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The Postville Raid: A Postmortem

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ABSTRACT

In 2008, the largest immigration raid to date took place in Postville, Iowa. The target of the raid was Agriprocessors Inc., where an estimated 75% of its 968 employees were in the country illegally. In addition to the deportation of those taken into custody, the decision was made to criminally prosecute the seized individuals en masse. This represented a departure from the selected and targeted criminal prosecutions of prior immigration raids. The raid was scheduled for Monday, May 12, 2008.

Immigration and Customs Enforcement (ICE), the United States Attorney’s Office for the Northern District of Iowa, the United States Department of Justice (DOJ), and the federal judiciary all participated in the planning, execution, and subsequent criminal prosecutions that arose from “the largest single-site operation of its kind in American history.” The execution of the Postville raid posed difficult legal questions for those who participated in the process. It also served as a reminder of both the government’s power and the abuse of that power that can occur when checks are set aside in the interest of efficiency.
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In 2008, the largest immigration raid to date took place in Postville, Iowa. The target of the raid was Agriprocessors Inc., where an estimated 75% of its 968 employees were in the country illegally.\(^1\) In addition to the deportation of those taken into custody, the decision was made to criminally prosecute the seized individuals en masse. This represented a departure from the selected and targeted criminal prosecutions of prior immigration raids.\(^2\) The raid was scheduled for Monday, May 12, 2008.

Immigration and Customs Enforcement (ICE), the United States Attorney’s Office for the Northern District of Iowa, the United States Department of Justice (DOJ), and the federal judiciary all participated in the planning, execution, and subsequent criminal prosecutions that arose from “the largest single-site operation of its kind in American history.”\(^3\) The execution of the Postville raid posed difficult legal questions for those who participated in the process. It also served as a reminder of both the government’s power and the abuse of that power that can occur when checks are set aside in the interest of efficiency.

I. THE RUN UP TO THE RAID

A. Scope

A significant amount of planning was invested in the raid’s preparation and subsequent criminal prosecution. The former involved the decision to prosecute detainees en masse as opposed to focusing on individuals.\(^4\) After that decision, the focus turned to the number of people who were to be taken into custody. Here, 697 arrest warrants were issued.\(^5\) Thus, the challenge facing the planners was to criminally prosecute almost 700 people—most of whom had language difficulties.\(^6\)

In addition, a series of logistical issues had to be resolved:

1. Location of the holding area;
2. Security of the holding area;
3. Housing, clothing and feeding of the detainees;

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\(^2\) See id. at 11.

\(^3\) Id. at 1.

\(^4\) Normally, the United States Attorney’s Office would criminally prosecute only a select number of individuals.

\(^5\) Camayd-Freixas, supra note 1.

\(^6\) See id.
4. Transportation of those taken into custody to the holding area;

5. Filing of necessary legal documents to process the criminal cases with the clerk’s office;

6. Attachment of Assistant United States Attorneys to prosecute the criminal cases;

7. Provision of certified interpreters for the detainees;

8. Provision of attorneys to represent the detainees;

9. Provisions of court facilities, including judges, judicial clerks, and court reporters; and

10. Movement of detainees into Bureau of Prisons’ facilities.

B. Organization Necessary for Planning

A planning committee involving ICE, the DOJ, the United States Attorney for the Northern District of Iowa, a federal judiciary representative, and the federal clerk’s office must have met months before the raid to plan the logistics and procedures for the prosecution and disposition of cases.

Two critical decisions were made early in the process after the scope and breadth of the raid were understood. The first involved the speed of the prosecutions. The desire to expedite the prosecutions, as opposed to letting the process run its course under the normal rules of criminal procedure, was obviously paramount to the government. The second involved the decision to prosecute in groups rather than individually. Again, this was done to expedite the process.

C. The Targets of the Raid

The individuals who were targeted for criminal prosecution were uneducated, undocumented, and unfamiliar with the legal system. Even the most hardened individuals with experience in the criminal justice system can be intimidated by a federal prosecution. The targets of the raid would be easily threatened by the show of force the government intended to use in effectuating the arrests. That sense of fear was further reinforced by the procedure that was to be adopted and implemented in these cases. This was illustrated by the plea the defendants would be offered.

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7 See id. at 5–6, 10.
D. The Plea Offer by the Government

After the initial decisions were made, a plea offer had to be created by the government that could be given to the defendants. Essentially, it would be an offer they could not refuse. Six charges were settled on: false representation about social security numbers, aggravated identity theft, false claim of citizenship, false claim of citizenship to obtain employment, use of false employment documents, and unlawful reentry. The primary offer to the defendants would be to plead to “knowingly using a false Social Security number” and agree to a five-month sentence with three years supervised release and deportation. 230 of the defendants accepted this plea offer. The government would agree that other charges would be dismissed, which included the aggravated identity theft charge.

The alternative was to plead not guilty, which meant the defendant would wait six to eight months for a trial without the possibility of bail because of the immigration detainer. Even if the defendant won the trial he or she would still be deported, and if he or she lost there would be a two-year minimum sentence before deportation. This plea offer was approved by the DOJ, and the Assistant United States Attorneys had no authority to vary from it.

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11 Id. § 911.

12 Id. § 1015(e).

13 Id. § 1546(a).


15 Camayd-Freixas, supra note 1, at 5.


17 Camayd-Freixas, supra note 1, at 5.

18 Id.

19 Id. At the time of the raid, the Eighth Circuit did not require the Government to prove the defendant knew the false identity used belonged to a real person. This changed with Flores-Figueroa v. United States, in which the Supreme Court concluded, “[Aggravated identity theft] requires the Government to show that the defendant knew
E. Participation of the Federal Judiciary

The federal judiciary was involved in pre-raid planning for several essential components of the plan. In a large-scale raid such as this, the government must first address the logistics of the courts that would be receiving a surge of criminal filings and the physical location of the clerk’s office. Next, the government would need to establish the location of the courts that would handle the legal proceedings and the procedures to be followed in “fast track” cases, appoint attorneys to represent the defendants, and determine the acceptance of plea negotiations. The latter would involve preapproval of the sentencing provisions offered by the government prior to the raid. The cooperation of the federal court was essential to the government’s plan to expedite proceedings.

F. Location, Location, Location

After executing the raid, authorities would need to make arrangements to transport the detainees to a location where they could be processed, clothed, and housed. This location would need to accommodate a potential population of 700 individuals. As previously noted, it would also have to accommodate federal law enforcement, the clerk’s office, and areas where the courts could convene. The location selected was the National Cattle Congress, a sixty-acre fairground in Waterloo, Iowa. The decision was made to employ the fairground’s “Electric Park Ballroom” as a makeshift court. Trailers were used for federal authorities’ purposes—including two designated as sentencing trailers—while a gymnasium was filled with cots to house detainees.

G. The Manual

A manual was prepared by the DOJ and United States Attorney’s Office—and approved by the federal judiciary—with all the forms and scripts that would be used during the processing

that the means of identification at issue belonged to another person.” Flores-Figueroa v. United States, 129 S. Ct. 1886, 1894 (2009).

20 See Camayd-Freixas, supra note 1, at 7.


22 Camayd-Freixas, supra note 1, at 1.

23 Id.

24 Id.
of the defendant after he or she was taken into custody. The manual would assist in both expediting the prosecution and, ultimately, sentencing the defendants. Defense attorneys participating in post-raid prosecutions would be given the “manual” to assist them representing their clients. The manual was divided into fifteen sections:

1. Script for Initial Appearances
2. Waiver of Indictment and Consent to be Prosecuted by Information
3. Consent to Plead Guilty Before a Magistrate Judge
4. Rule 11, Rule 12, and Script for 11(c)(1)(C) Guilty Pleas
10. Unlawful Reentry (8 U.S.C. § 1326(a))
11. Report and Recommendation Concerning Plea of Guilty
12. Waiver of Time to Object to Report and Recommendation and Consent to Acceptance of Guilty Plea by the District Court Judge
13. Order Accepting Magistrate Judge’s Report and Recommendation Concerning Defendant’s Guilty Plea
14. Sentencing Outline
15. Stipulated Request for Judicial Removal and Order of Removal

1. **Script for Initial Appearance**

   After a defendant is taken into custody, his or her initial appearance must take place “without unnecessary delay.” If the charge is a felony, the court must advise the defendant of the complaint, his or her right to counsel, the possibility of pretrial release, “any right to a preliminary hearing,” and his or her right against self-incrimination. The court must also

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25 See Operation Stretches Court, supra note 21 (noting statements and instructions were worded by members of the federal judiciary).


29 Id. 5(d)(1)(A).

30 Id. 5(d)(1)(B).

31 Id. 5(d)(1)(C).

32 Id. 5(d)(1)(D).
determine whether the defendant will be detained. The rule is steeped in the notion the defendant will have a “reasonable opportunity to consult with counsel.”

The conduct of an initial appearance would seem to be a straight-forward proceeding that is second nature to any attorney practicing in federal court. Yet for some reason, the author(s) of the Procedure and Scripts Manual wrote out the entire initial initial appearance in detail. The first few paragraphs of the script are telling:

Will the Deputy Clerk of Court please swear the interpreter? I’m (name of magistrate judge), a United States Magistrate Judge from the United States District Court for the Northern District of Iowa. We are in court on the following cases: [The judge will announce the cases].

Please raise your hand if you can hear and understand what the interpreter is saying to you in Spanish. If you have problems hearing or understanding something that happens during this hearing, please raise your hand and get my attention.

I want each of you to state your name so I’ll know who you are. [The judge will have each defendant to [sic] identify him/herself.]

Felony charges have been filed in this court charging each of you with making false representations about social security numbers and/or with aggravated identity theft. You each should have a copy of document called a “complaint,” which describes the charges against you. If you don’t have a copy of the complaint please raise your hand. [The judge will make sure each defendant has a copy of the complaint filed against him/her.]

Certain deductions are clear from reading the script. First, the script was drafted with the assumption that several defendants would be appearing in groups rather than individually. Second, the charges were preordained by the United States Attorney’s Office. It is also apparent the United States Attorney must have collaborated with the federal judiciary for prior approval of the “manual” and its contents.

33 Id. 5(d)(1)(E).
34 Id. 5(d)(3).
35 Id. 5(d)(2).
36 See Procedure and Scripts Manual, supra note 8, § 1.
37 Id. ¶¶ 1–4.
2. Waiver of Indictment and Consent to be Prosecuted by Information

Being prosecuted by information, as opposed to an indictment, is normally a strategic move used by defense counsel when clients have been targeted by the United States Attorney’s Office. By saving the government time and money in determining a charge to plead to, the defendant may be entitled to sentencing concessions or adjustments.\(^{38}\) In the Procedure and Scripts Manual, the waiver and consent was provided in both English and Spanish.\(^{39}\) Even though submission of a case to a Grand Jury may not have changed the charges, the Grand Jury would have served as a potential buffer and allowed defense counsel more time to investigate and prepare a client for decisions. Again, the focus of the manual was on speed and ease of processing clients into guilty pleas rather than any concern for effective representation and adequate research and investigation by defense counsel. The fact the forms are in both English and Spanish goes more for the protection of the plea process than for any concern for informed decision making by the defendants.

3. Consent to Plead Guilty Before a Magistrate Judge

This section of the manual was designed to allow a federal magistrate to accept the defendant’s guilty pleas.\(^{40}\) Allowing the plea before a magistrate judge expedites the processing of the defendants. By providing more judges (magistrates), the workload is spread out for the courts and defendants can be processed more quickly.

4. Script of 11(c)(1)(C)

The Federal Rules of Criminal Procedure allow for the acceptance of a guilty plea under the following conditions:

An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense the plea agreement may specify that an attorney for the government will:

\[\text{...}\]

[A]gree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).\(^{41}\)


\(^{39}\) Procedure and Scripts Manual, supra note 8, § 2.

\(^{40}\) Id. § 3.

\(^{41}\) FED. R. CRIM. P. 11(c)(1).
5. **Federal Statutes Defining the Crimes**

In the manual the author(s) included the federal statutes defining the charged crimes, the elements that would be charged during the prosecutions, and the guidelines for sentencing.\(^{42}\) It is likely the statutes were referenced with the elements of the potential charges in order to establish both a factual basis and penalty for each charge.

Regarding the crime of false representation of social security numbers, the manual communicated the penalty to the clients: “Under the statutes that apply to this charge, you could be sent to prison for up to five years, placed on supervised release for up to three years, and fined up to $250,000. There also will be a special assessment of $100 on this count.”\(^{43}\)

The next script gave the following penalty for aggravated identity theft:

> Under the statutes that apply to this charge, you will be sent to prison for a mandatory term of two years, consecutive to any sentence you receive on Count \(\text{@}\) of the Information. You also could be placed on supervised release for up to one year and fined up to $250,000. There also will be a special assessment of $100 on this count."\(^{44}\)

False claim of citizenship defendants were informed of that charge’s related statutory penalty: “Under the statutes that apply to this charge, you could be sent to prison for up [to] three years, placed on supervised release for up to one year, and fined up to $250,000. There also will be a special assessment of $100 on this count.”\(^{45}\)

False claim of citizenship to obtain employment charges carried the following penalty: “Under the statutes that apply to this charge, you could be sent to prison for up to five years, placed on supervised release for up to three years, and fined up to $250,000. There also will be a special assessment of $100 on this count.”\(^{46}\)

The use of false employment documents carried the following sanction: “Under the statutes that apply to this charge, you could be sent to prison for up to ten years, placed on supervised release for up to three years, and fined up to $250,000. There also will be a special assessment of $100 on this count.”\(^{47}\)


\(^{43}\) *Id.* § 5.

\(^{44}\) *Id.* § 6.

\(^{45}\) *Id.* § 7.

\(^{46}\) *Id.* § 8.

\(^{47}\) *Id.* § 9.
The penalty for unlawful reentry differed depending on the defendant’s prior conviction record.\footnote{Id. \textsection 10.} One of the applicable penalties noted: “Under the statutes that apply to this charge, you could be sent to prison for up to two years, placed on supervised release for up to one year, and fined up to $250,000. There will also be a special assessment of $100 on this count.”\footnote{Id. \textsection 11.}

6. \textit{Report and Recommendation Concerning Plea of Guilty}

In an effort to comply with the letter of the Rules, the manual contained a report and recommendation to accept the guilty plea and sentencing proposal that would be entered at the time of the guilty plea.\footnote{Id. \textsection 11.} The report advised the defendant that he or she could withdraw his or her plea if the district court rejected the plea agreement.\footnote{Id.} The likelihood of the court doing so under these circumstances was nonexistent because the plea agreement was approved by the federal judiciary prior to the raid. It is interesting to note that the raid was scheduled for May 12, 2008, but the form for the report was dated “____ day of May, 2008.”\footnote{Id.} This clearly indicates the planners’ intention to process the defendants before the end of May.

7. \textit{Waiver of Time to Object to the Report}

Federal law allows the defendant to file objections to the report within fourteen days of the acceptance of the guilty plea.\footnote{Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607.} However, this would delay the sentencing and give more time to reflect on the pleas and procedures. In order to move forward, the manual contained a waiver of the ten-day period and provided for the immediate acceptance of the guilty plea.\footnote{Procedure and Scripts Manual, \textit{supra} note 8, \textsection 12.} The form was also provided in Spanish.\footnote{Id.}
8. **Order Accepting Magistrate Judge’s Report and Recommendation Concerning Defendant’s Guilty Plea**

Again, in order to expedite the cases an order for the district court was attached accepting the waiver of time. It also was attached in Spanish.

9. **Sentencing Outline**

The sentencing outline was a script for the district court judge to use in sentencing groups of defendants.

10. **Stipulated Request for Judicial Removal**

The final segment of the manual was the request for judicial removal and order of removal. The purpose was to waive any hearing regarding immigration removal. It also waived any requests defendants might have for asylum, to not be sent to another country because of life-endangering circumstances in that country, or to be protected under the Convention Against Torture.

**H. Interpreters**

Approximately one month before the raid was scheduled the clerk’s office for the district court began contacting federally-certified interpreters regarding the raid and subsequent prosecutions. The interpreters were told they would be working at “a remote location as part of a ‘Continuity of Operation Exercise,’” in case the court needed to operate during an emergency. On May 12, 2008, the same day as the raid, twenty-six federally-certified interpreters located throughout the country were en route to Waterloo, Iowa.

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56 Id. § 13.

57 Id.

58 Id. § 14.

59 Id. § 15.

60 Id.

61 Id.

62 Camayd-Freixas, *supra* note 1, at 1.

63 Id.

64 Id.
I. The Selection of the Defense Attorneys

Prior to the Postville raid, a preselected group of federal panel attorneys were contacted by the United States district court and informed there would be a meeting at the federal district courthouse in Cedar Rapids, Iowa. The attorneys were advised they would be informed of the nature of the meeting at the meeting itself and were not to discuss this initial phone call. Only eighteen lawyers were contacted out of the approximately one hundred twenty panel attorneys and twelve federal defenders in the state, even though the federal judiciary and the United States Attorney’s Office knew that 697 arrest warrants had been issued. Had every warrant been executed there would have been one attorney for every 38.7 clients.

J. The Defense Attorneys’ Briefing

At 1:30 p.m. on May 12, the eighteen federal panel attorneys were called to the federal courthouse in Cedar Rapids, Iowa by the United States Attorney’s Office of the Northern District of Iowa. At this meeting the attorneys were told of “procedures that were going to be implemented to process detainees who were suspected of being undocumented aliens and were going to be charged with violations of federal criminal statutes.” The attorneys were given the Procedure and Scripts Manual at the start of the meeting and told they would represent groups of detainees, not individuals. The panels the attorneys were to represent would consist of ten clients, and each attorney could potentially represent up to four panels. They were also advised


68 See Camayd-Freixas, supra note 1.

69 See Letter from Rockne Cole, supra note 66.

70 Hearing, supra note 65.

71 Id. The manual was collected from any lawyer who decided not to participate in the procedures outlined at the meeting. Id. at n.1.

72 See generally Camayd-Freixas, supra note 1, at 2, 5, 7 (eighteen attorneys would be representing up to 697 detainees, giving each attorney an average of 38.7 clients).
of the potential pleas their clients would be offered by the United States Attorney’s Office. They were told they would have a limited number of days to represent their clients and assist them in making decisions. The plea status hearing would begin on Saturday, May 17, and the clients would have one week to accept the offer. This compressed process put the attorneys in the position of having to advise clients—many of whom had limited language skills—to make decisions in an abbreviated time frame. The plea offers made by the United States Attorney’s Office had criminal and immigration law consequences and needed to be communicated by the attorneys to their client panel through an interpreter in rapid-fire fashion. Within a few days, groups of hundreds of detainees represented by the selected defense attorneys appeared in federal court to enter into agreements having far-reaching consequences—consequences implicated by both criminal and immigration law.

II. MAY 12, 2008—THE RAID

697 arrest warrants had been issued, and 900 agents of Immigration and Customs Enforcement (ICE) were prepared to raid the Postville meatpacking plant. 900 uniformed agents, armed and assisted by a Sikorsky UH-60 helicopter—the civilian version of the military designation “Black Hawk”—executed the raid at 10 a.m. with military precision.

73 Letter from Rockne Cole, supra note 66.

She [the Assistant United States Attorney] then described the four possible pleas [sic] deals being offered to each group. The first deal was a plea to a felony . . . 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 defendant with significant aggravating facts such as prior aggravated felonies, or violent histories.

Id.

74 See Camayd-Freixas, supra note 1, at 5, 7.

75 See Letter from Rockne Cole, supra note 66.

76 See Camayd-Freixas, supra note 1, at 6–7.

77 See generally id. at 2, 5, 7 (most of the 306 detainees held for prosecution entered agreements affected by aspects of both criminal and immigration law).

78 Id. at 1, 2.

79 Interview with Dan Winters, Investigative Reporter, WHO-HD 13, in Des Moines, Iowa (July 22, 2010); see also Chopper 13 Video of Postville Immigration Raid (WHO-HD 13 television broadcast May 12, 2008), http://www.whotv.com/videobeta/?watchId=2af1bae8-9576-47a3-b0cc-3d8bc50e19a2.
390 individuals were arrested and eventually transported to a “detention center” at the National Cattle Congress, a sixty-acre cattle fairground in Waterloo, Iowa. Prior to their initial appearance, detainees were asked to sign Miranda waivers and were interviewed by ICE regarding their immigration status. 314 men and 76 women were arrested; included were 290 Guatemalans, 93 Mexicans, 4 Ukrainians, and 3 Israelis. The government released fifty-six mothers with unattended children or because of medical reasons, and twelve juveniles were either released with ankle bracelets or turned over for deportation. In sum, 306 detainees were held for prosecution. The fairground was converted into a facility that could intake, process, and warehouse the detainees.

The Cattle Congress was outfitted with trailers where federal courts would be convened to accept both guilty pleas and waivers of detention proceedings, and execute prearranged sentences with waivers.

In panels consisting of up to ten people, with one attorney and one interpreter per panel, detainees were paraded before federal magistrates and district judges to offer guilty pleas. The detainees did exactly what ICE, the DOJ, the United States Attorney’s Office, and the federal judiciary wanted and expected—they accepted the plea bargain and waived deportation in short order. For better or worse, 297 individuals were prosecuted, plead guilty, were sentenced, and waived deportation by the end of May.

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80 Camayd-Freixas, supra note 1, at 1, 2.
81 Moyers, supra note 16, at 668 (citations omitted).
82 Camayd-Freixas, supra note 1.
83 Id.
84 Id.
85 See id. at 1.
86 See id. at 1, 8.
87 See id. at 4–5. In sentencing proceedings, the panels were limited to five detainees due to spatial limits. Id. at 8.
88 See id. at 9, 10 (accepting the plea bargain provided detainees the surest and fastest way to be deported and reunited with their families).
89 See id. at 10 (noting 297 detainees were charged within the procedural time limits).
III. DESIGNED FAILURES

A. Lack of Access to Immigration Attorneys by Defense Attorneys and Clients

Because the Postville raid caused the intersection of criminal law and immigration law, panel attorneys should have had additional time to either become more familiar with immigration issues prior to the raid or immigration attorneys should have been allowed into the process. Access to immigration attorneys who are experts in that area helps ensure competent overall representation. As it turns out, immigration attorneys were initially denied access to the detainees.

The procedures and system adopted here generated guilty pleas in short order and quick dispositions. The fundamental failure was the lack of concern for the adequacy of client representation. The system favored the government to the point of reducing defense counsel’s role to that of a conduit for the government to communicate a plea offer.

Two aspects of the system directly restricted defense counsel’s ability to represent their clients. The first was the total number of defense attorneys available. The second was the lack of time counsel was given to evaluate cases and consult with clients.

The system that was created ran afoul of a number of concerns expressed by the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants in 2004. Some of these concerns included: “Meet ‘em and Plead ‘em” lawyers;\(^\text{91}\) incompetent and inexperienced lawyers;\(^\text{92}\) excessive caseloads;\(^\text{93}\) “lack of contact with clients and continuity in representation”;\(^\text{94}\) and “lack of investigation, research, and zealous advocacy.”\(^\text{95}\)

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\(^\text{91}\) Id. at 16. This classification encompasses exchanges between attorneys and their criminal defendant clients that are nothing more than “hurried conversation[s] . . . moments before entry of a guilty plea and sentencing.” Id.

\(^\text{92}\) Id. at 16–17.

\(^\text{93}\) Id. at 17–18.

\(^\text{94}\) Id. at 18–19. Indigent criminal defendants often have very little contact with their appointed counsel. Id. at 18. Moreover, they are often appointed different attorneys throughout their court proceedings, instead of having the opportunity to establish a close attorney–client relationship with a single attorney. Id. (citations omitted).

\(^\text{95}\) Id. at 19 (“[I]n many cases, indigent defense attorneys fail to fully conduct investigations, prepare their [client’s] cases, or advocate vigorously for their clients at trial and sentencing.”) (citations omitted).
B. Lack of Immigration Expertise

Part of the Government’s offer to the defendants included a stipulation regarding judicial removal.\(^96\) This obviated the need for any further hearing and waived any claims that would prohibit removal or deportation. This, of course, assumed the lawyers advising the clients were competent enough to be aware of immigration law and the relevant facts that would affect immigration and deportation. However, without base knowledge of an area of law on which an attorney is advising a client, that attorney cannot be considered competent to advise a client to execute a stipulated request for judicial removal.

The stipulation should have alerted the defense attorneys to inquire as to the underlying facts that could have provided his or her client with a basis for a claim to remain in the United States. The stipulation identified the following potential claims the government wanted the defendants to waive:

a. “[A]sylum pursuant to 8 U.S.C. § 1158”;

b. Any request “to be removed to another country because defendant’s life would be threatened in that country due to the defendant’s race, religion, nationality, membership in a social group, or political opinion, pursuant to 8 U.S.C. §1231(b)(3)”;

c. Any request “for protection under the Convention Against Torture, pursuant to 8 C.F.R. § 1208.16-18”;

d. Any request of removal for a person who was an alien and a “spouse, parent, or child of a U.S. citizen or of an alien lawfully admitted” for permanent residence “pursuant to 8 U.S.C. § 1227(a)(H)”; and

e. Any request of removal for a person who was an alien and “in the possession of a lawful visa and was otherwise admissible at the time of admission but for having made willful or innocent misrepresentations to gain entry into the United States” “pursuant to 8 U.S.C. § 1227(a)(H)).”\(^97\)

In the normal course of a removal proceeding, several divisions of the federal government are involved. In an article published in 2009, Professor LaJuana Davis set forth an excellent explanation of the agencies and their roles:

Congress and the Executive Branch have plenary power to regulate immigration. Immigration powers are “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” The political branches may even make rules regulating immigration “that would be unacceptable if applied to citizens.”

Several government agencies have immigration functions. Congress delegates regulatory and adjudicatory power in immigration matters to the Attorney General, who in turn delegates responsibilities to agencies within the Department of Justice. Under the plenary power doctrine, courts accord the

\(^{96}\) Procedure and Scripts Manual, supra note 8, § 15.

\(^{97}\) Id.
Attorney General’s immigration decisions great judicial deference. The Department of Homeland Security (DHS), the Department of Justice (DOJ), the State Department, and the Department of Labor are among the most prominent government agencies with immigration functions.

The Immigration and Nationality Act (INA) gives the DHS, a cabinet-level agency, authority to administer and enforce the nation’s immigration laws. In 2003, DHS absorbed the functions of the chief immigration agency, the Immigration and Naturalization Service (INS). The DHS divides its immigration functions largely among three sections: the United States Citizenship and Immigration Services (USCIS), which conducts the main immigration functions; the United States Immigration and Customs Enforcement (ICE), which governs interior enforcement and removal; and the United States Bureau of Customs and Border Patrol, which handles border enforcement. The Attorney General also has retained concurrent authority to order that noncitizens be detained under the Homeland Security Act of 2002. The INA gives the DOJ broad authority to detain aliens awaiting immigration hearings and subjects certain categories of aliens to mandatory detention.

Undocumented persons who are present in the United States in violation of its immigration laws are subject to removal, a term that refers to a noncitizen’s departure from the United States after a final order of removal, either by exclusion from entry or deportation. An undocumented person must leave the United States after a final order of removal. Noncitizens become subject to removal in a variety of ways, such as: (1) inadmissibility at time of entry or at adjustment of status, (2) committing a criminal offense, (3) failing to register and falsifying documents, (4) security and related grounds, (5) status as, or likelihood of becoming, a public charge, and (6) unlawful voting.

Undocumented persons may face expedited removal proceedings if they try to enter the United States without valid documentation. Most of these noncitizens return to their countries of origin. Noncitizens who are not lawful permanent residents and who have committed certain aggravated felonies are also subject to an “expedited removal” process without a hearing. When lawful permanent residents commit certain crimes that make them subject to removal, DHS’s enforcement agency, ICE, is notified. ICE also targets infrastructures that support illegal immigration, such as employers and criminal organizations, to identify persons eligible for removal. When an undocumented person is apprehended by authorities, he or she may enter the administrative immigration court system.

The DHS commonly initiates removal proceedings through a charging document. A charging document states what the charges are, that the noncitizen has a right to legal representation—provided that representation is at no cost to the government—and the consequences of failing to appear at scheduled hearings. When the DHS files a charging document with an immigration court, jurisdiction over the case transfers to the Executive Office for Immigration Review (EOIR)—the adjudicatory body—for a removal hearing.

Article I courts adjudicate removal hearings “under delegated authority from the Attorney General,” and the EOIR is the administrative body that
oversees the nation’s administrative immigration court system and “interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings.” Created in 1983, the EOIR administers three main bodies: (1) the Office of the Chief Immigration Judge, which is responsible for managing the nation’s fifty-four immigration courts, in which over two hundred immigration judges adjudicate individual cases; (2) the Board of Immigration Appeals (BIA), “which primarily conducts appellate reviews of immigration judge decisions;” and (3) the Office of the Chief Administrative Hearing Officer, “which adjudicates immigration-related employment cases,” including cases in which immigrants are accused of working in violation of their visas.

In removal hearings, undocumented persons appear before immigration judges and either concede the charges against them or contest the charges by showing that they are eligible to remain in the United States. In removal hearings, immigration judges typically decide: (1) whether an alien is subject to removal from the United States, and (2) “whether the alien is eligible for a form of relief from removal.”

Removal cases are appealed to the BIA. In limited circumstances, noncitizens who seek to remain in the United States may move to reopen their cases. When a motion to reopen is denied, the EOIR issues a final order of removal. Once a noncitizen has been ordered removed by the EOIR, jurisdiction reverts to the DHS, which carries out the removal.98

In re Lozada recognized the doctrine of ineffective assistance as a vehicle to reopen an immigration proceeding even though there is no constitutional right to court-appointed counsel.99 The Board of Immigration Appeals noted:

Any right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process. Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.100

An alien must show more than simply ineffective assistance of counsel; he or she must show the assistance was so ineffective it “impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.”101 Also, an alien must show he or she was prejudiced by his or her representative’s performance.102


100 Id. at 638 (citations omitted).

101 Id. (citing Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986)).

102 Id. (citations omitted).
From the information available, it appears almost no time was devoted by the panel attorneys to explore facts that would have led to claims that would have prevented removal.\(^{103}\) The plea agreement offered linked the criminal prosecutions to an administrative proceeding. The lawyers were placed in a position to offer advice in an area in which they had no expertise and were not able to conduct adequate fact investigation.\(^{104}\) The federal public defender hired an attorney with immigration expertise who prepared a questionnaire used by the federal defenders.\(^{105}\) Although the questionnaire was made available to the panel attorneys, it is unclear whether it was utilized.\(^{106}\) In fact, Immigration and Customs Enforcement denied admission to attorneys who had immigration expertise because they were not on a list of attorneys that were “invited” to the proceedings.\(^{107}\) This may have posed a potential problem for the government, but given the Attorney General’s authority over immigration proceedings the issue could have been remedied.\(^{108}\)

In 2008, the Attorney General directed the Board of Immigration Appeals to send three cases to his office, all of which involved allegations of ineffective assistance of counsel as a basis to reopen a removal hearing.\(^{109}\)

Professor Davis noted:

In January 2009, [then-Attorney General] Mukasey announced his decision in the cases, consolidated as *In re Compean (Compean I)*, ruling that no constitutionally enforceable right to counsel exists in immigration cases, and therefore noncitizens have no concomitant right to effective assistance of counsel. *Compean I* overturned more than twenty years of precedent set by *Lozada*\(^{110}\).

The Obama administration rescinded *Compean I* in *Compean II*, requesting input into the decision-making process.\(^{111}\) The question of whether ineffective assistance of counsel exists as a

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\(^{103}\) *See* Camayd-Freixas, *supra* note 1, at 7.

\(^{104}\) *Id.*

\(^{105}\) Interview with Nicholas T. Drees, *supra* note 67. Angela Campbell, a former assistant federal defender, was retained as an immigration consultant.

\(^{106}\) *Id.*

\(^{107}\) Camayd-Freixas, *supra* note 1, at 7. Attorneys Nikki Mordini and Amber Rutledge of the Davis Brown Law Firm in Des Moines drove to Waterloo to investigate possible immigration claims at the request of some of the defendants’ families but were denied entry.

\(^{108}\) *See* Davis, *supra* note 98, at 135 (citing 8 C.F.R. § 1003.1(g)–(h) (2009)).

\(^{109}\) *Id.* (citations omitted).

\(^{110}\) *Id.* at 135–36 (footnotes omitted).

viable claim to reopen a removal hearing remains open.\textsuperscript{112} The matter is moot for the Postville detainees who signed the stipulation for removal. What is clear is that the government anticipated potential issues and shut down investigation and exploration of immigration claims in short order.

The importance of immigration consequences of criminal charges was recently reemphasized by the United States Supreme Court in \textit{Padilla v. Kentucky}.\textsuperscript{113} The Court held, in part:

We have long recognized that deportation is a particularly severe “penalty,” but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.\textsuperscript{114}

With regard to counsel’s duty to investigate, research, and advise a client regarding immigration consequences of a guilty plea, the Court noted:

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . ., other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.\textsuperscript{115}

\textsuperscript{112} See \textit{id.} at 3.

\textsuperscript{113} Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

\textsuperscript{114} \textit{id.} at 1481 (citations omitted).

\textsuperscript{115} \textit{id.} at 1483.
At Postville, defense attorneys with little or no experience in immigration law were appointed and given a procedure to follow that was dictated by the government. The concept of independent defense counsel conducting investigation and research into the strengths and weaknesses of the government’s case went out the window. Defense counsel became nothing more than conduits for the government to communicate plea offers.

The argument will be made that the attorneys did not give false or misleading information to their clients at Postville—the clients were told they would be deported. This, however, ignores two essential functions of defense lawyers:

1. Competence. Here, the lawyers either needed to be competent in immigration law or affiliate with a lawyer who was.
2. Investigation. The lawyers needed to have adequately investigated the possibility that there were facts that would have taken their clients into safe harbors, thus protecting the clients from being deported.

IV. SUGGESTIONS FOR FUTURE RAIDS

A number of criticisms have been leveled at the Postville raid and subsequent prosecutions. Some of these could have easily been avoided.

A. Use of Force

First, the use of black-clad ICE agents with automatic weapons supported by Black Hawk helicopters to round up the suspects was absolutely unnecessary. The same task could have easily been accomplished without the excessive show of force. The use of force left even those who supported the raid with the unenviable task of justifying the force used.

The Justice Department and Immigration and Customs Enforcement should develop criteria regarding the use of force when conducting raids. There may be times that this level of force would be necessary, but it clearly was not at Postville.

B. Lack of Input by the Criminal Defense and Immigration Bars

Neither the criminal defense nor immigration bar was consulted prior to the adoption of the procedures implemented after Postville. Without input from these two organizations the process appears to be a planned and orchestrated attempt by the Justice Department to achieve a specific objective while disregarding due process. Worse yet, it has the appearance of acquiescence and participation by the federal judiciary, compromising and calling into question the process’s independence.

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117 See Hearing, supra note 65, at 5–6.
One of the justifications offered is that the inclusion of criminal defense and immigration attorneys would have compromised the raid.\footnote{Interview with Nicholas T. Drees, \textit{supra} note 67.} This argument rings hollow. The procedures adopted, such as those in the manual, could be discussed and adopted outside the district or state where the raid is to occur without reference to the date or target of the raid. Raising objections prior to the raid in the form of a committee would expose weaknesses within the system that could be corrected prior to any raid conducted by Immigration and Customs Enforcement.

\section*{C. Transparency of Process}

By establishing a committee to develop the procedures to be utilized, the process becomes more transparent. This would enhance the credibility of the government and the judiciary. It would also generate a better procedure and scripts manual if a separate manual is deemed necessary in this type of raid.\footnote{The manual used in the Postville raid was “rife with errors.” Moyers, \textit{supra} note 16, at 667 n.102. For example:}

\begin{quote}
In the model order accepting the magistrate judge’s report and recommendation regarding the defendant’s guilty plea, there is a reference to the standard of review set forth at Federal Rule of Civil Procedure 72(b). However, a district judge reviews a report and recommendation of a magistrate judge for a guilty plea in a criminal matter under Federal Rule of Criminal Procedure 59(b)(3).
\end{quote}

\textit{Id.} (citation omitted).

\section*{D. Individual Representation by Attorneys}

Having one lawyer representing panels of ten clients at a time is a recipe for disaster. This is especially the case when the clients do not speak English and only one interpreter is assigned to the panel. The criteria used to select the attorneys invited to participate in the Postville case is uncertain. Using a “by invitation only” process with no established criteria for attorney selection immediately calls into question the court’s selection process and undercuts the attorney’s credibility. The appointment criteria should include consideration of the attorney’s level of experience in federal court as well as the lawyer’s familiarity with immigration issues. The Federal Public Defender’s Office should be consulted for the representation of the defendants and be allowed to utilize the list of panel attorneys throughout the state.

The size of the panels and the compressed timeline lawyers were given resulted in attorneys spending no more than an hour with clients.\footnote{Hearing, \textit{supra} note 65, at 5.} Panel attorneys were sometimes meeting with several clients at once.\footnote{\textit{Id.}} Needless to say, client confidentiality took a backseat to
processing clients through an abbreviated system. The more compressed the time the greater the need for additional lawyers to effectively handle client cases.

E. Access to Immigration Attorneys by Defense Attorneys and Clients

Because the Postville raid caused the intersection of criminal and immigration law, panel attorneys should have had additional time to become more familiar with immigration issues prior to the raid, or immigration attorneys should have been allowed into the process. Access to immigration attorneys who are experts in the area helps ensure competent overall representation. As it turns out, immigration attorneys were initially denied access to detained clients.

F. Compression

The time frame in which several hundred cases were handled by a limited number of defense attorneys is astonishing. As previously mentioned, forcing group representation within a very short period of time denies lawyers the ability to adapt and adjust to the procedures put in place or conduct adequate factual and legal investigation on behalf of each individual they represent. The result may be defective representation by otherwise competent lawyers. Lawyers need adequate time and resources to explore and prepare a case. Even the best lawyer can be made ineffective without adequate time and resources. A timetable of seven days to accept a government plea is unacceptable to the defense bar.

G. Individual Attention by the Federal Judge

Having groups of clients appear before judges for the purpose of entering guilty pleas has the appearance of assembly-line justice. The process and environment employed following the raid were unnecessary and demeaned the federal courts.

V. Conclusion

The process used to prosecute criminal offenses in the United States is as important as the substantive law itself. Great care should be taken to protect the procedures adopted by Congress and tested in the courts to ensure the results are more than simply expeditious. The procedures adopted prior to the Postville raid call into question the constitutional guarantee of due process and fairness. We should take care not to sacrifice effective representation in order to expedite disposition of criminal cases. Postville is a poster child for how not to conduct criminal prosecutions and court proceedings. As a model it should be abandoned but not forgotten—it must not be repeated.