



Immigration Update

by Alicia Triche

Pursue Removal or Drop the Case? U.S. Immigration and Customs Enforcement and Prosecutorial Discretion

In late October 2013, a local trial attorney for

U.S. Immigration and Customs Enforcement (ICE) made a small presentation to a group of law students in Tennessee. He had been invited by the University of Memphis law school to speak to the Public Action Law Society, a group of students that was, at this particular meeting, adhering to an immigration theme. Several nonprofit representatives were present, as well, to speak about volunteer and internship opportunities. ICE's assistant chief counsel, however, had been asked to speak about prosecutorial discretion.

He opened by stating that the previously long-standing policy had been to pursue removal, to the fullest extent possible, for each and every detected offender. But, that policy, he explained, had now been altered. As he spoke, the students seemed to become more and more interested, and they asked him numerous follow-up questions. Undoubtedly they were zoning in on the fact that explicitly acknowledging enforcement priorities—and especially, enforcement *non*-priorities—was a considerably bold move in the U.S. immigration arena. And, although in a tiny setting, with no publicity or fanfare, the ICE attorney's presentation was a remarkable event. It reflected a historic shift in U.S. immigration policy, in which enforcement would now be openly prioritized, and some undocumented aliens would intentionally be spared from removal. In August 2013, the agency summarized that policy as follows: “[ICE] is committed to intelligent, effective, safe, and humane enforcement of the nation's immigration laws.”²

Exercising authority to drop the case, as it would be called in the criminal setting, is referred to in immigration law as an act of prosecutorial discretion.³ This “generally refers to the agency's determination of whether or not the immigration laws should be enforced against a particular individual or group of persons.”⁴ It is rooted in ICE's basic authority as the supervisor of the removal process. That authority is found in the opening sections of the U.S. Immigration and Nationality Act (INA),⁵ which provides that “[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act. ...”⁶ The INA, in turn, provides that in

certain circumstances, an arriving alien “is inadmissible,”⁷ and an alien already present “is deportable,”⁸ without mandating removal in either instance. When prosecutorial discretion occurs, ICE makes a joint motion for a U.S. immigration judge (or, less often, the Board of Immigration Appeals), to “administratively close” the case;⁹ and, at an earlier stage, it can also occur when ICE decides not to file a notice to appear with immigration court.

As Professor Shoba Wadhia explains, the “concept of prosecutorial discretion is not new to immigration law,” and, indeed, has been around in various incarnations since John Lennon asked for it in 1975.¹⁰ However, in its modern form, it is uniquely explicit, structured, and comprehensive. Prosecutorial discretion was announced in mid-2011, beginning with two internal directives that are now known far and wide as the Morton Memos. The first, issued in March 2011, directs that ICE has three priority areas for enforcement: aliens who pose a danger to national security or a risk to public safety, recent illegal entrants, and aliens who are fugitives or otherwise obstruct justice.¹¹ The second, issued in June 2011, directs that, in determining whether the exercise of prosecutorial discretion would be appropriate, “decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.”¹² Factors to consider include the length of the person's presence in the United States, the person's ties to his or her community, whether the person has U.S. citizen children, and the conditions in the person's home country.¹³ A third memo issued in August, 2013 adds an enforcement priority of maintaining family unity, especially in the detention context.¹⁴ It directs: “ICE personnel should ensure that the agency's immigration enforcement activities do not unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children.”¹⁵

As currently exercised, prosecutorial discretion confers neither legal status nor any other affirmative benefit upon the recipient. It leads only to the administrative closure of the case—a discretionary act ordered by an immigration judge, and one that can be displaced at that judge's discretion should it be decided at any time that the

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case should move forward. Indefinite as it may be, though, the offer of reprieve has proved tremendously important to those accepting it. A non-government statistic counts the number of pending cases closed for prosecutorial discretion to be near 26,000 as of September 30, 2013.¹⁶ The only official statistics indicate that, as of May 29, 2012, ICE had identified 9 percent of nondetained, pending cases as amenable to prosecutorial discretion; less than 1 percent of detained cases as qualifying; and, overall, had offered it to 3,998 individuals.¹⁷ Importantly, the May 2012 report indicated that 95 percent of prosecutorial discretion cases identified had been backlogged in the court system for more than six months.¹⁸

tions).

⁸See, e.g., 8 U.S.C. § 1237(a)(2)(B) (convictions relating to controlled substances).

⁹Immigration judges have authority to administratively close cases as an act of convenience, in furtherance of the efficient administration of removal proceedings. *Matter of Avetisyan*, 25 I&N Dec. 688, 690–93 (BIA 2012), citing 8 C.F.R. § 1003.10 (b) (other citations omitted).

¹⁰Shoba S. Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview* (American Immigration Council Jul. 2011), available at [www.immigrationpolicy.org/special-reports/morton-](http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview)

“We are empowering the attorneys nationally to make them more like federal prosecutors, who decide what cases to bring.”

—Anonymous Department of Homeland Security (DHS) official, Nov. 17, 2011¹

That statistic brings home one of the underlying principles of prosecutorial discretion: an admission that the “agency lacks the resources to target every person against whom a legally sufficient charge exists.”¹⁹ Against that backdrop, priorities must be set, and the prosecutorial discretion memos express an opening intent to move in that direction. Advocates such as Professor Shoba, however, have argued for more consistency and accountability in the process. While acknowledging that ICE has recently become “more attentive to tracking,” she maintains that, currently “there is a transparency challenge,” and “DHS should hold employees who abuse prosecutorial discretion accountable.”²⁰ She quotes the Supreme Court’s warning that “[a]bsolute discretion is a ruthless master,”²¹ and asserts that, if not properly monitored, its exercise could lead to vastly different treatment of similarly situated persons within our borders. Professor Shoba also asserts that better transparency would lead to improved agency efficiency, improved consistency, and more public acceptability.²² It remains to be seen whether that will occur and what fate will ultimately befall the prosecutorial discretion structure under future administrations. ☉

Endnotes

¹Julia Preston, *U.S. to Review Cases Seeking Deportations* (nytimes.com, Nov. 17, 2011).

²John Sandweg, “Facilitating Parental Interests in the Course of Immigration Enforcement Activities” (U.S. ICE Aug. 23, 2013).

³Professor Shoba Wadhia, one of the preeminent scholars of prosecutorial discretion authority and implementation, asserts it is important to point out that prosecutorial discretion refers only to ICE’s request that an immigration judge administratively close the case. The immigration judge’s decision, she distinguishes, is a judiciary action taken with statutory authority.

⁴Shoba Wadhia, “The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions”, 16 HARV. LAT. L. REV. 39, 41–42 (Spring 2013) (citations omitted).

⁵8 U.S.C. §§ 1101 *et seq.*, as amended.

⁶8 U.S.C. § 1103(a)(1) (2013).

⁷See, e.g., 8 U.S.C. § 1182(a)(2)(B) (multiple criminal convic-

[memo-and-prosecutorial-discretion-overview](#) (accessed Oct. 30, 2013).

¹¹John Morton, “Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (U.S. ICE Mar. 2, 2011) at 1–2.

¹²John Morton, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (US ICE Jun. 17, 2011) at 4.

¹³*Id.*

¹⁴John Sandweg (n. 2).

¹⁵*Id.* ¶ 2.

¹⁶TRAC Immigration, *Immigration Court Cases Closed Based on Prosecutorial Discretion*, trac.syr.edu/immigration/prosdisc-rection/compbacklog_latest.html (accessed Oct. 31, 2013); see also Shoba Wadhia, *Prosecutorial Discretion in Immigration Agencies: A Year in Review*, in *Emerging Issues Analysis* (LexisNexus 2012), available at cliniclegal.org/resources (accessed Oct. 31, 2013).

¹⁷ICE “Case-by-Case Review Statistics,” AILA Infonet Doc. No. 12060747 (posted Jun. 7, 2012).

¹⁸*Id.*

¹⁹Wadhia, *Prosecutorial Discretion in Immigration Agencies* (n. 16) at 1.

²⁰Telephonic Interview with Prof. Shoba Wadhia, Oct. 30, 2013 (notes on file with author).

²¹Wadhia, “The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions” (n. 4) 39–40, citing *United States v. Wunderlich*, 342 U.S. 98, 101 (1951).

²²Telephonic Interview (n. 20).

Correction

In the Oct/Nov 2013 issue of *The Federal Lawyer*, the first sentence of the Immigration Update should have read “In Russia, Snowden has now been granted the status of refugee.”