



COMMUNITY FAQ

STATUS OF PROSECUTORIAL DISCRETION UNDER THE BIDEN ADMINISTRATION

Law enforcement agencies have the authority to decide whether to enforce a law against a person at a given time. In 2003, Congress made the Department of Homeland Security's (DHS) authority to do this explicit when it wrote that the Secretary of DHS should establish "national immigration enforcement policies and priorities." Every administration since then has issued memos on prosecutorial discretion that tell agents in the field which groups of people they should consider priorities for immigration enforcement and which groups they should not pursue. Under these memos, immigration agents can decide not to pursue immigration enforcement like an arrest, detention, or deportation in a particular person's case. Immigration agents and agencies also generally have the authority to decide not to pursue enforcement against someone based on that person's individual facts and circumstances.

In September 2021, the Secretary of DHS, Alejandro Mayorkas, issued a [memo](#) outlining new immigration enforcement priorities under the Biden administration. The Mayorkas Memo asked Immigration and Customs Enforcement (ICE) agents to focus their resources on people DHS considered to be a threat to [national security, to public safety, or to border security](#). The ICE Office of the Principal Legal Advisor (OPLA), which represents the government in immigration court, then released its own [memo](#) in April 2022, explaining how ICE attorneys should apply the Mayorkas Memo to deportation cases pending in immigration court.

After the memos were issued, Texas and Louisiana sued the Biden administration to prevent it from implementing its enforcement priorities. A federal district court judge appointed by former president Trump sided with Texas and Louisiana and ordered the government to stop enforcing the Mayorkas Memo. The Biden administration appealed the ruling and asked the Fifth Circuit Court of Appeals to pause the district court decision as the case moved through the appeals process so that the enforcement priorities could stay in place, but the Fifth Circuit denied the Biden administration's request to pause the district court judge's decision.

When the Biden administration [asked](#) the United States Supreme Court to pause the district court judge's decision, the Court also [refused](#) to do so. In a 5 to 4 decision, the Supreme Court chose to allow the federal district court judge's ruling to stand while the Supreme Court

considers the case. Oral argument in the case will likely happen during the first week of December 2022, and a decision is expected in June 2023. This means that the enforcement priorities outlined in the Mayorkas Memo are currently on pause. ICE OPLA issued [guidance](#) on July 26, 2022 stating that its lawyers would also no longer abide by the enforcement priorities framework laid out in the Mayorkas Memo, but would continue to “exercise their inherent prosecutorial discretion on a case-by-case basis.”

This FAQ will explain the status of prosecutorial discretion and what it might mean for immigrants ahead of the Supreme Court’s June 2023 decision on the matter.

1. Where does prosecutorial discretion authority come from without a guiding memo from the Biden administration?

Immigration agencies, like other law enforcement, have always had the authority to make decisions about whether or not to pursue immigration actions against any given person. That authority has been recognized in legal opinions issued by immigration agencies [for decades](#). While the Texas court has, for now, stopped immigration officials from relying on the Mayorkas Memo specifically, that court decision does not stop them from deciding not to pursue enforcement based on the specific facts and circumstances of a particular case. That is why OPLA has issued [guidance](#) stating that its lawyers would continue to “exercise their inherent prosecutorial discretion on a case-by-case basis” during their regular review of immigration cases before the immigration court and as they choose what positions to take on specific immigration cases before the immigration court. That is also why you can still ask immigration agencies to exercise prosecutorial discretion on a case-by-case basis based on the particular circumstances of each case.

2. Are there other prosecutorial discretion memos issued under the Biden administration that are still in effect?

Yes. There are several memos and other forms of guidance issued under the Biden Administration that continue to be in effect, including:

- A directive to support noncitizens who are [victims of crime](#), including not pursuing enforcement against:
 - people who have U visas, T visas, VAWA relief, or Special Immigrant Juvenile Status (SIJS);
 - people who have applied for any of these forms of relief; and
 - people who are victims of trafficking and who have applied for or have been granted “Continued Presence.”
- a “[worksite enforcement](#)” memo, which stops mass worksite raids;
- a “[protected areas](#)” policy, which identifies certain places such as schools, hospitals, places of worship, and other similar locations as places where enforcement should not usually take place;
- a [U.S. military members](#) memo, which tells ICE agents to consider military service before taking enforcement actions against members of the military and their families;

- a [Department of Labor FAQ](#) that provides workers experiencing a worksite labor dispute guidance on how to seek the Department's support for their requests to DHS for immigration-related prosecutorial discretion.

All these memos are still in effect and provide different forms of protection from deportation for community members.

3. What are some common types of prosecutorial discretion that DHS may still consider?

Even though the Texas court has paused the Mayorkas Memo from being in effect, DHS can still decide not to pursue enforcement based on the specific facts and circumstances of each case. DHS can determine whether to exercise prosecutorial discretion based on the overall equities of a case in each of the following decisions:

- Whether to issue a stay of removal, which prevents DHS from deporting a noncitizen with a final order of removal (a final order of removal is when an immigration judge has ordered a person removed and that person either decided not to appeal to the Board of Immigration Appeals, or lost their appeal);
- Whether to decide not to act on an existing order of removal without issuing a stay of removal;
- Whether to detain someone;
- Whether to release a person detained by ICE;
- Whether to grant deferred action, parole, deferred enforced departure, or any other forms of temporary, administrative protection from deportation.

4. Should all noncitizens request that DHS exercise prosecutorial discretion in their cases?

No. It is important to note that for the most part, only people who are already in removal proceedings, have a final order of removal, or are detained by ICE should consider requesting that DHS exercise prosecutorial discretion in their case. By asking for prosecutorial discretion, you are getting in contact with DHS, and this should be done with care and with the assistance of a competent lawyer. A request for prosecutorial discretion by a person who is not otherwise on the radar of DHS is risky and could result in that person's detention or deportation from the United States.

5. Does the Texas court's decision to pause the Mayorkas Memo affect the Deferred Action for Childhood Arrivals (DACA) program?

No, the Texas court's decision to pause the Mayorkas Memo does not affect the DACA program. DACA is based on a [2012 memo](#) issued under the Obama administration. While that memo is not implicated here, it was challenged in another lawsuit. You can access more information on DACA on the [United We Dream](#) and [USCIS](#) websites.

6. What are some common types of prosecutorial discretion that OPLA may still consider?

OPLA is the office of ICE lawyers that represent the government in deportation cases. OPLA lawyers determine whether to [exercise prosecutorial discretion](#) in assessing:

- Whether to start a deportation case against someone;
- Whether to dismiss or delay a deportation case (through *dismissal*, which removes the case from the system, or *administrative closure*, which pauses a case so that no hearings get scheduled unless ICE or the person in proceedings formally requests a hearing);
- Whether to agree to relief from deportation, to bond, or to agree to certain issues in the case, as opposed to having the person prove the issue in immigration court (called *stipulations*);
- Whether to object to giving the person more time to prepare for the case in immigration court (called a *continuance*);
- Whether to appeal a case to the Board of Immigration Appeals;
- Whether to reopen a case, which means reversing a deportation order that an immigration judge issued in the past and scheduling the case back before the immigration court.

All these forms of discretion still exist on a case-by-case basis.

7. How can one request that OPLA exercise prosecutorial discretion in a case?

OPLA has [guidance](#) on how their lawyers should exercise prosecutorial discretion. The guidance states that OPLA lawyers should evaluate cases during the normal course of business to determine whether to exercise prosecutorial discretion. Immigrants or their advocates can affirmatively request that OPLA exercise prosecutorial discretion in an immigration case. Requests for prosecutorial discretion can be sent by email to the [specifically designated](#) OPLA prosecutorial discretion email addresses for each field office. Requests for prosecutorial discretion do not have to be sent by a lawyer or a representative fully accredited by the Department of Justice. However, submitting a request for prosecutorial discretion to OPLA may be a complex matter that requires the assistance of a competent lawyer.

Please note this information is intended as a resource for community members and does not constitute legal advice.