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Letter from Rockne Cole, Criminal Defense Attorney to Zoe Lofgren, Congresswoman

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LETTER FROM ROCKNE COLE, CRIMINAL DEFENSE ATTORNEY TO ZOE LOFGREN, CONGRESSWOMAN

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 the 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 packing plant 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

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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 3rd 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 plea 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. 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 [the client] 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 paper charges 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 presentence 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 6th 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 breathtaking 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.

Rockne Cole
Criminal Defense Attorney