November 14, 2014

LEGAL MEMORANDUM

TO: Honorable Benjamin J.F. Cruz
Vice-Speaker, 32nd Guam Legislature

FROM: Attorney General

SUBJECT: Viability of Legal Action to Compel Federal Compliance of Deportation Laws against Criminals from the Freely Associated States Detained in Guam

INTRODUCTION

This is to acknowledge receipt of your letter dated April 2, 2014, a copy of which is attached for the convenience of the reader. We apologize for the delay in responding. You ask that this Office consider and address the following:

1) The viability of legal action compelling U.S. ICE [Immigration and Customs Enforcement] to enforce 8 C.F.R. § 214.7 as it relates to FAS criminals [from the Freely Associated States] presently detained on Guam, and not removable by traditional means.

2) A review of Guam criminal laws specifically involving crimes of violence with intent to discern elements within local statutes that may impede the deportation process.

3) The extent of Governor Calvo’s Organic Act authority to enforce all laws of the United States applicable to Guam in the absence of federal enforcement.

DISCUSSION

With respect to your first question regarding the viability of legal action to compel U.S. ICE to enforce the law as it relates to deportation of FAS criminals, we are compelled to acknowledge that an action against the federal government to compel them to enforce 8 C.F.R.
§ 214.7 as it relates to deportation of FAS criminals presently detained on Guam would likely not survive a motion to dismiss.

I. Prosecutorial Discretion – General Rule

Numerous decisions from around the nation hold that the decision to prosecute or decline prosecution is a discretionary and policy-making function. See, e.g., United States v. Shaygan, 652 F.3d 1297, 1314 (11th Cir. 2011) (holding that the government has “broad discretion as to whom to prosecute” and that “the decision to prosecute is particularly ill-suited to judicial review.”); United States v. Valdez, 2011 WL 7143468 * 15 (W.D. La. 2011) (“the decision to prosecute one person and not another is a proper exercise of executive prosecutorial discretion with which the courts are hesitant to interfere”) (citing United States v. Webster, 162 F.3d 308, 333 (5th Cir. 1998)); Flores v. Attorney General, 2010 WL 5540951 * 4 (W.D. Tex. 2010) (“The decision to prosecute one person rather than another is one left to prosecutorial discretion.”) (citing United States v. Greene, 687 F.2d 1229, 1235 (5th Cir.1983)). See also, Thuan Quang Tran v. Cate, 2011 WL 7109327 * 9 (C.D. Cal. 2011) (“Prosecutors have wide latitude in making pretrial charging decisions and have broad discretion to decide whom to charge and what charges to file.”) (citing Wayte v. United States, 470 U.S. 598, 607 (1985); and United States v. Austin, 902 F.2d 743, 745 (9th Cir.1990)); Evans v. Runnels, 2011 WL 2358560 * 10 (C.D. Cal. 2011) (same).

The United States Supreme Court has explained why the decision to prosecute or refrain from prosecuting is “an exercise of discretion in making policy” that is not subject to judicial review.

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607-08 (1985). Accord, United States v. Scott, 631 F.3d 401, 406–07 (7th Cir. 2011) (“Reflecting this framework, our case law embodies the long-settled principle that we safeguard prosecutorial discretion by shielding it from judicial review that either forces the prosecutor to act in a prescribed manner or penalizes the prosecutor for acting in his preferred manner.”).
The reason why prosecution decisions by definition invoke the policy-making function of the executive, shielded from claims for injunctive relief as well as damages, was explained this way by the district court for the District of New Jersey:

In this case, Plaintiff wants this Court to order the United States Attorney for the District of New Jersey and the United States Attorney General to investigate and pursue the criminal prosecution of person(s) at the Special Treatment Unit. However, “the decision to prosecute is solely within the discretion of the prosecutor.” Leeke v. Timmerman, 454 U.S. 83, 87 (1981); see also Morrow v. Meehan, 258 Fed. App’x 492, 494 (3d Cir. 2007) (“Commencing a prosecution under any criminal law is discretionary”); Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (“Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law”). And although Mr. Aruanno casts his claim as a constitutional violation, the United States Supreme Court has held that a “private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); see also Maine v. Taylor, 477 U.S. 131, 137 (1986) (“private parties ... have no legally cognizable interest in the prosecutorial decisions of the Federal government”); Diamond v. Charles, 476 U.S. 54, 63 (1986) (“Were the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it ... because a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another”) (citation and internal quotation marks omitted). Because Mr. Aruanno has no legally cognizable interest in compelling federal prosecutors to investigate or prosecute alleged violations, the Complaint will be dismissed with prejudice for failure to state a claim upon which relief may be granted.


II. Prosecutorial Discretion –Deportation Proceedings Specifically

This practically unfettered prosecutorial discretion has been held especially applicable with respect to decisions whether or not to initiate deportation proceedings. See, e.g., Cabasug v. I.N.S., 847 F.2d 1321, 1324 (9th Cir. 1988) (“Congress also left the Attorney General discretion whether to seek deportation by the language ‘shall, upon the order of the Attorney General, be deported.’” 8 U.S.C. § 1251(a) (1982). This language implies that the Attorney General retains discretion at the stage of deciding to initiate a deportation proceeding.”)(citing Johns v. Department of Justice, 653 F.2d 884, 890 (5th Cir. 1981)), abrogated on other grounds, Abebe v. Mukasey, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc); Johns v. Department of Justice, 653 F.2d 884, 889 (5th Cir. 1981) (“Aliens who are determined to be deportable, ‘shall be deported’ upon the order of the Attorney General. 8 U.S.C. § 1251. His responsibility in this regard is akin to his responsibility for enforcing the criminal laws: in both situations, he has discretion to refrain from instituting proceedings even though grounds for their commencement may exist.”) (citing Gordon & H. Rosenfield, Immigration Law and Procedure § 5.3e(1) (1981); accord,
Costa v. I.N.S., 233 F.3d 31, 37-38 (1st Cir. 2000) ("Indeed, as we already have remarked, the INS has virtually unfettered discretion in such respects.") (citing Reno v. American–Arab Anti–Discrimination Comm., 525 U.S. 471, 483–85 (1999)); cf. Arizona Dream Act Coalition v. Brewer, 945 F.Supp.2d 1049, 1053 (D.Ariz. 2013) ("The INA charges the Secretary of Homeland Security with the administration and enforcement of all laws relating to immigration and naturalization. 8 U.S.C. § 1103(a)(1). Under this delegation of authority, the Secretary may exercise a form of prosecutorial discretion and decide not to pursue the removal of a person unlawfully in the United States."). Accordingly, at this time this Office can conceive of no legal basis to compel the federal government to initiate deportation proceedings against FAS citizens who commit crimes on Guam.

III. Review of Guam’s Criminal Laws

Your second query asks this Office to review Guam’s criminal laws specifically those involving crimes of violence with intent to discern elements within local statutes that may impede the deportation process. Chief Prosecutor Basil O’Mallan and the Prosecution Division have been assigned this task.

IV. Enforcement of Federal Deportation Law Under Guam’s Organic Act

Your third question inquires as to the extent of the Governor’s authority under Guam’s Organic Act to enforce the laws of the United States applicable to Guam in the absence of federal enforcement. The enforcement of federal laws pertaining to immigration and deportation of aliens is within the exclusive jurisdiction of the federal government and that attempts by state and local legislative bodies to enforce federal law in this area have routinely been held to be preempted under the Supremacy Clause of the United States Constitution. See generally, Arizona v. United States, 567 U.S. ___, 132 S.Ct. 2492, 2506 (2012) ("authorizing state officers to decide whether an alien should be detained for being removable ... violates the principle that the removal process is entrusted to the discretion of the Federal Government") (citing Reno, 525 U.S. 471).

A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 348, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation’s] relations with foreign powers and require consideration of changing political and economic circumstances” (internal quotation marks omitted)); see also Galvan v. Press, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress ...”); Truax v. Raich, 239 U.S. 33, 42, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government”).
Arizona, 567 U.S. at ___, 132 S.Ct. at 2506–07. See also, United States v. Alabama, 691 F.3d 1269, 1295 & n.21 (11th Cir. 2012) ("The federal government—not the fifty states working in concert—retains the power to exclude aliens from the country."). "Finally, any direct regulation of immigration—‘which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain’—is constitutionally proscribed because the ‘[p]ower to regulate immigration is unquestionably exclusive federal power.’" Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013) (quoting DeCanas v. Bica, 424 U.S. 351, 354–55 (1976)); see generally, Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1264–67 (11th Cir. 2012); and We Are America v. Maricopa County Bd. of Supervisors, 297 F.R.D. 373, 386–91 (D.Ariz. 2013). This Office therefore finds no authority for the Governor to enforce federal law in the event that the federal government fails or refuses to do so.

V. Alternative Considerations

Although we have not been asked, we have considered whether any alternative solutions might be available, such as conditioning probation or parole on a criminal defendant’s agreeing to voluntary self-deportation from Guam. See, e.g., Joy Archer Yeager, J.D, The propriety of conditioning parole on defendant’s not entering specified geographical area, 54 A.L.R.5th 743 (1997). While some courts have found that conditioning parole on voluntary self-exile during a specified term of imprisonment or parole may not be unconstitutional per se, depending upon the conditions imposed, see, e.g., Bagley v. Harvey, 718 F.2d 921 ((9th Cir. 1983); and Beavers v State, 666 So.2d 868 (Ala. Crim. App 1995), other courts have held to the contrary. See, Dear Wing Jung v. United States, 312 F.2d 73, 75–76 (9th Cir. 1962) ("Defendant objected to the sentence. The court having imposed a lawful imprisonment then suspended the sentence for six months upon the condition that the defendant depart from the United States. It is not enough for the government to answer that such condition merely gave the defendant a ‘choice.’ For instance, if the condition were that the defendant must join a certain church, that would be an unconstitutional condition upon the sentence. If, as the government contends, the defendant is not a citizen of the United States, his departure therefrom would leave him without any right to return to this country. The condition is equivalent to a ‘banishment’ from this country and from his wife and children, who will presumably remain here. This is either a ‘cruel and unusual’ punishment or a denial of due process of law. Be it one or the other, the condition is unconstitutional."); Lok v. Immigration and Naturalization Service, 548 F.2d 37, 39 (2nd Cir. 1977) ("Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties."); and Cordell v. Tilton, 515 F.Supp.2d 1114 (S.D. Cal. 2007) (absolute restriction without exception from entering county is overbroad and not reasonably related to accomplishing the government’s objective). For these reasons, in the absence of Congressional authorization this Office does not suggest voluntary self-deportation as a judicial alternative to imprisonment, or as a condition of probation or parole in the case of FAS citizens who commit crimes on Guam and who would otherwise be deportable under federal law.
CONCLUSION

Under current law there is no way to judicially compel the federal government, to enforce federal law pertaining to immigration and deportation of aliens. Additionally, because the entire field has been held to be preempted, state and local jurisdictions are without authority to enforce and prosecute federal law pertaining to the involuntary deportation aliens who commit crimes on Guam when the federal government fails or refuses to do so. Finally, this Office does not advise voluntary self-deportation as a judicial alternative to imprisonment or as a condition of probation or parole in the case of FAS citizens who commit crimes on Guam.

ROBERT M. WEINBERG
Assistant Attorney General

Attachment: Original Transmittal from Vice-Speaker Benjamin J.F. Cruz
April 2, 2014

Transmitted via Electronic Mail
Irapadas@guamag.org

Leonardo M. Rapadas
Attorney General of Guam
287 West O’Brien Drive
Hagatna Guam, 96910

Re: The Viability of Legal Action to Compel Federal Compliance of Deportation Laws Against FAS Criminals Detained in Guam

Dear General Rapadas:

Attached you will find my April 2 correspondence to U.S. Immigration and Customs Enforcement (ICE) Deputy Director Daniel H. Ragsdale of the U.S. Department of Homeland Security (DHS). In this letter I express my concerns regarding the ICE’s Enforcement and Removal Operations (ERO) in Guam. I strongly believe that ERO’s refusal to increase deportation actions against immigrants under the Compacts of Free Association (COFA)—because of either alleged local statutory infirmities or a high-level determination that the pursuit of violative habitual resident deportations is a “waste of litigation resources”—is not supported by the facts.

In the likely absence of a meaningful federal response to the inquiries I have outlined in the attached, I ask that your office begin to consider the following:

1) The viability of legal action compelling U.S. ICE to enforce 8 C.F.R. § 214.7 as it relates to FAS criminals presently detained on Guam, and not removable by traditional means.

2) A review of Guam criminal laws specifically involving crimes of violence with intent to discern elements within local statutes that may impede the deportation process.

3) The extent of Governor Calvo’s Organic Act authority to enforce all laws of the United States applicable to Guam in the absence of federal enforcement.

While I am aware that we share philosophical differences on the matter of deportation, it is my hope that you understand the enormity of the questions before us. Put simply, is the federal government required to follow federal law? Or, does the mere fact that we are a territory at the edge of American power permit the federal government to ignore the legal commitments it has made and leave us with the consequences of that act?
As we approach the FY2015 budget process, I am aware that you may require additional resources to meet my requests. As such, please provide me with an estimated cost assessment. As we continue to spend in excess of $100 million in unreimbursed COFA costs annually, I will seek the assistance of my colleagues in securing the support you need to address U.S. ICE’s ongoing disregard of the law and its regulations.

Thank you very much for your attention to this important matter. I look forward to your response, which may be electronically transmitted to senator@senatorbjcruz.com

Sincerely,

Benjamin J.F. Cruz

Attachments
April 2, 2014

Transmitted via Electronic Mail
daniel.ragsdale@dhs.gov

Mr. Daniel H. Ragsdale
Deputy Director
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th St., SW
Washington, D.C. 20536

Re: ICE Officials Neglect Federal Responsibilities in Guam

Dear Mr. Ragsdale:

I am writing to express my concerns regarding the U.S. Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO) in the U.S. territory of Guam. I strongly believe that ERO’s refusal to increase deportation actions against immigrants under the Compacts of Free Association—because of either alleged local statutory infirmities or a high-level determination that the pursuit of violative habitual resident deportations is a “waste of litigation resources”—is not supported by the facts.

As you may not be aware of the history of inter-island migration in the Micronesian sub-region, I wish to begin by providing background information so that you might have some context with which to understand the enormity of the challenges we face.

Compact of Free Association Acts of 1985 and 1986

The Compact of Free Association Acts (COFA), U.S. PUB. LAWS 99-239 (1985) and 99-658 (1986), granted the citizens of the Freely Associated States (FAS) of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau unrestricted immigration to the United States and its territories, provided that every such citizen maintained gainful employment or pursued an education while on U.S. soil.

These Acts were passed under the premise that unrestricted FAS immigration to Guam and other U.S. jurisdictions would be feasible through adherence to certain economic and legal commitments guaranteed by federal law and the Code of Federal Regulations. Periodic amendments to the economic provisions within the Acts are meant to cover costs incurred with the increased demand that COFA immigration places on affected jurisdictions' educational and social services. Additionally, federal law requires FAS migrants to demonstrate self-support pursuant to 8 C.F.R. § 214.7, and subjects felonious FAS migrants to deportation proceedings under the Immigration and Naturalization Act (INA), 8 U.S.C. § 1227.
Now, after nearly 28 years of life in Guam under the COFA, I am forced to question the sincerity of the federal government and its officials regarding these commitments.

According to the latest COFA impact report for Guam, the total cost of government services to FAS citizens climbed to $128 million in 2013 (a $3-million increase from 2012), with health care and welfare bearing the brunt of the impact. The report states that the total non-compensated impact amount from 1987 to 2003 is $269 million, broken down to “$178 million for education, $48 million for health, welfare and labor, and $43 million for public safety.”

To be clear, while I believe that every person—regardless of heritage, race or political status—who seeks an education on Guam or wishes to contribute to our economy is vital to the future of our island, those who commit crimes against our community are no longer deserving of the special opportunity that brought them here.

**Overrepresentation of FAS Citizens in Correction Facilities**

Guam’s corrections agency reports that FAS citizens, comprising 11.3 percent of the island’s population, represent over a quarter of its inmate and detainee populations. Additionally, only half of the $6.5 million in costs in housing these individuals was covered by federal grants and aid.

In order to determine the circumstances under which the ERO division of U.S. ICE would initiate deportation proceedings of non-resident aliens on Guam who have committed crimes, I issued a formal Freedom of Information Act request to the Guam ERO office in October 2013 seeking the total number of FAS citizens deported from Guam and the specific reasons for deportation.

I met with the field director of the San Francisco ERO at the time, Mr. Timothy S. Aitken, and his deputy, Mr. John P. Martinez, in January to follow up with my request and inquired about ERO’s inability to initiate deportation proceedings under 8 C.F.R. § 214.7, which states in part, that “habitual residents” (FAS residents of Guam and other U.S. territories) are subject to the following:

“A habitual resident who is not a dependent is subject to removal if he or she:

(i) Is not and has not been self-supporting for a period exceeding 60 consecutive days for reasons other than a lawful strike or other labor dispute involving work stoppage; or

(ii) Has received unauthorized public benefits by fraud or willful misrepresentation; or

(iii) Is subject to removal pursuant to section 237 of the [Immigration and Naturalization Act, 8 U.S.C. § 1227], or any other provision of the Act.”

Astonishingly, my inquiry was unmet as both Mr. Aitken and Mr. Martinez were oblivious to the provision’s very existence. In fact, they both asked that I transmit this information to them via email—of which I retain records—for legal review.

Cognizant that those in charge of enforcing federal laws and the rules which make them practical were not fully informed on this issue, I attempted to exhaust all remedies available to me and asked Mr. Aitken what could be done to increase successful deportations of those FAS citizens who committed crimes in Guam under 8 U.S.C. § 1227.
I was told that I would receive guidance on both matters at a later date.

Subsequent to this meeting, I along with Mr. Arthur B. Clark, chief policy adviser to the governor, were invited to a conference call regarding my inquiries with various officials from the U.S. Department of Homeland Security (DHS) officials on the morning of March 19, 2014.

These officials made four facts absolutely clear:

1) According to Mr. Matthew M. Downer, Deputy Director for Field Legal Operations (Office of the Principal Advisor) and contrary to Mr. Aitken’s representations to me in January, ICE officials have specifically discussed the provisions of 8 C.F.R. § 214.7 since 2010 and Mr. Downer pronounced that he had the emails to substantiate his claim.

2) ICE will not enforce the provisions of 8 C.F.R. § 214.7, as the agency’s legal officers believe the provision to be a “waste of litigation resources.”

3) The same legal officers were unaware of any action brought under this provision, and as such, are relying only on their individual experience and personal judgment to deem this provision unenforceable before the courts.

4) ICE officials are only willing to consider deportation actions brought under 8 U.S.C. § 1227. However, any desire to increase successful deportation rates above their current levels must be matched by revisions to our criminal laws, allowing such laws to be more compatible with federal deportation requirements. In spite of this representation, ICE is unwilling to provide any guidance on the criteria used to determine deportation or on amendments necessary to establish compatibility between our criminal statutes and federal deportation actions.

Sadly, that morning’s conference call revealed that a federal law enforcement agency does not have to adhere to an act of Congress, let alone follow the regulations it has written for itself.

While I do not agree with the sentiments expressed, I chose to continue this discourse in the hope that a rational alternative might be provided. To my dismay, ICE officials stated that they would only consider deportation actions brought under 8 U.S.C. § 1227. This judgment call drastically limits the circumstances under which a violative individual can be deported and is contrary to the spirit of the regulations immigration officials have pursued and drafted.

ERO Underperforms at Traditional Methods of Deportation

Notwithstanding its unwillingness to test 8 C.F.R. § 214.7, ERO underperforms at even traditional deportation methods for foreign-born criminals. For example, only 17 of the 172 FAS citizens presently confined in correctional facilities in Guam have been issued a detainer under federal deportation proceedings in 8 U.S.C. § 1227. ICE officials participating on this call represented that Guam’s criminal statutes must be amended to ensure consistency with deportation requirements. At the end of this conference, I was informed that the Hawaii ERO field director, Mr. Michael A. Samaniego, would visit me the next day to provide a partial response to my FOIA request.

1 Mr. Matthew M. Downer, Director for Field Legal (Office of the Principal Advisor); Ms. Patricia A. Beattie, Chief Counsel, Honolulu; Mr. Erick S. Bonnar, Deputy Field Office Director, San Francisco; Mr. Michael A. Samaniego, Assistant Office Director, Honolulu; Ms. Vida A. Leon Guererro, Supervisory Detention and Deportation Officer, Hagatña.
ERO-LESA Removal Statistics Report Show a Misrepresentation of Facts

On March 20, I met with Mr. Samaniego and Ms. Vida Leon Guerrero, Guam ERO supervisory detention and deportation officer, to receive preliminary data sought in a FOIA request I filed in October 2013.

Though the data the report provided was pre-decisional, it contained specific information based on the country of citizenship, the final charges, the departure date, and the most serious criminal conviction of each FAS migrant removed nationwide from 2009 to 2013.

During this same meeting, I queried both ICE officials regarding the disparate manner in which ERO removal policies are enforced throughout the nation. I repeatedly pointed out that their report indicated removal for FAS citizens whose most serious criminal convictions were purse snatching without force, liquor possession, and larceny. When I asked either of them to explain why some U.S. jurisdictions have succeeded in removing FAS citizens for lesser crimes while Guam taxpayers are forced to fund the subsistence of both violent criminals and the federal policies which invited them to our island, Ms. Leon Guerrero explained that the report’s “Most Serious Criminal Conviction” category did not adequately represent the crimes and contributing factors which lead to each alien’s removal. She further condescended: “Those of us who do this for a living know that there is something more the report doesn’t show—other crimes or contributing factors the report does not reflect.”

Again, these representations were made in the presence of the Hawaii ERO field director who offered no correction or clarification.

A detailed review of the documents provided has forced me to narrow my conclusions to two possibilities: either these ERO officials were grossly misinformed prior to this meeting or they were willfully deceptive in their remarks. The following paragraph was obtained directly from the report in question (emphasis added):

“The Most Serious Criminal Conviction reflects the most serious criminal charge for which an alien was convicted prior to the date of their departure or case closure. This is determined based on several selection criteria, of which the first is the NCIC Criminal Charge Severity Code that is assigned to the criminal charge for which the alien was convicted. The charge with the highest NCIC Criminal Charge Severity is selected as the Most Serious Criminal Conviction, but if there are two charges that were assigned the same Severity Code, then the earliest conviction is selected.”

Ms. Leon Guerrero further asserted that the methodology of this report precluded the consideration of other crimes or contributing factors. She continued to claim that the NCIC Criminal Charge Severity Code reflected details that were not considered in the data provided. Again, this assertion is directly refuted by the report itself (emphasis added):

“The charge with the highest NCIC Criminal Charge Severity is selected as the Most Serious Criminal Conviction, but if there are two charges that were assigned the same Severity Code, then the earliest conviction is selected.”

Yet again, this representation was made in the presence of the Director and he offered no correction or clarification.
When this language is read with even the most basic comprehension, commonsense dictates two things very clearly. First, crimes listed under “Most Serious Criminal Conviction” should be accepted without ambiguity as the most serious criminal conviction for which an alien has been convicted. Second, when an alien commits two separate charges meriting the exact same severity, the earliest charge is selected for this report. Put simply, the severity code contains no mysterious information that magically makes removal more likely.

I expressed these same sentiments to Mr. Samaniego and Ms. Leon Guerrero in near-identical letters transmitted on March 25. The following day, the Director contacted me via telephone to inform me that the “report is not as accurate as it should be”.

Essentially, what Director Samaniego was asking me to believe is that the report printed from your National Statistics Unit is unreliable, inaccurate and flawed. As I am unable to accept this explanation without evidence, I have no choice but to work with the only data I have been provided.

**Guam Bears Prison Costs; Others Deport for DUI, Purse Snatching and Liquor Possession**

According to an article published in the Pacific Daily News on March 9, 2014, the federal government has deported at least six non-citizens who were convicted of crimes on Guam since July 2013. That number represents about half of the foreign-born inmates who were slated for possible deportation, according to a July 2013 prison population list. Of those not deported, three were convicted of aggravated assault, two for parole/probation revocation, one for vehicular homicide, and one for family violence. Yet, this number is minuscule compared to the number of inmates and detainees of FAS citizenship who were never tried in deportation proceedings.

While the summary of deportations for fiscal years 2009 to 2013 contains a range of very serious crimes, it also contains deportable crimes that call into question the sincerity of deportation efforts on Guam (see Table 1). Based on this information provided, it appears that some U.S. jurisdictions are better able to protect themselves from those who would violate the privileges they have been granted.

<table>
<thead>
<tr>
<th></th>
<th>Theft 124</th>
<th>Traffic 6</th>
<th>Resisting Arrest 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex</td>
<td>115</td>
<td>Kidnapping 5</td>
<td>Hit and Run 1</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>93</td>
<td>Assault 5</td>
<td>Child Abuse 1</td>
</tr>
<tr>
<td>Drug</td>
<td>43</td>
<td>Cruelty 4</td>
<td>Explosives 1</td>
</tr>
<tr>
<td>Robbery</td>
<td>30</td>
<td>Public Order Crimes 4</td>
<td>Obstruction 1</td>
</tr>
<tr>
<td>Family Offense</td>
<td>13</td>
<td>Harassment 4</td>
<td>Tax 1</td>
</tr>
<tr>
<td>DUI</td>
<td>11</td>
<td>Intimidation 3</td>
<td>Escape From Custody 1</td>
</tr>
<tr>
<td>Weapons</td>
<td>9</td>
<td>Disorderly Conduct 3</td>
<td>Terrorizing 1</td>
</tr>
<tr>
<td>Trespassing</td>
<td>7</td>
<td>White Collar 3</td>
<td>Invasion of Privacy 1</td>
</tr>
<tr>
<td>Liquor</td>
<td>7</td>
<td>Not Listed 2</td>
<td>Sex Offender Registry 1</td>
</tr>
<tr>
<td>Manslaughter/Murder</td>
<td>6</td>
<td>Contempt of Court 2</td>
<td>TOTAL 251</td>
</tr>
</tbody>
</table>

Table 1. Number of deportations for each of the categories of crimes as indicated in the ERO-LESA statistical tracking unit for removal of FAS citizens from 2009 to 2013.
While a number of the offenders were removed for lesser crimes in other U.S. jurisdictions, Guam ERO officials seem unable or unwilling to remove FAS-born criminals for aggravated assault or manslaughter.

Deportation Detainers for Violent Criminals Consistent with Agency Guidance

On December 21, 2012, the U.S. ICE director at the time, Mr. John T. Morton, issued a memorandum entitled “Civil Immigration Enforcement: Guidance on the use of Detainers in the Federal, State Local and Tribal Criminal Justice Systems.” The following is excerpted from that memorandum:

“Consistent with ICE’s civil enforcement priorities and absent extraordinary circumstances, ICE agents and officers should issue a detainer in the federal, state, local, or tribal criminal justice systems against an individual only where (1) they have reason to believe the individual is an alien subject to removal from the United States and (2) one or more of the following conditions apply:

- the individual has a prior felony conviction or has been charged with a felony offense;
- the individual has three or more prior misdemeanor convictions;
- the individual has a prior misdemeanor conviction or has been charged with a misdemeanor offense if the misdemeanor conviction or pending charge involves:
  - violence, threats, or assault;
  - sexual abuse or exploitation;
  - driving under the influence of alcohol or a controlled substance;
  - unlawful flight from the scene of an accident;
  - unlawful possession or use of a firearm or other deadly weapon;
  - the distribution or trafficking of a controlled substance; or
  - other significant threat to public safety.”

Taken together, the Morton memo and the nationwide summary of FAS deportations (see Table 1) indicate that there should be no agency stranglehold on the removal of noncitizen criminals from the FAS presently detained in Guam.

Given this reality and the continued claim that Guam’s laws are somehow infirmed by a standard of mens rea that cannot be sustained throughout deportation process, I am forced to answer another question. To what extent does a mens rea of recklessness impact the deportability of a crime?

Ninth Circuit Court Rules on Removability for Crimes of Violence Involving Recklessness

In each of the three meetings I have had with ERO representatives from the U.S. DHS, it has been alleged that Guam’s statute for aggravated assault is defective because it requires a minimum mens rea that is greater than recklessness.

Any alien—including a legal, permanent resident alien—who is convicted of an aggravated felony at any time after admission to this country is deportable under 8 U.S.C. § 1251(a)(2)(A)(iii), now codified as 8 U.S.C. § 1227(a)(2)(A)(iii). The definition, encompasses a “crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for
which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18 of U.S.C. defines a crime of violence as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

While it is true that three of the Ninth Circuit’s sister circuits have interpreted used in the context of a crime of violence to require the intentional use of physical force, this is not an open question in the circuit itself. The Ninth has held that a reckless mens rea is sufficient for both 18 U.S.C. §§ 16(a) and 16(b).

In Park v. INS (9th Cir. 2001), the defendant argued that the definition under 18 U.S.C. § 16(b) requires that there be a substantial risk that physical force may be used intentionally in the course of committing the offense, an element not present in cases of involuntary manslaughter.

The Ninth rejected this argument on the basis that the court had already determined that a reckless mens rea was sufficient for satisfaction of the 18 U.S.C. § 16(b) definition. Although the court specifically acknowledged in its holding that involuntary manslaughter can constitute a crime of violence, this did not render all crimes of recklessness crimes of violence. However, it reaffirmed and emphasized the point that the intentional use of physical force is not required.

United States Of America v. Juan Ceron-Sanchez (9th Cir. 2000) involved a prior conviction under Arizona law for attempted aggravated assault for a traffic accident the defendant caused while driving intoxicated. (ARIZ. REV. STAT. §§ 13-1001 and 13-1204). The Ninth rejected the defendant's argument that his crime involving only a reckless state of mind did not constitute a crime of violence for purposes of an aggravated felony sentencing enhancement pursuant to U.S.S.G. § 2L1.2. Id. at 1172-73 (holding that his conviction qualified as a crime of violence under both 18 U.S.C. §§ 16(a) and § 16(b).

In light of these facts I am hard-pressed to believe that a “reckless” state of mind is the impenetrable roadblock to deporting a noncitizen for a crime of violence perpetrated in Guam.

Prosecutorial Discretion Does Not Bar Removal of Habitual Residents

On June 17, 2011, the Director Morton, issued a memo entitled “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.” The following is an excerpt from that memorandum (emphasis added):

“In exercising prosecutorial discretion in furtherance of ICE’s enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.”

In each of the prosecutorial discretion memos I have reviewed, none specifically address the issue of mens rea-based prosecutions nor bar the pursuit of deportations under 8 C.F.R. § 214.7. As such, I reiterate my concern that ERO’s refusal to increase deportation actions is not substantiated by the facts.

**Conclusion: A Request for Guidance**

In light of the foregoing, I respectfully request that U.S. DHS provide clear guidance on the following inquiries:

1) Under what circumstances, if any, will DHS pursue at least one deportation action pursuant to 8 C.F.R. § 214.7?

2) Based on prior deportation proceedings and experience, what specific statutory infirmities exist within Guam’s criminal laws that decrease the likelihood of a deportation or removal?

In the absence of a meaningful federal response on these issues, I will request that the Attorney General of Guam determine the viability of a legal action compelling your agency to enforce 8 C.F.R. § 214.7 as it relates to FAS criminals presently detained in Guam and not removable by traditional means.

Additionally, should U.S. DHS continue to neglect its responsibilities in these matters, I will ask him to opine on the Governor of Guam’s authority to enforce all federal laws applicable to Guam under the Organic Act of Guam.

Thank you very much for your attention to this important matter. I look forward to your response, which may be transmitted electronically to senator@senatorbjcruz.com.

Sincerely,

Benjamin F. Cruz

Attachments

Cc: Mr. Michael A. Samaniego, Assistant Field Office Director, Enforcement & Removal Operations (Hawaii, Guam, Saipan), U.S. Department of Homeland Security