

Elston, Michael (ODAG)

From: Mercer, Bill (ODAG)
Sent: Tuesday, February 28, 2006 10:16 AM
To: Elston, Michael (ODAG)
Subject: Charlton discussion

I gather that the DAG and Paul started to talk, but didn't finish the conversation. Charlton will be in DC to testify tomorrow. Could we get him penciled in for a mtg today or tomorrow? His policy is scheduled to take effect tomorrow.





Sent from my BlackBerry Wireless Handheld

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Friday, March 31, 2006 11:17 PM
To: Margolis, David
Cc: Mercer, Bill (ODAG)
Subject: FW: San Francisco Press Release

Importance: High

Attachments: tmp.htm; DOJ_clr_sm.gif; ole1.bmp; Steroid Guidelines Chart.wpd

   
tmp.htm (16 KB) DOJ_clr_sm.gif (15 KB) ole1.bmp (6 KB) Steroid Guidelines Chart.wpd (...)

David:

For your NDCA file. I have not received a response.

Mike

-----Original Message-----

From: Elston, Michael (ODAG)
Sent: Wednesday, March 29, 2006 12:55 PM
To: Ryan, Kevin (USACAN)
Cc: Mercer, Bill (ODAG); Roehrkasse, Brian
Subject: FW: San Francisco Press Release
Importance: High

Kevin:

Not sure that this was particularly helpful. I have already quashed DEA's effort to issue a press release on this subject at this time -- it is my judgment, as the Department's ex officio Commissioner, that this kind of thing actually harms our ability to ensure that the emergency amendment will become the permanent amendment. After our conversations, I am fairly surprised that you would not consult with me or anyone else in Main Justice before issuing a press release on something that has nothing to do with your office.

Please don't do anything further in this area without consultation.

Thanks,
Mike

-----Original Message-----

From: Roehrkasse, Brian
Sent: Wednesday, March 29, 2006 9:43 AM
To: Elston, Michael (ODAG)
Cc: Mercer, Bill (ODAG)
Subject: FW: San Francisco Press Release
Importance: High

-----Original Message-----

From: Smith, Kimberly A
Sent: Wednesday, March 29, 2006 9:29 AM
To: Roehrkasse, Brian
Cc: Wade, Drew; Lesch, Jaclyn
Subject: San Francisco Press Release
Importance: High

Brian-
Attached is the San Francisco Press release.

FROM LUKE MACAULAY (USAO PIO):

Kim,

We did issue a release. We kept it very factual and based it almost entirely upon what was posted on the USSC's website (www.ussc.gov).

United States Attorney Kevin V. Ryan
Northern District of California

FOR IMMEDIATE RELEASE
CONTACT: Luke Macaulay
March 24, 2006
(415) 436-6757

[WWW.USDOJ.GOV/USAO/CAN](http://www.usdoj.gov/USAO/CAN) <<http://www.usdoj.gov/USAO/CAN>>
Luke.Macaulay@usdoj.gov

SENTENCING COMMISSION ANNOUNCES STRICTER PENALTIES
FOR STEROID OFFENSES

Today, the United States Sentencing Commission enacted a temporary emergency amendment to increase the penalties for offenses involving anabolic steroids. The amendment to the sentencing guidelines provides stiffer penalties for steroids related offenses, and adds sentencing enhancements for individuals using masking agents to prevent the detection of steroids and for those who are distributing steroids to athletes. Finally, the amendment also provides a further sentencing enhancement for a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

U.S. Attorney Kevin V. Ryan stated, "We are pleased that the Sentencing Commission has taken this action to impose penalties for steroid offenses that reflect the seriousness of the crimes. Previous penalties required 50 steroid pills to equal one pill of another Schedule III drug, such as Vicodin. With this temporary amendment, steroids will carry the same penalties as other Schedule III drugs, and penalties will be enhanced for using masking agents, for a coach distributing steroids to his athletes, and for distributing steroids to athletes. We are hopeful that these enhanced penalties will help deter anabolic steroid trafficking and abuse."

According to the Commission, these sentencing enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The Commission notes in its 2006 Steroids Report that research has revealed that steroids are now considered potentially addictive, with documented withdrawal symptoms, and are capable of being more widely distributed than before through the use of the Internet and involve international sources.

In 2004, Congress passed the Anabolic Steroid Control Act, which directed the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the...guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use...."

Further Information:

The text of the emergency amendment to the steroids sentencing guidelines is available at www.ussc.gov <outbind://56/www.ussc.gov> .

Further information about the BALCO prosecution is available at:
http://www.usdoj.gov/usao/can/press/html/2005_10_18_balco_sentencing.htm

All press inquiries to the U.S. Attorney's Office should be directed to Luke Macaulay at (415) 436-6757 or by email at Luke.Macaulay@usdoj.gov.

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US SENTENCING GUIDELINES
SECTION 2D1.1(C), NOTES F & G
SCHEDULE III DRUGS

PRIOR TO 03/27/06

NON-STERIODS:

1 PILL = 1 UNIT =

0.5 MILLILITER = 1 UNIT =
(INJECTABLE LIQUID)

STERIODS:

50 PILLS
(1/50 RATIO)

10 MILLILITERS
(1/20 RATIO)

AFTER 03/27/06

NON-STERIODS:

1 PILL = 1 UNIT =

0.5 MILLILITER = 1 UNIT =
(INJECTABLE LIQUID)

STERIODS:

1 PILL
(1/1 RATIO)

0.5 MILLILITERS
(1/1 RATIO)

ADDITIONAL NEW GUIDELINE LANGUAGE:

2D1.1(c)(F) – Notes to Drug Quantity Table – For an anabolic steroid that is not a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the anabolic steroid used in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of anabolic steroid is one “unit.”

ADDITIONAL NEW GUIDELINE ENHANCEMENTS:

+2 LEVELS – 2D1.1(b)(6) – Steroid Distribution Involved the Use of a MASKING AGENT

+2 LEVELS – 2D1.1(b)(7) – Defendant Distributed Steroids to an ATHLETE

ADDITIONAL NEW APPLICATION NOTES:

2D1.1 Application Note Commentary – MASKING AGENT – a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual’s body.

2D1.1 Application Note Commentary – ATHLETE – an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic association.

2D1.1 Application Note Commentary – ABUSE OF POSITION OF TRUST – an adjustment ordinarily would apply under 3B1.3 in the case of a defendant who used his position as a coach to influence an athlete to use an anabolic steroid.

DAG00000429

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Tuesday, April 04, 2006 9:49 PM
To: Mercer, Bill (ODAG); Otis, Lee L; Mercer, Bill (USAMT)
Subject: Re: TPs on Issa's Catch-and-Release question

The meeting did not occur b/c the CA delegation could not coordinate their schedules. DAG has always been and remains willing to do this meeting.

-----Original Message-----

From: Mercer, Bill (ODAG)
To: Otis, Lee L; Mercer, Bill (USAMT)
CC: Elston, Michael (ODAG)
Sent: Tue Apr 04 21:47:24 2006
Subject: Re: TPs on Issa's Catch-and-Release question

I will look at this tonight. I'm quite sure that OLA offered a member briefing with Issa and the California Republicans. Not sure why it didn't happen. Logistics, I believe.

The calls -- if authorized by the DAG -- are designed to tell each USA of the need to do more prosecutions of illegal aliens -- agg felons and the other classes of illegal aliens that we have discussed in the past. We don't want to call it an "initiative" or a "priority".

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: Otis, Lee L
To: Mercer, Bill (ODAG); Mercer, Bill (USAMT)
CC: Elston, Michael (ODAG)
Sent: Tue Apr 04 20:27:33 2006
Subject: FW: TPs on Issa's Catch-and-Release question

Congressman Issa has indicated he intends to ask the AG a question about this letter at the HJC hearing on Thursday. You will remember that this letter had come in shortly after I arrived. The plan was to offer a briefing with the then-Acting DAG. Leg Affairs was never able to get that scheduled, I assume primarily because of difficulties on the Congressman's end, although they are now looking at scheduling it after the Easter recess. Here are some talking points that Ryan has drafted for the AG to use in responding to such a question. They look good to me, especially given the nature of the issue, but I thought I should run them by you as well.

I saw on the matrix that you sent around that there are a number of references to potential communications with the US Atties on this general issue. Wasn't sure who was supposed to be in charge of those but whoever that is should perhaps also get a copy of these.

I think these need to go to the AG tomorrow morning.

From: Bounds, Ryan W (OLP)
Sent: Tuesday, April 04, 2006 8:13 PM
To: Seidel, Rebecca; Otis, Lee L
Subject: TPs on Issa's Catch-and-Release question
Importance: High

See attached.

Ryan W. Bounds
Chief of Staff and Senior Counsel
Office of Legal Policy, DOJ
W: 202/305-4870
M: 202/532-5121
F: 202/514-1731

Elston, Michael (ODAG)

From: Connor, Mark
Sent: Tuesday, April 11, 2006 6:14 PM
To: Mercer, Bill (ODAG)
Cc: Elston, Michael (ODAG)
Subject: Fw: LA Proposal

Bill: This is the full court press we anticipated from McKay and the NCIS/LiNX team. FYI, McWeeney is the President of CSM, a private contractor who stands to benefit from the proposed recommendations. MAC

-----Original Message-----

From: Connor, Mark <Mark.Connor@SMOJMD.USDOJ.gov>
To: Duffy, Michael (OCIO) <Michael.Duffy@SMOJMD.USDOJ.gov>; Watkins, Harrell <Harrell.Watkins@SMOJMD.USDOJ.gov>; Warren, Jeremy <Jeremy.Warren@SMOJMD.USDOJ.gov>
CC: 'r.scott.crabtree@ic.fbi.gov' <r.scott.crabtree@ic.fbi.gov>; Hitch, Vance (OCIO) <Vance.Hitch@SMOJMD.USDOJ.gov>
Sent: Tue Apr 11 18:07:46 2006
Subject: Re: LA Proposal

All: This is a full court press by McKay, CSM, and LiNX (NCIS). McKay and the LiNX team are providing a demo and recommendations to the DAG tomorrow. I have communicated some concerns re the McKay/NCIS proposals to the DAG, PADAG, and Chief of Staff. I have also recommended the DAG meet with OCIO and me next week to discuss the recommendations. I do not envision the DAG endorsing the recommendations this week. I think we need to be prepared to discuss details next week. MAC

-----Original Message-----

From: Duffy, Michael (OCIO) <Michael.Duffy@SMOJMD.USDOJ.gov>
To: Watkins, Harrell <Harrell.Watkins@SMOJMD.USDOJ.gov>; Warren, Jeremy <Jeremy.Warren@SMOJMD.USDOJ.gov>; Connor, Mark <Mark.Connor@SMOJMD.USDOJ.gov>
CC: 'R.Scott.Crabtree@ic.fbi.gov' <R.Scott.Crabtree@ic.fbi.gov>; Hitch, Vance (OCIO) <Vance.Hitch@SMOJMD.USDOJ.gov>
Sent: Tue Apr 11 17:58:33 2006
Subject: Fw: LA Proposal

Harrell: What does this say?

All: If this is contrary to OneDOJ strategy (LiNX front porch), then I recommend you get a hold of Scott Crabtree and ask him to contact LA FO to clarify DOJ strategy. MDD

-----Original Message-----

From: Hitch, Vance (OCIO) <Vance.Hitch@SMOJMD.USDOJ.gov>
To: Duffy, Michael (OCIO) <Michael.Duffy@SMOJMD.USDOJ.gov>; Warren, Jeremy <Jeremy.Warren@SMOJMD.USDOJ.gov>
Sent: Tue Apr 11 12:17:10 2006
Subject: FW: LA Proposal

fyi

-----Original Message-----

From: tgm@csmweb.com [mailto:tgm@csmweb.com]
Sent: Tuesday, April 11, 2006 12:04 PM
To: Hitch, Vance (OCIO); Elston, Michael (ODAG); Mercer, Bill (ODAG)
Cc: McKay, John (USAWAW); tgm@csmweb.com

Subject: LA Proposal

John McKay asked that I forward to you Deb Yang's Linx proposal for LA. She will be briefing it at tonorrow's meeting. The LA Chiefs and the FBI ADIC strongly endorsed the project last week.

Tom McWeeney

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Thursday, May 18, 2006 4:39 PM
To: Otis, Lee L
Subject: Re: AP - Report says Border Patrol demoralized by lack of smuggling prosecutions

I meant Courtney.

-----Original Message-----

From: Elston, Michael (ODAG)
To: Otis, Lee L
Sent: Thu May 18 16:38:10 2006
Subject: Re: AP - Report says Border Patrol demoralized by lack of smuggling prosecutions

All plus Tasia, Mercer and the DAG.

-----Original Message-----

From: Otis, Lee L
To: Elston, Michael (ODAG)
Sent: Thu May 18 16:10:09 2006
Subject: FW: AP - Report says Border Patrol demoralized by lack of smuggling prosecutions

should we send this to Jeff, Kyle, or Tasia?

-----Original Message-----

From: Seidel, Rebecca
Sent: Thursday, May 18, 2006 3:51 PM
To: Roberts, Tom; Koehler, Joe (USAAZ); McHenry, Teresa; Morton, John (USAVAE); Campbell, Benton; Crews, John (USAE0)
Cc: Bounds, Ryan W (OLP); Otis, Lee L; Iglesias, David C. (USANM); Voris, Natalie (USAE0); Roland, Sarah E; Warwick, Brian
Subject: FW: AP - Report says Border Patrol demoralized by lack of smuggling prosecutions

see below story, we are going to need to ensure that you David have enough info to respond to questions you may get on this. We need to respond with our good prosecution numbers, and also, verify if the below is wrong or correct?

From: White House News Update [mailto:News.Update@WhiteHouse.Gov]
Sent: Thursday, May 18, 2006 3:16 PM
To: Ho, Allyson N.
Subject: AP - Report says Border Patrol demoralized by lack of smuggling prosecutions

Report says Border Patrol demoralized by lack of smuggling prosecutions

By ELLIOT SPAGAT

SAN DIEGO (AP) The vast majority of people caught smuggling immigrants across the border near San Diego are never prosecuted for the offense, demoralizing the Border Patrol agents making the arrests, according to an internal document obtained by The Associated Press.

``It is very difficult to keep agents' morale up when the laws they were told to uphold are being watered-down or not prosecuted,`` the report says.

The report offers a stark assessment of the situation at a Border Patrol

station responsible for guarding 13 miles of mountainous border east of the city. Federal officials say it reflects a reality along the entire 2,000-mile border: Judges and federal attorneys are so swamped that only the most egregious smuggling cases are prosecuted.

Only 6 percent of 289 suspected immigrant smugglers were prosecuted by the federal government for that offense in the year ending in September 2004, according to the report. Some were instead prosecuted for another crime. Other cases were declined by federal prosecutors, or the suspect was released by the Border Patrol.

The report raises doubts about the value of tightening security along the Mexican border. President Bush wants to hire 6,000 more Border Patrol agents and dispatch up to 6,000 National Guardsmen. He did not mention overburdened courts in his Oval Office address Monday on immigration.

The report was provided to the AP by the office of Rep. Darrell Issa, R-Calif., who has accused the chief federal prosecutor in San Diego of being lax on smuggling cases. Issa's office said it was an internal Border Patrol report written last August. It was unclear who wrote it.

The lack of prosecutions is "demoralizing the agents and making a joke out of our system of justice," said T.J. Bonner, president of the National Border Patrol Council, which represents agents. "It is certainly a weak link in our immigration-enforcement chain."

The 41-page report says federal prosecutors in San Diego typically prosecute smugglers who commit "dangerous/violent activity" or guide at least 12 illegal immigrants across the border. But other smugglers know they are only going to get "slapped on the wrist," according to the report.

The report cites a 19-year-old U.S. citizen caught three times in a two-week period in 2004 trying to sneak people from Tijuana, Mexico, to San Diego in his car trunk, two at a time.

"This is an example of a kid who knows the system," the report says. "What is true is that he will probably never be prosecuted if he only smuggles only one or two bodies at a time."

The report also cites a Mexican citizen who was caught in Arizona and California driving with illegal immigrants and was released each time to Mexico. He was prosecuted the fourth time, when two illegal immigrants in his van died in a crash, and sentenced to five years in prison.

U.S. Attorney Carol Lam in San Diego said about half her 110 attorneys work on border cases in an area where the Border Patrol made nearly 140,000 arrests last year. She said she gives highest priority to the most serious cases, including suspects with long histories of violent crime or offenders who endanger others' lives.

"We figure out how many cases our office can handle, start from the worst and work our way down," she said.

Lam said many suspected migrant smugglers are prosecuted instead for re-entering the country after being deported, a crime that can be proved with documents. Smuggling cases are more difficult to prosecute because they require witnesses to testify.

The Border Patrol, which would neither confirm nor deny the document's authenticity, said prosecutors in San Diego recently agreed to prosecute a Top 20 list of smugglers if they are caught.

The Justice Department in Washington declined to comment. However, at a congressional hearing last month, Rep. Ric Keller, R-Fla., told Attorney General Alberto Gonzales that Lam's record on migrant smuggling was "a

pathetic failure." Gonzales replied that he was urging U.S. attorneys to more actively enforce laws but noted that immigration cases were "a tremendous strain and burden" along the border.

Peter Nunez, a former U.S. attorney in San Diego, said prosecutors along the border struggle with limited resources and a huge caseload of immigration cases.

"This is not an indictment of the U.S. Attorney's Office, because you have to deal with the realities of the caseload, but it is an indictment of how badly Congress and presidents have handled the immigration system," he said.

The report says immigrants in the area paid an average of \$1,398 to be guided across the border in 2004.

"Smugglers are making lots of money breaking the immigration laws, and there is not much incentive for them to stop these illegal activities," it says. "The smugglers know that even if they are caught, it will be difficult to punish them."

Elston, Michael (ODAG)

From: Otis, Lee L.
Sent: Tuesday, May 23, 2006 8:10 PM
To: Tenpas, Ronald J (ODAG); Mercer, Bill (ODAG); Elston, Michael (ODAG)
Subject: FW: Border patrol report /Carol Lam

FYI re: Ron's note about Carol Lam

-----Original Message-----

From: Otis, Lee L.
Sent: Tuesday, May 23, 2006 7:22 PM
To: Fridman, Daniel (ODAG)
Subject: Border patrol report

I have not seen the underlying report. This is about a statement that the US Attorney's office issued yesterday responding to Issa about this.

Also FYI, looking at the AOUSC data, the New Mexico smuggling prosecution numbers seem to be down a little from 04 to 05, as are the overall immig numbers, although not by very much at all in the case of the latter and the former seem to fluctuate a bit more.

-----Original Message-----

From: Smith, Kimberly A
Sent: Tuesday, May 23, 2006 4:12 PM
To: Seidel, Rebecca; Roehrkasse, Brian
Cc: Voris, Natalie (USAE0); Otis, Lee L; Bounds, Ryan W (OLP)
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage);

Sounds good. I will tell their office they can send this out.

-----Original Message-----

From: Seidel, Rebecca
Sent: Tuesday, May 23, 2006 4:09 PM
To: Smith, Kimberly A; Roehrkasse, Brian
Cc: Voris, Natalie (USAE0); Otis, Lee L; Bounds, Ryan W (OLP)
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage);

re attaching stmt USA Lam issued so Ryan and Lee can see.
While we would have liked to have had heads up before she issued it, I don't see any problems with it.

-----Original Message-----

From: Smith, Kimberly A
Sent: Tuesday, May 23, 2006 3:55 PM
To: Roehrkasse, Brian; Seidel, Rebecca
Cc: Voris, Natalie (USAE0)
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage)

Correct, the USAO gave it to CNN over the phone last night--it was not an official statement that was blasted out.

-----Original Message-----

From: Roehrkasse, Brian
Sent: Tuesday, May 23, 2006 3:52 PM
To: Smith, Kimberly A; Seidel, Rebecca
Cc: Voris, Natalie (USAE0)
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage)

They already released it, right? I don't think we can not give them the statement we already released.

-----Original Message-----

From: Smith, Kimberly A

Sent: Tuesday, May 23, 2006 3:51 PM
To: Seidel, Rebecca; Roehrkasse, Brian
Cc: Voris, Natalie (USABO)
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage)

Rebecca-

The reporter is calling now wanting to know about the statement. If I don't hear back from OLA by 4:30pm, we are just going to go with the original statement from SDCA.
Thanks,
Kim

-----Original Message-----

From: Seidel, Rebecca
Sent: Tuesday, May 23, 2006 11:30 AM
To: Smith, Kimberly A; Roehrkasse, Brian
Cc: Voris, Natalie (USABO)
Subject: Re: Urgent Report (Border Patrol Report-CNN Coverage)

Brian, we should loop in WH press too. I will loop in WH leg.
I will be back in my office this afternoon, can we wait a little?

-----Original Message-----

From: Smith, Kimberly A
To: Seidel, Rebecca; Roehrkasse, Brian
Cc: Voris, Natalie (USABO)
Sent: Tue May 23 11:26:54 2006
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage)

While we are on the subject, Federal Times just called a few minutes ago about this same Issa Report. If OLA wants to make revisions to the statement below, we can do that before responding to the FT.

-----Original Message-----

From: Seidel, Rebecca
Sent: Tuesday, May 23, 2006 11:24 AM
To: Smith, Kimberly A; Roehrkasse, Brian
Cc: Scolinos, Tasia; Taylor, Jeffrey (OAG); Voris, Natalie (USABO)
Subject: Re: Urgent Report (Border Patrol Report-CNN Coverage)

Maybe because they didn't tell u about stmt till after fact?

-----Original Message-----

From: Smith, Kimberly A
To: Seidel, Rebecca; Roehrkasse, Brian
Cc: Scolinos, Tasia; Taylor, Jeffrey (OAG); Voris, Natalie (USABO)
Sent: Tue May 23 11:22:50 2006
Subject: RE: Urgent Report (Border Patrol Report-CNN Coverage)

They contacted OPA last night right after they had sent the statement. I've been working with them this morning to address it. As to why they sent an Urgent, I have no idea.

-----Original Message-----

From: Seidel, Rebecca
Sent: Tuesday, May 23, 2006 11:21 AM
To: Roehrkasse, Brian; Smith, Kimberly A
Cc: Scolinos, Tasia; Taylor, Jeffrey (OAG); Voris, Natalie (USABO)
Subject: Re: Urgent Report (Border Patrol Report-CNN Coverage)

No one in OLA

-----Original Message-----

From: Roehrkasse, Brian
To: Seidel, Rebecca; Smith, Kimberly A
CC: Scolinos, Tasia; Taylor, Jeffrey (OAG)
Sent: Tue May 23 11:17:35 2006
Subject: FW: Urgent Report (Border Patrol Report-CNN Coverage)

Did you see this? Did SDCA run their statement by anyone here?

-----Original Message-----

From: USAEO-Urgent
Sent: Tuesday, May 23, 2006 11:07 AM
To: Tenpas, Ronald J (ODAG); Taylor, Jeffrey (OAG); Sierra, Bryan (OPA); Scolinos, Tasia; Sampson, Kyle; Roehrkasse, Brian; Mercer, Bill (ODAG); Goodling, Monica; Elwood, Courtney; Elston, Michael (ODAG); Smith, Kimberly A; Battle, Michael (USAEO); Beeman, Judy (USAEO); Coughlin, Robert; Fisher, Alice; Friedrich, Matthew; Kelly, John (USAEO); Parent, Steve (USAEO); Sabin, Barry; Schools, Scott (USAEO); USAEO-Chron; Voris, Natalie (USAEO)
Subject: Urgent Report (Border Patrol Report-CNN Coverage)

URGENT REPORT-06-05-0021

TO: THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL

FROM: Carol C. Lam
United States Attorney
Southern District of California
(619) 557-5690 (Office)
(Home)
(Cell)

DATE: May 23, 2006

CLASSIFICATION: Limited Official Use

CONTACT PERSON: Carol C. Lam
United States Attorney
Southern District of California
(619) 557-5690 (Office)
(Home)
(Cell)

SYNOPSIS: Yesterday, Congressman Darryl Issa criticized on CNN's "Lou Dobbs Tonight" SDCA's "refusal" to prosecute 100% of all alien smugglers. The USAO-SDCA has learned that the "Border Patrol Report" on which Rep. Issa relies is an unauthorized, altered version of an old report. The USAO-SDCA has issued a written statement to CNN with that information.

DISCUSSION: On Thursday, May 18, 2006, the Associated Press ran a news story prompted by the release of a 2004 "Border Patrol Report" by Congressman Darryl Issa (R-CA). According to Congressman Issa, the report from the El Cajon substation of the Border Patrol (San Diego Sector) concluded that morale was low among Border Patrol agents at the El Cajon station due to the high number of declined prosecutions by our office. The story received national media attention.

On Friday, May 19, 2006, the Chief of the U.S. Border Patrol, San Diego Sector, informed us that the report released by Congressman Issa was actually an altered and unauthorized version of an actual internal intelligence report issued by the El Cajon substation. The original report was labeled "Prosecution of Smugglers" for Fiscal Year 2003; the altered report was labeled "Prosecution of Smugglers (1324) Fiscal Year 2004." The altered 2004 report contained editorial comments and conclusions that were never seen by or authorized by Border Patrol management.

On Monday, May 22, 2006, this office was contacted by CNN and informed that Congressman Issa would be appearing on "Lou Dobbs Tonight" to discuss the "Border Patrol Report." CNN asked our office for a written statement to be shared during the interview. After checking with Border Patrol, San Diego Sector, we submitted the following written statement:

"Representative Issa has been misled. The document he calls a "Border Patrol Report" is actually an old internal Border Patrol document, relating to a single substation, that has been substantially altered and passed off as an official report. Many of the comments in the document to which Representative Issa refers are editorial comments inserted by an unidentified individual, and they were not approved by or ever seen by Border Patrol management.

Many important issues are raised by the problem of illegal immigration. However, we believe that all dialogue and debate should be based on well-informed and accurate data."

We have also advised Representative Issa's office that we believe the Border Patrol report to be an unauthorized and altered version of an old internal report.

In light of previous media interest in this issue, there is a possibility that the disclosure that the report is not genuine could generate substantial media interest. Our statement was read to Representative Issa by Lou Dobbs during his interview which aired at 3:30 PST.

<<UR-06-06-0021SDCAwpd.wpd>>

Elston, Michael (ODAG)

From: Tenpas, Ronald J (ODAG)
Sent: Wednesday, May 24, 2006 2:02 PM
To: Moschella, William; Otis, Lee L; Mercer, Bill (ODAG); Scolinos, Tasia; Fridman, Daniel (ODAG); Elston, Michael (ODAG)
Subject: FW: REP. ISSA CRITICIZES U.S. ATTORNEY LAM FOR WITHOLDING INFORMATION ON ALIEN SMUGGLING PROSECUTIONS AND POLICIES

Attachments: tmp.htm; image001.gif; image002.jpg; 5.24.06 LamLetter.pdf



tmp.htm (8 KB)



image001.gif (348 B)



image002.jpg (3 KB)



5.24.06
LamLetter.pdf (117 KB)

want Carol to do.

Further to my e-mail last night on what we

Ron

-----Original Message-----

From: Lam, Carol (USACAS)
Sent: Wednesday, May 24, 2006 1:55 PM
To: Tenpas, Ronald J (ODAG)
Subject: Fw: REP. ISSA CRITICIZES U.S. ATTORNEY LAM FOR WITHOLDING INFORMATION ON ALIEN SMUGGLING PROSECUTIONS AND POLICIES

Ron,

For what it's worth, I have never met Congressman Issa.

Carol

-----Original Message-----

From: Hartman, Debra (USACAS) <DHartman@usa.doj.gov>
To: Lam, Carol (USACAS) <CLam@usa.doj.gov>
CC: Porter, Brenda (USACAS) <BPorter1@usa.doj.gov>
Sent: Wed May 24 10:25:26 2006
Subject: FW: REP. ISSA CRITICIZES U.S. ATTORNEY LAM FOR WITHOLDING INFORMATION ON ALIEN SMUGGLING PROSECUTIONS AND POLICIES

<<5.24.06 LamLetter.pdf>> <<image001.gif>> <<image002.jpg>>

If you can't pull this up we can fax it to you. SPC suggests that Brenda send it to David Smith and I would send it to Public Affairs and OLA so that they are aware of it. I will also send it over to David Iglesias' press person so that he can send it to his USA. Brenda is waiting from a call from Judy Beeman regarding the letter from DOJ to Issa.

NEWS FROM:

CONGRESSMAN DARRELL ISSA

Serving California's 49th District

211 Cannon House Office Building, Washington, DC 20515

(202) 225-3906, (202) 225-3303 (fax)

www.issa.house.gov <<http://www.issa.house.gov/>>

For Immediate Release

Contact: Frederick Hill

Wednesday, May 24, 2006
frederick.hill@mail.house.gov

Email:

REP. ISSA CRITICIZES U.S. ATTORNEY LAM FOR WITHOLDING INFORMATION ON ALIEN SMUGGLING PROSECUTIONS AND POLICIES

Washington, DC - Rep. Darrell Issa (R-CA), today, sent the following letter to U.S. Attorney for the Southern District of California Carol Lam:

Ms. Carol C. Lam
United States Attorney
880 Front Street, Room 6293
San Diego, California 92101

Dear Ms. Lam:

In response to your comments on the Border Patrol internal memo my office obtained and released, your statement misses the mark and exhibits a willful disregard to the documented 251 incidents in fiscal year 2004 where the Border Patrol at the El Cajon station apprehended smugglers but led to smuggling charges for roughly 6% of the cases. The memo I released contains a specific enforcement number for each of the 251 incidents that you or the Department of Homeland Security can confirm by simply typing the number into a computer database.

Your failure to address the substantive issues raised in the memo is consistent with previous news reports and comments that I have repeatedly heard from Border Patrol agents who work closely with your office. You have previously disregarded my requests for information that can help me understand the extent of the problems associated with prosecuting alien smuggling cases and the resources you would need to adopt a zero tolerance policy for trafficking in human beings.

In the case of the memo I released, the fact that you have chosen to focus on unspecified alterations to what you freely admit is an "old Border Patrol document" and your assertion that this document was not seen or approved by Border Patrol management does not dismiss the verifiable facts and details in the memo. I can readily understand that the internal memo, written by a Border Patrol employee, is an embarrassment to your office as the memo speaks with such candor about barriers to prosecution that it could not

be embraced and released publicly as a report representing the views of Border Patrol management.

On Monday, my office requested your assistance in obtaining a copy of the report you referenced in your statement but your office has not returned that phone call. I find your statement that "all dialogue and debate should be based on well-informed and accurate data" incredibly disingenuous considering your record in response to my past requests for information on criminal aliens and alien smuggling.

The last correspondence I sent to you was October 13, 2005, concerning an alien by the name of Alfredo Gonzales Garcia, a.k.a. Isidro Gonzales Alas, FBI # 180566JA5. In this letter I asked that if there is some barrier to the prosecution of criminal aliens, including smugglers, that I am unaware of, to please communicate it so we can make sure you have the resources and policies in place needed to allow you to bring these criminal aliens and repeat offenders to justice.

Finally, as the representative of a Congressional district that is greatly impacted by border crimes and as a Member of Congress who sits on the Judiciary Committee, the Intelligence Committee, and the Government Reform Committee that collectively have oversight responsibilities for the Department of Justice and the Department of Homeland Security, your lack of cooperation is hindering the ability of Congress to provide proper oversight over your office and to make informed policy decisions. I am asked to craft and vote on legislative policies that determine your legal authority and the resources you receive and having full and correct information on an issue like the challenges of stopping alien smugglers is essential.

I request a joint meeting with you and the Chief Patrol Agent of the San Diego Border Sector to discuss the prosecution of alien smugglers and what resources are needed to establish a zero tolerance policy for prosecuting individuals who traffic in human beings. My office will contact your office to try and arrange a meeting time.

Sincerely yours,

Darrell Issa

Member of Congress

Representative Issa has been misled. The document he calls a "Border Patrol Report" is actually an old internal Border Patrol document, relating to a single

substation, that has been substantially altered and passed off as an official report. Many of the comments in the document to which Representative Issa refers are editorial comments inserted by an unidentified individual, and they were not approved by or ever seen by Border Patrol management.

Many important issues are raised by the problem of illegal immigration. However, we believe that all dialogue and debate should be based on well-informed and accurate data.

-- 5/22/06 U.S. Attorney Carol Lam

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Frederick R. Hill
Press Secretary
Rep. Darrell Issa (California 49th)
211 Cannon House Office Building
Washington, D.C. 20515
Phone: 202-225-3906
Fax: 202-225-3303

DARRELL E. ISSA
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Congress of the United States
House of Representatives
Washington, DC 20515-0549

COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEES:
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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEES:
COURTS, THE INTERNET & INTELLECTUAL PROPERTY
IMMIGRATION, BORDER SECURITY & CLAIMS
HOUSE POLICY COMMITTEE

May 24, 2006

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United States Attorney
880 Front Street, Room 6293
San Diego, California 92101

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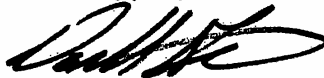
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Sincerely yours,



Darrell Issa
Member of Congress

DAG00000446

U.S. Department of Justice
Eastern District of Arkansas

FOR IMMEDIATE RELEASE
May 18, 2006

CONTACT: Bud Cummins
United States Attorney
501-340-2650

RECENT
CRIMINAL IMMIGRATION MATTERS IN THE
EASTERN DISTRICT OF ARKANSAS

In response to recent media inquiries about immigration related prosecutions, United States Attorney Bud Cummins announced the following examples of prosecution activity in the district involving four individuals: Francisco Javier Hurtado-Amezquta, Antonio Ortiz-Lopez, Saul Gregorio Salazar-Galicia, and Roberto Nava-Flores.

The grand jury recently handed up indictments for Francisco Javier Hurtado-Amezquta and Antonio Ortiz-Lopez.

Hurtado-Amezquta, a native and citizen of Mexico, was charged with illegally re-entering the United States after having already been deported. Hurtado has already been convicted in this district for illegal re-entry in 1999 and again in 2003. Hurtado is also charged in separate case alleging he distributed methamphetamine.

Ortiz-Lopez, also a Mexican National, was indicted for making a materially false statement while attempting to purchase a firearm and misusing a social security number. Aliens unlawfully in the United States are prohibited from purchasing firearms.

Immigration and Customs Enforcement (ICE), Alcohol Tobacco and Firearms (ATF) and Social Security Administration Office of Inspector General (SSA OIG) agents from Little Rock worked together to apprehend these individuals.

In recent days, prosecutors and immigration agents have also obtained two Complaints of criminal aliens in the district. On May 15, 2006, Saul Gregorio Salazar-Galicia, a Mexican National, was charged with illegally re-entering the Country after already having been deported. Salazar was already in the custody of the Arkansas Department of Correction for having been convicted in state court for Felony Driving Under the Influence 4th. Salazar was deported in 2001.

Yesterday, a United States Magistrate Judge issued a Complaint for Roberto Nava-Flores,

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also a Mexican National illegally in the United States. Nava was charged with possessing a fraudulent I-551 which is more commonly referred to as a "Green Card." Nava came to the attention of federal authorities when he was arrested for domestic violence in Pope County. ICE agents from Texarkana apprehended Mr. Salazar and agents from ICE in Fort Smith apprehended Mr. Nava.

The United States Attorney's Office has worked with the Little Rock and Texarkana ICE offices toward the creation of a criminal immigration task force. Meeting regularly, both federal and local law enforcement officers have initiated an organized strategy to attack the problems associated with criminal aliens and to start identifying criminal aliens that are most problematic and prevent their criminal enterprises in the jurisdiction. The task force is coordinated by Assistant United States Attorney Joe Volpe, who also coordinates the district's Anti-Terrorism Advisory Council and is a member of the Joint Terrorism Task Force.

One very real threat is the threat of terrorists using smugglers and fake documents to infiltrate the United States. However, other serious threats include fake document production, identity theft, alien smuggling, and foreign gang activity. Other serious criminal activity relates to crimes against aliens including civil rights violations involving alien slavery, and hostage taking. The Task Force will work together on these increasingly difficult issues with the aim of effectively reducing this criminal activity in Arkansas.

"Obviously, immigration problems in this country are a major focus of national attention," stated Cummins. "The solutions go farther than just law enforcement. They probably involve legislative, diplomatic, economic and cultural factors as well. But from a federal law enforcement perspective, we are continuing to aggressively pursue immigration violations in a variety of categories in this district."

DAG000000448

Congress of the United States
Washington, DC 20515

October 20, 2005

The Honorable Alberto Gonzales
Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Gonzales:

We write to request a meeting with you to discuss our frustration with the current policies within the Administration related to the prosecution of criminal aliens. To date, many illegal aliens, who deserve jail time, fall instead into the current practice of "catch and release." The recidivism rate among criminal aliens is high, and your Department's lack of action aggravates rather than remedies this problem.

The Border Patrol recently arrested illegal alien, Alfredo Gonzales Garcia, near the border in San Diego. Even though Mr. Garcia had at least two prior arrests for selling drugs and was incarcerated on two separate occasions for these offenses, the U.S. Attorney's Office in San Diego declined to prosecute him. Prior to that event, the U.S. Attorney's Office chose not to prosecute Antonio Amparo-Lopez, a human smuggler and illegal alien with multiple prior convictions. In each instance, under the Immigration and Nationality Act, they were both eligible, upon conviction, for a two-year prison sentence, at minimum.

The U.S. Attorney in San Diego has stated that the office will not prosecute a criminal alien unless they have previously been convicted of two felonies in the district. This lax prosecutorial standard virtually guarantees that both of these individuals will be arrested on U.S. soil in the future for committing further serious crimes.

There is one simple reason why "catch and release" cannot continue: it endangers our citizens. It is the responsibility of the Department of Justice to punish dangerous criminals who violate federal laws, and this includes criminal aliens. When we meet, at the very least we encourage you to be prepared to discuss the current policies used by the U.S. Attorneys to determine when to prosecute criminal aliens, including providing us with a copy of the prosecution guidelines that are applied to such cases in the Southern District of California.

Again, we would like to meet to discuss the disparity between crimes committed and prosecutions conducted at your earliest convenience. Please contact us at 202-225-3906 to schedule this meeting.

Sincerely,



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DAG00000449

Tom Collier
John Little
By M.D.
Eta Tuckey
Dana Roberts
Dina Nemes
Jan Jungu
Richard Rombo
Bill Thomas

Tom Kadenrich
Buck McElroy
Wayne
Wally Harger
Jimmy
Randy "Mike" Cunningham



U.S. Department of Justice
Office of the Deputy Attorney General

Washington, DC 20530

June 20, 2006

MEMORANDUM

TO: William Mercer
~~Principal Associate Deputy Attorney General~~
Office of the Deputy Attorney General

FROM: Mythili Raman *MDK/MP*
Senior Counsel to the Deputy Attorney General
Office of the Deputy Attorney General

SUBJECT: District of Arizona request to implement recording of confessions.

On March 8, 2006, Paul Charlton, United States Attorney for the District of Arizona, requested the Department's permission to institute a pilot program that would require federal investigative agencies in the District of Arizona to record confessions except in instances where a recording cannot be "reasonably obtained." As noted below, the investigative agencies that have been asked for their input on this proposal – FBI, DEA, ATF and USMS – are unanimously opposed to the implementation of a recording policy, while the Criminal Chiefs Working Group strongly favors the pilot program. For the reasons stated below, I recommend that the Department disapprove the request for the pilot program.

I. The USAO's Proposal to Implement a Pilot Program

A. The "Recording Policy"

The recording policy proposed by the U.S. Attorney's Office for the District of Arizona provides as follows:

Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, *shall* include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording *shall* cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.... *Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply.* The reasonableness of any unrecorded statement shall be determined by

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the AUSA reviewing the case with the written concurrence of his or her supervisor.

(emphasis added). An "investigative target" is defined by the USAO as "any individual interviewed by a law enforcement officer who has reasonable suspicion to believe that the subject of the interview has committed a crime."

Despite the mandatory language of the policy, Paul Charlton, in a letter to the investigative agencies in Arizona, emphasized that the policy "does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical." Furthermore, he emphasized that "there is no hard and fast rule under the Recording Policy that all statements in every circumstance must be overtly recorded." He did not, however, identify any specific examples of what he viewed to be acceptable exceptions to the policy.

B. The USAO's Stated Reasons for Implementing the Pilot Program

In requesting that the Department permit the pilot program to go forward in the District of Arizona, USA Charlton has thoughtfully articulated a number of factors favoring such a policy. Among other things, he argues that (1) a recorded statement is the best evidence of what was said; (2) recordings would facilitate the admission of any statements and would save the government time-consuming pretrial litigation; (3) recorded statements have a powerful impact on juries and are particularly important given that jurors are well aware that electronic devices can be small, effective and cheap; (4) recording confessions would enhance the government's ability to obtain convictions and would ensure that agents not be subject to unfair attack; (5) recording confessions would relieve agents of the need to take notes, thereby allowing them to conduct more effective interviews; (6) recording statements would allow agents to review the taped statements to look for additional clues and leads, and (7) recording would raise the public's confidence in law enforcement. He additionally notes that the U.S. Attorney has sole jurisdiction for prosecuting major crimes in Indian country, and because local police agencies in Arizona routinely tape confessions, the failure of the FBI to record confessions – which, in his view, resulted in acquittals or less than desirable pleas in at least three different cases prosecuted by his office – has created an unfair disparity between the way that crime is treated in the Native American community and all other communities in Arizona.

II. Opposition to Proposed Recording Policy by Investigative Agencies

With the exception of the Criminal Chiefs Working Group, which expressed a strong sentiment that there should be wider, if not regular, use of recording equipment to document confessions and certain witness interviews, all other agencies whose input was sought uniformly oppose the proposed recording policy. (The Criminal Chiefs Working Group did not articulate any reasons for its position beyond those stated by Paul Charlton and did not suggest any substantive changes to the Arizona policy.) Although some of the investigative agencies'

criticisms are focused on Arizona's particular proposal, most of the criticisms concern the implementation of *any* one-size-fits-all recording policy.

A. FBI

Under the FBI's current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the Special Agent in Charge ("SAC"). In reaffirming that policy in a memorandum issued to all field offices on March 23, 2006, the FBI argued that (1) the presence of recording equipment might interfere with and undermine a successful "rapport-building interviewing technique"; (2) FBI agents have faced only occasional, and rarely successful, challenges to their testimony; (3) "perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as a proper ~~means of obtaining information from defendants"; (4) the need for logistical and transcription~~ support would be overwhelming if all FBI offices were required to record most confessions and statements; and (5) a mandatory recording policy would create obstacles to the admissibility of lawfully obtained statements which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Despite the presumption in the FBI policy that most confessions are not to be recorded, the policy also expressly anticipates that recording can be useful in some situations, and accordingly gives each SAC the authority to permit recording if she or he deems it advisable.

The FBI opposes Arizona's proposed recording policy, primarily because the existing FBI policy, in its view, already gives SACs flexibility to authorize the recording of statements, as evidenced by the FBI Phoenix Division's internal policy of recording interviews of child sex victims and by its decision in many cases (including in Indian country cases), to record statements of targets or defendants. The FBI, in opposing the recording policy, also takes issue with Paul Charlton's description of three failed prosecutions that the USAO attributes to the FBI's failure to record a confession; in each of those three instances, the FBI points out several other factors that, in its view, contributed to the unfavorable results. More significantly, the FBI contends that the vast majority of Indian country cases, even those in which confessions were not recorded, have resulted in convictions.

B. DEA

The DEA's current policy permits, but does not require, the recording of defendant interviews. In voicing its strong opposition to the proposed pilot program, the DEA describes that the proposal is neither necessary nor practical. Among other things, the DEA notes that there is no history or pattern of the DEA's recording policy resulting in acquittals or the suppression of defendants' statements. Additionally, the DEA notes that given the number of multi-district investigations that it and other agencies conduct, the adoption of a mandatory recording policy by one district would make it extremely difficult for agents operating in other divisions to conduct multi-district investigations that involve that district. Moreover, the DEA, like the FBI, avers that a violation of the USAO recording policy could very well lead to suppression or acquittals in

cases in which a confession was not recorded, even where the confession was otherwise obtained lawfully. The DEA additionally notes that, at the very least, the failure of an agent to follow the recording policy would be admissible in civil litigation and could adversely affect agencies' ability to invoke the discretionary function exception in cases brought under the Federal Tort Claims Act.

Additionally, the DEA has expressed specific concerns about the particular policy proposed by the USAO in Arizona. First, the DEA notes that the recording policy, which anticipates the recording of statements of all "investigative targets," is overbroad, as the recording requirement would be triggered during even routine interdiction or other *Terry* stops. Additionally, the DEA notes that because the USAO's policy provides no guidance as to what constitutes a "reasonable" reason for not recording a statement, AUSAs and their supervisors ~~might engage in after-the-fact second-guessing of decisions made by the agents, which may result in disputes between the agencies and USAO and "AUSA shopping."~~ Additionally, the DEA avers that the proposed Arizona policy would allow the USAO to decline to prosecute an otherwise meritorious case simply because a recording was not made, rather than considering all the facts and circumstances in the case (including *all* admissible evidence), in deciding whether to accept a case for prosecution.

C. ATF

The ATF's current policy does not require electronic recording, but instead leaves the decision about whether to record to the discretion of the individual case agent. In making that decision, the case agent may confer with supervisors and the relevant USAO.

In voicing its opposition to Arizona's proposed pilot program, the ATF states that the Department should not promulgate a one-size-fits all approach to interrogation. Among other things, the ATF has expressed concern that (1) a suspect may "play" to the camera or be less candid; (2) utilizing "covert" recordings would not eliminate the problem of a suspect "playing" to the camera or withholding information, because the fact that an agency is covertly recording confessions would become public after the first trial at which such a recording is played; (3) juries may find otherwise proper interrogation techniques unsettling; (4) suspects may confess while being transported to a place where an interrogation is to take place; (5) mandatory recording raises a host of logistical questions, including questions about retention/storage of recordings and what to do in the event of an equipment malfunction; (6) the costs of supporting such a pilot program, including purchasing recording equipment and securing transcription services, would be enormous; (7) the mandatory language of the Arizona proposal leaves no discretion to agents on the field; and (8) the recording policy would hamper task force investigations where federal charges are brought in jurisdictions in which local law enforcement officers do not electronically record confessions. In sum, ATF argues that any benefits that may result from recording confessions would come at the expense of limiting the flexibility of agents to make the decision about whether to record a confession in any particular situation.

D. USMS

The USMS does not currently require taping of confessions and, indeed, the USMS notes that it does not normally solicit confessions to accomplish its mission of tracking and capturing fugitives. The USMS's opposition to a recording policy is based primarily on the impracticality of taping in carrying out its mission. Among other things, the USMS notes that because it conducts most of its interviews in the field, rather than in a controlled environment, recording is generally impractical. Additionally, the USMS notes that even when a defendant does confess to a crime while in USMS custody, that confession is usually spontaneous and not in response to any question posed by a USMS officer, and is usually made in vehicles or other remote locations where recording is not available.

III. Recommendation

I have set forth below factors that weigh in favor of and against instituting the specific pilot program proposed by the USAO in Arizona. On balance, I recommend against implementing the pilot program, as I believe that the potential costs, as outlined below, outweigh the potential benefits. For purposes of this analysis, I have not assumed that recording confessions necessarily is a presumptively wise or presumptively unwise law enforcement technique, given that experienced investigators and prosecutors have widely divergent views on that issue.

The following factors weigh in favor of permitting the USAO to institute a pilot program that would require the recording of confessions:

- 1) As noted in more detail by Paul Charlton, it is possible that at least some classes of prosecutions will be benefitted as a result of a mandatory recording policy, for example, child molestation cases in which the victim is often not cooperative or too afraid to testify. Accordingly, a pilot program, like the one proposed by the USAO, would allow the district to make immediate changes that could instantly strengthen at least some of its prosecutions. Additionally, and related, for the numerous reasons set forth in the USAO's submission to the Department, law enforcement as a whole could very well benefit from a policy that mandates recording of confessions.
- 2) The FBI's current policy creates a presumption that recording confessions is an unwise law enforcement technique. The FBI's decision to vest the discretion in the SAC to create "exceptions" to its policy, moreover, makes it difficult for any agent (or even the agent's immediate supervisor) to exercise his or her discretion to record a confession in any particular case or circumstance in which a recording may be warranted. Accordingly, although the FBI argues that it allows its agents the flexibility to record confessions, the practical effect of allowing only the SAC to grant an exception to its policy is the creation of a heavy presumption against taping.

- 3) Unless a pilot program is initiated, the District of Arizona will not be able to develop any real experience with the possible benefits of recording confessions, particularly given the presumption in the FBI's current policy that confessions should not be recorded.

The following factors weigh against permitting the USAO in the District of Arizona to institute its proposed pilot program. In my view, these factors far outweigh those favoring the pilot policy:

- 1) The problems identified by Paul Charlton in formulating his recording policy – such as the inadequacy of agents' reports documenting confessions – do not appear to be widespread, and isolated acquittals in the District of Arizona should ~~not lead the Department to institute a pilot program that could hamper multi-~~ district investigations and task force investigations. Absent evidence that many or most cases involving unrecorded confessions result in acquittals, there is simply an insufficient basis to impose any particular practice on investigative agents in any particular district.¹
- 2) As noted by many of the investigative agencies, mandating the recording of confessions could have a harmful effect on law enforcement, such as causing some defendants who may have been inclined to confess if they were not recorded, to decide not to confess once confronted with a recording device.
- 3) No federal agency currently prohibits agents from recording a statement, despite variances in their approaches to how and by whom the decision to record a confession can be made. Accordingly, the need for the USAO's proposed policy is unclear.
- 4) As noted by some of the agencies, the implementation of a pilot program would likely disrupt multi-district investigations that involve the district that is selected to implement the program. Additionally, if the local law enforcement authorities in that district do not mandate recording of confessions, task force investigations, too, could be disrupted.
- 5) A new USAO policy that mandates recording of confessions could *de facto* become a new basis on which judges suppress statements – a high cost given the uncertainty of the potential benefits.
- 6) The USAO has not indicated what measures of success it will use in evaluating the pilot program. In my view, measuring the success of such a program by, for

¹ The USAO's proposed policy does not appear to be limited to the Department and would presumably apply to investigative agencies such as ICE and USPIIS.

example, evaluating the number of acquittals, convictions, guilty pleas or lengths of sentences, would not be helpful because, as seen by the competing views of the FBI and USAO in the District of Arizona, reasonable people can disagree as to the factors that lead to any particular result in a case. Similarly, it would be difficult, if not impossible, to definitively track some of the potential costs of imposing the recording policy, such as whether a particular defendant declined to give a confession *because* the agents used recording equipment. Additionally, the problem of usefully extrapolating the experience of one district to another district is amplified by the fact that, as noted by the FBI, there are numerous variables involved in how and where to institute such a pilot program, including whether the district selected for the program should be one in which the local and state agencies record interrogations; whether the district selected for the program ~~should be large or small; whether two offices should be selected so that one can~~ operate as a "control"; whether the selected district should be one in which there are many prosecutions under the Assimilated Crimes Act; whether all target interviews should be recorded or only those involving certain serious felonies; and whether the recordings should be surreptitious or overt.

IV. Summary

For the reasons discussed in my description of the factors weighing against the pilot program, I recommend that the Department not approve the USAO's request to initiate a pilot program, as I believe that the potential costs far outweigh the potential benefits. If the Department, after further evaluating the USAO's proposal, is inclined to authorize the pilot program, I would recommend that the Department, at the very least, require the USAO in Arizona to provide the Department with a proposal of the measures by which the success of the pilot program will be assessed.

cc: Michael Elston
Ronald Tenpas

Elston, Michael (ODAG)

From: Goodling, Monica
Sent: Wednesday, July 05, 2006 10:17 AM
To: Elston, Michael (ODAG)
Subject: RE: Lam

Yes - need to discuss at the appts update anyway.

-----Original Message-----

From: Elston, Michael (ODAG)
Sent: Wednesday, July 05, 2006 10:16 AM
To: Goodling, Monica
Subject: Lam

Could we hold off on the Battle call until next week?



U.S. Department of Justice

Office of the Deputy Attorney General

Washington, DC 20530

July 7, 2006

MEMORANDUM

TO: William Mercer
Principal Associate Deputy Attorney General
Office of the Deputy Attorney General

Michael Elston
Chief of Staff
Office of the Deputy Attorney General

FROM: Mythili Raman ^{MR}
Senior Counsel to the Deputy Attorney General

SUBJECT: Recommendations for Implementation of Pilot Program Instituting Mandatory
Recording Policy in the District of Arizona

You have asked me to consider what, if any, changes should be made to the mandatory recording policy proposed by United States Attorney Paul Charlton in the District of Arizona, if the Department approved the implementation of a pilot program in Arizona to test that policy. I have set forth below some recommendations concerning the scope of the exception to the recording policy, and the manner in which the success of the policy should be measured at the end of a one-year pilot program.

I. Proposed Modifications to the Exception to the Recording Policy

A. The Current Policy

The recording policy currently proposed by the United States Attorney's Office for the District of Arizona provides as follows:

Rule: Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.

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Exception: *Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply.* The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

(emphasis added).

B. Proposed Expansion of the Exception to the Recording Policy

I recommend that if the Department were to approve a pilot program implementing the USAO's policy, the stated exception to the policy be modified and expanded to address concerns about (1) the rigidity and limited scope of the current exception to the policy, and (2) the implicit assumption in the current recording policy that an AUSA and USAO supervisor could decline prosecution of an otherwise strong case solely based on an agent's failure to record a statement. Specifically, I recommend that the exception to the policy be amended as follows:

Exception: Where taping a statement would not be reasonable in light of the specific circumstances presented, the Recording Policy shall not apply. Each agent or agency, before making a decision not to record a statement in a particular circumstance, must make every effort to consult with an Assistant United States Attorney. The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution.

As seen above, the first proposed amendment to the recording policy's exception expands the circumstances under which an agent may invoke the exception to the recording policy. In the current version of the recording policy, the exception to the policy is triggered only in instances "where a taped statement cannot be reasonably obtained." That language suggests that the exception to the mandatory recording policy applies only in cases where the physical act of recording cannot be practicably accomplished – for example, when an agent stops a suspect on the roadside and must immediately begin to question him for safety reasons, even though recording equipment is not readily available to tape the roadside interrogation.

That current version of the exception is not expansive enough to accommodate legitimate law enforcement concerns that go beyond just the availability of recording equipment or the practicability of recording a statement that may be taken at a roadside. For example, the current version of the exception does not appear to take into account the familiar situation in which a target agrees to cooperate with law enforcement and provide information about others involved in criminal activity, but – because of concerns about retaliation, concerns about personal safety or other factors – will do so only if the statement is not recorded and if agents can guarantee that his identity will remain confidential. In those circumstances, it would be reasonable – indeed crucial – for law enforcement agents to decline to record a statement in order to get as much information from the target as possible. This flexibility is particularly important in terrorism cases, where

gathering as much information as possible from a cooperative target is vital for national security. Similarly, the current version of the recording policy's exception does not appear to take into account situations in which, for example, a target in a drug case is interdicted with drug proceeds and immediately agrees to cooperate and conduct a controlled delivery of the money to his supplier. In such a situation, the agents should have the flexibility to determine that the entire pre-delivery debriefing and each statement made by the target while conducting the delivery itself (which could span several days) need not be recorded. My suggested amendment provides flexibility to the agents – in consultation with an AUSA – to decide not to record a statement in such circumstances.

My second proposed modification to the recording policy's exception is the deletion of the sentence which currently reads: "The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor." That language, when read in conjunction with the rest of the recording policy, has left the impression with some of the law enforcement agencies that the USAO can and will presumptively decline to prosecute a case in which a statement was not recorded. In cases where the evidence of a target's guilt is overwhelming, but an agent neglected to record the target's statement, declining prosecution clearly would not be in the best interests of the government. Accordingly, I propose deleting that sentence and replacing it with the following sentence: "The failure to record a statement pursuant to this Recording Policy will be a factor considered by the United States Attorney's Office in evaluating whether there is sufficient evidence to accept a case for prosecution." That amendment would give the USAO flexibility to decline a case in which the USAO believes that the failure to record will adversely affect the outcome of the prosecution, while still allowing agencies to present to the USAO cases that perhaps should be accepted for prosecution even absent a recorded statement.

II. Measuring the Success of the Pilot Program

The purpose of instituting a pilot program like the one proposed by the USAO would be to evaluate, at the end of a year, whether the program was successful in the District of Arizona and then to evaluate whether the program should be implemented in other districts. In response to the Department's request for a proposal on how the USAO would evaluate the pilot program, Paul Charlton has indicated that the USAO would take the following steps: (1) the USAO would track pleas and conviction rates in cases in which statements were or were not taped, and would ~~compare those rates to the plea and conviction rates obtained in cases investigated by the~~ "control" squads that would continue to use current agency recording policies; (2) the USAO would convene a coordinating group consisting of representatives from the USAO and the agencies, which would meet periodically to establish uniform procedures and iron out any problems; (3) AUSAs would poll juries after verdicts in which confessions were introduced to determine what effect the decision to tape a confession had on the juries' decisions; and (4) at the end of the one-year trial period, the USAO would distribute a questionnaire to AUSAs and agents soliciting their comments and anecdotal impressions regarding the recording policy and compile all of those findings into a report that could be presented to the Department.

These proposals provide a good start for evaluating the success of a pilot program. I recommend, however, that the following additional factors be considered and tracked in evaluating the success of any pilot program that may be implemented:

- 1) In addition to tracking conviction rates, the USAO should track whether the defendants are convicted of or plead to the most serious count charged in the indictment. This factor is an important one to follow, precisely because one of the complaints underlying the USAO's request to implement the pilot program was that, in at least one case, the USAO was forced to "plead down" a case to a less serious charge because the defendant's statement was not recorded. Accordingly, to address that concern, it will be essential to measure not only the number of convictions, but also whether the USAO was forced to "plead down" the case to something less than the most serious count charged in the indictment.
- 2) One of the possible benefits of the recording policy is that defendants, when confronted with their recorded confessions, may elect to plead guilty rather than proceed to trial. Accordingly, the USAO should make every effort to track whether the trial/guilty plea ratio is affected by the implementation of the recording policy.
- 3) In formulating the questionnaires that are circulated to AUSAs and agents, the Department must focus on obtaining information not just about factors that can be easily quantified – such as number of convictions – but also about other factors that cannot be easily quantified. For example, any anecdotal evidence from jurors that the taping of statements gives the community greater confidence in federal law enforcement would be important to compile and consider.
- 4) Similarly, in formulating the questionnaires, the Department must focus on determining whether there are law enforcement "costs" that result from the implementation of the program that cannot be easily quantified. Those potential law enforcement "costs," which necessarily would not be reflected in the number of convictions or pleas, include (a) whether a significant number of targets decline to give a statement when faced with a recording device that they may have otherwise given; (b) whether a significant number of targets "negotiate" with ~~agents about what they will or will not say when the agents insist on recording the~~ statements; (c) whether a significant number of defendants decline to cooperate and provide information about others immediately after an arrest because of the recording requirement; (d) whether the failure to comply with the recording policy results in, or is a factor in, any decisions by judges to suppress statements that were otherwise properly obtained; and (e) whether jurors acquit defendants of any or all counts because of a failure to comply with the recording policy where the jurors may not otherwise have considered that factor in the absence of a mandatory recording policy. This set of variables – i.e., the costs to law

enforcement that are not reflected in rates of convictions – will necessarily be the most difficult to track, but, in my view, must be tracked in evaluating any successes and failures of the pilot program.

- 5) Assuming that the Department adopts the USAO's view that each agency should have a "control" squad that continues to operate under each agency's current recording policy, it will be important at the conclusion of the pilot program to make comparisons *between* agencies; because the "control" groups from each agency necessarily will be using a different standard for recording during the one-year trial period. For example, the FBI "control" squads will utilize a policy of not recording statements absent approval from the SAC; while the ATF "control" groups will operate under a policy that allows each agent to use his or her own discretion in making the decision about whether to record. Because one of the goals of the pilot program should be to determine whether the USAO's proposed recording policy is more effective than any existing policy of any particular agency, it will be crucial that the evaluation of the program include a discussion about whether the recording policy affected cases investigated by each participating agency in a different way.¹
- 6) Finally, as discussed yesterday, the questionnaires that are completed by the agents and AUSAs should be anonymous, so that agents and AUSAs feel free to express opinions that may differ from the opinions of their supervisors or agencies. For the same reason, it would be wise for a Department component to compile the questionnaires and the statistics, and then prepare a report on the implementation of the program. Given the wide divergence of views about this pilot program – with the USAO strongly in favor and the agencies strongly against – it would be unwise for either the USAO or the agencies to take the lead on drafting the final report on the benefits and costs of the program. The report generated by the Department should, of course, be circulated to the USAO and agencies for comments.

III. Summary

The evaluation of a pilot program like the one proposed by the USAO in the District of Arizona is necessarily a difficult undertaking, precisely because the benefits and costs cannot be easily quantified. This difficulty is compounded by the fact that, as noted in my first memorandum describing the proposed pilot project, there are widely divergent views on the potential benefits and costs of the USAO's proposed recording policy. Accordingly, if the

¹ The USMS should be exempted from complying with the recording policy because, as mentioned in the USMS's submission, the USMS's mission is primarily to find fugitives rather than affirmatively investigate criminal matters, and most of the USMS's encounters with fugitives are under circumstances that do not easily lend themselves to recording.

Department approves the implementation of a pilot project, I strongly recommend that the USAO and the Department fully include the investigative agencies in the process of implementing and monitoring the program.

Elston, Michael (ODAG)

From: Mercer, Bill (ODAG)
Sent: Saturday, July 08, 2006 1:35 PM
To: Elston, Michael (ODAG)
Subject: Re: Carol Lam / Please call.

What that Carol Lam can't meet a deadline or that you'll need to interact with her in the coming weeks or that she won't just say, "O.K. You got me. You're right, I've ignored national priorities and obvious local needs. Shoot, my production is more hideous than I realized."

Or that I'm not going to send you as many of these humorous missives?

We are a good team. As I go through all of the stuff that remains on the to do list, it is pretty impressive how much we crossed off that list. I will miss that, but if all goes well we are only looking at about a 60 day hiatus.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Elston, Michael (ODAG)
To: Mercer, Bill (ODAG)
Sent: Sat Jul 08 13:11:47 2006
Subject: Re: Carol Lam / Please call.

This is so sad -- I am not adjusting well to this change.

-----Original Message-----
From: Mercer, Bill (ODAG)
To: Lam, Carol (USACAS)
CC: Elston, Michael (ODAG)
Sent: Sat Jul 08 11:54:13 2006
Subject: FW: Carol Lam / Please call.

My time as PADAG has come to a close. I gather that you will be e-mailing something on Monday. Will you direct it to the Deputy's COS Mike Elston?

From: Henderson, Charles V
Sent: Friday, July 07, 2006 5:45 PM
To: Mercer, Bill (ODAG)
Subject: Carol Lam / Please call.

She asked whether you are waiting for a response.

Elston, Michael (ODAG)

From: Elston, Michael (ODAG)
Sent: Saturday, July 08, 2006 3:11 PM
To: Mercer, Bill (ODAG)
Subject: Re: Carol Lam / / Please call.

Indeed -- but you will forget all of the little people once you are No. 3 in the Department!

Carol Lam is sad, too, but that was not what I was thinking!

-----Original Message-----

From: Mercer, Bill (ODAG)
To: Elston, Michael (ODAG)
Sent: Sat Jul 08 13:35:19 2006
Subject: Re: Carol Lam / / Please call.

What that Carol Lam can't meet a deadline or that you'll need to interact with her in the coming weeks or that she won't just say, "O.K. You got me. You're right, I've ignored national priorities and obvious local needs. Shoot, my production is more hideous than I realized."

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Subject: Carol Lam / / Please call.

She asked whether you are waiting for a response.

Elston, Michael (ODAG)

From: Smith, David L. (USAEO)
Sent: Thursday, July 13, 2006 8:14 PM
To: Elston, Michael (ODAG); Scott-Finan, Nancy; Voris, Natalie (USAEO)
Subject: RE: Feinstein letter — 1021001

Attachments: Sen.Feinstein.6.15.06.(3).wpd; Issa.5.24.06.ltr.wpd



Sen.Feinstein.6.15. Issa.5.24.06.ltr.wpd (60 KB)
06.(3).wpd ...

All,

Attached is the revised response to the Feinstein letter that includes Carol Lam's edits. I have placed it on OLA letterhead. Note that the added data comparing 2004 and 2005 sentencing at the 1-12, 36-60 and +60 month increments comes directly from EOUSA's LIONS data. I am seeking to follow up on the other added data, specifically the 543 sentenced defendants and the 880 defendants convicted of re-entry, which I think must include fast track defendants who plead under 1325. These latter two figures I believe come from SDCA data, not LIONS data, which is why the letter states "data from the Southern District."

I also put the Lam-revised Issa letter, which I forwarded in draft form earlier today, on OLA letterhead.

Dave

-----Original Message-----

From: Voris, Natalie (USAEO)
Sent: Wednesday, July 12, 2006 1:20 PM
To: Smith, David L. (USAEO); Scott-Finan, Nancy; Elston, Michael (ODAG)
Subject: FW: Feinstein letter ---- 1021001

Thanks, Dave.

Mike and Nancy - here is a similar letter that will need ODAG and OLA's approval. If you would prefer, I can go ahead and get both the Issa and Feinstein letters moving your direction through the Exec Sec process. Given the topic, I wanted to make sure that EOUSA was approaching our response in the correct manner before moving the letters out our door.

Thank you,
nv

-----Original Message-----

From: Smith, David L. (USAEO)
Sent: Wednesday, July 12, 2006 12:07 PM
To: Voris, Natalie (USAEO)
Subject: RE: Feinstein letter ---- 1021001

Natalie,

Attached is an edit of the Feinstein letter.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Dianne Feinstein
United States Senator
Washington, D.C. 20510

Dear Senator Feinstein:

This is in response to your letter dated June 15, 2006, to the Attorney General regarding the issue of immigration-related prosecutions in the Southern District of California. We apologize for any inconvenience our delay in responding may have caused you.

Attached please find the information you requested regarding the number of criminal immigration prosecutions in the Southern District of California. You also requested intake guidelines for the Southern District of California United States Attorney's Office. The details of prosecution or intake guidelines are not appropriate for public release because the more criminals know of the specific guidelines, the more they will conform their conduct to avoid prosecution.

Please rest assured that the immigration laws in the Southern District of California are being vigorously enforced. Indeed, prosecutions for alien smuggling in Fiscal Year 2006 in the Southern District of California are rising dramatically. As of March 2006, the halfway point in the fiscal year, there were 342 alien smuggling cases filed in that jurisdiction. This compares favorably with the 484 alien smuggling prosecutions brought there during the entirety of Fiscal Year 2005. Moreover, as you are aware, Congress did not fully fund the President's budget request in FY 2006, and this increase in alien smuggling prosecutions in Southern California is being accomplished with the same or fewer number of Assistant United States Attorneys in that Office as in Fiscal Year 2005.

Each United States Attorney attempts to leverage his or her existing resources to achieve maximum results. The United States Attorney for the Southern District of California is already committing approximately half of her personnel to prosecute criminal immigration cases. We believe that figure demonstrates a substantial commitment to these cases. As you know, the Department of Justice is committed to criminal immigration law enforcement, as well as to the investigation and prosecution of other federal crimes, including counter-terrorism, firearm violations, fraud and corruption, and online sexual exploitation.

DAG000000468

The Honorable Dianne Feinstein
Page Two

Although felony immigration filings in the Southern District of California dropped from FY 2004 to FY 2005, that result flowed from a conscious decision to focus resources on seeking higher sentences for more serious offenders. And, in fact, the number of immigration defendants prosecuted who received prison sentences of between 1-12 months dropped from 896 in 2004 to 338 in 2005, while the number of immigration defendants who received sentences between 37-60 months *rose* from 116 to 246, and the number of immigration defendants who received sentences greater than 60 months *rose* from 21 to 77.

The effort to obtain higher sentences for the immigration violators who present the greatest threat to the community also results in more cases going to trial, and consequently the expenditure of more attorney time. In FY 2004 the Southern District tried 42 criminal immigration cases; in FY 2005 the District tried 89 criminal immigration cases – substantially more than any other Southwest Border district in 2005.

In addition, the Southern District has devoted substantial resources to investigating and prosecuting border corruption cases which pose a serious threat to both national security and continuing immigration violations. For example, in the past 12 months, the district has investigated and prosecuted seven corrupt Border Patrol agents and CBP officers who were working with alien smuggling organizations. These investigations and prosecutions typically have time-consuming financial and electronic surveillance components.

With respect to the statistical information you provided regarding immigration prosecutions in the Southern District, the data in the United States Attorneys' Case Management System is substantially different. For FY 2005, data from the Southern District shows a total of 543 defendants sentenced after conviction for immigration smuggling offenses, not the 387 you cited. In addition, although you cite 262 aliens convicted for illegal re-entry after deportation, data from the Southern District shows 880 convictions of defendants who re-entered illegally after deportation (charged under 8 U.S.C. 1325 and 1326, and under 18 U.S.C. 911) in FY 2005.

Moreover, the Department has been very successful in prosecuting alien smuggling nationally as well. Data on alien smuggling prosecutions from the Executive Office for United States Attorneys' database shows that these cases have risen steadily during the last three years. In Fiscal Year 2003 there were 2,015 alien smuggling cases filed under 8 U.S.C. § 1324. In Fiscal Year 2004, there were 2,451 such cases, and in Fiscal Year 2005 there were 2,682. We are proud of our increasing productivity in this area of criminal law enforcement.

DAG000000469

The Honorable Dianne Feinstein
Page Three

We appreciate your interest in this matter. Please do not hesitate to contact the Department of Justice if we can be of assistance in other matters.

Sincerely,

William E. Moschella
Assistant Attorney General

DAG000000470



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Darrell Issa
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Issa:

This is in response to your letter dated May 24, 2006, to Carol C. Lam, United States Attorney for the Southern District of California, regarding immigration prosecutions in that district, as well as your request to meet with USA Lam. We apologize for any inconvenience our delay in responding may have caused you.

Please rest assured that the immigration laws in the Southern District of California are being vigorously enforced. Indeed, prosecutions for alien smuggling in Fiscal Year 2006 in the Southern District of California are rising dramatically. As of March 2006, the halfway point in the fiscal year, there were 342 alien smuggling cases filed in that jurisdiction. This compares favorably with the 484 alien smuggling prosecutions brought there during the entirety of Fiscal Year 2005. Moreover, as you are aware, Congress did not fully fund the President's budget request in FY 2006, and this increase in alien smuggling prosecutions in Southern California is being accomplished with the same or fewer number of Assistant United States Attorneys in that Office as in Fiscal Year 2005.

Certainly the U.S. Attorney's Office for the Southern District of California devotes substantial available resources to the prosecution of illegal immigration, and to alien smuggling in particular. Fully half of its 110 Assistant U.S. Attorneys are used to prosecute illegal immigration cases.

Although felony immigration filings in the Southern District of California dropped from FY 2004 to FY 2005, that result flowed from a conscious decision to focus resources on seeking higher sentences for more serious offenders. And, in fact, the number of immigration defendants prosecuted who received prison sentences of between 1-12 months dropped from 896 in 2004 to 338 in 2005, while the number of immigration defendants who received sentences between 37-60 months *rose* from 116 to 246, and the number of immigration defendants who received sentences greater than 60 months *rose* from 21 to 77.

DAG000000471

The Honorable Darrell Issa
Page Two

The effort to obtain higher sentences for the immigration violators who present the greatest threat to the community also results in more cases going to trial, and consequently the expenditure of more attorney time. In FY 2004 the Southern District tried 42 criminal immigration cases; in FY 2005 the District tried 89 criminal immigration cases – substantially more than any other Southwest Border district in 2005.

In addition, the Southern District has devoted substantial resources to investigating and prosecuting border corruption cases which pose a serious threat to both national security and continuing immigration violations. For example, in the past 12 months, the district has investigated and prosecuted seven corrupt Border Patrol agents and CBP officers who were working with alien smuggling organizations. These investigations and prosecutions typically have time-consuming financial and electronic surveillance components.

Please also know that decisions concerning whether to prosecute a given case as an alien smuggling case, or under some related charge, are case specific and very fact based. The number of possible alien smuggling charges that can be filed depends in part on the quality of the matter being referred to the United States Attorney's Office. For example, it is often necessary in an alien smuggling case to make a number of the smuggled aliens available as material witnesses, for the defense as well as the prosecution. If such witnesses are released at the time of the suspect's arrest, the opportunity to prosecute the case as an alien smuggling case, as opposed to a lesser charge, may be lost forever.

With regard to the immigration memo referred to in your letter, we cannot vouch for its authenticity. However, as you well realize, it is not physically possible to prosecute and imprison every single person apprehended on immigration violations. Thus, every United States Attorney's office necessarily uses prosecution guidelines to help identify which cases to prosecute under various circumstances. We have previously outlined for you in earlier correspondence the broad parameters of the guidelines used in the Southern District of California. Public dissemination of the details of such guidelines only serves to undercut law enforcement efforts. We note that the Bureau of Customs and Border Protection was heavily consulted during the drafting of the guidelines and approved of them at the time they were first disseminated.

Finally, we are aware that you recently spoke personally with USA Lam. If you are still interested in a meeting, please let us know.

DAG00000472

The Honorable Darrell Issa
Page Three

Please do not hesitate to contact the Department of Justice if we can be of assistance in other matters.

Sincerely,

William E. Moschella
Assistant Attorney General

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