

IMMIGRATION JUSTICE CAMPAIGN



Prosecutorial Discretion in Immigration Cases

What is prosecutorial discretion?

Prosecutorial discretion (PD) is a general term for the inherent authority of a law enforcement agency or officer to decide whether and to what degree to enforce the law in a particular case. Officers and agencies in various branches of the government routinely exercise PD in civil and criminal contexts. In the immigration context, many of the component bureaus of the Department of Homeland Security (DHS) have law enforcement responsibilities and, as such, have the authority to exercise PD. That authority does not flow from the statute or regulations, but from law enforcement's inherent discretionary authority to determine how to enforce the laws with which it is charged.

When can an immigration officer exercise prosecutorial discretion?

DHS has broad authority to exercise prosecutorial discretion at all stages of any enforcement process. The degree to which it does so depends generally on enforcement priorities which are established by the agency's leadership, and communicated to its officers via memoranda.

Three recent DHS memos set the framework for the agency's current PD policy: On February 18, 2021 Acting Immigration and Customs Enforcement (ICE) Director Tae Johnson issued [*Interim Guidance: Civil Immigration Enforcement and Removal Priorities*](#) to all ICE employees. On September 30, 2021 DHS Secretary Alejandro Mayorkas issued [*Guidelines for the Enforcement of Civil Immigration Law*](#) to the Department's component agencies: Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). And on April 3, 2022 ICE Principal Legal Advisor Kerry Doyle issued [*Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*](#). The Johnson and Mayorkas memos identify three broad categories of individuals whom the agency deems enforcement priorities and instruct its officers to exercise their prosecutorial discretion in accordance with those priorities. And the Doyle memo gives specific guidance to the various Offices of the Chief Counsel (the attorneys who represent DHS before the Executive Office for Immigration Review; that is, who serve as prosecutors in immigration court and Board of Immigration Appeals proceedings) in the exercise of prosecutorial discretion in removal and custody redetermination proceedings.

What are DHS' current enforcement priorities?

The Johnson and Mayorkas memos identify and define three broad categories of people as enforcement priorities:

1. Threats to National Security;
2. Threats to Public Safety;
3. Threats to Border Security (including anyone who entered or attempted to enter the United States "unlawfully" after November 1, 2020)

How do immigration officers exercise prosecutorial discretion?

ICE, CBP, USCIS and OPLA officials can exercise their prosecutorial discretion in myriad ways. Some of the most common are:

Before issuing a Notice to Appear (NTA)

- Whether to place an individual in expedited removal proceedings or issue an NTA;
- What charges to include in an NTA;
- Whether to cancel an NTA before it is filed with the Court;
- Whether to parole an individual into the country, rather than detaining them;
- Whether to detain or release a person on bond, supervision, personal recognizance, or other conditions;

While an individual is in immigration court removal or custody redetermination (bond) proceedings

- Whether to move to dismiss the NTA and/or terminate the removal proceedings;
- Whether to agree to a continuance or a request for administrative closure;¹
- Whether to stipulate to certain facts or legal issues;
- Whether or not to oppose the granting of a legal benefit or form of relief from removal;
- Whether to appeal an immigration judge's decision;

¹ A few words on the distinction between dismissing an NTA and administratively closing removal proceedings: Both are mechanisms by which an immigration judge can remove a case from the court's active docket, on motion from either party. Dismissal results in the removal proceedings themselves being terminated; the case ends, the noncitizen is no longer in removal proceedings, and any applications for relief which they had filed are terminated as well. Administrative closure, in contrast, is simply a mechanism to remove a case from active consideration. The proceedings, and any applications for relief, remain pending but the court holds no hearings and the judge takes no action on the case. Administrative closure is often more beneficial to the noncitizen, but DHS disfavors it, and will often only agree to dismissal.

After the issuance of a removal order

- Whether to join in, oppose, or state no position as to, a motion to reopen removal proceedings;
- Whether to stay the execution of a removal order;
- Whether to place an individual on supervised release, rather than detaining them.

How does one request a favorable exercise of prosecutorial discretion?

The first order of business in submitting a request for prosecutorial discretion is to identify the specific exercise of discretion which would best serve one's client's interests. For example, if a client is in removal proceedings with a strong claim for relief it might not be in their best interests to have the proceedings terminated since that would simply leave them in legal limbo and cut off their path to pursuing legal status. It would, however, certainly be in their best interests for DHS to agree not to appeal if the immigration judge decides to grant their application for relief from removal.

The second order of business is to identify which office or officer has the authority to exercise the particular act of discretion. For example, a request to terminate expedited removal proceedings and to issue an NTA would go to the border official who instituted the proceedings. A request to stipulate to certain facts or legal issues in a client's removal proceedings would go to the DHS/ICE Office of Chief Counsel (OCC or OPLA) in the relevant immigration court's jurisdiction. A request to join in a motion to reopen removal proceedings in which a final order of removal has already been issued would go to the OCC office which represented the government in the client's removal proceedings.

Unlike most immigration benefits, there is no form for a PD request; it is submitted by letter to the appropriate agency. The Office of the Principal Legal Advisor (also referred to as the Office of Chief Counsel) has a [dedicated webpage](#) on prosecutorial discretion, with instructions on how to submit requests via dedicated email boxes.

The limits of prosecutorial discretion

The scope of an agency's prosecutorial discretion is constrained by the laws which that agency is charged with enforcing. Officers can only exercise discretion in accordance with the law; put differently, they have no discretion to act in contravention of the law. So, for example, an OCC attorney might exercise her discretion to stipulate to a \$5,000 bond for a person who is statutorily eligible for release from custody, but would have no authority to stipulate to a grant of release on bond for a person who is subject to mandatory detention. And by the same token, a border official faced with a person who attempts to enter the country on an expired or fraudulent visa has no authority to admit that person on the invalid visa, but may exercise their discretion to parole that person into the United States for humanitarian reasons.

PD is not a solution to all of the problems inherent in the immigration system, or to every individual's case. It can, however, be an extremely effective mechanism to ease an overtaxed agency's workload, and to reach equitable outcomes in particular cases.