

RESPONSE TO QUESTION FOR THE RECORD: COMPREHENSIVE IMMIGRATION REFORM HEARING

Senator Lee,

Thank you for your question for the record regarding the Comprehensive Immigration Reform Hearing conducted April 19, 2013.

You have asked why I stated in a *National Review* editorial that it is important to withhold discretion regarding border security—specifically construction of a border fence—from the Secretary of Homeland Security and any other government functionary. The ultimate reason Congress should withhold this discretion can be reduced to one word: trust. More precisely, the abuse thereof.

Elected officials have repeatedly promised to secure the border and Congress has repeatedly passed legislation intended to secure the border. Promises to secure the border have proven to be piecrust promises – easily made and easily broken. Detailed below are several reasons why all Americans should favor withholding all but the most ministerial discretion regarding immigration law enforcement. Congress in particular should be keen to withhold such discretion. Although Congress and the executive are coequal branches, the latter repeatedly flouts duly-enacted legislation regarding immigration.

- 1) The past and present behavior of the Department of Homeland Security and almost every other federal agency demonstrates that when government officials have enforcement discretion in the immigration context, that discretion is almost invariably exercised in a direction that militates against enforcing the border.**

In 2006, Congress passed the Secure Fence Act. The legislation directed the Secretary of the Department of Homeland Security to “achieve and maintain operational control over the entire land and maritime borders of the United States.” “Operational control” is defined as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other terrorism.” The Secure Fence Act also directed DHS to install approximately 700 miles of two-layer reinforced fencing along the southern border.

Regrettably, the law was amended by Congress the following year to give DHS the *discretion* to determine what fencing to put where.¹ “Fencing” has been defined down to include concrete posts that are intended to stop vehicles, but pose no barrier to individuals crossing the border on foot. In 2011, “there [was] 36.3 miles of double-layer fencing.”² (the southern border is 1,930 miles long). This is but one example of what happens when DHS and other federal agencies are given discretion regarding substantive aspects of immigration. In addition, as Janice Kephart noted in her testimony before the Judiciary Committee on April 22, “S.744 only calls for

¹ *Obama says the border is “now basically complete,”* Politifact.com, May 16, 2011, <http://www.politifact.com/truth-o-meter/statements/2011/may/16/barack-obama/obama-says-border-fence-now-basically-complete/>.

² *Id.*

a *strategy*, nothing more. While a strategy is a good start, it is actually building [a fence]—one that is actually built to keep individuals out—that works to protect both the border and the environment.”³ (Emphasis added).

Completing a fence should be a prerequisite for even beginning a discussion of legalization of those here illegally. Recent history demonstrates that otherwise DHS will massage the data and smooth any requirements necessary to certify that the border is secure so that legalization can proceed. As Senator Cruz observed during the April 22 hearing, “Madame Secretary, it seems to me that if border security is to be measured by an amorphous, multifactor subjective test, that this Committee knows to a metaphysical certainty that DHS will conclude that border security is satisfied.”

I concur with Senator Cruz’s assessment. There is nothing in DHS’s performance, or indeed the performance of the government as a whole, that gives a reasonable person any confidence the government will secure the border. A double-layer fence that spans the terrain-compatible entirety of the southern border has the great advantage of not being subject to the amorphous, politically motivated whims of cabinet officials. Such a fence eliminates any subjectivity, temporizing or discretion in service of political imperatives.

2) Government officials have repeatedly promised to secure the border, yet the border still is not secure. A grant of discretion merely perpetuates this dynamic.

Elected officials have been promising to secure the border for almost 30 years. Securing the southern border was part of the 1986 amnesty, yet the border was not secured. Congress has passed multiple pieces of legislation since 1986 that purport to secure the border, including the aforementioned Secure Fence Act of 2006. Yet, as detailed in the testimony of Janice Kephart, it is clear that the southern border remains unsecured. Ms. Kephart testified that, “At least over the central Arizona border, there has been a tremendous surge in the amount of illegal border crossing activity from August to December of last year.”⁴ Recently released numbers from Customs and Border Protection indicate that significantly more illegal aliens have been arrested in 2013 than in 2012.⁵ Because there are no accurate measurements of how many people cross the border illegally, we have no idea whether this indicates that more people are crossing the border or if the Border Patrol has just happened to find more people.

As plainly evident from the testimony of Secretary Napolitano, apprehensions are a manifestly unreliable metric of border security. Secretary Napolitano was unable to provide a straight answer when asked about the current level of border crossings, vacillating between “it’s at a 40-year low” and “it’s about the same as last year” and “it’s about the same as last year, except in Texas near the Rio Grande.” If the Secretary of the Department of Homeland Security cannot even provide a straight answer regarding how many people are coming into the country

³ Written Testimony of Janice Kephart before the Senate Committee on the Judiciary, April 22, 2013, at 3, *available at* <http://www.judiciary.senate.gov/pdf/04-22-13KephartTestimony.pdf>.

⁴ *Id.* at 4.

⁵ William La Jeunesse, *States show surge in illegal immigrant traffic despite Napolitano claims*, FOXNEWS.COM, April 5, 2013, <http://www.foxnews.com/politics/2013/04/05/stats-show-surge-in-illegal-immigrant-border-traffic-despite-napolitano-claims/>.

illegally, it is impossible that the border is secure. The border is secure when we know who is coming in and when they leave, not before. The border certainly is not secure when we not only do not *know who* is coming into this country and whether they ever left, but we do not even have a firm idea of how *many* people are coming into the country illegally.

3) The Secretary of the Department of Homeland Security has chosen not to enforce the immigration laws even when she has no statutory discretion to make such a choice.

The Secure Fence Act of 2006 directed DHS to achieve “operational control” over the entire border. Yet in 2011, DHS decided to cease using the term “operational control” and to replace this measure of effectiveness with still-to-be-determined metrics. Customs and Border Patrol Chief Michael Fisher testified in 2011 that the term did not accurately capture “the efforts of CBP partners and the significance of information and intelligence in an increasingly joint and integrated operating environment.”⁶ Stripped of gobbledygook, this amounts to replacing a clearly defined standard—“the prevention of all unlawful entries into the United States”—with “we give ourselves an A for effort.” As Senator Cruz asked Secretary Napolitano, “If there are no objective metrics, if it is simply a subjective assessment of a host of factors, how can we have any confidence that the border will be secure and that any trigger will be meaningful?”

Interestingly, Mr. Fisher did not explain why DHS believed it had the authority to jettison a standard *statutorily mandated* by Congress. Regardless, more than two years after Mr. Fisher’s testimony, DHS still has not implemented a permanent, reliable standard for measuring the people and contraband goods that illegally cross the border. Mr. Fisher pointed to low numbers of apprehensions of illegal immigrants as a measure of success, although those figures are contradicted by numbers recently released by Customs and Border Protection.⁷ However, because we do not know how many people cross the border illegally, we cannot know whether apprehending fewer people represents success or failure. It could mean that fewer people are crossing the border. It could also mean that people have learned to better elude the Border Patrol.

On April 23, Senator Sessions asked Secretary Napolitano about a lawsuit in which ICE agents have sued DHS and Secretary Napolitano relating to DHS’s refusal to enforce federal law regarding the deportation of illegal aliens. Secretary Napolitano replied that she expected law enforcement to follow the enforcement priorities established by their superiors. When Senator Sessions suggested that **she did not have the authority to make a policy decision that**

⁶ Written Testimony of Michael J. Fisher, Chief, United State Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security Before House Committee on Homeland Security, Subcommittee on Border and Maritime Security on “Securing Our Borders – Operational Control and the Path Forward,” Feb. 15, 2011, *available at* <http://www.dhs.gov/news/2011/02/15/us-customs-and-border-protection-border-patrol-chief-michael-fishers-testimony>

⁷ See Written Testimony of U.S. Customs and Border Protection Border Patrol Chief Michael Fisher, Office of Field Operations Assistant Commissioner Kevin McAleenan, and Office of Technology Innovation and Acquisition Assistant Commissioner Mark Borkowski for a House Committee on Homeland Security, Subcommittee on Maritime and Border Security “Measuring the Outcomes to Understand the State of Border Security,” March 20, 2013, *available at* <http://www.dhs.gov/news/2013/03/20/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime>; see also La Jeunesse, *supra* note 3.

contradicted a statute, Secretary Napolitano replied, **“I disagree with almost everything you said.”** She then continued:

What we want our officers doing is focusing on drug traffickers and human smugglers and money launderers and others who misuse our border and our immigration system. By having a process by which those in the country illegally can pay a fine, can pay fees, can register so we know who they are, by dealing with the employer demand for illegal labor, by opening up the visa system, that will have the effect basically of confirming the focus of resources where they need to be.⁸

In short, Secretary Napolitano confirmed to Senator Sessions that she has decided not to enforce federal law because she disagrees with it as a matter of policy. She does not think that it is worthwhile to spend time deporting people who commit serious crimes such as identity theft, crimes that would land most Americans in jail. Chris Crane, the President of the ICE agents union, testified that ICE agents are not allowed to arrest illegal immigrants who have committed identity theft or have fraudulent documents.⁹ How can Congress trust Secretary Napolitano or any DHS official with discretion regarding border security when Secretary Napolitano has said that she will not and is not enforcing the law that is already on the books? On April 24, a federal judge even indicated that it is likely that Secretary Napolitano does not have the authority to disregard federal law in this way.¹⁰ Congress enacts laws, not the Secretary of DHS or the president. By flouting the law, Secretary Napolitano and her subordinates have shown themselves contemptuous of the responsible exercise of any discretion pertaining to border security.

In their lawsuit, ICE agents allege that Secretary Napolitano is defying federal law by refusing to deport hundreds of thousands of illegal aliens based only on her own policy preference and in defiance of federal law.¹¹ Secretary Napolitano does not have the statutory authority to make such a policy judgment. She is defying the law by exercising discretion where none is given.¹²

Furthermore, as Secretary of State Kris Kobach testified, there is evidence that Secretary Napolitano is using her arrogated discretion to release illegal aliens who are dangerous by any usual understanding—people who have been charged with “assault on a federal officer, sexual assault on a minor, and trafficking in cocaine.”¹³ Additionally, when Secretary Napolitano testified before the Senate Judiciary Committee that it is her understanding that the immigration bill allows people who are already in removal proceedings or who have in fact already been

⁸ Testimony of Janet Napolitano, Secretary of the Department of Homeland Security, before the Senate Committee on the Judiciary, April 23, 2012, *available at*

<http://www.judiciary.senate.gov/hearings/hearing.cfm?id=aa74149c42b092f2488b81816628a1f2>.

⁹ Written Testimony of Chris Crane before the Senate Committee on the Judiciary, April 22, 2013.

¹⁰ Andrew Harris, *Obama Deportation Program Likely to be Blocked, Judge Says*, BLOOMBERG, April 24, 2013, <http://www.bloomberg.com/news/2013-04-24/obama-deportation-program-likely-to-be-blocked-judge-says.html>.

¹¹ *Crane v. Napolitano*, Plaintiff’s Compl. 3:12-cv-03247-O, Oct. 10, 2012, at 35.

¹² See U.S.C. § 1225.

¹³ Written Testimony of Kris Kobach before the Senate Committee on the Judiciary, April 22, 2013, *available at* <http://www.judiciary.senate.gov/pdf/04-22-13KobachTestimony.pdf>.

removed from the country to apply for amnesty, it is clear that her primary goal is to maximize the number of illegal aliens who receive amnesty.¹⁴ Given her willingness to violate/ignore the law to promote her policy preferences, there is reason to believe that she would continue to exercise maximum discretion to avoid enforcing the immigration laws.

- 4) **A grant of discretion regarding certification of a completed border fence would eviscerate many of the remaining enforcement mechanisms in the bill, rendering it little more than a densely-worded amnesty.**

As set forth above, allowing Secretary Napolitano or any government functionary or politician the discretion to certify whether a border fence is complete will result, quite simply, in no fence. This will compound the broad discretion and multiplicity of waivers already provided the Secretary of DHS by the bill, transforming the Secretary into an immigration czar with few meaningful constraints on her/his ability to implement immigration policy based on political preference or whims. (Query: At what point does the downstream exercise of such discretion become an unlawful delegation of legislative authority?) The present draft of the bill provides the Secretary with the ability to waive employment, educational and tax requirements for illegal immigrants seeking Registered Provisional Immigrant status. Moreover, the bill also permits the Secretary to exercise discretion as to which crimes may be waived for determining RPI status. Reduced to its essence, such discretion, combined with border fence discretion, permits the Secretary to continue the massive influx of immigrants across the southern border and then pick and choose who is awarded RPI status. Since experience suggests that the overwhelming majority of illegal immigrants will be awarded RPI status, this ensures that the bill will act as a giant magnetic for continued illegal immigration.

In sum, discretion regarding something as important to national security as securing the border should not be awarded to individuals and/or entities with a demonstrable record of abusing that discretion.

Thank you for your question and the opportunity to supplement the record.

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¹⁴ Testimony of Janet Napolitano, *supra* note 4.