648) have even been deemed “amenable” for administrative closure by DHS under prosecutorial discretion
 - ONLY 2.9% (or 8361 people) have received offers of administrative closure of their cases.
 - ONLY 1.5% (or 4363 people) have actually accepted these case closure offers.

According to DHS, over 75% of these immigrants who have declined offers of administrative closure are those who are most likely to prevail before an immigration judge. In other words, they would have legal relief that would allow them to remain in the U.S. This raises serious questions about DHS' use of prosecutorial discretion. DHS has so narrowly applied discretion that half of the immigrants offered to have their cases *temporarily* closed already have legal relief allowing them to remain in the country.

DHS Still Failing To Uphold Commitment to Redirect Resources and Spare Immigrants with Strong Ties and Their Families the Pain of Deportation

Despite widely announced new priorities of the administration to re-focus immigration enforcement resources on deporting individuals who pose a public safety threat, a recent analysis by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University shows the reality has been very different. According to TRAC, “...official court records show that rather than increasing, the number of deportations ordered on the basis of criminal activity has continued to decrease. Evidence from the most recent quarter show that the agency continues to be headed in the opposite direction from its stated goal.”⁴

- According to TRAC, the total number of deportations ordered on the basis of “criminal” activity has actually gone down in each of the 3-month periods since Director Morton’s June 2011 memo outlining the new prosecutorial discretion program and priorities. (See table)
- Additionally, the percentage of all deportations that these “criminal” activity-based orders represented has also gone down or stayed flat in each of those quarters. It was 15% in Apr-Jun 2011, and 14% in each of the succeeding quarters (Jul-Sep 2011, Oct-Dec 2011, and Jan-Mar 2012).



³ More critical analysis, by the Immigration Policy Center, of DHS' most recently released statistics can be found at: <http://immigrationimpact.com/2012/06/07/updated-figures-highlight-shortfalls-of-prosecutorial-discretion-program/>

⁴ “ICE Charges Criminal Activity in Fewer Deportation Proceedings.” Transactional Records Access Clearinghouse (TRAC). May 8, 2012. <http://trac.syr.edu/immigration/reports/281/>

- Lastly, as reported by America’s Voice in April 2012, ICE’s signature program for finding and deporting “criminals,” Secure Communities (or S-Comm), has a poor track record of actually targeting criminals. Of all immigrants who’ve been deported as a result of S-Comm since the program began in 2008, over a quarter—26.2%—didn’t commit any crime at all. Only 26.9% have been what ICE calls “Level 1” offenders (people who have, in theory, been convicted of the most serious crimes). And it’s not just dangerous and violent criminals who get classified as “Level 1.” ICE records obtained by the Transactional Records Access Clearinghouse (TRAC) show that everything from cashing a check with insufficient funds to traffic offenses can get someone labeled a “high priority” “Level 1.” In fact, traffic offenses were the second-most-common charge in detention according to the records TRAC analyzed.⁵

Insufficient Protections for Immigrants Appearing in Court *Pro Se* (without representation)

As the Immigration Policy Center recently exposed in its report, *Falling Through the Cracks*, “While the Obama administration has expanded use of prosecutorial discretion in immigration cases, the subject of immigrants without legal representation and their ability to access this discretion remains unresolved. In 2011, almost 50% of all immigrants in removal proceedings appeared *pro se*, or without legal representation. While immigration attorneys can explain the effect of these policies to their clients, *pro se* immigrants may be unaware that new policies are even in effect. Immigrant advocates have thus been rightly concerned about whether *pro se* immigrants in removal proceedings will benefit from Immigration and Customs Enforcement’s (ICE) prosecutorial discretion policies.”⁶

⁵ “Who Is a Criminal? ICE’s Less-Than-Reliable Numbers on ‘Criminal Offenders.’” America’s Voice blog. April 4, 2012. http://americasvoiceonline.org/blog/ices_less-than-stellar_record_on_prosecutorial_discretion-2/

⁶ “Falling Through the Cracks: How Gaps in ICE’s Prosecutorial Discretion Policies Affect Immigrants Without Legal Representation,” by Joan Friedland. Immigration Policy Center. May 2012.

RECOMMENDATIONS

In the coming weeks, DHS has an opportunity to improve how it implements its own prosecutorial discretion policy. The following broad steps are critical to restoring the credibility of this program for concerned communities and constituencies expecting the program to bring relief to immigrants and their families.

KEY RECOMMENDATIONS TO MAKE PROSECUTORIAL DISCRETION A SUCCESS

- The authority and responsibility to exercise prosecutorial discretion must be clarified and enforced to ensure that families are protected from separation and those who stand up for their labor and civil rights are not punished.
- Ensure favorable treatment of all young people entering the system through use of Deferred Action, Parole-in-Place or Deferred Enforced Departure, and issuing employment authorization.
- Stop the so-called “Secure Communities” program, which condones racial profiling, outsources federal immigration enforcement to local police and undermines public safety by fostering distrust of those same police by local low-income immigrant communities.
- The Department of Justice (DOJ) must take a number of important steps to ensure immigrants’ civil, due process, and labor rights are protected by providing adequate legal representation for all individuals facing action in immigration courts; monitoring activities involving state and local law enforcement of immigration law; and strengthening the Racial Profiling Guidance by eliminating the border and national security loophole, to include profiling based on religion and ethnic origin, and ensuring that the guidance is enforceable.

Concrete Changes to Make Prosecutorial Discretion (PD) Work

To ensure that Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) adheres to the spirit of Director John Morton’s June 17, 2011 guidance and exercises this discretion appropriately at all stages of the deportation process, evaluating the totality of the circumstances in each individual case, and ensuring individuals are fully informed of their options, we propose:

1. DHS provide clearer guidance directing relevant personnel at all levels to conduct a more balanced and consistent review of all cases, utilizing the June 17th, 2011 memo issued by Director Morton to ensure more careful consideration of the totality of circumstances in cases involving negative factors. In addition, individuals granted relief through the Prosecutorial Discretion process obtain work authorization.
2. DHS provide a clearly defined mechanism for individuals, attorneys and accredited representatives to submit requests for discretion to ICE field offices and counsel, and provide clear, uniform instruction to its field offices and counsel on how to handle such requests. This mechanism should include: (a) a simple one-page application; (b) a basic guide to “How PD works” for all applicants; and (c) a process for individuals to seek review of their cases at higher levels of DHS to address inconsistent application of the policy and outright resistance in the field.
3. Easy to understand and widely available information about PD, translated into Spanish and other languages, be developed and disseminated by DHS immediately. Know your rights materials should also be made available to individuals seeking PD.

DHS & ICE Should Ensure Key Factors Are Considered As Part of the Totality of Circumstances in Assessing Individual Cases, as Outlined in DHS' Own Memoranda

4. “Absconders”: Too many “absconders” in fact received their removal order in absentia. Because of faulty information in ICE databases, the agency often mails Notices to Appear to incorrect or old addresses. As a result, the immigrant is not aware of her court hearing and gets ordered removed without the opportunity to defend herself, and is then inaccurately labeled as an “absconder.”
5. Re-entry: Often, immigrants penalized for “unlawful re-entry” are merely workers who seek to reunite with their families and pose no threat to the community. Unlawful re-entry should not automatically disqualify the use of discretion in case reviews.
6. Lawful permanent residents: Many immigrants with long-ago convictions have since kept clean records, started families, and become model members of their communities. These people pose no risk to public safety and therefore fall outside the agency’s stated enforcement priorities and the totality of circumstances for this population should be taken into consideration.
7. Asylum seekers should qualify for prosecutorial discretion without being forced to drop their application for asylum to ensure safety and compliance with international law.
8. Workers and others defending their labor rights and civil rights should be included for relief under prosecutorial discretion.

Recommendations on Broader DHS Policies and Practices

9. DHS follow through on the commitment to focus its enforcement resources appropriately by providing guidance that minor infractions alone (for example, traffic violations) should not lead to people being considered “high-priorities” for deportation. ICE’s signature program for finding and deporting “high priority” individuals, Secure Communities (or S-Comm), has a poor track record of meeting its stated goal of promoting public safety and instead has served as a deportation dragnet for hardworking immigrants and their families.
10. DHS, in the context of its Secure Communities program, should ensure the issuance of immigration detainers is conducted within the framework of DHS’s enforcement rather than the broad issuance of detainers currently being utilized.
11. DHS’ risk and custody classification tool should be fully implemented immediately to ensure people subject to immigration detention are treated fairly and decisions regarding release are in compliance with DHS’ PD guidance.

Leadership and Accountability Needed at All Levels of DHS and Across ICE, USCIS, and CBP

12. DHS leadership must engage in a broad public information and education campaign designed to explain the PD initiative’s goals and processes and achieve its successful implementation.
13. Secretary Napolitano must ensure accountability through the ranks and should communicate to all involved DHS personnel that the program is not yet meeting its goals, that a demonstrable improvement in the number of cases getting relief is needed, and that the policy’s objectives have the full backing of the Secretary. Resistance and “business as usual” in the field must be stopped.
14. US Citizenship and Immigration Services (USCIS) & Customs and Border Patrol (CBP): While ICE is taking steps to train its own personnel and hold them accountable to DHS’s priorities and prosecutorial discretion guidelines, and USCIS has issued guidance regarding issuance of

“Notices to Appear,” no such steps have been evident from CBP. CBP should be required to issue guidance, and USCIS should be held accountable to consistently apply the guidance they have issued.

Department of Justice (DoJ) Role in Ensuring the Success of Prosecutorial Discretion (PD)

Department of Justice must take a number of important steps to ensure that DHS and state/local government enforcement policies and actions are consistent with protecting civil and labor rights, including ensuring due process and adequate legal representation for all individuals facing action in immigration courts. Among the steps DoJ should take are:

15. Monitor immigration enforcement and application of PD to ensure protection of civil rights, labor rights, and due process rights.
16. The Department of Justice should be involved in the case-by-case review process to ensure the process is fair and balanced. For the remainder of the ongoing review of the case backlog and outstanding deportation cases, immigration courts should be closed during reviews of cases to ensure full and proper consideration of all cases and informed due process for all individuals.
17. As noted earlier in this report, nearly half of all immigrants appearing in immigration court in 2011 were *pro se*, or without any representation. As the Immigration Policy Center’s report, “Falling Through the Cracks,” noted, “The fact that immigrants are largely unrepresented in immigration proceedings can only be remedied by availability of counsel. But there are some steps that ICE and EOIR can take to mitigate against the unfairness.”⁷ The IPC report’s specific recommendations would significantly increase the efficiency and fairness of the proceedings and assist in achieving the objectives of prosecutorial discretion.
18. Strengthen Racial Profiling Guidance by eliminating the border and national security loophole, to include profiling based on religion and ethnic origin, and to ensure that the guidance is enforceable.

CONCLUSION

DHS’ prosecutorial discretion policy as announced one year ago brought with it the promise that immigrants and their families would have the opportunity to obtain relief from deportation. The program’s implementation to date has dashed such hopes, to the detriment of immigrant families and the credibility of the Obama Administration. In the coming weeks, FIRM and its allies across the immigrant movement, will be following closely whether DHS will implement these recommendations and ensure that prosecutorial discretion will be used for the tens of thousands of families excluded thus far.

⁷ “Falling Through the Cracks: How Gaps in ICE’s Prosecutorial Discretion Policies Affect Immigrants Without Legal Representation,” by Joan Friedland. Immigration Policy Center. May 2012.

Acknowledgements

Alliance for Immigration Rights & Reform (Michigan)
Center for Community Change
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
CASA de Maryland
Make the Road New York
Immigration Policy Center
America's Voice Education Fund
Florida Immigrant Coalition
Colorado Immigrant Rights Coalition
New York Immigration Coalition

And a special acknowledgement to the courageous individuals profiled in this report, to their families, and the organizations and community members who are fighting so that they may stay together.

