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UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

Frustrated by the lack of comprehensive immigration reform, many advocates, from grassroots community organizers to Members of Congress, have begun calling on President Obama to take action. They want the President and his administration to use the power of the executive branch to defer removals, revisit current policies and priorities, and interpret the law as compassionately as possible. The specific requests vary greatly. Senators Richard Durbin (D-IL) and Richard Lugar (R-IN), for instance, last year asked the Department of Homeland Security (DHS) to defer the removal of young people who qualified for legal permanent residence until such time as their legislation, the DREAM Act, became law. In April 2011, nineteen Democratic and Independent U.S. Senators, including Senators Harry Reid (D-NV), Richard Durbin (D-IL), and Kristin Gillibrand (D-NY), reiterated the call to stop the removal of all students who meet the strict requirements of the DREAM Act. While the DREAM Act is frequently invoked, many community groups have also called for exercising prosecutorial discretion in individual cases by declining to put people in removal proceedings, terminating proceedings, or delaying removals in cases where people have longstanding ties to the community, U.S.-citizen family members, or other characteristics that merit a favorable exercise of discretion.

Over the course of the summer, the Obama Administration began to address these requests, relying on its ability to exercise prosecutorial discretion in deportation decisions. On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued a memorandum directing ICE staff to consider many of these same factors when deciding whether or not to exercise prosecutorial discretion.¹ On August 18, 2011, in a response to the letter from Senator Durbin and others, DHS Secretary Janet Napolitano declined to grant deferral of removal to DREAM Act students across the board, but indicated a willingness to re-examine individual cases. She announced a two-pronged initiative to implement the June 2011 Morton memo across all DHS divisions to ensure that DHS priorities remained focused on removing persons who are most dangerous to the country.

The new initiative involves the creation of a joint committee with the Department of Justice that will review each of the nearly 300,000 pending removal cases to assess whether each case meets the high priority factors set forth in the June 2011 Morton memo. In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases will be administratively closed following this review – that is, they will be removed from the active docket of the immigration courts. Second, DHS announced that it would issue agency-wide guidance to ICE, U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Patrol (CBP) officers to ensure that they appropriately exercise discretion when determining whether a low priority case should be referred to immigration court in the future.

These new developments signal a growing recognition on the Obama administration's part that it must prioritize and distinguish between different types of immigration cases, but the actions it is taking are

hardly new. Like all government officials, from the local traffic cop to the Attorney General of the United States, immigration officials must make decisions every day about how they exercise their power. It is within their discretion to determine whom to target for removal. For instance, by prioritizing “criminal aliens” over “non-criminal aliens,” DHS is exercising its authority to decide what charges to bring and how to pursue immigration cases. These decisions are exercises of prosecutorial discretion.

For those unfamiliar with the idea of prosecutorial discretion—or with the way immigration laws are actually implemented—it can be confusing to identify and understand what is at stake when advocates couch their demands in terms of prosecutorial discretion. Consequently, the Immigration Policy Center of the American Immigration Council has produced the following brief introduction to the concept of prosecutorial discretion in immigration law. For a more detailed analysis of the mechanics of seeking a favorable exercise of prosecutorial discretion for a client, see the LAC Practice Advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#), on which much of this fact sheet is based.

What is Prosecutorial Discretion?

“Prosecutorial discretion” is the authority of an agency or officer to decide what charges to bring and how to pursue each case. A law-enforcement officer who declines to pursue a case against a person has *favorably* exercised prosecutorial discretion. The authority to exercise discretion in deciding when to prosecute and when not to prosecute based on a priority system has long been recognized as a critical part of U.S. law. The concept of prosecutorial discretion applies in civil, administrative, and criminal contexts. The Supreme Court has made it clear that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” Heckler v. Chaney 470 U.S. 821, 831 (1985).

When is Prosecutorial Discretion Used in Immigration Enforcement?

Prosecutorial discretion may be exercised at any stage of an immigration case. Specifically, prosecutorial discretion may be exercised when deciding whether to: issue a detainer; initiate removal proceedings; focus enforcement resources on particular violations or conduct; stop, question, or arrest a particular person; detain or release someone on bond, supervision, or personal recognizance; settle or dismiss a removal case; stay a final order of removal; pursue an appeal; and/or execute a removal order.² Examples of the favorable exercise of prosecutorial discretion in the immigration context include a grant of deferred action³; a decision to terminate or administratively close removal proceedings; a stay of removal⁴; or a decision not to issue a charging document in the first place.

Who Exercises Prosecutorial Discretion?

ICE, USCIS, and CBP officers have the authority to exercise prosecutorial discretion. Because prosecutorial discretion is a process that determines whether the government is going to pursue enforcement in a case, the initial decisions are made by those immigration officers assigned to the case. Once the initial decision is made to issue a Notice to Appear (a document that formally initiates removal proceedings by charging an individual with immigration violations), further decisions about continuing the government’s case will be made at higher levels within ICE or DHS. The June 2011 Morton memo clarified that the following ICE officers have the authority to exercise prosecutorial discretion: officers, agents, and their supervisors within Enforcement and Removal Operations who

have authority to engage in civil immigration enforcement; officers within Homeland Security Investigations who have authority to engage in civil immigration enforcement; attorneys and their respective supervisors within the Office of the Principal Legal Advisor who have the authority to represent ICE in immigration court; and the Director, Deputy Director, and senior staff of ICE.⁵ Ultimately, the Secretary of Homeland Security, as the official within the executive branch specifically charged with enforcing the Immigration and Nationality Act, is in a position to exercise prosecutorial discretion over every case. Because DHS now has announced that the Morton memo will apply to USCIS and CBP, there may be further guidance issued clarifying who within these two components has prosecutorial discretion authority.

Is Prosecutorial Discretion Always Case by Case?

No. Prosecutorial discretion can be exercised on either an agency-wide basis or by an individual officer or employee. The August announcement by DHS, implementing enforcement priorities on an agency-wide basis, is an example of an agency's exercise of prosecutorial discretion with respect to how to spend its resources. USCIS exercised its prosecutorial discretion when it adopted a new policy establishing a procedure for surviving spouses and children of deceased U.S. citizens, who were no longer eligible to apply for permanent residence, to apply for deferred action,⁶

In contrast, a DHS officer who decides to cancel an NTA as improvidently issued, *see* 8 C.F.R. § 239.2(a) (6), is exercising favorable prosecutorial discretion on an individual basis. Similarly, the August 18, 2011 announcement made it clear that ICE would not categorically defer removal, but that decisions regarding prosecutorial discretion will be made on a [case by case basis](#).

What Influences a Decision to Exercise Prosecutorial Discretion?

A range of factors can lead to a decision to favorably exercise prosecutorial discretion. In some cases, enforcement priorities change as society changes, leading law-enforcement officials to decline to implement laws that are outmoded or written more broadly than society wishes to put in force. Resource limitations also require law-enforcement officials to prioritize who should be prosecuted or charged. As a practical matter, it is impossible for any law-enforcement agency to pursue all offenses that come to its attention. Finally, many laws are open to interpretation, and rigid adherence to the strictest interpretation of the law is often found to not serve the public good.⁷

What Factors Does ICE Currently Use when Exercising Prosecutorial Discretion?

Because of limited agency resources, ICE cannot remove all persons illegally present in the U.S. Instead, ICE uses a number of factors, most of which were enumerated in a June 17, 2011 memo from Director John Morton, to decide when to prosecute and when to exercise prosecutorial discretion. While too lengthy to list here, the factors include: the person's pursuit of education in the U.S.; the circumstances of the person's arrival in the U.S.; the person's length of presence in the U.S.; whether the person or any immediate relative has served in the armed forces; the person's ties and contributions to the community; whether the person has a U.S. citizen or permanent resident spouse, child, or parent; the person's age; the person's ties to his or her home country; and whether the person is likely to be granted some sort of temporary or permanent relief from removal.⁸

Do the June 17 Prosecutorial Discretion Memo or the New Guidelines Provide Additional Forms of Relief?

No, the June 17 Prosecutorial Discretion memo does not provide additional forms of relief for noncitizens. Instead, the memo clarifies the factors that should be considered in exercising prosecutorial discretion, and in the process provides noncitizens and their representatives a better understanding of what cases are appropriate for deferrals or other action. The memo also clarifies which ICE officers can exercise prosecutorial discretion, increasing the probability that prosecutorial discretion will be exercised before an individual's case reaches immigration court. Ultimately, however, each case will continue to be decided individually on the basis of all available information.

The same is true for DHS's announcement on August 18. The two-pronged initiative will implement the enforcement priorities set forth in the Morton memo, but will not create any new forms of relief for individuals. For example, administrative closure of cases has long been available as a procedural convenience for immigration courts, ICE attorneys and noncitizens in removal proceedings. Similarly, more than a decade ago, former Commissioner Doris Meissner of the legacy Immigration and Naturalization Service instructed immigration officers about their authority to exercise prosecutorial discretion, including their authority to refrain from initiating removal proceedings against a noncitizen.⁹

Is Prosecutorial Discretion a New Idea in Immigration Enforcement?

No. Prosecutorial discretion exists whenever a government official is empowered to decide whether to pursue charges against someone. Consequently, prosecutorial discretion is inherent in our system of laws, regardless of the substantive issue. In the immigration context, research conducted by Shoba Sivraprasad Wadhia shows that immigration agencies and officials have a long and rich history of using prosecutorial discretion to resolve cases involving significant equities, policy calls, or practical resource issues.¹⁰ In 2000, then-INS Commissioner Doris Meissner issued guidance clearly articulating the role of prosecutorial discretion in immigration enforcement. That guidance remains in operation and has served as the touchstone for a series of other DHS memos on exercising discretion.¹¹ The Morton Memo on prosecutorial discretion is the most recent of at least thirteen such memos.¹²

Is Prosecutorial Discretion the Only Authority the Executive Branch Has to Affect Immigration Laws?

No. Prosecutorial discretion is one component of a much broader range of authority inherent in the executive branch's responsibility to implement the law. The role of the executive branch of the government has never been limited to blindly administer laws passed by the legislative branch. The effective implementation of any law (whether criminal, tax, environmental, securities, or immigration law) requires the executive branch to interpret the law and to develop strategies to implement it. Every new administration brings its own set of values and priorities to the task of interpreting and implementing existing laws. For instance, both the Bush and Obama Administrations conducted extensive regulatory reviews of rules proposed by their predecessors and in some cases withdrew or revised those rules to reflect different policy perspectives. Presidents also have broad authority to issue guidance and directives, including executive orders, which interpret existing laws.¹³

Do Members of Congress Recognize Prosecutorial Discretion as an Executive Branch Authority?

Yes. Members of Congress, while often disagreeing with the Executive Branch, also recognize and call for prosecutorial discretion to be implemented in interpreting laws. In November of 1999, Congressman Lamar Smith circulated a bipartisan letter signed by 28 members of Congress asking the Attorney General and Commissioner of the Immigration and Naturalization Service (INS) to exercise discretion in immigration cases. The letter stated that “there has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardships...we must ask why the INS has pursued removal in such cases when so many other more serious cases existed...The principle of prosecutorial discretion is well established.”¹⁴

Conclusion

In short, prosecutorial discretion is about exercising good judgment. Requests for an exercise of prosecutorial discretion, either individually or more broadly, require careful consideration of many factors. What is clear, however, is that rarely, if ever, are law-enforcement officials so constrained by the law that they cannot act. Good stewardship of limited government resources, balancing government priorities, and humanitarian concerns are all legitimate reasons for exercising discretion—and all merit more consideration in the current immigration debate.

Endnotes

¹ Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011) (available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

² Ibid.

³ Deferred action is a DHS decision not to pursue enforcement against a person for a specific period of time, in the exercise of the agency’s prosecutorial discretion. The grant of deferred action by USCIS does not confer lawful immigration status or alter the person’s existing immigration status. See ICE, “Detention and Deportation Officer’s Field Manual” (updated March 27, 2006).

⁴ Termination of a removal case will end the case and the individual will no longer be in removal proceedings. Administrative closure of a removal case temporarily removes the case from the immigration court’s active docket.

⁵ Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011) (available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

⁶ See Donald Neufeld, “Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children” (June 15, 2009), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf>.

⁷ See Bo Cooper, General Counsel, Memorandum for the Commissioner, INS Exercise of Prosecutorial Discretion, HQCOU 90/16P, Immigration and Naturalization Service, Washington D.C., undated.

⁸ Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011) (available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

⁹ Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (November 17, 2000), available at <http://drop.io/iceprosecutorialdiscretion>.

¹⁰ Shoba Sivaprasad Wadhia, “The Role of Prosecutorial Discretion in Immigration Law” (September 21, 2009); *Connecticut Public Interest Law Journal*, vol. 9, no. 2, p. 243, 2010; Penn State Legal Studies Research Paper No. 25-2010, available at SSRN: <http://ssrn.com/abstract=1476341>.

¹¹ Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (November 17, 2000), available at <http://drop.io/iceprosecutorialdiscretion>.

¹² Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011) (available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

¹³ Jeanne Butterfield, et al., Memorandum to Interested Parties, Executive Branch Authority Regarding Implementation of Immigration Laws and Policies, Washington, D.C. (April 29, 2011), available at http://www.immigrationpolicy.org/sites/default/files/docs/Memo_exec_branch_authority.pdf.

¹⁴ Henry Hyde, Lamar Smith, et al., Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings, November 4, 1999, in 76 *Interpreter Releases* 1730, December 3, 1999, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Hyde%20letter%20to%20Reno%20and%20Meissner%201999.pdf>.