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Scrambling to Cover Up a Possible Lie to the Supreme Court in *Nken v. Holder*, ICE Issues a New Memo Describing Policy that It Claimed Existed Years Ago

In the face of conflicting evidence, the government backs down in opposition to stay of removal in the Seventh Circuit

Just last month a federal judge made headlines by suggesting that the Office of the Solicitor General may have been "engaged in a bit of a shuffle" when it told the Supreme Court in 2009 that there was a government policy for returning individuals who had been wrongfully deported. Now, a new Immigration and Customs Enforcement (ICE) memo, issued on February 24, provides further evidence that there was no policy in place to return wrongfully deported individuals at the time that statement was made to the nation's highest court.

The memo falls far short of what an actual policy should include. Instead the memo is replete with loopholes, failing to mention what standards ICE uses or what office adjudicates requests for return. It also fails to cover individuals who need to return after a court reopens their case.

This is the first known document issued by ICE purporting to describe a "policy" in the three years since the Office of the Solicitor General asserted to the Supreme Court that the government maintains a policy and practice of returning people who win their immigration cases back to the United States and restoring their immigration status. Although the memo claims to "describe[] existing ICE policy," it does not supersede any other policy document or directive. No other evidence produced in response to a FOIA request shows that such a policy or practice actually exists.

The memo first surfaced when it was filed by the government in opposition to an emergency motion for stay of removal on March 1 in *Lam v. Holder*, a case in the Seventh Circuit. The Petitioner filed a response on March 6, attaching a declaration from Jessica Chicco of the Post-Deportation Human Rights Project at Boston College, detailing evidence that no policy or practice exists for providing effective relief to individuals who prevail in their immigration cases from abroad. The documents produced thus far in response to a FOIA request by the National Immigration Project et al. "reflect confusion within the agency not just about how to facilitate individuals' return, but about whether to do so at all." The government subsequently withdrew its opposition to the stay.

"Unfortunately, this memo raises more questions than it answers, and does little to provide real relief to those who win their cases from abroad," said Ms. Chicco, "It includes no concrete information on

how people wrongfully deported are to be returned to the United States. Instead, this memo seems designed to help the government convince courts that it has a policy in place, when all other evidence points to the contrary."

The February 24, 2012 memo was issued in the wake of a federal District Court Order that instructed the U.S. government to release portions of emails between the Department of Justice (DOJ) and ICE that served as the alleged factual basis for the Solicitor General's inaccurate assertion to the Supreme Court in *Nken v. Holder* in 2009. The District Court has granted the government's request to stay the order for 60 days. Rather than release the emails, however, ICE simply has issued a new memo claiming that such a policy always has existed, once again failing to provide any actual procedures to make such a policy a reality.

The "policy" document by no means provides effective relief to individuals seeking return. For example, there is no mention of which agency office bears responsibility for helping individuals who seek to return or how ICE is to return those individuals. Unlike other memos of this type, this directive includes no procedures at all. Under the heading "Procedures/Requirements" it states: "None." In addition to the lack of any concrete steps a person can take to return to the country, the memo fails to provide any information about how the government intends to communicate this new return process to prevailing litigants outside the United States, especially persons without counsel.

Moreover, the "policy" leaves large gaps in its coverage. Significantly, it fails to cover individuals who win Motions to Reopen or those who were removed erroneously in violation of a court-ordered stay. It *only* applies to people who had Petitions for Review pending when ICE removed them, and, within this subgroup of people, *only* to individuals whose lawful permanent resident (LPR) status is restored by the Court, or whose presence is "necessary for continued administrative removal proceedings." The memo lacks any explanation of when ICE will deem presence "necessary"—a limitation which was nowhere to be found in the government's representation to the Supreme Court. Thus, the memo ultimately renders return dependent on a favorable ICE determination that presence is necessary, not on a favorable court outcome. As such, this memo would leave scores of individuals without access to return, including those who have their asylum or other status restored. Last but not least the memo provides no information on what would constitute the "extraordinary circumstances" in which ICE would not have to facilitate return, an exception that could swallow the rule.

Despite evidence submitted in court showing that immigrants face extreme difficulties in returning after winning their cases from abroad, the government has continued to deport individuals while they seek appeals and to rely on statements made in *Nken v. Holder* to argue that deported individuals who later prevail in their cases will not face irreparable harm.

The February 24, 2012 ICE memo can be found here:
http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf

Background information about the FOIA case and the Court decision ordering the release of the DOJ and ICE emails can be found here: http://www.nationalimmigrationproject.org/news.htm

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