national IMMIGRATION project of the National Lawyers Guild

Practice Alert: Judge Tipton Issues Decision Vacating Mayorkas Enforcement Priorities Memo[1]

June 15, 2022

On Friday, June 10, 2022, Judge Andrew Tipton of the U.S. District Court for the Southern District of Texas issued final judgment in *Texas v. United States*, No. 6:21-cv-0016, a lawsuit brought by Texas and Louisiana to challenge the Biden administration's enforcement priorities, including the memo issued by Secretary Alejandro Mayorkas on September 30, 2021, "Guidelines for the Enforcement of Civil Immigration Law" ("Mayorkas Memo"). The order is the culmination of an ongoing effort by the attorneys general of Texas and Louisiana to force the Biden administration to continue the Trump administration's cruel and inhumane immigration enforcement policies. If allowed to go into effect, Judge Tipton's order will vacate the Mayorkas Memo in its entirety.

Judge Tipton concluded that the state plaintiffs proved that the Mayorkas Memo was unlawful under the Administrative Procedure Act, requiring vacatur. The order was entered after a two-day bench trial. Even though the Mayorkas Memo's priorities apply "Department-wide" to most decisions about the "apprehension and removal of noncitizens," and never once mentions detention, Judge Tipton's order focused narrowly on just two detention statutes, INA §§ 236(c) and 241(a)(2) (8 U.S.C. §§ 1226(c), 1231(a)(2)), which he wrongly interpreted as creating a judicially enforceable mandate to detain certain categories of noncitizens. Judge Tipton also held that the Mayorkas Memo did not adequately consider evidence of "criminal alien recidivism and abscondment" and that the APA required the memo to pass through notice and comment rulemaking.

Almost every one of Judge Tipton's conclusions[2] has already been roundly rejected by a Sixth Circuit panel led by Chief Judge Jeffrey Sutton, which granted a stay pending appeal of a similar order entered by a judge in the Southern District of Ohio.

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[2] However, Judge Tipton correctly rejected Louisiana's claim that its January 8, 2021, agreement with then-Acting DHS Deputy Secretary Kenneth Cuccinelli independently required vacatur of the memo. Judge Tipton held that an attempt by a lame-duck administration to constrain an incoming administration by giving individual states an enforceable right to weigh in on immigration policy "would have profound constitutional implications" and was not supported by the record. Order at 84.

Importantly, the earliest Judge Tipton's order could take effect is **Friday, June 24, 2022.** The government has filed a notice of appeal and Judge Tipton has entered a temporary stay of the order to allow the government to seek emergency relief from the Fifth Circuit. It is difficult to know whether the Fifth Circuit will stay the Judge Tipton's order pending appeal.[3] Immigration practitioners should therefore continue to monitor this case and look for further updates from NIPNLG.

If the order does take effect, practitioners should keep in mind that its sole effect is to vacate the categorical priorities established in the Mayorkas Memo. **Nothing in the order precludes immigration officials from exercising prosecutorial discretion in individual cases**. *See* Order at 62 ("Individualized decisions to abandon law enforcement are outside the reach of judicial review: a litigant cannot demand that DHS enforce the law against a particular person."). Nor does the order require the detention or removal of any specific person. Even if the order goes into effect, practitioners should continue to make individualized requests for prosecutorial discretion on behalf of their clients with relevant DHS components, highlighting positive factors and contextualizing any negative factors in the case.

Nevertheless, it is difficult to predict how the order will affect DHS's prosecutorial discretion practices, so practitioners should be prepared for a less favorable enforcement climate. If the order goes into effect, DHS would not be able to rely on the Mayorkas Memo in taking any kind of favorable discretionary action. At this point it is not clear what position DHS will take on whether and how the order affects the April 3, 2022, memo issued by Principal Legal Advisor Kerry Doyle, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion." ("Doyle Memo"). Advocates are attempting to seek clarity from OPLA regarding whether it will continue to follow the Doyle Memo if the order vacating the Mayorkas memo goes into effect. The *Texas* case does not challenge the Doyle Memo, and that memo is not mentioned in Judge Tipton's decision. Practitioners whose clients would benefit from prosecutorial discretion may wish to make a request under the Doyle Memo before Judge Tipton's order goes into effect, as the most cautious approach. Unless and until OPLA indicates that the Doyle Memo is no longer in effect, practitioners should continue seeking PD under it.[4]

Since the government has already filed a notice of appeal, Judge Tipton's order will not be the last word on the Mayorkas Memo.

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[3] When the government appealed an earlier preliminary injunction in this case, a liberal panel of the Fifth Circuit granted a stay of that order. However, the full Fifth Circuit, sitting *en banc*, voted to vacate that stay shortly after. That earlier appeal was dismissed after new enforcement priorities were issued.

[4] In the event OPLA does indicate the Doyle Memo is no longer in effect, practitioners can and should still make PD requests relying on their client's individual circumstances and enforcement agencies' inherent authority to exercise discretion and prioritize cases.