

STATEMENT OF JOHN ROTH
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BEFORE THE

**SUBCOMMITTEE ON NATIONAL
SECURITY AND THE SUBCOMMITTEE
ON HEALTH CARE, BENEFITS, AND
ADMINISTRATIVE RULES**

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

A REVIEW OF THE PRESIDENT'S EXECUTIVE ACTIONS ON IMMIGRATION

June 17, 2015



Good afternoon Chairmen Jordan and DeSantis, Ranking Members Cartwright and Lynch, and Members of the Subcommittees. Thank you for inviting me here today to discuss DHS' collection of prosecutorial discretion data.

There are an estimated 11.5 million removable aliens¹ in the United States—roughly equivalent to the population of Ohio—including people who may pose a risk to public safety or national security. According to ICE, DHS removed or returned a total of 577,295 aliens in FY 2014. Given the sheer number of removable aliens, and the finite resources available to remove them, DHS has decided it must focus on those who pose the greatest risk. To this end, DHS has instituted various policies over time that allow the use of prosecutorial discretion in making immigration enforcement decisions. However, the Department does not collect or use the full range of prosecutorial discretion data to help assess immigration policy, evaluate the effectiveness and results of enforcement actions, or to be able to assess the reasonableness of the exercise of that discretion on the part of DHS personnel.

My testimony today will focus on the results of our recent audit of DHS' use of prosecutorial discretion data.² In May, we reported that DHS is not collecting and analyzing enough data and does not have a mechanism to monitor and receive feedback on the results of using prosecutorial discretion. We also reported on the inability of officers at U.S. Immigration and Customs Enforcement (ICE) to access aliens' criminal records in their country of origin.

During our audit, we reviewed data the Department and its components collected and reported as of September 30, 2014, prior to the policy changes announced by the Administration in November 2014. Our office has not assessed the legal basis of the Department's executive immigration reforms, prior prosecutorial discretion policies, or prosecutorial decisions made on individual cases.

In addition to our recent audit, today I will discuss several other reviews in which we found that components did not have enough reliable data to make informed decisions.

DHS' Prosecutorial Discretion Policies

Because DHS and its components have finite resources to respond to all immigration violations or remove all persons illegally in the United States, DHS exercises prosecutorial discretion in enforcing the law. "Prosecutorial

¹ A "removable alien" is an individual who is not a citizen or national of the United States and may be removed for reasons such as entering the country illegally, committing crimes, or representing a risk to national security or public safety.

² [*DHS Missing Data Needed to Strengthen Its Immigration Enforcement Efforts*](#), OIG-15-85, May 2015

discretion” is the authority of an agency or officer to decide whether to enforce immigration laws, and if so, to what extent. For example, ICE enforcement officers are exercising prosecutorial discretion when deciding whom to stop, question, arrest, and remove from the country.

Since DHS’ formation in 2003, ICE has implemented various policies to focus its efforts on criminal and civil enforcement priorities. It has also issued policies for processing aliens with special circumstances, such as crime victims and witnesses, nursing mothers, and the elderly, as well as ensuring that enforcement actions are not focused on sensitive locations, such as schools and churches.³

At the time of our audit, ICE’s removal actions were governed by a series of policy memoranda signed by ICE Director John Morton in March and June of 2011, and it focused enforcement resources on three priorities:

Priority 1: Aliens who pose a danger to national security or a risk to public safety.

Priority 2: Aliens who recently violated immigration controls at the border, at ports of entry, or through knowingly abusing visa programs.

Priority 3: Aliens who are fugitives or otherwise obstruct immigration controls.

Additionally, in 2012, the Department issued guidance known as Deferred Action for Childhood Arrivals (DACA), which allows the use of prosecutorial discretion to defer removal action for some aliens who came to the United States as children and meet certain other criteria.⁴

In November 2014, the Department published several other policy memoranda to implement executive immigration reforms. These policies included a new, department-wide enforcement and removal policy, an expansion of DACA, and an extension of deferred action for parents of U.S. citizens and lawful permanent residents. These policies were not in place during the conduct of our audit fieldwork and were not reviewed as part of our work.

ICE, CBP, and USCIS Roles in Prosecutorial Discretion

In DHS, ICE, U.S. Customs and Border Protection (CBP) (which includes the U.S. Border Patrol), and U.S. Citizenship and Immigration Services (USCIS) have primary responsibility for enforcing U.S. immigration laws. Each

³ Please see appendix 1 for a list of ICE policies in effect during our audit.

⁴ More information about DACA eligibility and criteria is available on USCIS’ website, at www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

component uses prosecutorial discretion differently. Each component's role is described below.

Immigration and Customs Enforcement

ICE's Enforcement and Removal Operations identifies and apprehends removable aliens, detains them when necessary, and removes them from the United States when warranted. ICE prioritizes the removal of convicted criminals, those who pose a threat to national security, fugitives, and recent border entrants.

A removable alien may come to ICE's attention in various ways, including internal ICE enforcement efforts, such as their program to apprehend fugitives, as well as referrals from CBP and USCIS. When ICE officers encounter a removable alien, they may query law enforcement and immigration databases, review documents, and conduct interviews to determine the alien's identity, immigration status, and criminal history. Officers then exercise prosecutorial discretion by deciding whether the alien qualifies for an exception and may be released or whether to initiate removal proceedings. ICE may also exercise prosecutorial discretion at other points during the removal process. For example, an ICE officer may identify a removable alien as a high enforcement priority, but ICE attorneys may later deem the individual a low enforcement priority and choose not to pursue removal.

Customs and Border Protection

CBP is tasked with safeguarding our Nation's borders. As part of that mission, CBP law enforcement personnel apprehend more than 1,000 individuals each day for suspected violations of U.S. immigration laws. Border Patrol apprehensions totaled 486,651 nationwide in FY 2014. CBP uses prosecutorial discretion to determine whether a removable alien qualifies for a DACA exception. If an alien is eligible for a DACA exception, CBP may advise the individual to contact USCIS to apply for deferred action. According to CBP, it had released 650 DACA-eligible individuals from DACA's inception to the end of FY 2014. CBP processes all other removable aliens and refers them to ICE and does not otherwise exercise discretion in whether to process specific removable aliens. Of course, ICE attorneys may exercise discretion later in the process.

U.S. Citizenship and Immigration Services

USCIS oversees lawful immigration to the U.S. and grants immigration and citizenship benefits. For example, it processes citizenship applications, family and employment-based petitions for residency, and work authorizations. USCIS also adjudicates DACA requests according to departmental guidance. The process for requesting DACA includes completing an application, paying a fee, submitting supporting documentation, and completing a background check. Individuals who do not meet DACA requirements may be referred to ICE

for removal. USCIS maintains records on the number of DACA requests it processes. In FY 2014, USCIS reported that it approved 632,855 DACA requests for deferred action.

DHS Needs More Complete and Reliable Prosecutorial Discretion Data

Despite its reliance on prosecutorial discretion to prioritize enforcement resources, ICE often does not collect prosecutorial discretion data and does not always ensure its statistics are accurate and complete. For example, ICE records its use of prosecutorial discretion broadly, without distinguishing the various types of exceptions to removal, such as DACA-related exceptions. Additionally, prosecutorial discretion statistics may be inaccurate because enforcement officers may not document every encounter with aliens it considers to be a low enforcement priority; ICE officials told us that field office personnel do not always record their use of prosecutorial discretion because it is too time consuming. ICE officials also said that they may use prosecutorial discretion at various points in the removal process, which would result in multiple records for the same person. As a result, data to support decisions to use prosecutorial discretion on low priority aliens may not be available.

DHS also does not collect other prosecutorial discretion-related data that might help immigration efforts. For example, DHS would benefit from capturing information regarding aliens who are granted prosecutorial discretion and later commit a crime or pose a threat to national security and public safety.

DHS Needs a Mechanism to Evaluate the use of Prosecutorial Discretion

As DHS moves forward and revisits immigration policies and programs, it should ensure it can support its decisions with solid data. Once the Department implements a plan to consistently collect and maintain reliable prosecutorial discretion data, it should develop a mechanism to monitor and get feedback on the use of prosecutorial discretion to make sure the correct decisions are being made. Such a mechanism would help DHS accurately assess the results of policy decisions and make needed changes.

A feedback mechanism for the use of prosecutorial discretion could help DHS identify gaps, set goals, determine budget requirements, and provide information to improve program performance. In terms of overall immigration enforcement policy, such a mechanism could help compare the results of changes to the policy to goals and objectives, identify needed improvements, and develop sound future programs and policies.

In addition to assisting in the overall policy-making process, capturing the right information would allow the Department to ensure the proper and evenhanded application of the policies that do exist. As it stands now, there is no mechanism by which to assess the reasonableness of an individual officer's

exercise of discretion, to compare prosecutorial discretion decisions for similarly situated aliens, or to compare the use of prosecutorial discretion by various field offices. This data, if collected, could also be used to evaluate the performance of individual officers or field offices.

Uneven or inconsistent policy enforcement can have a negative effect on DHS' immigration enforcement mission. For example, in February 2013 we published an audit report examining ICE's worksite enforcement strategy, and found that headquarters did not adequately oversee the field offices to ensure that they were consistent in issuing warnings and fines, and some field offices issued significantly more warnings than fines. The directorate also negotiated fines with employers, in some cases substantially reducing the amounts. Homeland Security Investigations' inconsistent implementation of the administrative inspection process, plus the reduction of fines, may have hindered its mission to prevent or deter employers from violating immigration laws. ([*U.S. Immigration and Customs Enforcement's Worksite Enforcement Administrative Inspection Process*](#), OIG-14-33, February 2014)

Here, because the Department does not collect data on, much less monitor, the use of prosecutorial discretion, we are unable to determine whether the Department is using prosecutorial discretion consistently or fairly.

DHS Needs Better Access to Aliens' Criminal History

During our audit, we identified a data access issue that may impede sound prosecutorial discretion decisions. ICE field office personnel said they are not always able to access aliens' criminal histories in their countries of origin. As a result, aliens convicted of or wanted for a felony committed in their home country, but not convicted of a felony or significant misdemeanor in the United States may not be placed in or may inadvertently be taken out of the removal process. The information components use to make prosecutorial discretion decisions was beyond the scope of our audit; however, we encourage the Department to address this potential issue and take corrective action as necessary.

DHS Needs Reliable Data for Other Aspects of Immigration Enforcement

Several of our recent reports demonstrate that DHS is hindered by a lack of data in other areas of immigration enforcement. Often, DHS cannot accurately assess program performance and make informed policy decisions because it either does not collect enough data to get a complete picture or the data it gathers is not reliable. For example:

- According to ICE, its Intensive Supervision Appearance Program (ISAP) is effective because, using its metrics, few program participants abscond.

However, ICE no longer supervises some ISAP participants throughout their immigration proceedings, so it cannot definitively determine whether aliens who once were, but no longer are, in the program, have escaped or been arrested for criminal acts. Although ICE ends many aliens' participation in ISAP before their immigration cases are completed, it continues to measure whether aliens abscond or are arrested only while they are actually participating in the program. ICE concurred with our recommendation to adjust program metrics and is working on a methodology to measure these "latent effects." ([*U.S. Immigration and Customs Enforcement's Alternatives to Detention \(Revised\)*](#), OIG-15-22, February 2015)

- ICE did not capture essential data, such as reasons detained aliens missed flights and the optimum seating capacity to support operational decisions related to air travel for detainees. For example, we determined that ICE did not always document whether detainees missed flights due to medical reasons or travel documentation problems. Without this information, ICE may miss opportunities to correct potential problems and improve the efficiency of its detainee air transportation program. ([*ICE Air Transportation of Detainees Could Be More Effective*](#), OIG-15-57, April 2015)
- According to CBP, the goal of the Streamline initiative is to reduce the rate of re-entry into the U.S. by illegal aliens by apprehending them and referring them to the Department of Justice for prosecution. CBP measures Streamline's effect on re-entry using year-to-year data to analyze re-entry trends; it does not measure an alien's border crossing history, re-entry, or re-apprehension over multiple years. In other words, an alien who attempts to cross the border at the end of a fiscal year and makes a second attempt at the beginning of the next fiscal year would not be considered a recidivist. As a result, CBP is not fully and accurately measuring Streamline's effect on deterring aliens from entering and re-entering the country illegally. CBP concurred with our recommendation to measure over multiple fiscal years and reported it is developing a "State of the Border Risk Methodology Strategy" to analyze a wide range of indicators to better assess and analyze its enforcement efforts. ([*Streamline: Measuring Its Effect on Illegal Border Crossing*](#), OIG-15-95, May 2015)

The Department's ability to oversee and make informed decisions in other program areas has also been affected by its components' inability to accurately record needed information. For example, we reported that CBP's Unmanned Aircraft System program operated for 8 years without establishing performance measures needed to prove the program's effectiveness. Additionally, the Department did not adequately manage its components' motor vehicle fleet

operations, in part because the components were reporting inaccurate and incomplete vehicle data, which the Department relied on to manage the motor vehicle fleet program. ([*U.S. Customs and Border Protection's Unmanned Aircraft System Program Does Not Achieve Intended Results or Recognize All Costs of Operations*](#), OIG-15-17, December 2014; [*DHS Does Not Adequately Manage or Have Enforcement Authority Over Its Components' Vehicle Fleet Operations*](#), OIG-14-126, August 2014)

Conclusion

The Department agreed with our recommendation to improve collection, analysis, and reporting of data on the use of prosecutorial discretion. DHS is planning a multi-pronged approach for assessing and accounting for its immigration enforcement efforts. We are leaving this recommendation open until we receive the Department's planned strategy to collect, analyze, and report data on its use of prosecutorial discretion, as well as milestones for developing and implementing the strategy. We believe such a strategy is particularly important given that over the past two fiscal years, ICE, CBP, and USCIS collectively received, on average, about \$21 billion annually. The Department must spend this significant investment efficiently and make decisions based on the best available information. The Department also relies on prosecutorial discretion to focus resources and has implemented a number of prosecutorial discretion policies; data analysis is essential to developing sound future immigration policies. By analyzing prosecutorial discretion data, the Department could potentially strengthen its ability to remove aliens who pose a threat to national security and public safety. Moreover, reporting all immigration enforcement actions would provide greater transparency and promote public confidence in the Department's immigration enforcement mission.

Chairmen DeSantis and Jordan, this concludes my prepared statement. Thank you for inviting me to speak on this topic today. I welcome any questions you or other Members of the Subcommittees may have.

Appendix 1

Selected ICE Prosecutorial Discretion Policies in Effect During Our Audit

Date	Title	Purpose
10/6/2005	Exercising Prosecutorial Discretion to Dismiss Adjustment Cases	Reallocates limited ICE resources to priority cases by dismissing cases in which the adjustment of status appears clearly approvable.
10/24/2005	Prosecutorial Discretion	Provides guidance to ICE attorneys on using prosecutorial discretion when prosecuting removal proceedings.
11/7/2007	Prosecutorial and Custody Discretion	Highlights the importance of prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers.
* 3/2/2011	Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens	Outlines ICE civil immigration enforcement priorities relating to the apprehension, detention, and removal of aliens.
* 6/17/2011	Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens	Provides guidance on the exercise of prosecutorial discretion to ensure that ICE's immigration enforcement resources focus on its enforcement priorities.
6/17/2011	Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs	Provides guidance for using prosecutorial discretion in removal cases for certain individuals, including victims and witnesses of crime.
10/24/2011	Enforcement Actions at or Focused on Sensitive Locations	Ensures that enforcement actions do not occur at or focus on sensitive locations, such as schools and churches.

* These policies were superseded by DHS' November 2014 policy for the apprehension, detention, and removal of undocumented immigrants.

Source: OIG analysis of ICE prosecutorial discretion policies

Appendix II

OIG Reports Referenced in This Testimony

DHS Missing Data Needed to Strengthen Its Immigration Enforcement Efforts,
OIG-15-85, May 2015

Streamline: Measuring Its Effect on Illegal Border Crossing, OIG-15-95, May
2015

*U.S. Immigrations and Customs Enforcement's Alternatives to Detention
(Revised)*, OIG-15-22, February 2015

ICE Air Transportation of Detainees Could Be More Effective, OIG-15-57, April
2015

*U.S. Customs and Border Protection's Unmanned Aircraft System Program Does
Not Achieve Intended Results or Recognize All Costs of Operations*, OIG-15-17,
December 2014

*DHS Does Not Adequately Manage or Have Enforcement Authority Over Its
Components' Vehicle Fleet Operations*, OIG-14-126, August 2014

*U.S. Immigration and Customs Enforcement's Worksite Enforcement
Administrative Inspection Process*, OIG-14-33, February 2014