

## Chapter 7

### Case Study: Postville, Iowa

The Background:

## News Releases

May 12, 2008

### ICE and DOJ joint enforcement action at Iowa meatpacking plant

CEDAR RAPIDS, Iowa - U.S. Immigration and Customs Enforcement (ICE) agents executed a criminal search warrant this morning at Agriprocessors, Inc., in Postville, Iowa, for evidence relating to aggravated identity theft, fraudulent use of Social Security numbers and other crimes, as well as a civil search warrant for people illegally in the United States. The announcement was made by United States Attorney for the Northern District of Iowa Matt M. Dummermuth and ICE Special Agent in Charge Claude Arnold.

"This is not the first time this office has been a part of a criminal worksite enforcement operation," said Dummermuth. "However, this is the largest operation of its type ever in Iowa. Agents and officers from federal, state, and local agencies are involved today. The coordination and logistical planning efforts have been going on for months."

"ICE is committed to enforcing the nation's immigration laws in the workplace to maintain the integrity of the immigration system," said Claude Arnold, Special Agent in Charge of the ICE Office of Investigations in Bloomington, Minnesota. "We carry out that obligation in a fair and responsible manner, ensuring humanitarian needs are taken into consideration."

Anyone encountered during this operation who is discovered to be in the United States illegally eventually will be placed into administrative removal proceedings. So far, ICE agents have arrested more than 300 individuals for administrative immigration violations.

All of those taken into custody during today's operation will be interviewed by ICE agents and Public Health Service officers to determine if they have health, caregiver, or other humanitarian concerns. As a result of those interviews, over 40 individuals have so far been released on humanitarian grounds under supervision, pending future immigration proceedings.

ICE has established a toll-free number that family members can call to obtain information about the custody status and detention location of those detained today. That number is 866-341-3858. Contacts were made this morning to alert local schools, government officials and the Iowa Department of Human Services about the operation.

The men apprehended today initially will be held in housing established for their detention at Estel Hall, in Waterloo, Iowa; women initially will be held at local county jails.

The investigation is being led by U.S. Immigration and Customs Enforcement. Other agencies assisting today include the United States Marshals Service; United States Postal Inspections Service; Iowa Department of Public Safety; Iowa Department of Transportation; Federal Bureau of Investigation; Federal Protective Service; Internal Revenue Service-Criminal Investigations;

United States Department of Labor; Public Health Service; United States Department of Agriculture; United States Environmental Protection Agency; Iowa Department of Natural Resources; Drug Enforcement Administration; Waterloo Police Department; and the Postville Police Department.

-- ICE --

Last Modified: Monday, May 12, 2008

U.S. Immigration and Customs Enforcement (ICE) was established in March 2003 as the largest investigative arm of the Department of Homeland Security. ICE is comprised of five integrated divisions that form a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities.

Source: ICE and DOJ joint enforcement action at Iowa meatpacking plant  
<http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.htm>

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## News Releases

May 20, 2008

### **85 sentenced for criminal offenses in one day following ICE operation in Iowa**

WATERLOO, Iowa - U.S. Attorney Matt M. Dummermuth announced today that 85 defendants pleaded guilty and were sentenced Monday on federal felony charges. They were among the 389 illegal aliens arrested by U.S. Immigration and Customs Enforcement (ICE) May 12 at Agriprocessors Inc. in Postville, Iowa.

Criminal proceedings began at 8 a.m. Monday and concluded about 8:30 p.m.

"This is the greatest number of defendants ever to plead guilty and be sentenced in one day in the Northern District of Iowa," said Dummermuth. "Because of a special early disposition program approved by the Department of Justice, we have been able to handle this large volume of cases in a relatively short period of time."

"Close collaboration with the U.S. Attorney's office and our partner law enforcement agencies resulted in a highly successful operation," said Claude Arnold, special agent in charge of the ICE Office of Investigations in Bloomington, Minn. "To maintain the integrity of our legal immigration system, ICE is committed to enforcing the nation's immigration laws in the workplace."

Seventy-seven defendants were sentenced to prison after pleading guilty to using a false identification document to obtain employment and admitted they fraudulently used the identity of an actual person. The other eight defendants were sentenced to probation after pleading guilty to using a false identification document to obtain employment but the identity did not belong to an actual person. All 85 admitted they were in the United States illegally. Those sentenced to prison received five months in prison, three years of supervised release, and face deportation following their release from prison. The other eight were sentenced to five years probation and face deportation.

According to a U.S. District Court website, additional hearings are scheduled through Thursday (<http://www.iand.uscourts.gov/cvjschedule.nsf/by+date>). Those sentenced to prison terms are being held in the custody of the U.S. Marshals Service. Those sentenced to probation will be turned over to ICE's Office of Detention and Removal Operations and placed in removal proceedings.

This was an ICE-led investigation. Other agencies assisting include: the U.S. Postal Inspection Service, the Iowa Department of Public Safety, the Iowa Department of Transportation, the FBI, the Internal Revenue Service's Criminal Investigations, and the U.S. Department of Labor.

-- ICE --

Source: 85 sentenced for criminal offenses in one day following ICE operation in Iowa  
<http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm> 5/21/2008

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**Two Recountings - an interpreter and a defense attorney**

**STATEMENT  
OF  
DR. ERIK CAMAYD-FREIXAS  
FEDERALLY CERTIFIED INTERPRETER  
AT THE  
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
IOWA  
REGARDING A HEARING ON  
“THE ARREST, PROSECUTION, AND CONVICTION  
OF 297 UNDOCUMENTED WORKERS  
IN POSTVILLE, IOWA,  
FROM MAY 12 TO 22, 2008”  
BEFORE THE  
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,  
REFUGEES, BORDER SECURITY AND INTERNATIONAL LAW  
July 24, 2008 at 11:00am  
1310 Longworth House Office Building**

**PREPARED STATEMENT OF DR. ERIK CAMAYD-FREIXAS**

**Introduction**

Good morning, Chairwoman Lofgren, and distinguished members of the Subcommittee. My name is Dr. Erik Camayd-Freixas. I was one of 26 interpreters who started the court hearings at Waterloo on May 13, 2008, and one of approximately 16 interpreters who stayed the whole two weeks, until May 22.

The role of the Interpreter is defined in Rule 604 of the *Federal Criminal Code and Rules* (1989) as both an Officer of the Court and the Court's Expert Witness. In that impartial

capacity, I wrote my essay, *Interpreting after the Largest ICE Raid in US History*, which I respectfully submit for the congressional record. I finished the essay on June 13, with the intention of sending it to an educational trade journal for translators and interpreters.

I first sent my essay to the court and to the group of interpreters with whom I worked in Waterloo. After proper consultation and several requests, I granted permission to forward the essay to family and friends. Immediately, I began to receive, on a daily basis, scores of e-mails of support from attorneys, academics, other interpreters, and people in all walks of life around the country. Distributed by people over the Internet, in two weeks my essay had been read by thousands, had made it to Congress, and later to the media.

The essay can be found at the end of this statement.

In my capacity as the court's expert witness I observed that the arrest, prosecution, and conviction of 297 undocumented workers from Postville was a process marred by irregularities at every step of the way, which combined to produce very lamentable results.

It is important to note that the initial appearances, plea hearings, and sentencing hearings were presided by different magistrates and judges, and that the interpreters were the only officers of the court who were present at every step of this fast-tracking operation, including the individual interviews in jail, which were not accessible to judges or prosecutors.

This unprecedented operation was a learning experience for all concerned. It was also a pilot operative to be replicated at a similar or smaller scale throughout the country. In this context, it is the duty of the interpreter, as the court's expert, to ensure that the court is not misled, and to bring to the court's attention any misunderstandings and impediments to due process.

While on location, I was only able to give the court a sketchy oral report. Only after careful research, analysis, and reconstruction of the events was I able to make a detailed written report in the form of the abovementioned essay. Moreover, I had to do this after the cases were already closed, so as not to influence their outcome, which is the rationale for the confidentiality clause in the interpreter's code of ethics.

It is also important to note that I maintained an impartial position throughout the proceedings and I remain impartial today. All my judgments were arrived at from such impartial perspective, in the same way that judges or juries can emit impartial judgments and conclusions of fact.

I had occasion to observe and document the following problems in the judicial process:

- 1) The compound and quarters where the detainees were kept were not certified by the DOJ or the Bureau of Prisons.
- 2) The court failed to maintain a physical separation and operational independence from the ICE prosecution.
- 3) There was inadequate access to legal counsel.
- 4) The court failed to provide a level playing field for the (centralized) prosecution and the (fragmented) defense.
- 5) At initial appearance there was no meaningful presumption of innocence.
- 6) Many defendants did not appear to understand their rights, particularly the

meaning and consequences of waiving their right to be indicted by a grand jury.

7) There was no bail hearing, as bail was automatically denied pursuant to an immigration detainer.

8) The heavier charge of aggravated identity theft, used to leverage the Plea Agreement, was lacking in foundation and never underwent the judicial test of probable cause.

9) Many defendants did not appear to understand their charges or rights, insisting that they were in jail for being in the country illegally (and not for document fraud or identity theft), and insisting that they had no rights.

10) Many defendants did not know what a Social Security Number is or what purpose it serves. Because “intent” was an element of each of the charges, many were probably not guilty, but had no choice but to plead out.

11) The denial of bail, the inflated charge, and the leveraged Plea Agreement combined to create, for the many sole providers whose families were put in jeopardy, a situation of duress under which the pleas were obtained. Under these circumstances, the pleas, in many cases, may have been coerced.

12) At sentencing, the judges had no discretion to administer justice, as they were presented with a binding and coerced Plea Agreement.

13) It was a foreseeable effect that, for the many sole providers whose families were put in jeopardy, the recommended prison sentence would in fact result in a cruel and unusual psychological punishment.

In order to accurately interpret the meaning and spirit of the message, the interpreter has to identify with and “become” each speaker. Seeing from within the perspective of the other is a common procedure in legal interpreting. When I assumed the perspective of most defendants, I found the charges and rights to be incomprehensible; I felt that a great injustice was being done; and I found their imprisonment, with their families in jeopardy, to be an intolerable burden.

I will now concentrate briefly on the defendants’ inability to understand their charges and rights. This was due to the interplay of four factors:

1) It was unclear to what extent the numerous ethnic Mayans understood Spanish as a second language.

2) There are vast cultural differences between Mexican and Guatemalan rural cultures, on the one hand, and American legal culture on the other.

3) It is my expert opinion as an educator that, due to their lack of schooling and low rate of literacy, most of the defendants had a level of *conceptual* and *abstract* understanding equivalent to that of a third grader or less. They needed much more time and individualized legal counsel than could be remotely provided by this fast-tracking process under the average ratio of 17 clients per attorney.

4) The court was put in a position of interdependence with the prosecution, which resulted in the court sending very mixed messages. For example, telling defendants in chains, without right of bail, and who are being fast-tracked without regard for individual circumstance, that they have the presumption innocence.

In general, the defendants were not able to understand the far-fetched, abstract, and derivative concept of “identity theft,” because they felt they had not literally stolen from anybody, but had in fact *purchased* the documents necessary to obtain work, paying up to \$300 for them.

Similarly, many had trouble understanding the charge of Social Security fraud because they felt they had not done anyone any harm. They simply understood that both were arbitrary charges brought by the government for the sole reason that they were in the

country illegally and that, therefore, they had no rights.

They further understood that, because they were in the country illegally, they had no chance of ever winning at trial, and that its outcome was predetermined. They had lost all confidence in our justice system. Some even distrusted their own court appointed lawyers, who had come to deliver a forcible Plea Agreement that offered them no viable option. If they pleaded not guilty, they could end up waiting longer in jail, without bail, for a trial they felt they could never win.

Whatever rights they were told they had made absolutely no difference, so they kept insisting that they had no rights because they were here illegally. With their rights being meaningless or denied, and without understanding the nature of the charges against them, they were unable to aid in their own defense.

Their decision, both to waive grand jury indictment or other rights and to plead guilty, was solely based on which was the fastest way to get back home and look after their families. Nothing else had any real meaning.

## **Interpreting after the Largest ICE Raid in US History: A Personal Account**

**Erik Camayd-Freixas, Ph.D.**

*Florida International University*

June 13, 2008

On Monday, May 12, 2008, at 10:00 a.m., in an operation involving some 900 agents, Immigration and Customs Enforcement (ICE) executed a raid of Agriprocessors Inc, the nation's largest kosher slaughterhouse and meat packing plant located in the town of Postville, Iowa. The raid –officials boasted– was “the largest single-site operation of its kind in American history.” At that same hour, 26 federally certified interpreters from all over the country were en route to the small neighboring city of Waterloo, Iowa, having no idea what their mission was about. The investigation had started more than a year earlier. Raid preparations had begun in December. The Clerk's Office of the U.S. District Court had contracted the interpreters a month ahead, but was not at liberty to tell us the whole truth, lest the impending raid be compromised. The operation was led by ICE, which belongs to the executive branch, whereas the U.S. District Court, belonging to the judicial branch, had to formulate its own official reason for participating. Accordingly, the Court had to move for two weeks to a remote location as part of a “Continuity of Operation Exercise” in case they were ever disrupted by an emergency, which in Iowa is likely to be a tornado or flood. That is what we were told, but, frankly, I was not prepared for a disaster of such a different kind, one which was entirely man-made.

I arrived late that Monday night and missed the 8pm interpreters briefing. I was instructed by phone to meet at 7am in the hotel lobby and carpool to the National Cattle Congress (NCC) where we would begin our work. We arrived at the heavily guarded compound, went through security, and gathered inside the retro “Electric Park Ballroom” where a makeshift court had been set up. The Clerk of Court, who coordinated the

interpreters, said: “Have you seen the news? There was an immigration raid yesterday at 10am. They have some 400 detainees here. We’ll be working late conducting initial appearances for the next few days.” He then gave us a cursory tour of the compound. The NCC is a 60-acre cattle fairground that had been transformed into a sort of concentration camp or detention center. Fenced in behind the ballroom / courtroom were 23 trailers from federal authorities, including two set up as sentencing courts; various Homeland Security buses and an “incident response” truck; scores of ICE agents and U.S. Marshals; and in the background two large buildings: a pavilion where agents and prosecutors had established a command center; and a gymnasium filled with tight rows of cots where some 300 male detainees were kept, the women being housed in county jails. Later the NCC board complained to the local newspaper that they had been “misled” by the government when they leased the grounds purportedly for Homeland Security training.

Echoing what I think was the general feeling, one of my fellow interpreters would later exclaim: “When I saw what it was really about, my heart sank...” Then began the saddest procession I have ever witnessed, which the public would never see, because cameras were not allowed past the perimeter of the compound (only a few journalists came to court the following days, notepad in hand). Driven single-file in groups of 10, shackled at the wrists, waist and ankles, chains dragging as they shuffled through, the slaughterhouse workers were brought in for arraignment, sat and listened through headsets to the interpreted initial appearance, before marching out again to be bused to different county jails, only to make room for the next row of 10. They appeared to be uniformly no more than 5 ft. tall, mostly illiterate Guatemalan peasants with Mayan last names, some being relatives (various Tajtaj, Xicay, Sajché, Sologüí...), some in tears; others with faces of worry, fear, and embarrassment. They all spoke Spanish, a few rather laboriously. It dawned on me that, aside from their Guatemalan or Mexican nationality, which was imposed on their people after Independence, they too were Native Americans, in shackles. They stood out in stark racial contrast with the rest of us as they started their slow penguin march across the makeshift court. “Sad spectacle” I heard a colleague say, reading my mind. They had all waived their right to be indicted by a grand jury and accepted instead an *information* or simple charging document by the U.S. Attorney, hoping to be quickly deported since they had families to support back home. But it was not to be. They were criminally charged with “aggravated identity theft” and “Social Security fraud” —charges they did not understand... and, frankly, neither could I. Everyone wondered how it would all play out.

We got off to a slow start that first day, because ICE’s barcode booking system malfunctioned, and the documents had to be manually sorted and processed with the help of the U.S. Attorney’s Office. Consequently, less than a third of the detainees were ready for arraignment that Tuesday. There were more than enough interpreters at that point, so we rotated in shifts of three interpreters per hearing. Court adjourned shortly after 4pm. However, the prosecution worked overnight, planning on a 7am to midnight court marathon the next day.

I was eager to get back to my hotel room to find out more about the case, since the day’s repetitive hearings afforded little information, and everyone there was mostly refraining from comment. There was frequent but sketchy news on local TV. A colleague had suggested *The Des Moines Register*. So I went to [DesMoinesRegister.com](http://DesMoinesRegister.com) and started reading all the 20+ articles, as they appeared each day, and the 57-page *ICE Search Warrant Application*. These were the vital statistics. Of Agriprocessors’ 968 current employees, about 75% were illegal immigrants. There were 697 arrest warrants, but late-shift workers had not arrived, so “only” 390 were arrested: 314 men and 76

women; 290 Guatemalans, 93 Mexicans, four Ukrainians, and three Israelis who were not seen in court. Some were released on humanitarian grounds: 56 mostly mothers with unattended children, a few with medical reasons, and 12 juveniles were temporarily released with ankle monitors or directly turned over for deportation. In all, 306 were held for prosecution. Only five of the 390 originally arrested had any kind of prior criminal record. There remained 307 outstanding warrants.

This was the immediate collateral damage. Postville, Iowa (pop. 2,273), where nearly half the people worked at Agriprocessors, had lost 1/3 of its population by Tuesday morning. Businesses were empty, amid looming concerns that if the plant closed it would become a ghost town. Beside those arrested, many had fled the town in fear. Several families had taken refuge at St. Bridget's Catholic Church, terrified, sleeping on pews and refusing to leave for days. Volunteers from the community served food and organized activities for the children. At the local high school, only three of the 15 Latino students came back on Tuesday, while at the elementary and middle school, 120 of the 363 children were absent. In the following days the principal went around town on the school bus and gathered 70 students after convincing the parents to let them come back to school; 50 remained unaccounted for. Some American parents complained that their children were traumatized by the sudden disappearance of so many of their school friends. The principal reported the same reaction in the classrooms, saying that for the children it was as if ten of their classmates had suddenly died. Counselors were brought in. American children were having nightmares that their parents too were being taken away. The superintendent said the school district's future was unclear: "This literally blew our town away." In some cases both parents were picked up and small children were left behind for up to 72 hours. Typically, the mother would be released "on humanitarian grounds" with an ankle GPS monitor, pending prosecution and deportation, while the husband took first turn in serving his prison sentence. Meanwhile the mother would have no income and could not work to provide for her children. Some of the children were born in the U.S. and are American citizens. Sometimes one parent was a deportable alien while the other was not. "Hundreds of families were torn apart by this raid," said a Catholic nun. "The humanitarian impact of this raid is obvious to anyone in Postville. The economic impact will soon be evident."

But this was only the surface damage. Alongside the many courageous actions and expressions of humanitarian concern in the true American spirit, the news blogs were filled with snide remarks of racial prejudice and bigotry, poorly disguised beneath an empty rhetoric of misguided patriotism, not to mention the insults to anyone who publicly showed compassion, safely hurled from behind a cowardly online nickname. One could feel the moral fabric of society coming apart beneath it all.

The more I found out, the more I felt blindsided into an assignment of which I wanted no part. Even though I understood the rationale for all the secrecy, I also knew that a contract interpreter has the right to refuse a job which conflicts with his moral intuitions. But I had been deprived of that opportunity. Now I was already there, far from home, and holding a half-spent \$1,800 plane ticket. So I faced a frustrating dilemma. I seriously considered withdrawing from the assignment for the first time in my 23 years as a federally certified interpreter, citing conflict of interest. In fact, I have both an ethical and contractual obligation to withdraw if a conflict of interest exists which compromises my neutrality. Appended to my contract are the *Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts*, where it states: "Interpreters shall disclose any real or perceived conflict of interest... and shall not serve in any matter in which they have a conflict of interest." The question was did I

have one. Well, at that point there was not enough evidence to make that determination. After all, these are illegal aliens and should be deported —no argument there, and hence no conflict. But should they be criminalized and imprisoned? Well, if they committed a crime and were fairly adjudicated... But all that remained to be seen. In any case, none of it would shake my impartiality or prevent me from faithfully discharging my duties. In all my years as a court interpreter, I have taken front row seat in countless criminal cases ranging from rape, capital murder and mayhem, to terrorism, narcotics and human trafficking. I am not the impressionable kind. Moreover, as a professor of interpreting, I have confronted my students with every possible conflict scenario, or so I thought. The truth is that nothing could have prepared me for the prospect of helping our government put hundreds of innocent people in jail. In my ignorance and disbelief, I reluctantly decided to stay the course and see what happened next.

Wednesday, May 14, our second day in court, was to be a long one. The interpreters were divided into two shifts, 8am to 3pm and 3pm to 10pm. I chose the latter. Through the day, the procession continued, ten by ten, hour after hour, the same charges, the same recitation from the magistrates, the same faces, chains and shackles, on the defendants. There was little to remind us that they were actually 306 individuals, except that occasionally, as though to break the monotony, one would dare to speak for the others and beg to be deported quickly so that they could feed their families back home. One who turned out to be a minor was bound over for deportation. The rest would be prosecuted. Later in the day three groups of women were brought, shackled in the same manner. One of them, whose husband was also arrested, was released to care for her children, ages two and five, uncertain of their whereabouts. Several men and women were weeping, but two women were particularly grief stricken. One of them was sobbing and would repeatedly struggle to bring a sleeve to her nose, but her wrists shackled around her waist simply would not reach; so she just dripped until she was taken away with the rest. The other one, a Ukrainian woman, was held and arraigned separately when a Russian telephonic interpreter came on. She spoke softly into a cellular phone, while the interpreter told her story in English over the speakerphone. Her young daughter, gravely ill, had lost her hair and was too weak to walk. She had taken her to Moscow and Kiev but to no avail. She was told her child needed an operation or would soon die. She had come to America to work and raise the money to save her daughter back in Ukraine. In every instance, detainees who cried did so for their children, never for themselves. The next day we started early, at 6:45am. We were told that we had to finish the hearings by 10am. Thus far the work had oddly resembled a judicial assembly line where the meat packers were mass processed. But things were about to get a lot more personal as we prepared to interpret for individual attorney-client conferences. In those first three days, interpreters had been pairing up with defense attorneys to help interview their clients. Each of the 18 court appointed attorneys represented 17 defendants on average. By now, the clients had been sent to several state and county prisons throughout eastern Iowa, so we had to interview them in jail. The attorney with whom I was working had clients in Des Moines and wanted to be there first thing in the morning. So a colleague and I drove the 2.5 hours that evening and stayed overnight in a hotel outside the city. We met the attorney in jail Friday morning, but the clients had not been accepted there and had been sent instead to a state penitentiary in Newton, another 45-minute drive. While we waited to be admitted, the attorney pointed out the reason why the prosecution wanted to finish arraignments by 10am Thursday: according to the *writ of habeas corpus* they had 72 hours from Monday's raid to charge the prisoners or release them for deportation (only a handful would be so lucky). The right of habeas corpus, but of course! It dawned on me that we were paid overtime, adding hours to the day, in a mad rush to abridge habeas corpus, only to help put more workers in jail. Now I really felt bad. But it would

soon get worse. I was about to bear the brunt of my conflict of interest.

It came with my first jail interview. The purpose was for the attorney to explain the uniform Plea Agreement that the government was offering. The explanation, which we repeated over and over to each client, went like this. There are three possibilities. If you plead guilty to the charge of “knowingly using a false Social Security number,” the government will withdraw the heavier charge of “aggravated identity theft,” and you will serve 5 months in jail, be deported without a hearing, and placed on supervised release for 3 years. If you plead not guilty, you could wait in jail 6 to 8 months for a trial (without right of bail since you are on an immigration detainer). Even if you win at trial, you will still be deported, and could end up waiting longer in jail than if you just pled guilty. You would also risk losing at trial and receiving a 2-year minimum sentence, before being deported. Some clients understood their “options” better than others.

That first interview, though, took three hours. The client, a Guatemalan peasant afraid for his family, spent most of that time weeping at our table, in a corner of the crowded jailhouse visiting room. How did he come here from Guatemala? “*I walked.*” What? “*I walked for a month and ten days until I crossed the river.*” We understood immediately how desperate his family’s situation was. He crossed alone, met other immigrants, and hitched a truck ride to Dallas, then Postville, where he heard there was sure work. He slept in an apartment hallway with other immigrants until employed. He had scarcely been working a couple of months when he was arrested. Maybe he was lucky: another man who began that Monday had only been working for 20 minutes. “I just wanted to work a year or two, save, and then go back to my family, but it was not to be.” His case and that of a million others could simply be solved by a temporary work permit as part of our much overdue immigration reform. “The Good Lord knows I was just working and not doing anyone any harm.” This man, like many others, was in fact *not* guilty. “Knowingly” and “intent” are necessary elements of the charges, but most of the clients we interviewed did not even know what a Social Security number was or what purpose it served. This worker simply had the papers filled out for him at the plant, since he could not read or write Spanish, let alone English. But the lawyer still had to advise him that pleading guilty was in his best interest. He was unable to make a decision. “You all do and undo,” he said. “So you can do whatever you want with me.” To him we were part of the system keeping him from being deported back to his country, where his children, wife, mother, and sister depended on him. He was their sole support and did not know how they were going to make it with him in jail for 5 months. None of the “options” really mattered to him. Caught between despair and hopelessness, he just wept. He had failed his family, and was devastated. I went for some napkins, but he refused them. I offered him a cup of soda, which he superstitiously declined, saying it could be “poisoned.” His Native American spirit was broken and he could no longer think. He stared for a while at the signature page pretending to read it, although I knew he was actually praying for guidance and protection. Before he signed with a scribble, he said: “God knows you are just doing your job to support your families, and that job is to keep me from supporting mine.” There was my conflict of interest, well put by a weeping, illiterate man.

We worked that day for as long as our emotional fortitude allowed, and we had to come back to a full day on Sunday to interview the rest of the clients. Many of the Guatemalans had the same predicament. One of them, a 19-year-old, worried that his parents were too old to work, and that he was the only support for his family back home. We will never know how many of the 290 Guatemalans had legitimate asylum claims for fear of persecution, back in a country stigmatized by the worst human rights situation in

the hemisphere, a by-product of the US-backed Contra wars in Central America under the old domino theory of the 1980s. For three decades, anti-insurgent government death squads have ravaged the countryside, killing tens of thousands and displacing almost two million peasants. Even as we proceeded with the hearings during those two weeks in May, news coming out of Guatemala reported farm workers being assassinated for complaining publicly about their working conditions. Not only have we ignored the many root causes of illegal immigration, we also will never know which of these deportations will turn out to be a death sentence, or how many of these displaced workers are last survivors with no family or village to return to.

Another client, a young Mexican, had an altogether different case. He had worked at the plant for ten years and had two American born daughters, a 2-year-old and a newborn. He had a good case with Immigration for an adjustment of status which would allow him to stay. But if he took the Plea Agreement, he would lose that chance and face deportation as a felon convicted of a crime of “moral turpitude.” On the other hand, if he pled “not guilty” he had to wait several months in jail for trial, and risk getting a 2-year sentence. After an agonizing decision, he concluded that he had to take the 5-month deal and deportation, because as he put it, “I cannot be away from my children for so long.” His case was complicated; it needed research in immigration law, a change in the Plea Agreement, and, above all, more time. There were other similar cases in court that week.

I remember reading that immigration lawyers were alarmed that the detainees were being rushed into a plea without adequate consultation on the immigration consequences. Even the criminal defense attorneys had limited opportunity to meet with clients: in jail there were limited visiting hours and days; at the compound there was little time before and after hearings, and little privacy due to the constant presence of agents. There were 17 cases for each attorney, and the Plea offer was only good for 7 days. In addition, criminal attorneys are not familiar with immigration work and vice versa, but had to make do since immigration lawyers were denied access to these “criminal” proceedings. In addition, the prosecutors would not accept any changes to the Plea Agreement. In fact, some lawyers, seeing that many of their clients were not guilty, requested an *Alford plea*, whereby defendants can plead guilty in order to accept the prosecution’s offer, but without having to lie under oath and admit to something they did not do. That would not change the 5-month sentence, but at least it preserves the person’s integrity and dignity. The proposal was rejected. Of course, if they allowed Alford pleas to go on public record, the incongruence of the charges would be exposed and find its way into the media. Officially, the ICE prosecutors said the Plea Agreement was directed from the Department of Justice in Washington, D.C., that they were not authorized to change it locally, and that the DOJ would not make any case by case exceptions when a large number of defendants are being “fast-tracked.” Presumably if you gave different terms to one individual, the others will want the same. This position, however, laid bare one of the critical problems with this new practice of “fast-tracking.” Even real criminals have the right of *severance*: when co-defendants have different degrees of responsibility, there is an inherent conflict of interest, and they can ask to be prosecuted separately as different cases, each with a different attorney. In fast-tracking, however, the right of severance is circumvented because each defendant already has a different case number on paper, only that they are processed together, 10 cases at a time. At this point, it is worth remembering also that even real criminals have an 8<sup>th</sup> Amendment right to reasonable bail, but not illegal workers, because their immigration detainer makes bail a moot issue. We had already circumvented habeas corpus by doubling the court’s business hours. What about the 6<sup>th</sup> Amendment right to a “speedy trial”? In many states “speedy” means 90 days, but in federal law it is vaguely defined, potentially exceeding the recommended sentence,

given the backlog of *real* cases. This served as another loophole to force a guilty plea. Many of these workers were sole earners begging to be deported, desperate to feed their families, for whom every day counted. “If you want to see your children or don’t want your family to starve, sign here” –that is what their deal amounted to. Their Plea Agreement was coerced.

We began week two Monday, May 19th. Those interpreters who left after the first week were spared the sentencing hearings that went on through Thursday. Those who came in fresh the second week were spared the jail visits over the weekend. Those of us who stayed both weeks came back from the different jails burdened by a close personal contact that judges and prosecutors do not get to experience: each individual tragedy multiplied by 306 cases. One of my colleagues began the day by saying “I feel a tremendous solidarity with these people.” Had we lost our impartiality? Not at all: that was our impartial and probably unanimous judgment. We had seen attorneys hold back tears and weep alongside their clients. We would see judges, prosecutors, clerks, and marshals do their duty, sometimes with a heavy heart, sometimes at least with mixed feelings, but always with a particular solemnity not accorded to the common criminals we all are used to encountering in the judicial system. Everyone was extremely professional and outwardly appreciative of the interpreters. We developed among ourselves and with the clerks, with whom we worked closely, a camaraderie and good humor that kept us going. Still, that Monday morning I felt downtrodden by the sheer magnitude of the events. Unexpectedly, a sentencing hearing lifted my spirits.

I decided to do sentences on Trailer 2 with a judge I knew from real criminal trials in Iowa. The defendants were brought in 5 at a time, because there was not enough room for 10. The judge verified that they still wanted to plead guilty, and asked counsel to confirm their Plea Agreement. The defense attorney said that he had expected a much lower sentence, but that he was forced to accept the agreement in the best interest of his clients. For us who knew the background of the matter, that vague objection, which was all that the attorney could put on record, spoke volumes. After accepting the Plea Agreement and before imposing sentence, the judge gave the defendants the right of allocution. Most of them chose not to say anything, but one who was the more articulate said humbly: “Your honor, you know that we are here because of the need of our families. I beg that you find it in your heart to send us home before too long, because we have a responsibility to our children, to give them an education, clothing, shelter, and food.” The good judge explained that unfortunately he was not free to depart from the sentence provided for by their Plea Agreement. Technically, what he meant was that this was a binding 11(C)(1)(c) Plea Agreement: he had to accept it or reject it as a whole. But if he rejected it, he would be exposing the defendants to a trial against their will. His hands were tied, but in closing he said onto them very deliberately: “I appreciate the fact that you are very hard working people, who have come here to do no harm. And I thank you for coming to this country to work hard. Unfortunately, you broke a law in the process, and now I have the obligation to give you this sentence. But I hope that the U.S. government has at least treated you kindly and with respect, and that this time goes by quickly for you, so that soon you may be reunited with your family and friends.” The defendants thanked him, and I saw their faces change from shame to admiration, their dignity restored. I think we were all vindicated at that moment.

Before the judge left that afternoon, I had occasion to talk to him and bring to his attention my concern over what I had learned in the jail interviews. At that point I realized how precious the interpreter’s impartiality truly is, and what a privileged perspective it affords. In our common law adversarial system, only the judge, the jury,

and the interpreter are presumed impartial. But the judge is immersed in the framework of the legal system, whereas the interpreter is a layperson, an outsider, a true representative of the common citizen, much like “a jury of his peers.” Yet, contrary to the jury, who only knows the evidence on record and is generally unfamiliar with the workings of the law, the interpreter is an informed layperson. Moreover, the interpreter is the only one who gets to see both sides of the coin up close, precisely because he is the *only* participant who is not a decision maker, and is even precluded, by his oath of impartiality and neutrality, from ever influencing the decisions of others. That is why judges in particular appreciate the interpreter’s perspective as an impartial and informed layperson, for it provides a rare glimpse at how the innards of the legal system look from the outside. I was no longer sorry to have participated in my capacity as an interpreter. I realized that I had been privileged to bear witness to historic events from such a unique vantage point and that because of its uniqueness I now had a civic duty to make it known. Such is the spirit that inspired this essay.

That is also what prompted my brief conversation with the judge: “Your honor, I am concerned from my attorney-client interviews that many of these people are clearly not guilty, and yet they have no choice but to plead out.” He understood immediately and, not surprisingly, the seasoned U.S. District Court Judge spoke as someone who had already wrestled with all the angles. He said: “You know, I don’t agree with any of this or with the way it is being done. In fact, I ruled in a previous case that to charge somebody with identity theft, the person had to at least know of the real owner of the Social Security number. But I was reversed in another district and yet upheld in a third.” I understood that the issue was a matter of judicial contention. The charge of identity theft seemed from the beginning incongruous to me as an informed, impartial layperson, but now a U.S. District Court Judge agreed. As we bid each other farewell, I kept thinking of what he said. I soon realized that he had indeed hit the nail on the head; he had given me, as it were, the last piece of the puzzle.

It works like this. By handing down the inflated charge of “aggravated identity theft,” which carries a mandatory minimum sentence of 2 years in prison, the government forced the defendants into pleading guilty to the lesser charge and accepting 5 months in jail. Clearly, without the inflated charge, the government had no bargaining leverage, because the lesser charge by itself, using a false Social Security number, carries only a discretionary sentence of 0-6 months. The judges would be free to impose sentence within those guidelines, depending on the circumstances of each case and any prior record. Virtually all the defendants would have received only probation and been immediately deported. In fact, the government’s offer at the higher end of the guidelines (one month shy of the maximum sentence) was indeed no bargain. What is worse, the inflated charge, via the binding 11(C)(1)(c) Plea Agreement, reduced the judges to mere bureaucrats, pronouncing the same litany over and over for the record in order to legalize the proceedings, but having absolutely no discretion or decision-making power. As a citizen, I want our judges to administer justice, not a federal agency. When the executive branch forces the hand of the judiciary, the result is abuse of power and arbitrariness, unworthy of a democracy founded upon the constitutional principle of checks and balances.

To an impartial and informed layperson, the process resembled a lottery of justice: if the Social Security number belonged to someone else, you were charged with identity theft and went to jail; if by luck it was a vacant number, you would get only Social Security fraud and were released for deportation. In this manner, out of 297 who were charged on time, 270 went to jail. Bothered by the arbitrariness of that heavier

charge, I went back to the *ICE Search Warrant Application* (pp. 35-36), and what I found was astonishing. On February 20, 2008, ICE agents received social security “no match” information for 737 employees, including 147 using numbers confirmed by the SSA as invalid (never issued to a person) and 590 using valid SSNs, “however the numbers did not match the name of the employee reported by Agriprocessors...” ***“This analysis would not account for the possibility that a person may have falsely used the identity of an actual person’s name and SSN.”*** “In my training and expertise, I know it is not uncommon for aliens to purchase identity documents which include SSNs that match the name assigned to the number.” Yet, ICE agents checked Accurant, the powerful identity database used by law enforcement, and found that 983 employees that year had nonmatching SSNs. Then they conducted a search of the FTC Consumer Sentinel Network for reporting incidents of identity theft. “The search revealed that *a person who was assigned one of the social security numbers used by an employee of Agriprocessors has reported his/her identity being stolen.*” That is, out of 983 only 1 number (0.1%) happened to coincide by chance with a reported identity theft. The charge was clearly unfounded; and the raid, a fishing expedition. “On April 16, 2008, the US filed criminal complaints against 697 employees, charging them with unlawfully using SSNs in violation of Title 42 USC §408(a)(7)(B); aggravated identity theft in violation of 18 USC §1028A(a)(1); and/or possession or use of false identity documents for purposes of employment in violation of 18 USC §1546.”

Created by Congress in an Act of 1998, the new federal offense of identity theft, as described by the DOJ (<http://www.usdoj.gov/criminal/fraud/websites/idtheft.html>), bears no relation to the Postville cases. It specifically states: “knowingly uses a means of identification of another person with the *intent to commit any unlawful activity or felony*” [18 USC §1028(a)]. The offense clearly refers to harmful, felonious acts, such as obtaining credit under another person’s identity. Obtaining *work*, however, is not an “unlawful activity.” No way would a grand jury find probable cause of identity theft here. But with the promise of faster deportation, their ignorance of the legal system, and the limited opportunity to consult with counsel before arraignment, all the workers, without exception, were led to waive their 5<sup>th</sup> Amendment right to grand jury indictment on felony charges. Waiting for a grand jury meant months in jail on an immigration detainer, without the possibility of bail. So the attorneys could not recommend it as a defense strategy. Similarly, defendants have the right to a status hearing before a judge, to determine probable cause, within ten days of arraignment, but their Plea Agreement offer from the government was only good for... seven days. Passing it up, meant risking 2 years in jail. As a result, the frivolous charge of identity theft was assured never to undergo the judicial test of probable cause. Not only were defendants and judges bound to accept the Plea Agreement, there was also absolutely no defense strategy available to counsel. Once the inflated charge was handed down, all the pieces fell into place like a row of dominoes. Even the court was banking on it when it agreed to participate, because if a good number of defendants asked for a grand jury or trial, the system would be overwhelmed. In short, “fast-tracking” had worked like a dream.

\*\*\* you can read the rest of this essay at:  
<http://judiciary.house.gov/hearings/pdf/Camayd-Freixas080724.pdf> \*\*\*

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About Dr. Erik Camayd-Freixas:

Dr. Erik Camayd-Freixas is Associate Professor of Latin American Literature, Director of the Translation & Interpretation Program, and Director of the Research Initiative on Immigration Reform at Florida International University. A Harvard-trained analyst, social theorist, and expert linguist at federal and state courts, Dr. Camayd has trained more than 3,000 interpreters and regularly works on Spanish television broadcasts of presidential speeches and special events. He has interpreted for eight heads of state, including President Obama and Pope Benedict XVI.

Dr. Camayd was a federal interpreter at the Postville, Iowa hearings following the May 12, 2008 raid at AgriProcessors, Inc. He made international headlines with his essay, “Interpreting after the Largest ICE Raid in U.S. History: A Personal Account,” denouncing the criminalization of workers, and deconstructing the totalitarian agenda of immigration enforcement and the politics of intolerance of what he calls “a dark period in American history.”

His essay provoked a congressional investigation, which brought him to testify before the Immigration Subcommittee on July 24, 2008. He started working immediately in the Postville relief effort centered on St. Bridget’s Church. He received the National Association of Criminal Defense Lawyers President’s Commendation for his defense of due process and equality under the law. In August he began rallying labor unions, interfaith groups, and the Hispanic Caucus to demand a moratorium on raids, forwarding numerous resolutions to help start Rep. Luis Gutierrez’s family protection campaign. In September he founded the Research Initiative on Immigration Reform at Florida International University. In October he interviewed 94 Postville prisoners in federal detention, obtained affidavits of abuses, and forwarded them to Rep. Lofgren, who demanded an investigation from Atty. Gen. Mukasey and Sec. Chertoff. He compiled a wage theft list on behalf of the workers for the Iowa DOL to proceed against the employer, and worked intensively with the Florida Immigrant Advocacy Center (FIAC) and the Guatemalan Embassy and Consulate to locate, protect, and expedite the post-sentence deportation of the workers. He later received the FIAC Altruism Award and the Humanitarian Award from the Guatemalan government. In November he began working with NYU Law School preparing an amicus brief to the USSC against identity theft in U.S. v. Flores-Figueroa. This resulted in a unanimous Supreme Court decision on May 4, 2009. In December 2008 he began working on documenting ICE abuses and brutality during raids and home invasions for the Immigration Subcommittee. He was elected “2008 Linguist of the Year” by the Intranet Global Network of Translators, based in Rouen, France. In January 2009 he lobbied the Guatemalan Government for the establishment of a Deportee Reintegration Program. He is the recipient of the American Immigration Lawyers Association 2009 Human Rights Award.

Dr. Camayd has continued to lecture and write in support of human rights and a moratorium on raids, and against the separation of families, the persecution of migrants, and the horrors of detention and human tagging. He is currently engaged, through his research group, in finding solutions for immigration reform, and advocating for AgJOBS and the DREAM Act. His present focus is on designing a transnational system of legal and administrative protections for exploited guest workers, and a guardian ad litem program for asserting the family unity rights of U.S.-born children.

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**Letter from Court-Appointed Defense Counsel: Rockne Cole, Esq., Iowa City, Iowa**



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July 24, 2008

Representative Zoe Lofgren  
Washington, D.C. Office  
102 Cannon HOB  
Washington, D.C. 20515

Re: May 12, 2008 Postville Immigration Raids

Dear Congresswoman Lofgren:

Your Legal Advisor Traci Hong contacted me last week, and asked me to submit a written statement in connection with the Congressional hearing on the immigration raids in Postville, Iowa. I told her that I had a fairly limited role in this process, but that I would be willing to describe my experience of May 12, 2008.

May 12 began like any other day. I arrived at the office, and began reading my email. At about 9:30 a.m., my partner, Dan Vondra, knocked on my door, and told me "the raids have begun and the black helicopters are flying over Postville." Homeland Security officials had rented the *Cattle Congress* several weeks before, but no one knew when or where the raid would take place. We anticipated that the raid would probably proceed like the Swift plant packing raid in Marshalltown, Iowa last year. I then checked the internet, looked at the initial photos, and then went back to work.

A short time later, Denise Pickens, a clerk in the Northern District of Iowa, called me. Ms. Pickens used to be the appointment clerk for *Criminal Justice Act* appointments for the federal court in Cedar Rapids, Iowa. About two years ago, the Federal Defender consolidated *Criminal Justice Act* appointments into the office of the Chief Public Defender in Des Moines, Iowa, and now all appointments usually begin with a phone call from Des Moines. Ms. Pickens told me that there was going to be a special meeting at the United States District Courthouse in Cedar Rapids at 1:30 p.m. that afternoon, and that I should not tell anyone about the meeting. So I drove up to Cedar Rapids to see what this meeting was about.

I went up to the Main Courtroom on the 3<sup>rd</sup> Floor. I saw approximately 10-15 defense lawyers whom I knew to be on the *Criminal Justice Act* Panel in Cedar Rapids. I also saw: Assistant United States Attorney (AUSA) Stephanie Rose; Chief Clerk of Court Robert Phelps; some United States marshals, and I believe some probation officials. At some point early in the presentation, Chief Clerk Phelps handed out what I can only characterize as guilty plea handbooks. These handbooks described all of the elements of offenses, and essentially contained a book of waivers of various rights of the defendants.

Mr. Phelps also passed around a sign up sheet with requests for our cell phones, and email addresses.

AUSA Rose began the meeting by scanning the audience for media officials. After she determined that no media were present, she began the presentation. She immediately began discussing the so called "representation plan." She indicated each attorney would be assigned a group consisting of 10 clients. She indicated that we could be expected to represent up to 40 defendants, and that they were expecting possibly 700 defendants. As it turns out, I believe the Des Moines *Register* confirmed an average of 17 clients per attorney.

She then described the four possible pleas deals being offered to each group. The first deal was a plea to a felony (I do not recall which), and immediate placement in the custody of Bureau of Immigration and Customs Enforcement. So in other words, the defendant was offered no jail time, but the client would have a felony in the record. The second deal, and apparently most common, was a five month jail sentence to be followed by immediate deportation to their home countries. The third category was 12 months and one day. I believe the fourth category was reserved for defendants with significant aggravating facts such as prior aggravated felonies, or violent histories. I do not recall the specific felony that had to plead to but all the felonies were basically some variation on the use of a forged identification card to get a job.

At one point, I asked if she had considered that any of the defendants were innocent. She replied that they could opt out and proceed on the regular docket if they wanted to. I do not recall at that time whether she indicated that the United States was threatening an aggravated identity theft charge if they opted out. I have subsequently learned that any defendant refusing such a deal could face the aggravated identity theft.

My next question focused on the presentence investigation reports. I have probably represented about 5-7 federal defendants on fake papers charge in the past. In the typical case, the client had entered without inspection, and consequently had no legal status in the United States to protect. They often had already admitted to possession of the fake identification document, and consequently such cases were difficult to defend. Most resulted in "time served" plea deals. In those simple cases, we had often complained to probation about why they needed to do a full pre-sentence investigation report on the Defendants IF they chose to get deported as soon as possible. In fact, at one conference last year, United States District Court Judge John Jarvey even told one of the probation officers that a full presentence report was not necessary in the run of the mill case. The United States Attorney's Office and the Probation Office had often strongly resisted waiver of presentence reports on two grounds. First, they did not want to miss prior criminal convictions, which can increase the prison sentence. Secondly, the probation office did not get full credit for an abbreviated presentence report. So they wanted to do a full presentence report to keep their funding up for more probation staffing.

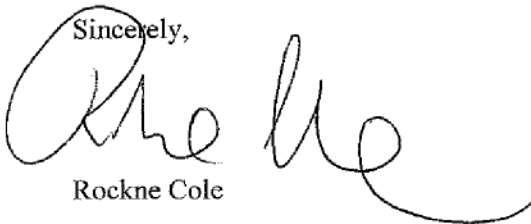
I asked Ms. Rose how they could be doing such a quick guilty plea process when they had so strenuously resisted abbreviated reports in the past. I asked her why they were not concerned about missing criminal convictions as they had in the past. She replied that these were Rule 11 (c) (1) (C) plea deals. In the typical plea deal, the court is not bound by the sentencing recommendations of each party. She is only limited by the statutory maximum penalty and the advisory sentencing guidelines. A Rule 11 (c) (1) (C) allows the court to be bound to the sentencing recommendations of the United States and defendant. At the guilty plea hearing, the court notifies the parties if she will accept the guilty plea, and if she does, she is bound to the sentencing recommendation of the Parties. If not, the defendant can withdraw the plea. This effectively guarantees that the defendant will get the agreed upon sentence on the plea bargain, and avoid the risk of a longer sentence before the judge. What I found most astonishing is that *apparently* Chief Judge Linda Reade *had already ratified these deals prior to* one lawyer even talking to his or her client. Judge Reade's presence at the meeting seemed to confirm as much. This directly violates Rule 11 plea procedure, which provides that the "court must not participate in these [plea] discussions." Moreover, this ratification appeared to be *ex parte* with the United States Attorney's office. Indeed, it had to have been *ex parte* because no lawyers had even met with their clients prior to these Rule 11 (c) (1) (C) plea bargains being announced.

Ms. Rose concluded by stating that plea status hearings would begin by Saturday, May 17, 2008, and that the clients would have seven days to accept offer. She justified the quick time line because they were concerned about getting the defendants back to their families in Guatemala as soon as possible. Especially considering this extremely rushed process, I realized that the acceptance of such an appointment would have required me to immediately report myself to the Iowa Bar Association for failing to protect a client's right to conflict free counsel. Iowa Rule of Professional Responsibility 32:1.7 (a) and (b) provides that a lawyer shall not represent a client if there is a significant risk of conflict, and that any consent to conflict shall be in writing. The potential conflicts were obvious. For example, suppose, under the group representation plan, that an attorney simultaneously represents a woman with a Violence Against Women Act adjustment case against her husband, and her husband in a different group. In this situation, the wife may have a good claim to adjust status, and remain in the United States on the basis of her status as a victim of domestic violence. Her husband will likely be prosecuted for domestic abuse, and could be deported on the basis of being the abuser. Their interests directly conflict. Other examples come to mind. What if one of the workers helped the other to obtain the false paper? That person would certainly be a witness for either the defense, or the United States. Moreover, if such potential conflicts existed, the 6<sup>th</sup> Amendment compels disclosure to the Court, and on the record colloquy by the District Court to ensure the client's right to conflict free counsel. See Holloway v. Arkansas 435 U.S. 475, 485-486 (1978) (defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.). Under these circumstances, it would have impossible to meaningfully assess conflict of interest issues in seven days.

After Ms. Rose described the plea deals, a United States marshal began describing the Orwellian security plan. Each attorney accepting an appointment had to arrive early the following day at the *Cattle Congress* for processing and to obtain a photo identification card. I think these cards were similar to a necklace type press credential. He then told us that attorneys would be able to meet with clients in a designated representation zone. He indicated that each attorney could not walk around *Cattle Congress* grounds without an escort by a United States marshal. He also advised us of an evacuation plan in case of any disturbance. At that point, I felt that I could not participate in the mass violation of rights. I informed Mr. Phelps that I would not be participating. He said, "Ok, please turn in your 3-ring binder." I then walked out in disgust. Chief Judge Reade was there for at least 10 minutes. I do not recall at which point she left. I think at some point AUSA Stephanie Rose advised her it would be a good time to leave as people began asking about the details of these deals.

Obviously, I am fairly reluctant to openly criticize Judge Reade. I have pretty much resigned myself to not taking any more appointments in her district. However, in spite of the financial repercussion for taking this position, I simply could not stay silent on this issue. The Clerk of Court issued a press release talking about the roundup of illegal aliens. This process: presumed guilt; deprived defendants of their right to due process; and interfered with their basic right to choose their own counsel. The court appointed attorney's role appeared to be only to act as a guilty plea processing clerk, and served only to expedite the mass waiver of rights. From what I can infer based upon the facts from the initial meeting as well as subsequent media reports, Judge Reade, and the United States Attorney's office coordinated the mass detention, roundup, representation plan, plea deals, and sentencings PRIOR to one single attorney consulting with a client. I hope I am wrong about that inference, but the overwhelming facts suggest a breath taking level of coordination between the United States District Court Judge and the Department of Justice. I nevertheless strongly encourage the Committee to keep an open mind, and to afford all officials involved a fair hearing, which unfortunately was not given to the Defendants in Postville.

Sincerely,

A handwritten signature in black ink, appearing to read "Rockne Cole". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Rockne Cole

## The Law

### Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### FLORES-FIGUEROA v. UNITED STATES

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08–108. Argued February 25, 2009—Decided May 4, 2009

A Federal statute forbidding "[a]ggravated identity theft" imposes a mandatory consecutive 2-year prison term on an individual convicted of certain predicate crimes if, during (or in relation to) the commission of those other crimes, the offender "knowingly . . . uses, without lawful authority, a means of identification of another person." 18

U. S. C. §1028A(a)(1) (emphasis added). After petitioner Flores-Figueroa, a Mexican citizen, gave his employer counterfeit Social Security and alien registration cards containing his name but other people's identification numbers, he was arrested and charged with two immigration offenses and aggravated identity theft. Flores moved for acquittal on the latter charge, claiming that the Government could not prove that he knew that the documents' numbers were assigned to other people. The District Court agreed with the Government that the word "knowingly" in §1028A(a)(1) does not modify the statute's last three words, "of another person," and, after trial, found Flores guilty on all counts. The Eighth Circuit affirmed.

Held: Section §1028(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person. As a matter of ordinary English grammar, "knowingly" is naturally read as applying to all the subsequently listed elements of the crime. Where a transitive verb has an object, listeners in most contexts assume that an adverb (such as "knowingly") that modifies the verb tells the listener how the subject performed the entire action, including the object. The Government does not provide a single example of a sentence that, when used in typical fashion, would lead the hearer to a contrary understanding. And courts ordinarily interpret criminal statutes consistently with the ordinary English usage. See, *e.g.*, *Liparota v. United States*, 471 U.S. 419. The Government argues that this position is incorrect because it would either require the same language to be interpreted differently in a neighboring provision or would render the language in that provision superfluous. This argument fails for two reasons. Finally, the Government's arguments based on the statute's purpose and on the practical problems of enforcing it are not sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of Congress' words. Pp. 4–11.

274 Fed. Appx. 501, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS,

C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

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### **Discussion**

Scope for review of the Postville convictions in light of the Supreme Court's decision in Flores-Figueroa, above?

The IIRIRA institutes a tighter system of checks - but it must be remembered that tighter doesn't necessarily mean better. For example, the Social Security Administration and the INS are going to be the backbone of the new employment verification system. But the SSA admits that as much as fifteen to twenty percent of its database is flawed or inaccurate. What does this mean for the fifteen or twenty percent of the people who apply for jobs, are run through the system and then cannot be given work authorization through the social security or INS computer? The burden then shifts on these individuals to provide proof of their ability to live and work in the United States. This could certainly pose some unique problems for some job applicants. Secondly, it is arguable as to why a job applicant who is a U.S. citizen or permanent resident should have to bear the burden of proof for the failure of a government computer to provide the correct information. It is also important to note that while the investigation of the work authorization proceeds, the applicant may not work. What then, does the applicant do to support himself or herself and his or her family?

Of course, there is are several legitimate goal of the immigration laws - and one of those is to curb curb illegal immigration. But the bar on adjustment of status for aliens who are present in the U.S. illegally really doesn't help. First of all, most of these aliens have family and extended family in this country many of who are citizens and permanent residents. Removing them from the United States causes incredible hardship to these family members. Secondly, most of these aliens are hard working, self-supporting individuals. They have to be - they're not eligible for any government safety net of welfare or unemployment benefits. In fact, numerous studies have shown that illegal immigrants aren't flooding the USA for welfare benefits; they're coming here to take the lowest jobs on the economic ladder. Overall, studies show, aliens contribute far more than they take - or are alleged to take - from the system. So they are not taking anything away from the government or the tax payers - they are helping businesses find scarce labor and often times undertaking jobs that nobody else wants to do.

### **Local Response to Undocumented Aliens - Arizona SB 1070**

The Arizona law passed in April 2010 authorizing law enforcement to question the immigration status of virtually any individual has revealed a disturbing trend in a sizeable section of the US population, that is now being mirrored in several state legislatures. Specifically, Subsection (B) of Article 8, of Section 2, title 11, chapter 7, of the Arizona laws – the first section of the Arizona law SB1070, reads as follows:

**B. FOR ANY LAWFUL CONTACT MADE BY A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE WHERE REASONABLE SUSPICION EXISTS THAT THE PERSON IS AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES, A REASONABLE ATTEMPT SHALL BE MADE, WHEN PRACTICABLE, TO DETERMINE THE IMMIGRATION STATUS OF THE PERSON. THE PERSON'S IMMIGRATION**

STATUS SHALL BE VERIFIED WITH THE FEDERAL GOVERNMENT PURSUANT TO 8 UNITED STATES CODE SECTION 1373(c).

Nowhere in SB 1070 is there a definition of what “Lawful Contact” is supposed to be.

The effect of this omission – whether wilful or not – is profound: what this means is that a police officer can, on “lawful contact” – and therefore without ANY suspicion of any illegal activity, stop a person to ask about that activity and in the course of that inquiry, also inquire about the person’s legal status if the officer suspects (again, no explanation of the basis for such suspicion) that person is “unlawfully present” in the United States.

This means that if a person is standing at a bus stop or a street corner, or is walking along a street and a police officer has some occasion for “lawful contact”, not only can that person be stopped, he or she would then be subject to questioning about his or her activities and in the course of that questioning, asked about his or her immigration status and then further be asked to produce documents.

“What are you doing here”? Sounds Communist, Fascist, or just plain uninformed? It probably is.

The ramifications of such a horrible and harsh measure are obvious, but are clearly being ignored by the uninformed elements in the US population that only wants to penalize over and over again the undocumented alien who lives and works in their midst. Even though these undocumented aliens are most often doing jobs that US workers do not want to do, SB 1070 legalizes tracking, hunting down, and deporting these undocumented workers. Not only this, but the law allows private citizens to sue the Arizona entity that does not enforce these laws! The entity would have to pay a fine to the State for any violation!

There are so many questions that the law leaves unanswered. Here are but a few of the most glaring omissions:

What is a “Lawful Contact?” What gives a police officer a “reasonable suspicion”.

Is it a person’s attire? Is it that the person does not fit into his or her surroundings? Is it the dirt under the person’s fingernails? How will police officers determine who is suspicious and who is not? Will there be heightened suspicion for people who do not fit in or who are of a different ethnicity compared to the majority of the population in the area? This law legalizes racial profiling and discrimination in the worst sort of way. The law allows police to claim – without any evidence – that the police had a “suspicion” of a person and therefore stopped and questioned that person. If that person is indeed undocumented, that person would be removed from the United States thus sharply reducing the likelihood that the police department is going to be sued for civil rights or constitutional violations.

The law immunizes police officers for activities that would be considered entrapment and penalizes employers who are “predisposed” to hire undocumented aliens. How such predisposition is proved is also unclear. An employer may be entrapped into hiring undocumented aliens and have no defense to an officer’s testimony that he or she was “predisposed” to hire an alien.

A US citizen may be criminally charged and convicted for driving an undocumented alien to a hospital or to child care or to a grocery store\*. There is no exemption for “good samaritans” under SB 1070. Maybe when officers arrest and charge some lovely old, white granny who was helping her undocumented church members get to an appointment, then finally, Arizona’s “tough”

policy will start to crumble.

In its rush to “get tough” on undocumented aliens, the Arizona legislature has clearly sacrificed the rights of even US citizens and the ability of law enforcement officers to stop crime and apprehend criminals. Gone is any vestige of cooperation from the public in the investigation of crimes. Even citizens or documented aliens may be afraid to come forth for fear of drawing attention to themselves or their friends or relatives.

“Show us your papers.”

Even if immigration documents are produced, does the officer have enough training to recognize that the papers are valid or not? What about, for example, the student visa that has expired, but the student who has legally entered the USA under that visa and is in legal status in the USA during the duration of his or her studies? What about the visitor who’s extension for stay is pending? Or the business visitor who leaves his passport in the hotel safe? Throw them all into jail pending USICE clearance? What about the citizen who does not carry any identification? What about the burden on the taxpayer? What about the innocent who gets assaulted in jail? Who pays for the damages awarded in lawsuits against the state and the police?

Even citizens are not immune from unlawful arrest and wrongful prosecution: Keep in mind that there is no “national ID card” and that IIRIRA specifically admonished against creation of such a document. So if a citizen does not have a Driver’s license or carry around a US passport, how does a citizen prove US citizenship? Carrying around a birth certificate really does not help – it is a record of a person’s birth, nothing more. It does not bear a current photo of the person who is the subject of the birth certificate. So how does a citizen show proof of citizenship? College or other photo ID’s are likewise non-determinative indicia of US citizenship for the same reason.

Not only does the law violate fundamental civil rights, elements of the law clearly invite challenges under the Fourth, Sixth and Fourteenth amendments to the Constitution. Under the Constitution, immigration is clearly a federal subject, not one relegated to the States. Several lawsuits have been filed against the Arizona law, more will doubtless be filed once the law is implemented. On June 19, the federal government declared that it would also jump into the fray, filing a lawsuit to block the Arizona law.

Conclusion:

There is no question that the US immigration system needs serious and substantive repair; but SB 1070 is not the answer. This knee-jerk reaction to the problem of undocumented immigration is ill conceived, poorly informed, and badly drafted. Only Comprehensive Immigration Reform (CIR) offers sensible and permanent systemic improvements to our current immigration crisis. Stay attuned to this critical issue for further developments.

\*(View the hardships that immigrants go through to build a better life before you jump to conclusions about undocumented aliens. Watch the movie “Entre Nos” (<http://reformimmigrationforamerica.org/blog/moms-for-family-unity/>) to see the “other side”.)

Only time will tell whether the current structure under the INA and under the IIRIRA really achieves the above goal of curbing illegal immigration. It seems clear, though that without amendments to the IIRIRA, the law will hurt deserving applicants for permanent residency much more than it will help to curb illegal immigration.

\* \* \*

## Questions and Discussion - Chapter 7

I. After reading the materials in your text relating to the Postville, Iowa ICE raids, imagine that your role is that of a defense attorney. You must undertake the assignment.

Now that you have chosen to defend the accused:

- What types of problems do you see in your representation?
- What specific problems do you see in representing your clients?
- What is your duty as an attorney?
- What would you do in the Postville circumstance?
- How would you provide zealous, competent representation under the circumstances?
- What strategies, if any, would you employ in defending your clients?
- Would you seek assistance? How? Where?

II. Assume that next month there is a similar raid in Akron, Ohio at a plastics manufacturing plant. 50 or so Kenyan workers are apprehended. How would you apply the lessons you learned from your representation in the Postville raids?

III. What is your task as an attorney? What are your obligations to your clients? What is your obligation as an “officer of the court?” - See Ohio the model rules and Code of Professional Responsibility.