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The Potential to Increase Efficiency in Immigration Courts through Broader Prosecutorial Discretion as Exemplified by the Mayorkas and Doyle Memos

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THE POTENTIAL TO INCREASE EFFICIENCY IN IMMIGRATION COURTS THROUGH BROADER PROSECUTORIAL DISCRETION AS EXEMPLIFIED BY THE MAYORKAS AND DOYLE MEMOS

Sara Glesne

I. INTRODUCTION

Immigration is an area of law prone to frustrating backlogs in case processing.[1] On April 3, 2022, Immigration and Customs Enforcement (ICE) Principal Legal Advisor Kerry Doyle published a memorandum (Doyle Memo) on prosecutorial priorities and discretion.[2] The Doyle Memo produced a swift policy change that transformed immigration removal defense strategy by broadly expanding the possibilities of a somewhat informal avenue of relief: case dismissal under prosecutorial discretion.[3] The Doyle Memo expressly sought to address major case backlogs in the immigration courts by providing guidelines for how Department of Homeland Security (DHS) prosecutors exercise discretion in dismissing removal cases against noncitizens who did not fall within enumerated priority categories.[4] Just over four months after the Doyle Memo's publication—and as immigration lawyers, immigrants, and DHS prosecutors were adjusting to the prosecutorial priorities that it set forth—a decision by the U.S. District Court for the Southern District of Texas negated its effects by vacating another DHS memorandum (Mayorkas Memo)[5] that the Doyle Memo relied on.[6] The court's decision to vacate the Mayorkas Memo undercut efforts to frame prosecutorial discretion in a way that could have reduced the daunting case backlog in removal proceedings experienced by U.S. immigration courts today.[7]

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[1] *See* TRAC Immigration, *Immigration Court Backlog Tool*, SYRACUSE UNIV. https://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/D52Z-U7XC] (showing pending cases and length of wait by nationality, state, court, and hearing location).

[2] Memorandum from Kerry A. Doyle, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys, U.S. Immigr. & Customs Enf't, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* 15 (Apr. 3, 2022) [hereinafter Doyle Memo].

[3] *Id.*

[4] *Id.* ("[I]n consideration of the severe immigration court backlog, [Office of the Principal Legal Advisor] attorneys should focus DHS's finite resources on pursuing priority cases . . . .") The Office of the Principal Legal Advisor (OPLA) is a part of the Department of Homeland Security (DHS) that also provides legal services to Immigration and Customs Enforcement (ICE) offices. *Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF'T (Sept. 1, 2022), https://www.ice.gov/about-ice/opla [https://perma.cc/5F4P-X5MT]. OPLA represents DHS in immigration removal proceedings. *Id.* The three priority categories included: (A) Threat to National Security; (B) Threat to Public Safety; and (C) Threat to Border Security. Doyle Memo, *supra* note 2, at 2–3.

[5] Memorandum from Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, *Guidelines for the Enforcement of Civil Immigration Law* 2 (Sept. 30, 2021) [hereinafter Mayorkas Memo].

[6] Texas v. United States, No. 6:21-00016, 2022 U.S. Dist. LEXIS 104521, at *118 (S.D. Tex. June 10, 2022) (vacating the Mayorkas Memo as "arbitrary and capricious, contrary to law, and failing to observe procedure under the Administrative Procedure Act."); *see also* Doyle Memo, *supra* note 2 at 2–3 (demonstrating the Doyle Memo's reliance on the Mayorkas Memo via its discussion of the priority framework set by the Mayorkas Memo).

[7] At the end of September 2022, there were 1,936,504 immigration cases pending before U.S. immigration courts, which exceeded the number of cases pending before the courts at any other time. TRAC Immigration, *supra* note 1. "The number of cases pending in the

Under U.S. immigration law, DHS may place noncitizens within the geographic bounds of the United States into removal proceedings if those noncitizens are subject to one or more grounds of inadmissibility or deportability under the Immigration and Nationality Act (INA) Section 212 or 237, respectively.[8] Before the beginning of the COVID-19 pandemic, individuals in removal proceedings experienced lengthy wait times for adjudication of their removability through individual merits hearings.[9] Between court closures associated with the pandemic and a steady stream of newly initiated cases, the case backlog ballooned to an estimated 1.6 million cases pending before the Executive Office for Immigration Review (EOIR), the administrative body that adjudicates immigration removal cases, as of December 2021.[10]

A May 2021 memorandum issued by ICE's then Principal Legal Advisor characterized the case backlog and case resolution delays as "imped[ing] the interests of justice for both the government and respondents alike and undermin[ing] public confidence in this important pillar of the administration of the nation's immigration laws."[11] The Mayorkas Memo, issued in September 2021, estimated that there were then over 11 million noncitizens living in the United States without documents or who otherwise could be found removable.[12] In 2019, the EOIR faced

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[immigration] courts has increased every fiscal year for the past 15 years, from 168,827 in FY2006 to an all-time high of approximately 1.5 million in the first quarter of FY2022." HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47077, U.S. IMMIGRATION COURTS AND THE PENDING CASES BACKLOG 1 (2022), https://crsreports.congress.gov/product/pdf/R/R47077 [https://perma.cc/ELK6-AHAB].

[8] HIROKO KUSUDA & HEATHER DRABEK PRENDERGAST, *Introduction to Removal Proceedings*, *in* AM. IMMIGR. LAWS. ASS'N, NAVIGATING THE FUNDAMENTALS OF IMMIGRATION LAW 419, 419 (Sumangala Bhattacharya, Breanna Cary, Lindsay Chichester Koren, Jennifer Drugay Cook, Lindsay Curcio, Michelle Gergerian, Noah Klug, Maris Liss, Olivia McLaren & Elaine Witty eds., 2022–23 ed. 2022) (ebook); Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182 (listing grounds of inadmissibility for certain noncitizens, including criminal convictions for money laundering or multiple convictions resulting in an aggregate sentence of five years or more); Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227 (listing grounds of deportability for certain noncitizens, such as aggravated felonies or offenses involving fraud and deceit).

[9] TRAC Immigration, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times*, SYRACUSE UNIV. (Oct. 25, 2019), https://trac.syr.edu/immigration/reports/579 [https://perma.cc/2BEU-Q34D] (stating that, as of October 2019, average caseloads of immigration judges were significantly backlogged and steadily rising). The study found that if the Executive Office for Immigration Review (EOIR) caseloads could have been frozen in 2019 with no additional cases added to the docket, it would have taken the then existing pool of immigration judges approximately 4.4 years to clear the accumulated backlog at an accelerated rate of closing 700 cases annually per judge. *Id.*

[10] Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, TIME (Jan. 20, 2022), https://time.com/6140280/immigration-court-backlog [https://perma.cc/9XEU-D3YE].

[11] Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys, U.S. Immigr. & Customs Enf't, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021) [hereinafter Trasviña Memo].

[12] Mayorkas Memo, *supra* note 5.

what was then a record-breaking 547,280 newly initiated removal cases.[13] In contrast, the EOIR completed a total of 277,074 cases that year, just over half the number of new cases, without factoring in the backlog of unresolved cases initiated in previous years also pending before the courts at that time.[14] Whether the focus is placed on enforcement of immigration laws outside the courtroom or cases currently pending before the EOIR, the backlog in immigration matters is substantial and appears likely to remain an obstacle to resolving currently pending and future immigration matters.[15]

In response to the case backlog and in an effort to manage the government's limited capacity for enforcing and adjudicating removability claims, DHS and ICE issued a series of memoranda from 2021 through 2022 on removal enforcement priorities.[16] The first memo was released the same day as a Biden Administration executive order that redefined the executive branch's immigration priorities concerning the removal of noncitizens with immigration law violations.[17] The initial interim guidance memos and the executive order were followed by a pair of more detailed memos issued by the Secretary of Homeland Security Alejandro Mayorkas[18] and by ICE's Principal Legal Advisor Kerry Doyle,[19] each on the topic of prosecutorial discretion and underscoring the role of prosecutorial decisions to prioritize cases as a tool to manage immigration case backlogs and enable greater efficiency in the system.[20] The latter of those memos (the Doyle Memo) set an expectation that prosecutors under DHS's Office of the Principal Legal Advisor (OPLA) would use their discretion at all stages of enforcement and that their discretion would be consistent with priorities set forth in the Mayorkas Memo.[21]

The guidance provided in these memos was intended to "ensure that finite DHS resources are used in a way that accomplishes the Department's enforcement mission most effectively and justly."[22] The Doyle Memo reiterated three groups of individuals previously identified in

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[13] U.S. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS – HISTORICAL (Oct. 13, 2022), https://www.justice.gov/eoir/page/file/1530261/download [https://perma.cc/4FU7-97HB].

[14] *Id.*

[15] *See id.*

[16] Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't & Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021) [hereinafter Pekoske Memo]; Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, U.S. Immigr. & Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021) [hereinafter Tae Johnson Memo]; Mayorkas Memo, *supra* note 5; Doyle Memo, *supra* note 2.

[17] Pekoske Memo, *supra* note 16; Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 25, 2021).

[18] Mayorkas Memo, *supra* note 5.

[19] Doyle Memo, *supra* note 2.

[20] Mayorkas Memo, *supra* note 5; Doyle Memo, *supra* note 2.

[21] Doyle Memo, *supra* note 2, at 9–10.

[22] *Id.* at 1.

the Mayorkas Memo as removal priorities: (1) "threat[s] to national security;" (2) "threat[s] to public safety;" and (3) "threat[s] to border security."[23] The Doyle Memo then set forth expectations for OPLA attorneys' decision-making and documentation of enforcement priority determinations, ultimately assigning responsibility for reliance on the Mayorkas categories to Chief Counsel or Deputy Chief Counsel and requiring recording decisions based on those categories in OPLA's case management system.[24] Additionally, the Doyle Memo enumerated a number of circumstances in which OPLA prosecutors could exercise prosecutorial discretion in alignment with the guidance and the framework provided in the Mayorkas Memo.[25] The Doyle Memo also included a list of mitigating and aggravating factors for prosecutorial consideration.[26]

In Section II.A., this Note summarizes the structure of the federal immigration system to contextualize the distribution of powers and the agency bodies authorized to exercise discretion within it.[27] Section II.B. explains the manner in which prosecutorial discretion functions within the immigration system, including its applicability to matters over which judicial discretion does not extend.[28] Section II.B. also addresses a few common criticisms of prosecutorial discretion in the immigration context.[29] Section II.C. compares similarities and distinctions in executive branch approaches to prosecutorial discretion under the Obama, Trump, and Biden Administrations, including the removal priorities and DHS procedures set forth by the Mayorkas Memo and the Doyle Memo, which were both issued under the Biden Administration.[30] Section II.D summarizes the U.S. District Court for the Southern District of Texas's decision that resulted in vacatur of the Mayorkas Memo and the appeal of that decision currently pending before the U.S. Supreme Court.[31]

Part III discusses the reasoning and effect of the Texas Southern District Court's vacatur of the Mayorkas Memo, arguing that the court's vacatur of the memo was inappropriate because the plaintiffs did not establish a concrete and particularized injury for standing in the case.[32] Part III further argues that permitting DHS to set its own prosecutorial discretion guidelines serves the public interest of managing limited resources to strategically curb removal proceedings at a time of record-breaking delays in removal hearing adjudication, while also providing the benefit of enabling the humanitarian aspect of prosecutorial discretion to apply to certain

[23] *Id.* at 2–3.
[24] *Id.* at 7–8.
[25] *Id.* at 10–15 (including discussion of OPLA's prosecutorial discretion under the Mayorkas Memo priority categories regarding Notices to Appear, dismissal of removal proceedings, administrative closure, stipulations to issues and relief, continuances, pursuing appeal, and joining motions to reopen with respondents).
[26] *Id.* at 4.
[27] *See infra* Section II.A.
[28] *See infra* Section II.B.
[29] *See id.*
[30] *See infra* Section II.C.
[31] *See infra* Section II.D.
[32] *See infra* Section III.B.

matters that would not be as well served by bright-line rules.[33] Part IV argues that the U.S. Supreme Court should rule in favor of broader prosecutorial discretion by overturning the vacatur of the Mayorkas Memo. Part IV also provides recommendations for Congress to codify prosecutorial discretion in immigration and offers other proposals that could work in tandem with prosecutorial discretion to contribute to clearing the case backlog.[34] Part V concludes by summarizing the discussion from Part III considering the delays currently riddling removal proceedings and advocates that the Supreme Court decide *United States v. Texas* in the government's favor or that Congress codify prosecutorial discretion priorities reflecting modern attitudes toward immigration and the potential of broader prosecutorial discretion to address U.S. immigration court delays.[35]

II. BACKGROUND

A. Structure of Agencies Involved in the Federal Immigration System

A critical consideration of prosecutorial discretion's role in the federal immigration system requires contextualizing the prosecutors who yield that discretion within the agencies that enforce and adjudicate the country's immigration laws. The Act to Establish the Department of Justice (the Act) created the Department of Justice (DOJ) under the executive branch of the U.S. government.[36] The Attorney General sits at the head of the DOJ.[37] The Act granted the DOJ control of criminal prosecutions, as well as "civil suits in which the United States ha[s] an interest."[38] Such civil suits include immigration matters managed by a number of agencies under the DOJ's supervision, each with duties related to the function of the immigration system.[39] One such body is the Executive Office for Immigration Review (EOIR).[40] The EOIR is the DOJ's judicial division responsible for adjudicating immigration matters at the trial level in its immigration courts.[41] Immigration judges under the EOIR endeavor to fairly and speedily adjudicate immigration matters, primarily in the form of

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[33] *See infra* Section III.C.
[34] *See infra* Part IV.
[35] *See infra* Part V.
[36] 28 U.S.C. §§ 501, 503, 509 (1870).
[37] *About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/VXE9-SNJW].
[38] U.S. DEP'T OF JUST., U.S. DEPARTMENT OF JUSTICE OVERVIEW, https://www.justice.gov/jmd/file/821911/download [https://perma.cc/4BSH-QKVK].
[39] *See Agencies*, U.S. DEP'T OF JUST., https://www.justice.gov/agencies/chart/map [https://perma.cc/NY9X-H88V].
[40] INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 3 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/AC5M-AJAY]; STRAUT-EPPSTEINER, *supra* note 7, at 1.
[41] STRAUT-EPPSTEINER, *supra* note 7, at 1.

removal proceedings, but historic backlogs and inadequate staffing to address those backlogs continue to pose obstacles to that mission.[42]

DHS is another executive department with a significant role in the federal immigration legal system.[43] DHS was established by the Homeland Security Act of 2002 in order to unify domestic security efforts by the federal government.[44] That Act also disbanded the legacy agency Immigration and Naturalization Service (INS) by replacing it with three sub-agencies under DHS: U.S. Customs and Border Protection (CBP),[45] ICE,[46] and U.S. Citizenship and Immigration Services (USCIS).[47] DHS and its subagencies began operating in 2003.[48] The purview of DHS is broader than solely immigration, as its creation combined twenty-two separate federal agencies into a single central agency.[49]

As the immigration law enforcement body of DHS, ICE tasks its officers with following the immigration laws to identify, arrest, and detain noncitizens who are deemed inadmissible or deportable under the INA.[50] OPLA is the sole representative of DHS and ICE in immigration removal proceedings against noncitizens that DHS deems removable.[51] OPLA is also the largest legal body under DHS.[52] OPLA attorneys operate analogously to criminal prosecutors within the DOJ by representing the federal government's interests in enforcing immigration laws.[53]

B. Prosecutorial Discretion in Immigration Law, Contrast with Judicial Discretion, and Common Criticisms

1. Prosecutorial Discretion in Immigration

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[42] Aguilera, *supra* note 10.

[43] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[44] *Creation of the Department of Homeland Security*, DEP'T OF HOMELAND SEC. (June 3, 2022), https://www.dhs.gov/creation-department-homeland-security [https://perma.cc/WYE5-3V4S].

[45] U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/4MK8-J5J8] ("CBP prevents drugs, weapons, and terrorists and other inadmissible persons from entering the country.").

[46] *Id.* ("ICE enforces criminal and civil laws governing border control . . . and immigration.").

[47] *Id.* ("USCIS oversees lawful immigration to the United States and naturalization of new American citizens.").

[48] *Id.*

[49] *About DHS*, DEP'T OF HOMELAND SEC. (Sept. 28, 2022), https://www.dhs.gov/about-dhs [https://perma.cc/M5QS-FSH5]; *Who Joined DHS*, DEP'T OF HOMELAND SEC. (Oct. 26, 2022), https://www.dhs.gov/who-joined-dhs [https://perma.cc/9MY9-58FS].

[50] *Mission*, U.S. CUSTOMS & IMMIGR. ENF'T (Aug. 17, 2022), https://www.ice.gov/mission [https://perma.cc/LU9T-Y98T]; *see also* Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182 (listing grounds of inadmissibility); Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227 (listing grounds of deportability).

[51] *Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF'T (Sept. 1, 2022), https://www.ice.gov/about-ice/opla [https://perma.cc/5F4P-X5MT].

[52] *Id.*

[53] *See id.*

Prosecutorial discretion is the "longstanding authority of a law enforcement agency" that is "an indispensable feature of any functioning legal system . . . to preserve limited government resources" while still permitting fair adjudication of individual cases.[54] Prosecutorial discretion guides a prosecutor's decisions on whether and how to enforce a law in a given case.[55] As DHS's exclusive representative in removal proceedings before the EOIR, "OPLA attorneys have the inherent authority to exercise [prosecutorial discretion] on a case-by-case basis" when handling removal cases.[56] This authority is not expressly addressed in either immigration statutes or regulations but is inevitable as a function of the role of prosecutors.[57] In practice, exercising prosecutorial discretion permits OPLA attorneys to prioritize the focus and use of their finite resources while still weighing the relevant facts and law of a case.[58] In immigration, prosecutorial discretion includes prosecutor agreements to support dismissal or administrative closure of a case,[59] stipulate to certain facts or legal issues, relief, bond, or continuances.[60] Prosecutorial discretion arises throughout the removal process at different stages and takes multiple forms.[61]

2. Contrast of Prosecutorial Discretion with Judicial Discretion in Immigration

In addition to prosecutorial discretion, judicial discretion also plays a role in some forms of relief for immigrants in removal proceedings.[62] In

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[54] *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF'T (Sept. 12, 2022), https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/57YW-U2QK]; *see also* KUSUDA & DRABEK PRENDERGAST, *supra* note 8, at 446 (stating that prosecutorial discretion "is the inherent discretionary authority the agency has with respect to how it enforces the law").

[55] *See generally* Trasviña Memo, *supra* note 11 (discussing the role prosecutorial discretion plays in enforcing agency law and preserving resources).

[56] *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, *supra* note 54.

[57] KUSUDA & DRABEK PRENDERGAST, *supra* note 8, at 446.

[58] *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, *supra* note 54.

[59] Administrative closure is a case management tool available to immigration judges and the Board of Immigration Appeals that allows Judges to "temporarily remove a case from [the] active calendar or . . . docket." Matter of Avetisyan, 25 I&N Dec. 688, 692 (BIA 2012) (citing Matter of Gutierrez, 21 I&N Dec. 479, 480 (BIA 1996)). Administrative closure is often granted to permit processing of an application with USCIS that is pending at the time of a respondent's removal proceedings when the result will have an impact on the respondent's removability. *See id.* at 696. "[A]dministrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Id.* at 692.

[60] *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, *supra* note 54.

[61] *See* Trasviña Memo, *supra* note 11, at 5.

[62] Judicial discretion is relevant to decisions to grant or deny certain forms of relief, such as voluntary departure, cancellation of removal, asylum, and adjustment of status in removal proceedings. *See* 8 C.F.R. § 1240.11(a)(3) (2022) (discussing an immigration judge's discretion to look beyond a proceeding's record when considering an application for adjustment of status); *see also* 8 C.F.R. § 1240.11(e) (2022) (providing that a noncitizen applying for cancellation of removal, permanent residence, asylum, withholding, or voluntary

Padilla v. Kentucky, the Court noted that statutory changes to federal immigration law have dramatically limited judicial authority "to alleviate the harsh consequences of deportation."[63] The Court commented that under federal immigration law, grounds of deportability used to be narrowly limited and judges previously had broad authority to provide discretionary relief.[64] Substantial changes to grounds of deportability and inadmissibility that place stricter limits on judicial discretion resulted from the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996.[65] While IIRIRA placed certain constraints on prosecutorial discretion,[66] OPLA prosecutors still have discretionary authority that judges do not possess.[67] However, issues arise in defining the precise scope of that prosecutorial discretion.[68]

3. Common Criticisms of Prosecutorial Discretion in Immigration

Additional concerns related to prosecutorial discretion in immigration law, beyond defining its exact scope, typically fall into two categories: (1) that the unpredictability of prosecutorial discretion may render it arbitrary and regularly lacking in transparency;[69] and (2) that prosecutorial discretion is unconstitutional when it is used to lessen the effects of statutes that the executive "deems to be bad law."[70] The second category raises concerns when discretion results in grants of relief to broad classes of immigrants rather than on a case-by-case basis.[71]

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departure bears the burden initially of proving eligibility for relief, which an Immigration Judge "should [then] grant *in the exercise of discretion*." (emphasis added)).

[63] *559* U.S. 356, 360 (2010).

[64] *Id.*

[65] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (including a strict bar at Section 344 against previously available fraud waivers for noncitizens who have made false claims of U.S. citizenship to obtain a government benefit and also creating at Section 347 a ground for deportability for noncitizens who had voted in local, state, or federal U.S. elections, in addition to generally making criminal grounds for deportability and inadmissibility more stringent); *see* Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. REV. 119, 139–40 (2014) (describing how IIRIRA limits on judicial discretion expand prosecutorial discretion).

[66] AM. IMMIGR. COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION 3 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf [https://perma.cc/8P4R-T8LJ] (discussing IIRIRA's requirement of mandatory detention and removal of noncitizens who have committed an offense deemed an "aggravated felony" by Congress which can range in severity from shoplifting to murder).

[67] *See Padilla*, *559* U.S. at 360.

[68] *See* Corcoran, *supra* note 65, at 131–44 (providing a detailed history of prosecutorial discretion in immigration law under both the INS and DHS including efforts and conflicts in defining what decisions fall within a prosecutor's discretion).

[69] *See id.* at 124.

[70] *Id.* at 125.

[71] *Id.* (discussing this criticism of prosecutorial discretion in the context of executive orders issued by President Obama that effected the policy of Deferred Action for Childhood Arrivals (DACA)).

The second concern is of particular relevance to the priority categories set forth in the Mayorkas Memo.[72] The setting of categorical priorities for removal by the executive branch has a long history in immigration, extending at least as far back as the INS's secretive Nonpriority Program.[73] The U.S. Supreme Court has interpreted an executive agency's decision to not initiate proceedings as akin to a criminal prosecutor's choice to not indict.[74] The decision not to indict is said to fall within the "special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[75] Across different presidential administrations, presidents and the administrative agencies responsible for enforcing immigration laws have published a variety of guidelines and policies related to the prosecutorial discretion of immigration law enforcement officers, from ICE agents to OPLA attorneys.[76] A discussion of the three most recent administrations' approaches to immigration prosecutorial discretion follows.

C. Prosecutorial Discretion Approaches in Immigration Law Vary with Administrative Changes to Guidance and Policy

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[72] Mayorkas Memo, *supra* note 5, at 3–4.

[73] Corcoran, *supra* note 65, at 136. INS is the legacy agency that preceded the Department of Homeland Security. *Id.* The INS used its Nonpriority Program to defer action in deportation cases for humanitarian reasons where the INS deemed removal would be inappropriate. *Id.* Under the program, the INS weighed factors including age, duration of presence in the United States, need for physical or mental healthcare only available in the United States, impact of deportation on the immigrant's family, and the immigrant's moral character and criminal history. *Id.* This program only became public knowledge in 1975 following its exposure as a result of a response to a request under the Freedom of Information Act (FOIA) submitted by John Lennon of The Beatles. *Id.* (citing Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 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. 44 (1976) ("*Nonpriority status* [was] a euphemism for an administrative stay of deportation which effectively place[d] an otherwise deportable alien in a position where he is not removed simply because his case ha[d] the lowest possible priority for INS action.").

[74] Corcoran, *supra* note 65, at 127–28.

[75] *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[76] *Id.* at 129 (stating that despite these various policies there is no single definitive document that provides guidance to DHS prosecutors on how to exercise their discretion); *see, e.g.*, Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigr. & Naturalization Serv., to Doris Meissner, Comm'r, U.S. Immigr. & Naturalization Serv., *INS Exercise of Prosecutorial Discretion* (July 11, 2000) (discussing prosecutorial discretion in an effort to "provide . . . a foundation to develop [further] guidance" to INS agents); Memorandum from Doris Meissner, Comm'r, U.S. Immigr. & Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents & Reg'l & Dist. Couns., U.S. Immigr. & Naturalization Serv., *Exercising Prosecutorial Discretion* 1 (Nov. 17, 2000) (instructing INS officers that they were not only authorized but expected to judiciously exercise discretion so as to promote "the efficient and effective enforcement of the immigration laws . . . ."); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Chief Couns., U.S. Immigr. & Customs Enf't, *Prosecutorial Discretion* at 2 (Oct. 24, 2005) (underscoring the importance of prosecutorial discretion in managing the high volume of immigration cases that DHS processes); *see also infra* discussion of Pekoske, Johnson, Mayorkas, and Doyle Memos at Section II.C.3.

1. Adoption of Removal Prioritization Categories Under the Obama Administration's Priority Enforcement Program

President Barack Obama's administration inherited an immigration removal policy from the Bush Administration called the Secure Communities (S-COMM) program.[77] Under S-COMM, when individuals were fingerprinted while in custody for a criminal offense, their fingerprints would be automatically submitted to the FBI and ICE to facilitate a determination of whether ICE could seek removal of those individuals.[78] On November 20, 2014, DHS Secretary Jeh Johnson replaced S-COMM by creating the Priority Enforcement Program (PEP) via a memorandum (Jeh Johnson Memo) that issued department-wide guidance related to ICE enforcement priorities.[79] The Jeh Johnson Memo stated an intent to clarify guidance on removal priorities and indicated that individuals who posed threats to "national security, public safety, and border security" were the top priority for removal.[80] The memo identified prosecutorial discretion as critical to enforcing immigration laws via development of "smart enforcement priorities," particularly due to the reality that DHS could not respond to all instances of immigration violations given the agency's limited resources and the prevalence of violations.[81]

In contrast to S-COMM, PEP narrowed the category of individuals that DHS could seek to transfer from law enforcement custody by preventing ICE from requesting the transfer of individuals charged solely with *civil* immigration offenses.[82] PEP instead prioritized transfers of individuals deemed removable under immigration laws because they were convicted of certain crimes, intentionally participated in criminal gang activity, or posed a danger to national security.[83] PEP was implemented in part to reform ICE practices of issuing detainers to criminal enforcement

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[77] Alex Nowrasteh, *Obama's Mixed Legacy on Immigration*, CATO INST. (Jan. 25, 2017), https://www.cato.org/publications/commentary/obamas-mixed-legacy-immigration [https://perma.cc/ZK2N-N7DU].

[78] *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 9, 2021), https://www.ice.gov/secure-communities [https://perma.cc/2JN7-3YLX].

[79] *See* Memorandum from Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigr. Servs. & Alan D. Bersin, Acting Assistant Sec'y for Pol'y, U.S. Dep't of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) [hereinafter Jeh Johnson Memo].

[80] *Id.* at 1.

[81] *Id.* at 2.

[82] *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T (July 21, 2022), https://www.ice.gov/pep [https://perma.cc/GZQ9-E35B]. One example of a category of purely civil immigration offenses is the unlawful presence bar on admissibility. 8 U.S.C. § 1182(a)(9)(B). Another example is the inadmissibility for five years of student visa holders who have violated any term or condition of their visa status. 8 U.S.C. § 1182(a)(6)(G).

[83] *Priority Enforcement Program*, *supra* note 82.

agencies.[84] It did so by setting specific priority categories for transferring individuals from the custody of criminal law enforcement to immigration law enforcement.[85] The Jeh Johnson Memo also set forth factors that DHS personnel "should consider" when deciding whether a noncitizen was a priority for immigration enforcement, including whether the individual had family or community ties in the United States and whether there were relevant extenuating circumstances in the underlying criminal matter.[86] Despite the executive branch characterizing PEP as the "felons, not families" policy,[87] DHS transferred a higher percentage of noncitizens with only civil immigration violations (as opposed to criminal convictions) to ICE detention in the year following announcement of PEP than the year preceding it.[88] One explanation offered for the shortcomings of PEP's reforms was that the reforms were "largely ignored" by ICE officers in practice.[89] The increase in the percentage of detainees transferred from criminal to immigration law enforcement custody, despite the policy purposes behind PEP, exemplifies the common criticism that granting broader discretion to law enforcement agencies is problematic because a lack of transparency can lead to seemingly arbitrary decisions.[90] Further, the related uncertainty for noncitizens navigating the legal system underscores the importance of bearing this critique in mind when envisioning how prosecutorial discretion already is and could be further used as a tool to increase efficiency.

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[84] AM. IMMIGR. COUNCIL, IMMIGRATION DETAINERS UNDER THE PRIORITY ENFORCEMENT PROGRAM 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_under_the_priority_enforcement_program.pdf [https://perma.cc/8WVD-WZ54]. Level 1 (the most serious category) applied to noncitizens with felony convictions, who had participated in terrorist or gang acts, or who were arrested while trying to cross the border without authorization. *Id.* Level 2 applied to noncitizens convicted of three or more misdemeanors, a "significant misdemeanor," or individuals who had recently entered the U.S. without authorization. *Id.* Level 3 included all noncitizens who had been issued final removal orders. *Id.*

[84] Jeh Johnson Memo, *supra* note 79, at 6.

[83] *Id.*

[86] Jeh Johnson Memo, *supra* note 79, at 6.

[87] Leighton Akio Woodhouse, *Obama's Deportation Policy Was Even Worse Than We Thought*, INTERCEPT (May 15, 2017), https://theintercept.com/2017/05/15/obamas-deportation-policy-was-even-worse-than-we-thought [https://perma.cc/C2F5-GP87].

[88] TRAC Immigration, *Reforms of ICE Detainer Program Largely Ignored by Field Officers*, SYRACUSE UNIV. (Aug. 9, 2016), https://trac.syr.edu/immigration/reports/432 [https://perma.cc/9E8Y-N7VU] (stating that in the year before PEP's implementation, 57% of individuals ICE issued detainers for had been convicted of a crime while that number fell to just 49% of ICE issued detainers in the year following announcement of PEP). *Contra* Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/6DGN-5L2B] (stating that DHS reported that more than 99% of removals and returns of noncitizens in FY2015 fell within the three PEP priorities).

[89] AM. IMMIGR. COUNCIL, *supra* note 84, at 4.

[90] *See supra* Section II.B.3.

2. Elimination of Removal Priorities for Exercise of Discretion and Restrictions on Prosecutorial Discretion Under the Trump Administration

The Trump Administration replaced PEP by reactivating the S-COMM program under an executive order issued on January 25, 2017, titled "Enhancing Public Safety in the Interior of the United States."[91] The rescission of PEP was reiterated in a memorandum issued by DHS Secretary John Kelly which also laid out the Trump Administration's expansive approach to the removal of noncitizens in the United States.[92] The priority categories set forth under President Obama were overtaken by a lengthy list of additional "priorities," including all noncitizens charged with any unresolved criminal offense and those who "abused any program related to receipt of public benefits," among other categories.[93] Comparing the Obama Administration's approach to immigration removal priorities under PEP to the Trump Administration's efforts following reactivation of S-COMM, Human Rights Watch lawyer Clara Long wrote, "Trump's policy essentially [made] everyone a priority whereas Obama's specifically weighed the impact of deportation on U.S. citizen children."[94]

In addition to expanding priority categories to a point where the distinction between a priority and nonpriority case was almost meaningless, the use of discretion by OPLA prosecutors was substantially limited during the Trump Administration.[95] In a memo, DHS Secretary Kelly acknowledged that the exercise of prosecutorial discretion is a part of the work of DHS officials, but that this tool cannot be used in a way that "exempts or excludes a specified class or category of [noncitizens] from enforcement of the immigration laws."[96] In the year following the Trump

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[91] Exec. Order No. 13768, 82 Fed. Reg. 8799 (2017) (stating that the purpose of the order was to "direct executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States").

[92] Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleelan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., U.S. Dep't of Homeland Sec., Dimple Shah, Acting Assistant Sec'y for Int'l Affs., U.S. Dep't of Homeland Sec. & Chip Fulghum, Acting Undersecretary for Mgmt., U.S. Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* 2 (Feb. 20, 2017) [hereinafter Kelly Memo] (rescinding all prior conflicting agency guidance, directing DHS officials to "no longer exempt classes or categories of removable aliens from potential enforcement," and setting expansive new enforcement priorities).

[93] *Id.*

[94] Woodhouse, *supra* note 87.

[95] KUSUDA & DRABEK PRENDERGAST, *supra* note 8, at 446.

[96] Kelly Memo, *supra* note 92, at 4. This statement is relevant to several unresolved issues in immigration, including the bounds of prosecutorial discretion, discussed in this paper, as well as the fate of DACA, a program that has granted approximately 643,560 individuals deferred action and de-prioritization from removal due to their membership in the specified class of individuals who arrived in the United States prior to their sixteenth birthday, were under age thirty-one on June 15, 2012, have continuously resided in the U.S. since June 15, 2007, and

Administration's reinitiating S-COMM and rescinding the Obama Administration's priority categories, ICE statistics reflected a forty-two percent increase in noncitizen arrests.[97] While PEP provided results contradicting its stated policy goal of reducing the number of individuals in immigration detention for solely civil offenses, S-COMM, under President Trump, succeeded in its purpose of expanding immigration law enforcement based on the sheer increase in numbers.

3. The Biden Administration's Reframing of Prosecutorial Discretion Priorities

An executive order issued by the Biden Administration in January 2021 revoked Trump's 2017 executive order, "Enhancing Public Safety in the Interior," and replaced it with "Revision of Civil Immigration Enforcement Polices and Priorities," in which President Biden acknowledged the complexity of enforcing immigration laws and the need to "reset the policies and practices for enforcing civil immigration laws."[98] Biden's executive order was released simultaneously with a memo by Acting DHS Secretary David Pekoske (Pekoske Memo).[99] In the Pekoske Memo, Pekoske directed DHS employees to review their internal practices in light of the directives set forth by Biden's executive order.[100] "[P]olicies governing the exercise of prosecutorial discretion" are listed among the policies requiring comprehensive review under the Pekoske Memo.[101] The Pekoske Memo also set forth interim civil enforcement guidelines with some similarities to those in effect under President Obama's PEP initiative.[102] The

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were physically present in the U.S. on June 15, 2012, along with other requirements. U.S. CITIZENSHIP & IMMIGR. SERVS., APPROXIMATE ACTIVE DACA RECIPIENTS: AS OF MARCH 31, 2020 (2020), https://www.uscis.gov/sites/default/files/document/data/Approximate%20Active%20DACA%20Receipts%20-%20March%2031%2C%202020.pdf [https://perma.cc/E7A7-NQX7] (providing the approximate number of active DACA recipients in March 2020); *DACA Information*, UNIV. OF CAL. AT BERKELEY (Oct. 20, 2022), https://undocu.berkeley.edu/legal-support-overview/what-is-daca [https://perma.cc/6YHW-H7X8] (providing background on the DACA program including what group of individuals has previously been eligible for DACA).

[97] AM. IMMIGR. COUNCIL, *supra* note 66, at 2.

[98] Exec. Order No. 13993, 86 Fed. Reg. 7051 (2021).

[99] Pekoske Memo, *supra* note 16.

[100] *Id.* at 1.

[101] *Id.* at 2.

[102] *Compare id.* (setting forth three priority categories for enforcing immigration violations of (1) individuals who have or are suspected of participating in terrorism or espionage; (2) individuals apprehended at the border while attempting to enter the U.S. without authorization after a certain date; and (3) individuals convicted of an aggravated felony as defined by section 101(a)(43) of the INA at the time of conviction) *with* Jeh Johnson Memo, *supra* note 79 (setting forth three priority categories for detainers issued to noncitizens in criminal custody under PEP of (1) individuals with felony convictions, who had participated in terrorist or gang acts, or who were arrested while attempting to cross the border without authorization; (2) individuals convicted or three or more misdemeanors, a single "significant misdemeanor," or who had recently entered the United States without authorization; and (3) individuals who had been issued final orders of removal).

priorities in the Pekoske Memo were intended to extend further than PEP's priority levels, including decisions such as "whether to settle, dismiss, appeal, or join in a motion on a case," which are all decisions directly involving the discretion of OPLA attorneys rather than solely ICE enforcement officers.[103] The Pekoske Memo stated that while its enforcement priorities were relevant to allocating DHS's limited resources, they did not necessarily preclude DHS officials from exercising prosecutorial discretion to apprehend or detain individuals not expressly included in the detention priorities.[104] Less than a month later, the Pekoske Memo was followed by a memo from ICE Acting Director Tae D. Johnson (Tae Johnson Memo), which set interim guidance for ICE officers pending a final memo by DHS Secretary Mayorkas, reiterated the Pekoske categories, and provided additional details.[105]

The Mayorkas Memo followed in September 2021 and became effective November 29, 2021.[106] The Mayorkas Memo rescinded and replaced the guidance set forth under the Pekoske Memo and the Tae Johnson Memo.[107] The Mayorkas Memo centered the well-established role of prosecutorial discretion in federal law, stating that "[t]he exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition."[108] Mayorkas reasoned that the guidance was necessary as the country simply lacked resources to remove every single noncitizen who had violated U.S. immigration law, repeating a sentiment that had become commonplace in immigration.[109] The Mayorkas Memo detailed the same three priorities first announced in the Pekoske Memo, and also underscored the role of prosecutors asserting their discretion to work for the "country's well-being" by targeting individuals who "pose a threat to national security, public safety, and border security" before others who do not.[110] In regard to enforcement of the second and third priority categories, the Mayorkas Memo stated that DHS personnel "should" evaluate the totality of the facts and circumstances when exercising their discretionary judgment.[111]

Shortly after publishing the Mayorkas Memo, ICE Principal Legal Advisor Kerry Doyle issued the Doyle Memo, formally titled "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion."[112] The Doyle Memo built upon the Mayorkas Memo's DHS-wide guidance by reiterating the three priority categories while filling in logistical gaps specifically related to the

[103] *See* Pekoske Memo, *supra* note 16, at 2–3.
[104] *Id.* at 3.
[105] Tae Johnson Memo, *supra* note 16, at 4–5.
[106] Mayorkas Memo, *supra* note 5, at 6.
[107] *Id.*
[108] *Id.* at 2.
[109] *See id.*
[110] *Id.*
[111] *Id.* at 3–4.
[112] Doyle Memo, *supra* note 2.

work of OPLA prosecutors.[113] The Doyle Memo noted that "distinct from any particular policy framework or articulated priorities, prosecutorial discretion is an inherent part of what OPLA attorneys do every day, a reality that is particularly acute in an era of increasingly constrained resources."[114] The Doyle Memo highlighted the role of OPLA as "officers of the court" with a duty to ensure immigration proceedings meet constitutional standards so that immigration cases are fully heard, and proper outcomes achieved.[115] As a practical matter, the Doyle Memo impacted the work of OPLA prosecutors by establishing guidelines for two categories based on the Mayorkas priorities: priority for removal and nonpriority.[116] A noncitizen categorized as a nonpriority could benefit from OPLA attorneys exercising their discretion to either (1) not file the removability charging document known as a Notice to Appear (NTA), or (2) dismiss proceedings if the NTA had already been filed.[117] The Doyle Memo also permitted immigrants categorized as priorities to affirmatively request recategorization as a nonpriority, though the memo did not expressly mandate OPLA's consideration of every such request.[118] The Doyle Memo noted that OPLA attorneys "should" record priority categorization of each noncitizen within OPLA's case management system.[119]

Data from OPLA's internal case management system reflects receipt of 26,751 requests for recategorization as a nonpriority under prosecutorial discretion while the Doyle Memo was in effect.[120] Of those requests, OPLA granted 24,946.[121] Relatively speaking, this number put only a small dent in the overall cases before the EOIR;[122] nonetheless, the percentage of nonpriority categorizations is notably high. The potential long-term impact of the priority guidelines is something that could only be speculated at this point due to the relatively short window in which the Doyle and Mayorkas Memos were simultaneously in effect and the uncertainty inherent in any attempt to extrapolate from such limited data.[123]

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[113] *Id.*

[114] *Id.* at 8. At the time of the memo's issuance, immigration court dockets totaled over 1.5 million cases across the United States. *Id.* at 9.

[115] *Id.* at 8–9.

[116] *Id.* at 7–8.

[117] *Id.* at 10.

[118] *Id.*

[119] *Id.* at 7.

[120] Response from Department of Homeland Security to Charles E. Grassley and James Lankford, Ranking Members, U.S. Senate (Oct. 31, 2022), https://www.grassley.senate.gov/imo/media/doc/dhs_to_grassley_-_response_to_doyle_memo_letter_questions.pdf [https://perma.cc/VN3R-KQZD].

[121] *Id.*

[122] *See* STRAUT-EPPSTEINER, *supra* note 7.

[123] Some, however, have tried to estimate the impact that the Biden Administration's approach to prosecutorial discretion could have had in the long term, including a San Jose immigration defense firm which stated that prosecutorial discretion "could potentially cancel or close . . . millions of deportation cases currently pending in immigration court." @ImmigrationDfns, TWITTER (June 29, 2021, 2:51 PM), https://twitter.com/ImmigrationDfns/status/1409962820746182656 [https://perma.cc/JFB5-E2GC].

Nonetheless, this short time period represented a unique window in recent immigration history where slightly more transparency existed in regard to the practices of prosecutorial discretion by DHS.

D. Texas v. United States, Vacatur of the Mayorkas Memo, and Pending Appeal to the United States Supreme Court

On June 10, 2022, in *Texas v. United States*, the U.S. District Court for the Southern District of Texas vacated the Mayorkas Memo, and by extension, the Doyle Memo.[124] The district court stated that the Administrative Procedure Act (APA) empowered the court to set aside agency actions that were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[125] The court held that the Mayorkas Memo's framework of categorizing noncitizens for removal based on the three priority categories failed to conform with two provisions of the INA (Sections 1226(c) and 1231(a)(2)) that mandate detention of certain noncitizens and that the memo was therefore arbitrary, capricious, an abuse of discretion, and not in accordance with the INA.[126] States challenged the Mayorkas Memo after criminally convicted noncitizens were released into the general population, some of whom reoffended, while states presumed other released noncitizens were consuming public benefits.[127] The court deemed both of these effects were injurious to Texas, the affected state that the court looked at to determine standing.[128]

Shortly after the *Texas v. United States* decision was issued, the government filed for a stay of the Mayorkas Memo vacatur with the Fifth Circuit.[129] The request for a stay was denied, and the district court's order for vacatur became effective on June 25, 2022.[130] The government again appealed for a stay to the U.S. Supreme Court.[131] Justices Sotomayor, Kagan, Coney Barrett, and Jackson voted to grant the stay, but ultimately the request was denied.[132] While the government's application for stay of the vacatur was not expressly labelled a petition for certiorari, the Solicitor General recommended the Court view it as such.[133] The Court granted certiorari and the case was argued on November 29, 2022.[134] The questions

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[124] Texas v. United States, No. 6:21-00016, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022).
[125] *Id.* at *43 (citing 5 U.S.C. § 706(2)(A)).
[126] *Id.* at *44.
[127] *Id.* at *40–42.
[128] *Id.* at *40.
[129] Texas v. United States, 40 F.4th 205 (5th Cir. 2022).
[130] TRAC Immigration, *FY 2022 Seeing Rapid Increase in Immigration Court Completions*, SYRACUSE UNIV. (Sept. 16, 2022), https://trac.syr.edu/immigration/reports/695 [https://perma.cc/6BBQ-V8F8].
[131] United States v. Texas, 143 S. Ct. 51 (2022) (order denying application for stay, granting petition for certiorari).
[132] *Id.*
[133] *See id.*
[134] *United States v. Texas*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/united-states-v-texas-5 [https://perma.cc/S52L-S5QK].

briefed and argued included whether (1) Texas and Louisiana have standing to challenge the DHS memos; (2) the Mayorkas Memo and other "guidelines" set forth in DHS prosecutorial discretion memos violate the APA and 8 U.S.C. §§ 1226(c) and 1231(a); and (3) 8 U.S.C. § 1252(f)(1) precludes an order to "hold unlawful and set aside" such guidelines under 5 U.S.C. § 706(2).[135]

III. DISCUSSION

A. The District Court Erred in Vacating the Mayorkas Memo as Texas Lacked Standing.

In December 2014, Judge Beryl Howell dismissed a suit by Arizona Sheriff Joe Arpaio opposing the creation of the Deferred Action for Childhood Arrivals (DACA) program, stating, "The role of the Judiciary is to resolve cases and controversies properly brought by parties with a concrete and particularized injury—not to engage in policymaking better left to the political branches."[136] Just as it was inappropriate for the judiciary to rule on the internal workings of DHS in *Arpaio v. Obama* due to the lack of clear injury and causation, the court's decision in *Texas v. United States* should have never proceeded to judicial review as the plaintiffs failed to demonstrate a concrete and particularized harm caused by the Mayorkas Memo's internal agency guidance on prosecutorial discretion and removal priorities.

To bring suit in federal court, a plaintiff must have standing.[137] Standing requires injury in fact, causation, and the ability of a favorable decision to redress the injury underlying the claim.[138] Standing to challenge a federal government action, including action by an executive branch agency, is "'substantially more difficult' to establish" due to the heightened difficulty of causation and redressability inherent in challenging a federal agency action.[139] In *Texas v. United States*, Texas and Louisiana asserted standing based on theories that they would suffer and had already suffered harm resulting from the Mayorkas Memo's effects on immigrant detention due to the financial and social costs associated with the (1) incarceration of criminal noncitizens for longer periods of time; (2) criminal recidivism of noncitizens

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[135] *Texas*, 143 S. Ct. at 51; *see also* Defendants' Motion to Consolidate Related Cases and Briefly Stay the Cases Pending Consideration of How Best to Proceed, Texas v. United States, No. 6:21-00016, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022) (requesting the Court consolidate Texas and Louisiana's claims that DHS-issued policy guidelines on prosecutorial discretion stemming from the Pekoske Memo were in violation of the Administrative Procedures Act, among other claims).

[136] Arpaio v. Obama, 27 F. Supp. 3d 185, 191 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015).

[137] *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ [https://perma.cc/C775-F894].

[138] *Id.*

[139] *Id.*

released into the general population at the end of their criminal sentences; (3) education of criminal noncitizens; and (4) healthcare of criminal noncitizens.[140] The district court noted that only one of the plaintiffs needed to establish standing for the case to proceed, so it considered only Texas's claims, as they were stronger than Louisiana's.[141] Of the reasons offered by the plaintiffs to establish injury, the court discussed only recidivism of noncitizens convicted of crimes who were statutorily subject to mandatory detention but had not actually been detained by ICE (presumably due to officers' exercise of discretion).[142] In considering traceability, the court shifted from the recidivism concern to concerns surrounding state incarceration, healthcare, and education costs, speculating about the possibility that former inmates would cost the state by seeking healthcare and education services upon release.[143] This section reads more as a continuation of the injury analysis, rather than a true search for a causal link. Next, the court reasoned that these injuries would be redressable under the APA's power to "'set aside agency action[s]' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"[144] Finally, the court reasoned that *Massachusetts v. EPA* relaxed standing requirements when the plaintiff is a sovereign state, and therefore Texas had established standing to bring the APA claim.[145]

In comparison, in *Arizona v. Biden*, the Sixth Circuit Court of Appeals considered claims by Arizona, Montana, and Ohio alleging injury to the states caused by the Mayorkas Memo.[146] Similar to the *Texas* plaintiffs, the *Arizona* plaintiffs also based their injury claim on the financial harms of DHS's "failure to enforce the immigration laws more vigorously" due to the prosecutorial discretion guidelines prioritizing concerns of public safety, terrorism, and border security over other removal priorities set forth in the INA.[147] The concerns, much like those in *Texas*, centered around fears that the states would suffer costs related to increased crime and public welfare demands if fewer noncitizens were removed, or at least if the Mayorkas Memo changed the order in which those noncitizens' removal cases were heard.[148] The court quickly disposed of the states' claims to injury, stating that "considerable speculation undergird[ed]" their claims.[149] The court's reasoning makes sense. It is inherently speculative to assume that a change in priorities would result in lighter enforcement of immigration laws. Given the court's limited resources, enumerating enforcement priorities would not necessarily lessen the number of removal orders issued overall. Logically, enumerating enforcement priorities would simply reallocate those sources,

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[140] Texas v. United States, No. 22-40367, slip op. at 7–10 (5th Cir. July 6, 2022).
[141] *Id.* at 7.
[142] *Id.* at 8.
[143] *Id.* at 11–12.
[144] *Id.* at 26 (quoting 5 U.S.C. § 706(2)).
[145] *Id.* at 7 n.4 (citing 549 U.S. 497, 518 (2007)).
[146] 31 F.4th 469, 475 (6th Cir. 2022).
[147] *Id.* at 474.
[148] *See id.*
[149] *Id.*

which could have a number of results, including the likely possibility of actually increasing removals.

The injuries proposed by the plaintiff states in *Texas* and *Arizona* are quite similar. As in *Arizona*, the *Texas* claims to injury speculate what might come to be if certain noncitizens were released into the general population rather than submitted immediately to immigration removal proceedings and detention.[150] While *Texas* demonstrated the existence of recidivism within the general prison population after release from state criminal custody,[151] the court presented nothing directly tying a higher likelihood of future recidivism to *noncitizens* who had been held in criminal custody as compared with the general prison population.[152] In fact, research has long reflected a general trend that immigrants commit crimes at lower rates than their U.S. citizen counterparts.[153] Additionally, the unascertained costs of such recidivism are difficult—if not impossible—to measure with any degree of precision. For these reasons, the U.S. District Court for the Southern District of Texas erred in finding that Texas had established standing to challenge the Mayorkas Memo. The court should not have issued a decision on the matter as the court did not have authority to do so given the plaintiff states' lack of standing.

B. The Mayorkas Memo was a Permissible Rule of Agency Procedure, Not Final Agency Action Under the APA.

The U.S. Supreme Court stated in *Arizona v. United States* that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system."[154] Despite the district court's ruling in *Texas v. United States*, the Mayorkas and Doyle Memos provided permissible agency guidance to OPLA attorneys based on those attorneys' long-recognized ability to use their discretion throughout the removal process, including by dismissing non-priority cases under the Mayorkas and Doyle Memo frameworks.[155]

The Board of Immigration Appeals (BIA) has recognized that discretion is required when prosecutors decide whether to initiate

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[150] Texas v. United States, No. 22-40367, slip op. at 28 (5th Cir. July 6, 2022).
[151] *See id.* at 11–12.
[152] *See id.*
[153] Alex Nowrasteh, *New Research on Illegal Immigration and Crime*, CATO INST. (Sept. 24, 2019), https://www.cato.org/blog/new-research-illegal-immigration-crime [https://perma.cc/7GTG-6JSP] (interpreting data from the state of Texas demonstrating that both undocumented and legalized immigrants have lower criminal incarceration rates than native-born U.S. citizens, that reductions in deportations did not coincide with any appreciable increase in crime, and that higher undocumented immigrant populations do not lead to increases in crime rates).
[154] 132 S. Ct. 2492, 2499 (2012).
[155] *See Practice Advisory: Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo*, IMMIGR. LEGAL RES. CTR. 2 (July 2022), https://www.ilrc.org/sites/default/files/resources/doyle_memo_practice_advisory_updated_7.25.22_clean.pdf [https://perma.cc/8TD8-QA3Y].

deportation proceedings and that those decisions are not a matter that an immigration judge or the BIA may review.[156] It reasonably follows that policy guidelines informing prosecutors of priorities to guide that discretion, that do not create a new or independent right to relief, should also be beyond judicial review. The decision to prosecute an individual for an immigration offense is likely one of the "rare administrative decisions traditionally left to agency discretion" as it pertains to an agency's decision not to institute enforcement proceedings, which is typically not judicially reviewable.[157] This limitation on judicial review is a matter of good policy as the ability to question such commonly made decisions would risk further accelerating the EOIR backlog.

As an administrative agency, DHS cannot establish policies contrary to statutes that provide the Agency's authority, which is significant because "a lot of immigration law relies and subsists on guidance documents" issued by DHS and its sub-agencies.[158] The APA governs administrative procedures and requires posting notice of rules proposed by an agency in the Federal Register or personally serving that notice to those it would affect at least thirty days before a rule goes into effect.[159] The APA also requires individuals be given opportunity to comment on a proposed rule and that those comments be considered by the Agency and inform its statement of purpose in the final rule.[160] There are exceptions to the formal rulemaking procedures provided by the APA, including no requirement for formal procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[161] This exception is reasonable given the inevitable gap-filling role of administrative agencies as internal policy issues inevitably arise in the course of fulfilling their duties. Further, requiring strict procedures for every single internal agency guidance memo would exacerbate efficiency issues like the immigration case backlog by tangling agencies in unnecessary red tape.

For an agency's action to be subject to judicial review under the APA, the action must be a final agency action satisfying two conditions: (1) it is the final product of the agency's decision-making process, and (2) it

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[156] KUSUDA & DRABEK PRENDERGAST, *supra* note 8, at 448 (citing Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980)).

[157] Texas v. United States, No. 6:21-00016, 2022 U.S. Dist. LEXIS 104521, at *59 (quoting Regents v. United States, 140 S. Ct. 1891, 1905 (2020)); *see* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (exemplifying an unreviewable agency decision under the APA in the form of the FDA's refusal to take enforcement action to prevent use of certain drugs to perform lethal injections and the notion that courts are generally deferential to an agency's construction of any statute the agency is charged with implementing).

[158] Shoba Sivaprasad Wadhia, *Symposium: Remarks on Prosecutorial Discretion and Immigration*, 123 DICK. L. REV. 733, 738 (Spring 2019) [hereinafter *Symposium: Remarks on Prosecutorial Discretion and Immigration*]; *see also* Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 65 AM. U. L. REV. 1285, 1296 (June 2015) (stating that immigration regulations are "precious fuel for interpreting what the [INA] actually means") [hereinafter *The History of Prosecutorial Discretion in Immigration Law*].

[159] 5 U.S.C. § 553 (2022).

[160] *Id.*

[161] *Id.* at § 553(b)(A).

either creates legal rights or obligations, or legal consequences flow from the action.[162] In the *Texas* decision, the court reasoned that the Mayorkas Memo fulfilled both of these prongs and that it was therefore judicially reviewable final agency action.[163] The parties did not dispute the first prong as both parties acknowledged the Mayorkas Memo was intended to be the "consummation of the agency's decision-making process."[164] The legal effect prong, however, was in dispute.[165] The court reasoned the Mayorkas Memo's use of language such as "*must*," "*is not to be determined*," and "*should be*" demonstrated the creation of legal rights for noncitizens and obligations of OPLA prosecutors.[166] While the court took those words as grounds to establish the memo's legal effect, it dismissed the Mayorkas Memo's language that the guidance did not "compel an action to be taken or not taken" as insufficient to dilute what the court found the other language demonstrated as the memo's mandatory legal effects.[167] This selective reading of the Mayorkas Memo takes a logical leap for a select portion of the language, while inexplicably doubting the truth of another section. This comes across as a disingenuous reading of the memo's text, which served to reinforce policy goals of the previous presidential administration in cutting down the inherent discretion of DHS prosecutors to set their own priorities as a matter of case management.

In *Arizona v. Biden*, the Sixth Circuit differed from the court in *Texas v. United States* in its approach to reading and interpreting the Mayorkas Memo's language.[168] In *Arizona*, the court held that the Mayorkas Memo constituted "consummation of the Department's decision making," but that it did not satisfy the legal effect requirement to be deemed final agency action subject to judicial review under the APA.[169] The court characterized the Mayorkas Memo as containing "nothing [that] . . . prohibits a single agent from detaining or removing a single person or . . . category of noncitizens identified in the [relevant] statutes."[170] The court reasoned that while the states viewed the department guidance as beyond mere prioritization, and instead as legally binding action, those states failed to concretely establish what binding action the Mayorkas Memo created.[171] Prosecutorial discretion, including the ability to request dismissal as a non-priority case, existed prior to the Mayorkas Memo and continues to exist today. The Mayorkas Memo enabled DHS to provide transparency to its staff, immigrants, and immigration practitioners regarding that ongoing practice.

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[162] Texas v. United States, No. 22-40367, slip op. at 14–15 (5th Cir. July 6, 2022).
[163] *Id.* at 17.
[164] *Id.* at 14.
[165] *Id.* at 15–16.
[166] *Id.*
[167] Texas v. United States, No. 6:21-00016, 2022 U.S. Dist. LEXIS 104521, at *47 (S.D. Tex. June 10, 2022); Mayorkas Memo, *supra* note 5, at 5.
[168] Arizona v. Biden, 31 F.4th 469, 477 (6th Cir. 2022).
[169] *Id.*
[170] *Id.* at 475.
[171] *Id.*

The court in *Arizona* also acknowledged that agency actions are reviewable under the APA, but that refusing "to take enforcement steps" is not.[172] The court reasoned that the Mayorkas Memo was a mere policy statement rather than final agency action for several reasons, including the fact that while it possesses language about implementation, such language is in all non-binding policy statements.[173] The court dismissed the plaintiffs' claim that the Mayorkas Memo's goal of uniformity rendered the memo a law, rather than mere guidance.[174] It did so by highlighting that uniformity in an agency is a simple and common policy and not a distinct law.[175] Additionally, the court noted that it would not be possible for an individual to actually invoke protection under the memo as it only provides a framework rather than a right to relief.[176] This is notable as dismissal by an OPLA attorney under prosecutorial discretion was an informal type of relief that existed prior to the Mayorkas Memo and continues to exist to this day, albeit less-so now than in the period that the Mayorkas and Doyle Memos were in force. While the court did not make this comparison, contrasting the Mayorkas Memo with the benefits conferred by deferred action (such as DACA), which allows a noncitizen to apply for employment authorization (something that dismissal under prosecutorial discretion notably does not permit), further demonstrates that the Mayorkas Memo was not final agency action.

Ultimately, the Sixth Circuit correctly interpreted the Mayorkas Memo as an agency policy statement not subject to judicial review, whereas the U.S. District Court for the Southern District of Texas erred in holding that it was a final agency action subject to review under the APA. When considering the matter in *United States v. Texas*, the Supreme Court should view the Mayorkas Memo through the lens the Sixth Circuit applied in *Arizona*.

C. DHS Should Have Broad Discretion in Providing Guidance to Its Prosecutors for the Sake of Increasing Efficiency in the Backlogged Immigration Courts

Permitting broader prosecutorial discretion of OPLA attorneys is in the best interest of justice because granting such discretion is likely to increase efficiency in the immigration courts. Additionally, prosecutorial discretion in immigration allows for humanitarian solutions to complex cases that are not always well served by strict bright-line rules. While there are issues with prosecutorial discretion,[177] individuals working within an agency are well suited to understand the issues they face in their work. For that reason, agency heads should have broad discretion to set internal

[172] *Id.* at 478 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *See* discussion *supra* Section II.B.3.

guidelines for staff just as the Mayorkas and Doyle Memos set such guidelines.[178] In *Heckler v. Chaney*, the U.S. Supreme Court discussed the logic of allowing agencies to make their own decisions related to enforcement, remarking on the complex factors with which agency staff are intimately acquainted, qualifying them to make well-informed decisions on enforcement.[179] The American Immigration Council has stated that moving away from allowing DHS to set its own enforcement priorities "wastes finite law-enforcement resources on the apprehension and removal of people who represent no danger to public safety."[180] Given the long history of prosecutorial discretion in immigration,[181] embracing the possibilities for discretion to alleviate removal case backlogs is one way to help resolve that issue currently plaguing immigration courts.

It is worth acknowledging some of the disadvantages inherent to dismissal of removal cases under DHS's prosecutorial discretion. Non-adjudication of a dismissed case means that the immigrant may have unresolved immigration status issues if that person has no other option for acquiring status, such as no U.S. citizen spouse or adult child over twenty-one to petition for them.[182] Another consequence of particular importance to non-citizens seeking to remain in the United States and support themselves and their families financially is that any employment authorization (an "EAD" or, colloquially, a "work permit") granted based on an application that was pending before the court is immediately invalidated upon dismissal under prosecutorial discretion.[183] For these reasons and more, one immigration lawyer said, "You don't pursue prosecutorial discretion when you have a client who is eligible for some more durable relief, like asylum or cancellation of removal."[184] Despite the legal status limbo that usually accompanies dismissal under prosecutorial discretion, it is the humanitarian aspect of prosecutorial discretion that makes it a valuable tool; prosecutorial discretion can give certain noncitizens with weak or nonexistent claims to relief from removal extra time to strategize how to overcome grounds of inadmissibility or deportability they

[178] *See* Doyle Memo, *supra* note 2, at 8–9 (discussing prosecutorial discretion and directing OPLA attorneys "[t]o use their professional judgment to do justice in each case"); Mayorkas Memo, *supra* note 5, at 2 (discussing prosecutorial discretion and stating that a noncitizen's removable status "should not alone be the basis of an enforcement against them. We will use our discretion . . . in a more targeted way.").

[179] 470 U.S. 821, 831–32 (1985).

[180] AM. IMMIGR. COUNCIL, *supra* note 66.

[181] *See* discussion *supra* Section II.B.

[182] Jason Dzubow, *Prosecutorial Discretion in Immigration Court*, ASYLUMIST (June 8, 2022), https://www.asylumist.com/2022/06/08/prosecutorial-discretion-in-immigration-court [https://perma.cc/XE7A-AALG].

[183] *Id.*

[184] *Symposium: Remarks on Prosecutorial Discretion and Immigration*, *supra* note 158, at 735.

might face when those individuals have done nothing to place themselves in a priority category for removal.[185]

Overall, embracing the potential of broader prosecutorial discretion to help clear case backlogs is worth serious consideration. Whether or not the policy is formalized by priority guidelines like those set forth in the Mayorkas Memo, prosecutorial discretion will inevitably continue to function on some level within the immigration system as it historically has and inherently does. Prosecutorial discretion is already a part of OPLA attorneys' work, and so, will continue to be a part of that work whether or not it is made more transparent by the publication of guidelines.[186]

IV. RECOMMENDATIONS

A. The Supreme Court Should Rule That Vacatur of the Mayorkas Memo Was Improper and That Providing Reasonable Guidance on Prosecutorial Discretion Is Within DHS's Authority as an Agency

United States v. Texas presents an opportunity for the Supreme Court to clarify the bounds of prosecutorial discretion in immigration law.[187] Among the issues raised by the case, the critical question relevant to the ultimate fate of the Mayorkas Memo and future similar guidance will likely hinge on the Court's determination of whether the guidelines violated the APA and 8 U.S.C. §§ 1226(c) and 1231(a).[188] As discussed in Section III.B., the Court should look to the Sixth Circuit's reasoning in *Arizona v. Biden*[189] for guidance in answering those questions. While the Mayorkas and Doyle Memos each had a real impact on the way prosecutors approached their discretionary powers and the way immigrants and their counsel approached their strategy in removal proceedings, neither the Mayorkas Memo nor the Doyle Memo created a new private right for immigrants in removal proceedings; they merely provided guidance to OPLA prosecutors that informed the bounds of the discretion they already possessed in such matters. If the Supreme Court rules in favor of the government on this aspect of the case, the result will create additional breathing room for prosecutors to stipulate to dismissal in certain non-priority cases again and by extension will alleviate, even slightly, the EOIR caseload.

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[185] *See id.* at 736 ("There has long been an element of compassion and humanitarian factors that drive who will be protected from enforcement or deportation as a matter of prosecutorial discretion.").

[186] *See Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, *supra* note 54 (stating that "PD is the longstanding authority of a law enforcement agency, and an indispensable feature of any functioning legal system, that can be used to preserve limited government resources necessary to achieve just and fair outcomes in individual cases").

[187] *See* United States v. Texas 143 S. Ct. 51, 51 (2022) (mem.) (directing the parties to brief and argue the question of whether the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a)).

[188] *Id.*

[189] 31 F.4th 469, 477 (6th Cir. 2022).

B. Congress Should Codify Prosecutorial Discretion by Setting Immigration Enforcement Priorities in Line with the Mayorkas Memo or Authorize Greater Agency Discretion

If the Supreme Court rules that the U.S. District Court for the Southern District of Texas's vacatur of the Mayorkas Memo was proper, Congress could still address the issue of redefining the bounds of prosecutorial discretion in immigration. For the immigration system to benefit from the potential of increased case dismissals through priority categories like those under the Mayorkas and Doyle Memos, Congress should either codify similar priority categories or grant DHS more express authority to set its own removal priorities. One immigration practitioner described prosecutorial discretion in its current state as alternating between invisible non-enforcement and overt affirmative acts, such as grants of DACA, but that either way the tenuous nature of prosecutorial discretion as it is currently results in an "immigration purgatory" for many.[190] This view of prosecutorial discretion in immigration, at present, makes sense given the tumult and unpredictability of a partially invisible system that nonetheless has tangible impacts.

Prosecutorial discretion does not need to remain in its current obscured state. Congress can prevent another situation like what occurred with the Mayorkas Memo through the codification of priority and non-priority categories or by granting express authority to immigration enforcement agencies to set their own prosecutorial discretion guidelines with legal force. Such action would also permit DHS to follow or enact guidance reflecting modern changing attitudes toward immigrants by facilitating more humanitarian grants of discretionary dismissal by prosecutors.

Considering the track record of comprehensive immigration reform in the United States,[191] the last piece of Congressional legislation that substantially transformed the U.S. immigration system was the IIRIRA in 1996: a law that created rigid and highly punitive immigration consequences for noncitizens with criminal histories.[192] Codification of priorities similar to

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[190] *The History of Prosecutorial Discretion in Immigration Law*, *supra* note 158, at 1286.

[191] *See* Jessica Bolter, *Immigration Has Been a Defining, Often Contentious, Element Throughout U.S. History*, MIGRATION POL'Y INST. (Jan. 6, 2022), https://www.migrationpolicy.org/article/immigration-shaped-united-states-history [https://perma.cc/47E8-SNU3]. Despite multiple attempts at passing comprehensive immigration reforms, efforts have failed consistently, including notable efforts in 2006, 2007, and 2013. *Id.* "With Republicans increasingly focused solely on prioritizing enforcement and Democrats motivated chiefly by legalization, hopes of reaching a legislative grand bargain have faded." *Id.*

[192] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546; *see generally* Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (discussing the effects of two "exceptionally harsh" laws passed in 1996, IIRIRA

those laid out in the Mayorkas Memo might appear unlikely given the stalemates that have surrounded immigration reform efforts in the legislature post-IIRIRA,[193] but the priority categories align with some of the more conservative attitudes that motivated passage of IIRIRA—placing consequences on certain acts by noncitizens.[194] A history of acquiescing to such attitudes may in part explain why the nation's immigration courts are in the state they are, but nonetheless, framing priority categories as such could possibly persuade skeptical Congressmembers of the benefits of broader prosecutorial discretion: more efficient courts and more efficient removal of noncitizens who have committed egregious offenses, particularly related to terrorist acts and violent crime.

C. Additional Reforms Beyond Prosecutorial Discretion Are Needed to Alleviate the Backlog in Immigration Courts

There is no singular solution capable of resolving the issues plaguing U.S. immigration. Prosecutorial discretion, even in its more limited case-by-case form in immigration, plays a role in reducing case backlogs.[195] Still, those backlogs are the result of a variety of causes,[196] and addressing as many of those causes as possible is necessarily part of the solution. Proposals by lawmakers, DHS, immigration judges, and attorneys include increasing the number of immigration judges, implementing tools to more efficiently manage dockets, and speeding dockets for certain populations.[197]

The first of those proposed solutions, increased hiring of immigration judges,[198] would hinge on budgetary changes.[199] Some critics argue that because significantly more funding is allocated to DHS enforcement agencies like ICE and CBP, this contributes to the case

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and the Antiterrorism and Effective Death Penalty Act (AEDPA), on immigration and criminal law); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (critiquing the "one-size-fits-all approach" of IIRIRA in defining a set of offenses and sentences that per se trigger deportation).

[193] *See* Bolter, *supra* note 191 (noting that attempts to reform immigration legislation have repeatedly failed).

[194] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546.

[195] *See, e.g.*, TRAC Immigration, *supra* note 130, tbl. 2 (showing that prosecutorial discretion and administrative closure together resulted in 30,888 case completions for these three categories in fiscal year 2022, a period that included the Doyle Memo's influence as well as brief periods preceding and following it).

[196] *See* STRAUT-EPPSTEINER, *supra* note 7, at 1 (listing factors internal and external to EOIR connected to the growth in the immigration courts' backlog, such as "court resources and staffing, increased DHS interior and border enforcement, changing migrant arrival patterns at the U.S.-Mexico border, and impacts from the COVID-19 pandemic.").

[197] *Id.*

[198] *Id.* at 31 (demonstrating that DOJ has already increased immigration judge hiring in recent years in an effort to address case backlogs, including more than doubling the number of immigration judges from FY2014 to FY2021).

[199] *Id.* at 20 (highlighting that some observers contend that funding for immigration enforcement far exceeds the courts' resources to adjudicate cases).

backlog by funneling more offenders into an underfunded court system that lacks resources to keep up with the pace of detentions while also balancing other matters before the courts.[200] The issue is more complex than simply matching funds between the organizations; their scope and functions are distinct,[201] so their funding needs are not exactly parallel. Research and analysis to contrast the budgets and associated outcomes at present funding levels is one tool that could assist in leveling out current imbalances between immigration law enforcement and adjudication bodies. Congress could implement changes to funding of these organizations to balance the distinct but interrelated areas of immigration enforcement and adjudication to lower the number of new cases and raise future case resolution rates. At present, hundreds of thousands of cases are filed annually by ICE and CBP with the EOIR, which attempts to respond to that caseload with fewer than six hundred presiding immigration judges.[202] Research already conducted by the Congressional Research Service estimated that if five hundred additional immigration judges had been hired in 2022, the case backlog would have been cleared by 2030.[203] Shifting funds to immigration courts to facilitate the hiring of additional immigration judges is one action that would likely increase efficiency in the immigration courts, and appears to already be starting.[204]

Another recommendation, supplying more tools targeted to increase efficiency of docket management, covers some efforts already underway that are within the courts' control. For example, the courts are transferring EOIR paper files to the EOIR's electronic filing system, ECAS, which became mandatory for all new matters on February 11, 2022.[205] The EOIR has associated the estimated one million cases still only available in paper format with "scheduling and adjudication inefficiencies."[206] The EOIR estimates that it will be another five years until all paper files have been digitized and entered into ECAS while new cases are solely being entered into the electronic system.[207] Another tool courts use for efficient case management is administrative closure, a judicial action that transfers an active case to an inactive docket, usually to permit the respondent to seek adjudication of an application for relief outside the scope of the court's

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[200] *Id.* (citing Press Release, Off. of Representative Zoe Lofgren, Lofgren Statement at EOIR Oversight Hearing (Nov. 1, 2017), https://lofgren.house.gov/media/press-releases/lofgren-statement-eoir-oversight-hearing [https://perma.cc/7ZGU-ZBZE]).

[201] *See id.* ("[I]t is difficult to meaningfully compare funding for ICE and CBP with EOIR's appropriations given differences in the scopes and sizes of those agencies.")

[202] *Id.* at 43.

[203] *Id.* at 34.

[204] *See* TRAC Immigration, *Immigration Court Case Closures Accelerate, Racing to Catch up with Growing DHS Filings*, SYRACUSE UNIV., https://trac.syr.edu/reports/709 [https://perma.cc/HU8P-2UPM] (noting that a record number of 104 new immigration judges were hired in FY 2022).

[205] *EOIR Courts & Appeals System (ECAS) – Online Filing*, U.S. DEP'T OF JUST. (Feb. 11, 2022), https://www.justice.gov/eoir/ECAS [https://perma.cc/5CFC-SZMV].

[206] STRAUT-EPPSTEINER, *supra* note 7, at 22.

[207] *Id.*

jurisdiction.[208] Use of administrative closure in immigration proceedings was paused under the Trump Administration's Attorney General Jeff Sessions's decision in *Matter of Castro-Tum*.[209] However, *Castro-Tum* was overturned, and administrative closure was restored by *Matter of Cruz-Valdez* in July 2021 under the Biden Administration.[210] At different points, immigration judges and EOIR leadership have characterized administrative closure as a way for judges to prioritize enforcement of certain cases while granting respondents with lower priority cases the opportunity to resolve their immigration status by using fewer limited court resources and instead turning to agencies like USCIS.[211] In this way, administrative closure is another judicial tool that tends to increase efficiency in the immigration courts. Notably, it shares some features with dismissal under prosecutorial discretion, as it deprioritizes certain cases by temporarily putting them on pause to allow higher priority cases to be heard by the courts.

Another approach to improve case completion in immigration courts is the practice of speeding dockets for certain categories of respondents.[212] This is already a common practice of the courts,[213] though courts' past and current use of these dockets raises serious concerns of due process and disadvantages to respondents whose cases are accelerated without their input or approval, regardless of any positive effects the practice has on clearing case backlogs.[214] As of April 2022, accelerated dockets were still in active use in ten immigration courts.[215] While most proposed solutions to address the removal case backlog raise at least some issues, priority dockets are a solution with a pronounced history of mixed results that requires particularly careful consideration, including weighing the impact on due process[216] and the challenges of the one-size-fits-all nature of such an approach given the nuances in adjudicating removability claims of noncitizens who may lack access to counsel while also facing language, financial, and cultural barriers.

No single proposal, including broader prosecutorial discretion, is capable of single-handedly clearing backlogged immigration court dockets.

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[208] *Id.* at 34.
[209] 27 I&N Dec. 271 (A.G. 2018).
[210] 28 I&N Dec. 326 (A.G. 2021).
[211] STRAUT-EPPSTEINER, *supra* note 7, at 34.
[212] *Id.* at 37.
[213] *Id.* at 38. Priority dockets have existed for unaccompanied children and families with children in removal proceedings since at least 2014. *Id.*
[214] *Id.* at 37; *see also* Beth Fertig, *Fast-Tracking Families Through Immigration Court*, WNYC NEWS (Apr. 9, 2019), https://www.wnyc.org/story/fast-tracking-families-through-immigration-court [https://perma.cc/UKH4-9Q5H] (discussing the issue that the speed of priority docket calendaring renders it almost impossible for immigration lawyers to adequately prepare their clients' cases).
[215] STRAUT-EPPSTEINER, *supra* note 7, at 38.
[216] Another issue raised by accelerated dockets is the difficulty for unrepresented immigrant families to find counsel who will take their case before their individual merits hearing given the quick turnaround which may be an insufficient amount of time to prepare for trial. *See, e.g.*, Alyssa Aquino, *Immigration Courts Are Closing 'Historic' Number of Cases*, LAW360 (Sept. 19, 2022), https://www.law360.com/articles/1531649/immigration-courts-are-closing-historic-number-of-cases [https://perma.cc/28SA-9297].

In addition to passing legislation to allow DHS to more easily dismiss certain non-priority cases, Congress should consider reallocating funding so that immigration courts can adequately staff the bench and hire support staff. The executive branch in turn can continue implementing tools that modernize the courts and also contribute to more efficiency. Caution must be exercised around certain one-size-fits-all approaches like accelerated dockets that raise due process concerns given the rush they put on respondents to find legal representation. Overall, the immigration courts will only become more efficient through a coalescing of efforts by Congress, the EOIR, DHS, and the executive branch.

V. CONCLUSION

Prosecutorial discretion has been a part of U.S. immigration law for decades.[217] DHS, and the legacy agencies that preceded it such as the INS, have set forth guidelines for its use across many years, with some of that guidance shrouded in secrecy.[218] The Mayorkas Memo was an attempt by DHS to set guidelines splitting removal cases into two priority categories to contribute to resolving the increasingly severe backlog in U.S. immigration courts.[219] The U.S. District Court for the Southern District of Texas's decision to vacate the Mayorkas Memo was improper given issues with standing and the court's misinterpretation of the Mayorkas Memo as final agency action under the APA.[220] Further, vacatur of the Mayorkas Memo was a bad policy decision because the case priority structure that it set forth, which was further elaborated in the Doyle Memo, was likely to increase efficiency in the immigration courts. That increased efficiency would benefit the public by speeding up the removal process for those deemed dangerous to society, while permitting noncitizens who do not pose significant risk to society the opportunity to remain and seek alternate forms of relief.[221] Ideally, the Supreme Court will rescind the vacatur and reinstate the Mayorkas Memo when it rules on *United States v. Texas*.[222] No matter what the decision is in that case, prosecutorial discretion is one area of immigration law that holds substantial promise, although also certain risks, to ameliorate the lengthy delays experienced by those in removal proceedings in the United States.

Immigration court backlogs are the result of a number of factors including insufficient funding and staffing, inefficient procedures like paper files, and red tape preventing certain administrative agencies, such as OPLA, from exercising their discretion to enhance efficient case resolution via

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[217] *Symposium: Remarks on Prosecuted Discretion and Immigration*, *supra* note 158, at 736.
[218] *See generally* Wildes, *supra* note 73 (discussing the history of the INS's Nonpriority Program and its exposure following a FOIA request by John Lennon of the Beatles).
[219] *See* discussion *supra* Section II.C.3.
[220] *See* discussion *supra* Section III.A.–B.
[221] *See* discussion *supra* Section III.C.
[222] *See* discussion *supra* Section IV.A.

dismissal of nonpriority cases.[223] A more expansive view of prosecutorial discretion, such as the framework presented by the Mayorkas and Doyle Memos, is one tool that could increase efficiency of our overburdened immigration courts.

[223] *See* discussion *supra* Section IV.C.