



# U.S. Immigration and Customs Enforcement

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**STATEMENT**

**OF**

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**Regarding a Hearing on  
*“Recalcitrant Countries”***

**U.S. HOUSE OF REPRESENTATIVES  
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE**

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## **INTRODUCTION**

Chairman Chaffetz, Ranking Member Cummings, and distinguished Members of the Committee, thank you for the opportunity to appear before you today to discuss the ongoing challenge of uncooperative and recalcitrant countries as we carry out the critical mission of U.S. Immigration and Customs Enforcement (ICE). I look forward to discussing our operations and highlighting our continued efforts to bring such countries back into compliance, in partnership with the U.S. Department of State (DOS).

I am very proud to represent the dedicated men and women of ICE. ICE promotes homeland security and public safety through broad criminal and administrative enforcement of approximately 400 federal laws governing border control, customs, trade, and immigration. The agency carries out its mission through four principal components: Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), the Office of the Principal Legal Advisor (OPLA), and Management and Administration (M&A). Additionally, the Office of Professional Responsibility (OPR) investigates allegations of administrative and criminal misconduct at ICE, and performs important inspection and oversight functions across the agency. Today, ICE has approximately 20,000 law enforcement, attorney, and support personnel in all 50 states, the District of Columbia, three U.S. territories, and strategically stationed positions in 46 countries worldwide.

## **ENFORCING IMMIGRATION LAWS**

The nearly 6,000 law enforcement officers of ERO identify removable aliens and make arrest, detention, and removal determinations in a manner designed to best promote national security, public safety, and border security while remaining consistent with the following Department of Homeland Security (DHS) enforcement priorities:

- Priority 1 includes those who pose a threat to national security, border security, or public safety (including those convicted of felonies or aggravated felonies);
- Priority 2 includes those who have been convicted of significant or multiple misdemeanors, those who have significantly abused the visa or visa waiver programs, and those apprehended who unlawfully entered the United States after January 1, 2014; and
- Priority 3 focuses on those individuals who have been issued a final order of removal on or after January 1, 2014.

ERO works to identify foreign nationals who may be subject to immigration enforcement actions in a number of ways, including working with our federal, state, and local law enforcement partners to identify, locate, arrest, and remove convicted criminal aliens who pose a threat to the public. Throughout the process, ERO works closely with ICE OPLA, which represents the Department in removal proceedings in the immigration court system, administered by the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR). Once individuals are ordered removed by EOIR immigration judges, it is ICE's responsibility to execute those orders, which includes obtaining the necessary travel documents from the countries to which they are being returned.

The revised priorities noted above have intensified ICE's focus on removing aliens convicted of serious crimes as well as public safety and national security threats, and recent border entrants. ICE's Fiscal Year (FY) 2015 removal statistics illustrate our commitment to ensuring that individuals who pose a threat to public safety are not released from ICE custody, and our review processes demonstrate ICE's commitment to public safety.

In FY 2015, ICE conducted 235,413 removals: 59 percent of all ICE removals, or 139,368, involved individuals who were previously convicted of a crime. Of the 96,045 individuals removed who had no criminal conviction, 94 percent, or 90,106, were apprehended at or near U.S. borders or ports of entry. The leading countries of origin for removals were Mexico, Guatemala, Honduras, and El Salvador.

ICE continued to prioritize its removals in FY 2015 by focusing on serious public safety and national security threats, increasing by 3 percent over FY 2014 the percentage of removals that involved convicted criminals. More specifically, of the total ICE removals, 86 percent (202,152) fell into Priority 1, which includes national security and public safety threats; 8 percent (18,536) fell into Priority 2, which includes individuals convicted of serious or multiple misdemeanors; and 4 percent (9,960) fell into Priority 3, or those who received a final order of removal on or after January 1, 2014. Thus, 98 percent of all ICE removals met one or more of ICE's stated immigration enforcement priorities.

While ICE remains firmly committed to enforcing the immigration laws effectively and sensibly, ICE does face significant challenges in obtaining travel documents from some of its foreign partners, which are necessary to effectuate the removal of individuals ordered removed from the United States.

### **DEALING WITH RECALCITRANT AND UNCOOPERATIVE COUNTRIES**

The removal process is impacted by the level of cooperation offered by our foreign partners. As the Committee is aware, in order for ICE to effectuate a removal, two things are generally required: (1) an administratively final order of removal and (2) a travel document issued by a foreign government. Although the majority of countries adhere to their international obligation to accept the return of their citizens who are not eligible to remain in the United States, ICE faces unique challenges with those countries that systematically refuse or delay the repatriation of their nationals. Such countries are considered to be uncooperative or recalcitrant, and they significantly exacerbate the challenges ICE faces in light of the U.S. Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In *Zadvydas*, the Court effectively held that aliens subject to final orders of removal may generally not be detained beyond a presumptively reasonable period of 180 days, unless there is a significant likelihood of removal in the reasonably foreseeable future. Regulations were issued in the wake of *Zadvydas* to allow for detention beyond that period in a narrow category of cases involving special circumstances, including certain terrorist and dangerous individuals with violent criminal histories. Those regulations have faced significant legal challenges in federal court. Consequently, ICE has been compelled to release thousands of individuals, including many with criminal convictions, some of whom have gone on to commit additional crimes.

### *Determining Whether a Country is Uncooperative or Recalcitrant*

Countries are assessed based on a series of tailored criteria to determine their level of cooperativeness with ICE's repatriation efforts. Some of the criteria used to determine cooperativeness include: hindering ICE's removal efforts by refusing to allow charter flights into the country; country conditions and/or the political environment, such as civil unrest; and denials or delays in issuing travel documents. This process remains fluid as countries become more or less cooperative. ICE's assessment of a country's cooperativeness can be revisited at any time as conditions in that country or relations with that country evolve; however, ICE's current standard protocol is to reassess bi-annually. As of May 2, 2016, ICE has found that there were 23 countries considered recalcitrant, including: Afghanistan, Algeria, the People's Republic of China, Cuba, Iran, Iraq, Libya, Somalia, and Zimbabwe. As a result of their lack of cooperation, ICE has experienced a significant hindrance in our ability to remove aliens from these countries. In addition, ICE is also closely monitoring an additional 62 countries with strained cooperation, but which are not deemed recalcitrant at this time.

### *Negative Impact on ICE Resources and Public Safety*

DHS as a whole, and ICE specifically, takes very seriously its mission to remove foreign nationals in a timely and efficient manner and any challenges associated with limitations on the ability to do so. As a result, DHS works both directly with foreign governments and through DOS to improve cooperation with countries that systematically refuse or delay the repatriation of their nationals.

### *Resource Implications*

Whether a foreign government wholly refuses to take back one of its nationals or simply refuses to take back its nationals in a timely manner, there are significant resource implications for ICE.

ICE begins the removal process with requests for travel documents to the appropriate foreign government. If a travel document is not issued and reasonable efforts to secure the issuance of such a document are not fruitful, then ICE can take action pursuant to its own authorities, such as recommending non-inclusion of recalcitrant countries on the H-2 Eligible Countries List as well as, in appropriate circumstances, sending a letter to the nation's Embassy in the United States seeking cooperation with the removal process. Such letters, referred to as "Annex 9 letters," are issued to countries that are International Civil Aviation Organization (ICAO) Member States. Pursuant to Article 37 of the Convention on International Civil Aviation, signed at Chicago on December 7, 1944, in order to facilitate and improve air navigation, ICAO promulgates international standards and recommended practices addressing, *inter alia*, customs and immigration procedures. ICE has sent 125 such letters as of July 7 of this fiscal year, which is more than any other year on record.

Another possible tool is ICE requesting the issuance of a Demarche to the recalcitrant country by DOS. If that does not achieve results, a joint meeting between ICE, DOS Consular Affairs, and the Ambassador of the uncooperative nation can occur. Within the last two fiscal

years ICE has worked with DOS to issue 17 Demarches to Iraq, Algeria, Bangladesh, Cape Verde, Ivory Coast, Eritrea, The Gambia, Ghana, Guinea, Liberia, Mali, Mauritania, Niger, Sierra Leone, Senega, Cuba and St. Lucia. Although Algeria remains on the list of recalcitrant countries, the Algerian government committed to address the issue and has issued a handful—but not all—or the required travel documents since then.

Responses to a country's recalcitrance are, in part, guided by a Memorandum of Understanding (MOU) between ICE and DOS Consular Affairs, signed in April 2011. Pursuant to this MOU, ICE continues to work through U.S. diplomatic channels to ensure that other countries accept the timely return of their nationals in accordance with international law by pursuing a graduated series of steps to gain compliance with the Departments' shared expectations. The measures that may be taken when dealing with countries that refuse to accept the return of their nationals, as outlined in the 2011 MOU, include:

- issue a demarche or series of demarches;
- hold a joint meeting with the Ambassador to the United States, Assistant Secretary for Consular Affairs, and Director of ICE;
- consider whether to provide notice of the U.S. Government's intent to formally determine that the subject country is not accepting the return of its nationals and that the U.S. Government intends to exercise authority under section 243(d) of the Immigration and Nationality Act (INA) to encourage compliance;
- consider visa sanctions under section 243(d) of the INA; and
- call for an interagency meeting to pursue withholding of aid or other funding.

While this process sets forth a general protocol, specific steps—including the invocation of visa sanctions under INA section 243(d)—are considered by the DHS Secretary in consultation with DOS. Section 243(d) states that, upon notification from the Secretary of Homeland Security, the Secretary of State shall direct consular officers to stop issuing visas to immigrants, nonimmigrants, or both, from countries that unreasonably delay or fail entirely to repatriate their nationals. As such, use of this authority must be considered in light of both the potential impact it could have on U.S. foreign and domestic policy interests, particularly with respect to adverse effects on bilateral relations with a foreign partner, and whether visa restrictions will be an effective tool in gaining the country's compliance. In addition to the ICE and DOS MOU-guided process outlined above, on occasion, Secretaries Johnson and Kerry have also personally engaged with their foreign counterparts to underscore the need for compliance with international repatriation obligations.

### *Public Safety*

There is a clear public safety threat posed to the United States by the failure of uncooperative or recalcitrant countries to accept the timely return of their nationals who have committed crimes in this country. Such countries' unwillingness to comply with their international obligations to promptly facilitate repatriation of their nationals, coupled with ICE's obligation to comply with the Supreme Court's *Zadvydas* decision, has required ICE to release thousands of dangerous individuals, including criminal aliens. many with criminal convictions for serious crimes like arson, assault, property damage, extortion, forgery or fraud, homicide, kidnapping, weapons offenses, embezzlement, controlled substance offenses, and sexual

offenses. Sadly, ICE records indicate a number of these aliens have gone on to commit additional crimes while in the United States.

Recognizing this public safety threat, in recent years, ICE has worked aggressively to secure some progress in removing aliens to recalcitrant countries, albeit slow and with significant costs in terms of time and resources. In FY 2015, ICE was able to remove convicted criminals to ten countries, including Uganda and Sudan, which did not previously permit ICE to conduct removals by charter flight. Through negotiations, ICE was able to remove individuals to those countries via ICE Air Operations charters for the first time. This effort allowed ICE to remove an individual to Uganda convicted of selling drugs, resisting arrest, driving under the influence, and criminal trespassing, and another individual to Sudan who had been convicted of an attempted bombing. ICE remains firmly resolved to engage all foreign counterparts that deny or unreasonably delay the acceptance of their nationals. We continue to address foreign government representatives, both in Washington, D.C. and abroad, along with interagency partners, in an effort to improve cooperation with ICE removals.

However, despite ICE's continued efforts, there are a number of factors that constrain ICE's ability to improve the number and timeliness of repatriations to recalcitrant or uncooperative nations. Such factors include limited diplomatic relations with some countries; the countries' own internal bureaucratic processes, which foreign governments at times utilize to delay the repatriation process; and the views of some foreign governments that repatriation is simply not a priority.

### **CONCLUSION**

ICE will continue to play a critical role in fulfilling DHS's national security, border security, and public safety mission. Thank you again for the opportunity to testify today and for your continued support of ICE and its critical mission. I look forward to answering your questions.