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# United States Senate

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WASHINGTON, DC 20510-6275

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March 29, 2012

The Honorable Eric Holder Jr.  
Attorney General  
United States Department of Justice  
950 Pennsylvania Ave, N.W.  
Washington, D.C.

Dear Mr. Attorney General:

I write to request clarification of a potentially misleading statement made by the Office of the Solicitor General to the U.S. Supreme Court. Every person in our Nation relies upon the Office of the Solicitor General to truthfully represent the people in matters before the Court. If the Solicitor General spoke in error, it must correct the record. The matter I write about occurred under the prior administration, but has not yet been addressed in a meaningful manner.

In January 2009, in a brief to the U.S. Supreme Court in the case *Nken v. Holder*, 129 S.Ct. 1749 (2009), the Office of the Solicitor General office argued that the executive branch has a policy in place to assist improperly deported non-citizens return to the United States. The Solicitor General's brief stated, "By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States ... and according them the status they had at the time of removal." Brief for Respondent 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (No. 08-681), 2009 WL 45980 at \*44.

The Chief Justice referenced this point in his opinion for the Court, writing, "Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return[.]" 129 S.Ct. at 1761. The Department of Justice's Office of Immigration Litigation has reportedly relied upon this statement by the Chief Justice and continues to claim that deportees may return to the United States if they later win their immigration appeals.

It appears, however, that the executive branch may not have had any such policy in 2009. In response to Freedom of Information Act (FOIA) requests, the Departments of State and Homeland Security claimed to have no knowledge of the matter. The Department of Justice acknowledged that it is in possession of electronic mail records that reference this issue, but declined to release them, a matter that is now the subject of litigation. Judge Jed Rakoff of the U.S. District Court for the Southern District of New York recently stated that the plaintiffs in the pending FOIA litigation "provided substantial evidence that the judicial process may have been impugned" by the Supreme Court's reliance on the 2009 statement by the Solicitor General. *National Immigration Project of the National Lawyers Guild v. U.S. Department of Homeland Security*, --- F.Supp.2d ----, 2012 WL 375515 (S.D.N.Y., February 7, 2012) at \*6.

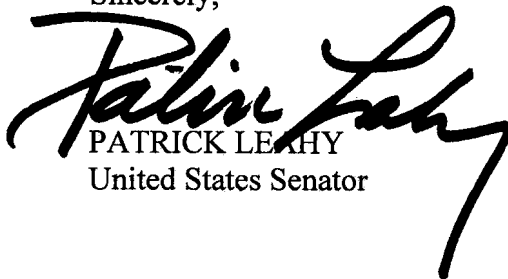
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On February 24, 2012, three years after the statements by the Solicitor General and two weeks after Judge Rakoff's decision in the FOIA case, U.S. Immigration and Customs Enforcement (ICE) released a statement of policy titled, "Facilitating the Return to the United States of Certain Lawfully Removed Aliens." However, that document does not provide guidance on how such a policy will be implemented in practice by ICE beyond stating that it might issue a boarding document for a flight and admit the alien to the United States under its parole authority. The policy statement does not provide any guidance to eligible aliens as to how they may request such facilitation of their reentry, or of how to adjust their immigration status upon arrival.

I do not write to interfere in pending litigation on this matter, but simply to ask for clarification of the claim made by the Office of the Solicitor General in 2009, and apparently embraced by the current administration. Is there a meaningful policy and practice to facilitate the return of deportees who later win their immigration cases? Was there such a policy in place in 2009? Is there any record of the executive branch implementing such a policy prior to the February 24, 2012, ICE policy statement?

I fully recognize that implementation of the ICE policy falls under the purview of the Department of Homeland Security, but given the roots of this matter in the Office of the Solicitor General, I ask for your clarification.

Sincerely,



PATRICK LEAHY  
United States Senator