



**THE
MORTON MEMO**

AND

**PROSECUTORIAL
DISCRETION**

AN OVERVIEW

By Shoba Sivaprasad Wadhia

JULY 2011

THE MORTON MEMO AND PROSECUTORIAL DISCRETION

AN OVERVIEW

BY SHOBA SIVAPRASAD WADHIA

JULY 2011

ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

ABOUT THE AUTHOR

Shoba Sivaprasad Wadhia is Clinical Professor of Law and Director of the Center for Immigrants' Rights at the Dickinson School of Law of Pennsylvania State University. J.D., Georgetown University Law Center; B.A., Indiana University, with honors. She joined Penn State Law in July 2008 as director of the school's new Center for Immigrants' Rights and as a clinical professor of law. She also teaches Asylum and Refugee Law and a clinical course on Immigration Law and Policy. Previously, Professor Wadhia worked for several years as deputy director for legal affairs at the National Immigration Forum, an immigration advocacy organization in Washington, D.C. During that time, Professor Wadhia was immersed in issues surrounding the creation of the U.S. Department of Homeland Security and "Post 9-11" executive branch policies impacting immigrant communities, and was a voice in the debates surrounding "comprehensive immigration reform." She provided legal expertise and analysis of legislative and regulatory proposals; engaged in direct advocacy with Congress and the administration; and led an NGO-governmental work groups on immigrant due process and civil liberties. She also taught Immigration Law and Asylum and Refugee Law at Howard University School of Law and the American University Washington College of Law (2005-2008).

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Introduction

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued two significant memoranda on the use of prosecutorial discretion in immigration matters.¹ Prosecutorial discretion refers to the agency's authority to not enforce immigration laws against certain individuals and groups.² The primary memo (the Morton Memo on Prosecutorial Discretion) calls on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S. and instead spend the agency's limited resources on persons who pose a serious threat to public safety or national security. Morton's second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits. The memo instructs "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."³

A closer look at the Morton Memo on Prosecutorial Discretion reveals that it reaffirms many of the principles and policies of previous guidance on this subject. The memo, however, takes a further step in articulating the expectations for and responsibilities of ICE personnel when exercising their discretion.

Origins of Prosecutorial Discretion

The concept of prosecutorial discretion is not new to immigration law, and became public in 1975 after a lawsuit involving music legend, John Lennon. Lennon faced a medley of immigration issues. In order to help Lennon, his attorney Leon Wildes pushed the Immigration and Naturalization Service (INS) to disclose its policy on prosecutorial discretion under the Freedom of Information Act.⁴ This policy, known then as the "nonpriority" program, recognized that certain cases did not necessarily merit deportation; officers were instructed to consider advanced or tender age, long-time presence in the United States, health conditions, and family ties as reasons why the agency should consider exercising prosecutorial discretion favorably.⁵ While the agency's stated criteria for the "nonpriority" program were subsequently repealed, the substance of that guidance was preserved in a memorandum issued by former INS Commissioner Doris Meissner (Meissner Memo). The Meissner Memo contained a mandate for every officer to exercise prosecutorial discretion in a judicious manner at every stage of the enforcement process and also published a list of equitable factors INS officers should consider in making prosecutorial decisions.⁶

After 9/11, Congress passed the Homeland Security Act of 2002, abolishing INS and creating the Department of Homeland Security (DHS).⁷ INS functions were absorbed and dispersed throughout the Department.⁸ While the creation of DHS changed the landscape and functions of immigration laws in significant ways, the agency has continued to support prosecutorial discretion guidance that favors smart enforcement and temporary relief for resident noncitizens with socially desirable qualities or compelling equities.⁹

Two Premises for Prosecutorial Discretion

For more than 30 years, the use of prosecutorial discretion in U.S. immigration enforcement has been based on two premises. The first is the necessity of using limited resources wisely—in other words, it’s about the money. To illustrate, a June 30, 2010, memorandum published by ICE concluded:

[ICE]...has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency’s highest enforcement priorities, namely national security, public safety, and border security.¹⁰

Under that memo, ICE policy priorities are reflected in priority categories of individuals ICE seeks to target for arrest and removal. These categories are:

- Priority 1. Aliens who pose a danger to national security or a risk to public safety
- Priority 2. Recent Illegal Entrants
- Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls.¹¹

Significantly, the recent Morton Memo on Prosecutorial Discretion reaffirms these priorities, but places them within the decision-making process by identifying them as adverse factors which can mitigate or cancel out other considerations in a given case.¹²

The second theory of prosecutorial discretion concerns compassionate and humanitarian use of law-enforcement tools. Whereas resource issues motivate practical implementation decisions, humanitarian factors go to broader questions of whether justice is actually done in a given case. The kinds of factors that address this impulse in prosecutorial discretion include tender age, older age, the existence of a medical or mental health condition, the presence of family in the U.S., and positive contributions to the United States.¹³

Exercising Prosecutorial Discretion

Various agency memoranda stipulate that prosecutorial discretion can be exercised by any branch of DHS in many forms and at many points in the enforcement process, a point reiterated by the Morton Memo on Prosecutorial Discretion.¹⁴ Moreover, these memos all consistently stress the wide range of circumstances where prosecutorial discretion should be exercised. To illustrate, an officer may decide not to bring charges against someone who is out of status and is otherwise in the U.S. working. After an arrest, an officer may decide not to detain a person who does not appear to be a danger or a flight risk. Even after an arrest or detention, a DHS employee or attorney may decide not to serve the individual and the court with a Notice to Appear (charging papers) in removal proceedings because the person appears to be eligible for

a family benefit with the “services” side of immigration, United States Citizenship and Immigration Services. Moreover, if a person is already in removal proceedings, then ICE could exercise prosecutorial discretion by cancelling a Notice To Appear (NTA), or joining in a “motion to terminate.”¹⁵ Finally, if a person has already been ordered removed, ICE could grant a stay of removal. Alternatively, anywhere in the process any DHS component could grant “deferred action,” a discretionary remedy that keeps a person in a legal limbo.¹⁶ Regardless of the form prosecutorial discretion takes (i.e., NTA cancellation, deferred action, refraining from filing an NTA) the act itself confers no substantive benefit or right of action to the noncitizen.¹⁷

Factors for Prosecutorial Discretion

While the standard for prosecutorial discretion in immigration matters has been largely the same for many years, the Morton Memo on Prosecutorial Discretion clarifies that standard in at least five important ways. First, it attempts to streamline the various memoranda on prosecutorial discretion by “build[ing] upon” a library of pre-existing policies on the subject. Second, it creates an extra “check” in the process by allowing ICE trial attorneys to review charging decisions by DHS employees and, as a matter of discretion, dismiss low-priority cases. Third, the Morton Memo on Prosecutorial Discretion directly addresses the role of the ICE attorney when an immigrant is in removal proceedings and the virtues of exercising discretion at this stage. Fourth, it clearly encourages ICE employees and attorneys to consider prosecutorial discretion “without waiting for an alien or alien’s advocate or counsel to request a favorable exercise of discretion.”¹⁸ In no other memoranda has there been such an explicit affirmative duty placed on the DHS employee to initiate prosecutorial discretion in cases. In fact, my experience in communicating with attorneys and researching this topic for several years is that only attorneys who are well informed about prosecutorial discretion and connected with DHS officials are successful. Finally, the Morton Memo on Prosecutorial Discretion offers a robust list of largely humanitarian circumstances that should trigger a favorable exercise of prosecutorial discretion. The list itself includes the following 19 factors that should be considered in deciding whether prosecutorial discretion is warranted:

- the agency’s civil immigration enforcement priorities;
- the person’s length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person’s pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person’s criminal history, including arrests, prior convictions, or outstanding arrest warrants;

- the person’s immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person’s ties and contributions to the community, including family relationships;
- the person’s ties to the home country and conditions in the country;
- the person’s age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person’s spouse is pregnant or nursing;
- whether the person or the person’s spouse suffers from severe mental or physical illness;
- whether the person’s nationality renders removal unlikely;
- Whether the person is likely to be granted legal status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state, or local law-enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.¹⁹

The Morton Memo on Prosecutorial Discretion also identifies classes of persons who warrant “particular care” when making prosecutorial decisions.²⁰ Specifically, these individuals include:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.²¹

Prosecutorial Discretion Does Not Confer Legal Status

Merely days after the Morton Memo was issued in June, select members of Congress, ICE’s own union, private associations opposed to any immigration reform, and the press erroneously labeled Morton’s memo on prosecutorial discretion a vehicle for circumventing Congress and, more specifically, as an “amnesty” for potential beneficiaries of the DREAM Act and other large groups.²² The problem with this label is that the DREAM Act is a piece of legislation that has been introduced in several Congresses in various forms; at its core, the DREAM Act provides graduated high-school students with a vehicle for earning permanent legal status in the U.S. if they go to college or serve in the military for a specified period of time.²³ It should not be

surprising that some potential beneficiaries of the DREAM Act have the kinds of equities that are given favorable consideration by agency officers exercising prosecutorial discretion. That said, it is inaccurate to label the new Morton Memo on Prosecutorial Discretion a backdoor route to passing the DREAM Act. First, any form of prosecutorial discretion is tenuous at best, and does not confer a legal status or benefit. In contrast, the DREAM Act would result in a legal status for eligible students. Second, prosecutorial discretion, however tenuous, should be considered in a variety of situations and applied to low-priority cases that include strong equities, not just to qualifying DREAM Act cases. Finally, decisions about prosecutorial discretion are normally made on a case-by-case basis as opposed to categorically.

Conclusion

Prosecutorial discretion has and will continue to play an important role in immigration enforcement. ICE has taken an important step by issuing the recent memos on prosecutorial discretion and protection for crime victims, guidance that is sensitive to individuals who have attributes that our society values, but who will remain vulnerable to harsh immigration enforcement unless ICE attorneys and employees do the right thing and are given the support to make those decisions. Implementation of the memos should include a process by which prosecutorial discretion is considered in every case brought to ICE's attention before a Notice to Appear is issued. ICE attorneys and employees must be trained on these memos, and held accountable when they are not followed. Moreover, ICE must keep statistics and profiles on the individuals considered for prosecutorial discretion and make them available to the public. Finally, ICE must invest resources in training and (re)acculturating its officers and attorneys to the concept of prosecutorial discretion and the importance of exercising it in each and every case.

Endnotes

¹ See John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement (June 17, 2011), [hereinafter Morton, *Exercising Prosecutorial Discretion*] <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Immigration and Customs Enforcement (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

² See, e.g., *id.* at 2; memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memo] (on file with author); memorandum from William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005) [hereinafter Howard Memo] (on file with author); memorandum from Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007) (on file with author); John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement (2010), [hereinafter Morton, *Civil Immigration Enforcement*] http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; and John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Immigration and Customs Enforcement, (2011), [hereinafter Morton, *Victims, Witnesses, and Plaintiffs*], <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>. For a broader discussion about the role of prosecutorial discretion in immigration law, and relevant lessons one can draw from the administrative and criminal law contexts, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010), [hereinafter Wadhia, *Prosecutorial Discretion*] available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341.

³ See Morton, *Victims, Witnesses, and Plaintiffs*, *supra* note 3.

⁴ See Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1980); Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1974); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1977).

⁵ See Wadhia, *Prosecutorial Discretion*, *supra* note 3, at 248.

⁶ See Meissner Memo, *supra* note 3. For a closer examination of the factors listed in the Meissner Memo see Wadhia, *Prosecutorial Discretion*, *supra* note 3.

⁷ Homeland Security Act (HSA) of 2002, Pub. L. 107-296, 116 Stat. 2135.

⁸ See *Organizational Chart*, U.S. DEPARTMENT OF HOMELAND SECURITY (May 31, 2011), <http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf>. The primary immigration components in DHS include Customs and Border Protection; Immigration and Customs Enforcement; and United States Citizenship and Immigration Services. The immigration court system is housed in the Department of Justice in a unit called the Executive Office for Immigration Review. For more information about these agencies, see *Department Subcomponents and Agencies*, U.S. DEPARTMENT OF HOMELAND SECURITY (May 31, 2011), <http://www.dhs.gov/xabout/structure/>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (May 31, 2011), <http://www.justice.gov/eoir/>.

⁹ See Wadhia, *Prosecutorial Discretion*, *supra* note 3.

¹⁰ Morton, *Civil Immigration Enforcement*, *supra* note 3, at 1. This memo was reissued in March 2, 2011 with the following addition “These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 4 (2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

¹¹ Morton, *Civil Immigration Enforcement*, *supra* note 3, at 1-2. For a closer analysis of the Morton Memo on Civil Enforcement Priorities, see Shoba Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, IMMIGRATION POLICY CENTER-AMERICAN IMMIGRATION COUNCIL; THE PENNSYLVANIA STATE UNIVERSITY LEGAL STUDIES RESEARCH PAPER No. 46-2010 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723165.

¹² “ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum ...which this memorandum is intended to support.” Morton, *Exercising Prosecutorial Discretion*, *supra* note 3, at 2.

¹³ See, e.g., sources cited *supra* note 3.

¹⁴ Most memoranda, including the Morton Memo, encourage employees to exercise prosecutorial discretion at the earliest possible stage of the enforcement process, ideally before charges are filed with the immigration court.

¹⁵ See, e.g., Morton, *Exercising Prosecutorial Discretion*, *supra* note 2; Meissner Memo, *supra* note 3; Howard Memo, *supra* note 3.

¹⁶ See, e.g., Meissner Memo, *supra* note 3; *USCIS Update: USCIS Issues Guidance for Surviving Spouses of U.S. Citizens*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 31, 2009), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f2b53533ea073210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

¹⁷ See, e.g., Morton, *Exercising Prosecutorial Discretion*, *supra* note 2. Beyond the scope of this paper is a discussion about whether certain acts of prosecutorial discretion should operate as a formal benefit and be accompanied by a right of review and other protections. For an analysis on this topic, see Wadhia, *Prosecutorial Discretion*, *supra* note 3.

¹⁸ Morton, *Exercising Prosecutorial Discretion*, *supra* note 2, at 5.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ *Id.*

²² See, e.g., R. Cort Kirkwood, *Circumventing Congress: Failed Dream Act Mandated by ICE Director*, NEW AMERICAN (June 27, 2011) <http://www.thenewamerican.com/usnews/immigration/8015-circumventing-congress-failed-dream-act-mandated-by-ice-director>; Letter from Rep. Lamar Smith, *Prevent the Obama Administration from Bypassing Congress and Legalizing Millions of Illegal Immigrants Co-Sponsor the HALT Act* (June 23, 2011), http://big.assets.huffingtonpost.com/Smith_DearColleague.pdf; *Obama Administration Bypasses Congress; Grants Amnesty to DREAM Act Students*, FEDERATION FOR AMERICAN IMMIGRATION REFORM http://www.fairus.org/site/News2/1245052251?page=NewsArticle&id=24229&security=1601&news_iv_ctrl=1012 (last visited July 1, 2011); *ICE Agent’s Union Speaks Out on Director’s “Discretionary Memo” Calls on the public to take action*, AFG NATIONAL COUNCIL (June 23, 2011), <http://www.iceunion.org/news/ice-agent%E2%80%99s-union-speaks-out-director%E2%80%99s-%E2%80%9Cdiscretionary-memo%E2%80%9D-calls-public-take-action-click-her>.

²³ See, e.g., Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong.; Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong.; U.S. SENATOR DICK DURBIN, <http://durbin.senate.gov/public/index.cfm/legcrimejusticejudiciary> (last visited July 1, 2011).