

Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion

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On June 30, 2010, the Deputy Assistant Secretary for Immigration and Customs Enforcement (ICE), John Morton, issued a memo to the agency that reflected the Obama administration's oft repeated intent to focus removal efforts on serious offenders. Morton noted:

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.

Coupled with last year's announcement that ICE would not engage in the kind of major worksite raids that became common during the Bush administration, the "Morton Memo" potentially marks a new phase in the enforcement of immigration law. Moreover, the memo gives us insight into the Obama administration's approach to prosecutorial discretion in immigration enforcement.

A close reading of the Morton Memo reveals, however, that it is likely to be subject to multiple interpretations, offering some guidance but little clarity for handling the hundreds of thousands of decisions made annually by ICE agents regarding the arrest, detention, and removal of individual immigrants. This report explains the key provisions of the Morton Memo, points out its strengths and weaknesses, and offers recommendations for additional guidance that should be issued to fulfill the promise of reform suggested in the memo itself.

What's In a Name? Criminal Aliens

Issued on June 30, 2010, the Morton Memo identifies priorities for immigration officers to follow in the apprehension, detention, and removal of noncitizens. It contains a striking statistic: that ICE has funds to deport approximately 400,000 noncitizens per year, which is less than 4 percent of the estimated population of undocumented noncitizens present in the U.S. In light of this limitation, and in an effort to streamline ICE resources in a manner that focuses on the most serious offenders, the memo outlines three priorities, the first of which is the highest and the second and third constituting equal but lower priorities: individuals who 1) pose a public safety risk or danger to society, defined in part by a history of terrorist or criminal activity; 2) recently entered the United States through means other than a valid port of entry or border checkpoint; and 3) have been identified by ICE as remaining in the United States with an outstanding order of removal "or otherwise obstruct immigration controls."

Looking more carefully at these priority categories raises numerous questions, particularly in Priorities 2 and 3. ICE defines the highest priority cases as follows:

Priority 1. Aliens who pose a danger to national security or a risk to public safety

The removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration enforcement priority. These aliens include, but are not limited to:

aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
aliens not younger than 16 years of age who participated in organized criminal gangs;
aliens subject to outstanding criminal warrants; and
aliens who otherwise pose a serious risk to public safety.

ICE's focus on individuals who "pose a danger to national security or a risk to public safety" appears reasonable on its face. However, the agency has a long history of ignoring this calculus or applying the standard of dangerousness beyond its ordinary meaning. While the Morton Memo contains a qualifying clause advising officers not to read "otherwise pose a serious risk to public safety" too broadly, the cautionary note is dropped in a footnote and lacks specific examples and explanations; thus, it likely will be overlooked or disregarded by officers in the field.

For noncitizens convicted of crimes, the Morton Memo further prioritizes enforcement within this first category into three "Levels" based on the following criminal convictions:

- Level 1: "aggravated felonies as defined in [the immigration statute], or two or more crimes each punishable by more than one year."
- Level 2: "any felony or three or more crimes punishable by less than one year."
- Level 3: "crimes punishable by less than one year."

While these levels represent a logical progression, and emphasize convictions over mere arrests or suspicious activity, they nonetheless lack sufficient detail. The discussion of priorities fails to address further distinguishing characteristics that would create even lower prioritization within these levels. For instance, what priority should be given to certain individuals convicted of nonviolent crimes, those with strong equities such as family or employment inside the United States, or those convicted of crimes for which they served no actual time in prison.

Moreover, placing all persons convicted of an "aggravated felony" categorically within Level 1 is misleading, because "aggravated felony" under immigration law is a broad term that does not require that a person be convicted of an actual felony or an aggravated crime. To illustrate, in immigration cases, the aggravated felony definition encompasses shoplifting offenses and other misdemeanors. While the Morton Memo remarks in a corresponding footnote that "... 'aggravated felony' includes serious, violent offenses and less serious, non-violent offenses, agents, officers, and attorneys should focus particular attention on the most serious of the aggravated felonies..." this qualification, as expressed, is insufficient. It will be too easy for an officer to overlook this footnote, particularly because it does not contain specific examples that will educate officers less familiar with the spectrum of "aggravated felonies."

Similarly, in describing the Level 3 offenses covering misdemeanor crimes, the Morton Memo advises officers to exercise "particular discretion" for less serious misdemeanor offenses. Again, this advice is reduced to the form of a footnote and is likely to lead to confusion. For example, what constitutes "particular discretion" as opposed to the exercise of discretion promoted in the text of the Morton Memo? If an officer confronts an individual with a misdemeanor conviction that is "more" serious than a traffic stop but "less" serious than a violent crime, is the officer to exercise "less" particular discretion?

Priorities 2 and 3. The other priority categories are described in the memo as of lesser importance, but of equal priority, a categorization that seems confusing on its face. The memo states:

Priority 2. Recent illegal entrants

In order to maintain control at the border and at ports of entry, and to avoid a return to the prior practice commonly and historically referred to as "catch and release," the removal of aliens who have recently violated immigration controls at the border, at ports of entry, or through the knowing

abuse of the visa and visa waiver programs shall be a priority.

Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls

In order to ensure the integrity of the removal and immigration adjudication processes, the removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls, shall be a priority. These aliens include:

- Fugitive aliens, in descending priority as follows:
 - fugitive aliens who pose a danger to national security;
 - fugitives aliens convicted of violent crimes or who otherwise pose a threat to the community;
 - fugitive aliens with criminal convictions other than a violent crime;
 - fugitive aliens who have not been convicted of a crime;

- Aliens who reenter the country illegally after removal, in descending priority as follows:
 - previously removed aliens who pose a danger to national security;
 - previously removed aliens convicted of violent crimes or who otherwise pose a threat to the community;
 - previously removed aliens with criminal convictions other than a violent crime;
 - previously removed aliens who have not been convicted of a crime; and aliens who obtain admission or status by visa, identification, or immigration benefit fraud.

What is most notable about these categories is the wide range of offenses collapsed within them. The Morton Memo's second priority category is essentially those who recently entered the United States out of compliance with the law, while the third priority are those who were issued removal orders by the agency and remain in the United States—pejoratively described by ICE as “fugitives”—and “others” who obstructed immigration controls. While a detailed description of these noncitizen classifications is beyond the scope of this report, it is worth noting that individuals without a criminal history or in some cases without actual knowledge that they are in violation of immigration law, can readily fall into ICE's new Priority 2 and 3 categories. For example, many individuals are subject to removal orders issued in absentia who failed to appear at their hearings only because they never received notice of those hearings. Such an individual would have a legitimate basis to move to reopen their case, but is treated no differently from other cases in which someone deliberately avoided a removal order.

The Morton Memo also accepts as a given, the necessity of pursuing “fugitive aliens” and “absconders” without acknowledging the failures of the Fugitive Operations Program, which has repeatedly been found to encourage the arrest and detention of individuals who do not fall into high priority categories. Additionally, some of the classes that fall into Levels 2 and 3 are likely candidates for future legalization programs, making their relatively high prioritization troubling and confusing. Similarly, the memo's categorization of individuals who “otherwise obstruct immigration controls” in Priority 3 is over inclusive at best.

Prospectively, without specific data about the number of noncitizens pursued by immigration agents under the aforementioned priorities, it will be difficult to calculate how the Levels are being applied and what oversight capacity the agency possesses. For example, if the data shows that Level 3 offenders are among the highest of ICE arrests, and also includes those convicted of relatively minor violations for which they served little or no time in jail, this would raise concerns about whether ICE has focused on the truly dangerous. Similarly, if the data shows that half of the ICE resources are being used on Priority 2 and Priority 3 noncitizens, one could reasonably conclude that the priorities have been improperly applied. In this way, the benchmarks identified by ICE regarding whether the Morton Memo is in fact being implemented properly are as important as the scope of data collection. As I note in the recommendations, making this data available to the public is critical.

Detention

Once individuals have been arrested, a second prioritization is anticipated under the Morton Memo which outlines the criteria for determining whether or not to release an individual on bond or further detain them. The memo notes:

As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, ICE officers or special agents must obtain approval from the field office director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

Despite a relatively clear articulation of vulnerable groups who should be released from detention whenever possible, there remains a great likelihood that officers will struggle with those instances where an individual falls within the “Mandatory detention” category but are nonetheless in one of the humanitarian release groups. “Mandatory detention” is a controversial legal term of art that applies to categories of people who are subject to detention and lack the opportunity to request bond or release from custody in the short term. Because mandatory detention applies to broad classes of noncitizens, including but not limited to certain lawful permanent residents (green card holders), those with less serious or nonviolent criminal histories, and asylum seekers fleeing persecution who arrive in the U.S. without all of their paperwork, there is a strong need to further clarify what options are available to an officer. While the memo encourages the officer to seek further guidance from ICE counsel in these circumstances, inconsistent application is likely without further guidance. There is an underlying difficulty not addressed by the memo: how will officers address those cases where someone falls under Level 3 priority for purposes of arrest, but if arrested is subject to mandatory detention. Without further guidance, an immigration officer might interpret the mandatory detention language to mean that any person subject to mandatory detention should be arrested because he or she is a detention priority.

Further clarification on the classes of vulnerable populations is also warranted. While “aliens who are known to be suffering from a serious physical or mental illness” should be not be detained if not subject to mandatory detention, there will clearly be disagreement between reasonable minds over what constitutes a sufficiently serious level of illness, particularly with respect to mental health. This problem may be further complicated if persons who are arrested are not examined and screened thoroughly at the time of arrest. Other categories of vulnerable groups are absent, including survivors of trauma or torture, suggesting that the general guidance will require far more detail in order to be fully carried out.

Prosecutorial Discretion

The final substantive section of the memo briefly recaps the agency position on prosecutorial discretion. The inclusion of a discussion on prosecutorial discretion, although brief, is a significant statement of ICE's intent to guide officers towards common-sense enforcement of the immigration laws. It is a particularly important reminder at a time when many politicians criticize the government for exercising discretion in the enforcement of immigration law, arguing for a policy that would deport everyone. The memo notes:

The rapidly increasing number of criminal aliens who may come to ICE's attention heightens the need for ICE employees to exercise sound judgment and discretion consistent with these priorities when conducting enforcement operations, making detention decisions, making decisions about release on supervision pursuant to the Alternatives to Detention Program, and litigating cases.

Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens. Additional guidance on prosecutorial discretion is forthcoming. In the meantime, ICE officers and attorneys should continue to be guided by the November 17, 2000 prosecutorial discretion memorandum from then-INS Commissioner Doris Meissner; the October 24, 2005 Memorandum from Principal Legal Advisor William Howard; and the November 7, 2007 Memorandum from then-Assistant Secretary Julie Myers.

For those unfamiliar with ICE guidance, however, the rather cryptic references to past memoranda probably limits the impact of this paragraph, particularly as ICE has embraced the principle of prosecutorial discretion in the past, but its officers have not necessarily followed it. A brief review of prosecutorial discretion is thus in order.

For years, long before the demise of the Immigration and Naturalization Service (INS) and creation of the Department of Homeland Security (DHS), the Attorney General was empowered to exercise prosecutorial discretion to make charging decisions and weigh equities, balancing questions of resource management and humanitarian concerns against potential harm. The Secretary of DHS retains that authority and through delegation to immigration officials, is able to enforce the immigration laws against some people, and not others, potentially resulting in a more targeted pool of those actually investigated, charged, detained, and/or removed from the United States. The use of prosecutorial discretion has been controversial, insofar as groups and individuals with compelling hardships or strong equities, such as steady employment, family connections, and business ties in the U.S., nonetheless have been targeted by the agency for removal. Moreover, reasonable minds disagree about whether the profiles of those removed from the U.S. match the agency's pledge to crack down on the truly dangerous.

The INS first made public its philosophy of prosecutorial discretion in 1975 following a noteworthy lawsuit involving music legend John Lennon, and his wife Yoko Ono. Thereafter, INS issued guidance in the form of an "Operations Instruction" (O.I.) to describe the situations in which prosecutorial discretion should be favorably exercised. That now-defunct Operations Instruction advised officers to consider "(1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate." While the O.I. itself was later amended and then rescinded altogether, the factors contained therein have been reiterated in subsequent agency policy memoranda, and leading immigration law treatises. For example, a memorandum issued by then INS Commissioner Doris Meissner in November 2000 (Meissner Memo) acknowledged the continued vitality of the O.I. in deferred action cases and also specified a list of largely humanitarian-related factors former INS should consider when exercising prosecutorial discretion.

The Meissner Memo that was later adopted by DHS is cited, along with subsequent agency memos, as guidance that remains in effect under the Morton Memo. Nonetheless, from a drafting perspective, placing the discussion of prosecutorial discretion at the end of the document minimizes

its effect. While the Morton Memo suggests that additional guidance on prosecutorial discretion is forthcoming, the agency's practice has been to issue piecemeal memos on prosecutorial discretion based on specific circumstances. This is a cumbersome process that can be confusing and lead to inconsistent interpretations. Offering a clear and overarching guidance, such as the 2000 Meissner Memo, should be a priority for the Administration. Moreover, clarifying that prosecutorial discretion should be emphasized at every step of the immigration enforcement process—from investigation to arrest, from detention to actual removal—may be the single most effective way to ensure that prioritization is put into practice.

Oversight and Accountability

The Morton Memo contains an effective date of “immediately,” increasing the probability that officers will be confused about how to implement the broadly defined priorities. It is unclear whether ICE officers tasked with implementing the Morton Memo have been adequately trained not only about the language and interpretation of the newly stated priorities, but also on the various prosecutorial discretion directives referenced in the Morton Memo and on how to resolve potential conflicts and contradictions. The Morton Memo also contains this construction clause: “Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States.” Practically speaking, this clause may confuse individual ICE officers about noncitizens they encounter who do not fall into one of the priority categories outlined by the Morton Memo and in fact may encourage them to arrest and detain those with status violations who pose no flight risk or danger to society.

The Morton Memo ends with stated goals for creating an instrument to measure ICE's effectiveness in measuring the priorities outlined therein. Absent from the memo are specific types of data ICE intends to collect to measure such effectiveness and the public's ability to access this data.

Recommendations and Conclusion

While the Morton Memo directs ICE officers to prioritize based on resources and strategic objectives; its impact turns on whether officers can exercise prosecutorial discretion consistent with a thoughtful and compassionate sense of judgment. Historically, this has not been done and the success of the Morton Memo will ultimately be judged on whether it is implemented with consistency and accountability. To achieve this, the following recommendations are offered:

Training: ICE employees at every level should be trained on the various directives on prosecutorial discretion with specific methods for applying humanitarian factors.

Data Collection: ICE should collect information about the number and categories of noncitizens targeted in the wake of the Morton Memo to determine whether the stated priorities are being followed and/or if there is a need to refine the priorities. Similarly, ICE should develop measures to track the instances where officers decide not to target an individual based on the framework set forth in the Morton Memo. Such information must be publicly available.

Accountability: ICE must have an instrument for holding officers accountable when the Morton Memo is not followed. For example, if a particular officer has a history of targeting Priority 3 or nonpriority noncitizens, appropriate disciplinary action must be taken. Consideration must also be given to identifying an agency outside of ICE, such as the DHS Office of Inspector General, to monitor the officers' performance through an audit or investigation.

Conflict Resolution: What is the vision of the Morton Memo and how do its contents correspond to the Administration's stated support for broad immigration reform? ICE should identify which portions of the Morton Memo as applied or as written conflict with or contradict the agency's stated desire to focus resources on the truly dangerous, and the Obama Administration's stated desire to afford legal status to contributing noncitizens in the U.S.

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Beyond the Morton Memo, all components of DHS must engage in a serious discussion about the creation of a consistent and overarching policy that guides the actions of its officers, incorporating prosecutorial discretion into its policies and rulemaking. Only then can prosecutorial discretion be exercised in a way that is both economical and fair. Even with the greatest administrative reforms to prosecutorial discretion, the need for Congress to implement holistic changes to the domestic immigration system are in clear order, and a critical ingredient to restoring the true meaning of discretion.

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