

MEMORANDUM

July 19, 2011

To: Interested Parties

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Re: **Recent Immigration and Customs Enforcement Memoranda On
Prosecutorial Discretion**

On April 29, 2011, we issued a memorandum addressing the Executive Branch's authority to exercise discretion in deciding what cases to investigate and prosecute under existing immigration law, as is regularly done with respect to other civil and criminal laws. Subsequently, on June 17, 2011, John Morton, Director of Immigration and Customs Enforcement, issued two memoranda to agency personnel clarifying the role of prosecutorial discretion in immigration agency enforcement actions. These memoranda have been criticized as exceeding the scope of the Administration's authority, and we have been asked whether the memoranda are consistent with the analysis of prosecutorial discretion we provided in our April 29, 2011 memo on Executive Action. After reviewing the ICE memos, we conclude that they are perfectly consistent with existing law on the use of prosecutorial discretion and serve to guide its sound exercise in immigration law enforcement decisions.

Purpose of Memos

As noted, the two memoranda serve to clarify the role of prosecutorial discretion in immigration enforcement actions. Neither document represents in any respect a change to existing law or departure from permissible policy, but instead clarifies responsibilities inherent in the exercise of prosecutorial discretion.

The first memorandum, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” builds upon prior prosecutorial discretion guidance reaching back to 1976 and outlines the nature of prosecutorial discretion, the personnel empowered to exercise discretion, and both positive and negative factors to consider in deciding whether to proceed with an immigration enforcement action against an individual.

The second memorandum, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” locates the use of prosecutorial discretion within specific enforcement situations involving witnesses or victims of crimes who may be eligible for immigration benefits. This memo largely serves as a reminder to ICE personnel that it is generally against ICE policy to initiate removal proceedings against such persons, even if they are encountered as a result of programs such as Secure Communities.

Effect of Memos

As noted, neither memorandum changes any law, nor does either provide any new form of relief to persons here in violation of the immigration laws. The first, more general memo simply emphasizes that the exercise of discretion in determining whether to initiate or terminate an action must be guided by an understanding of existing agency priorities. The memo explains that limited agency resources require ICE personnel to consider whether prosecution of an individual case is consistent with the agency’s priorities of promoting national security, border security, public safety, and the integrity of the immigration system. The memo does not dictate a particular result in any case or category of cases; instead it encourages ICE personnel to consider a wide range of positive and negative factors, to review charging decisions made by other agencies as appropriate, and to act affirmatively in appropriate cases. Thus, the primary effect of the memo, if followed by ICE personnel, will be to empower individual officers and attorneys to act in the best interests of the agency by limiting the prosecution of cases that do not fit within the agency’s stated priorities, allowing the agency to focus more specifically on individuals who do fit within those priorities.

Similarly, the second memo on treatment of victims and witnesses creates no new requirements or obligations for ICE personnel. Instead, the memo serves as a reminder of the special immigration benefits authorized by Congress for victims or witnesses of crime who cooperate with law enforcement and the possible conflict with Congress’s purposes in authorizing those benefits that may occur if removal proceedings are initiated against such individuals.

Conclusion

After carefully reviewing Director Morton’s memoranda dated June 17, 2011, we believe that the analysis of the law and the guidance provided therein lie squarely within the basic authorities available to the executive branch.