



U.S. Immigration
and Customs
Enforcement

April 3, 2022

MEMORANDUM FOR: All OPLA Attorneys

FROM: Kerry E. Doyle KERRY E
Principal Legal Advisor DOYLE

SUBJECT: Guidance to OPLA Attorneys Regarding the Enforcement of Civil
Immigration Laws and the Exercise of Prosecutorial Discretion

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KERRY E DOYLE
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On September 30, 2021, Secretary of Homeland Security Alejandro N. Mayorkas issued a memorandum titled, *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas Memorandum), which took effect on November 29, 2021.¹ The Mayorkas Memorandum lays out the Department of Homeland Security's (DHS or Department) civil immigration enforcement priorities to ensure that finite DHS resources are used in a way that accomplishes the Department's enforcement mission most effectively and justly. In accordance with the Mayorkas Memorandum, the memorandum issued by our General Counsel, Jonathan E. Meyer, titled, *Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law* (Meyer Memorandum),² and the enduring principles of prosecutorial discretion, I am providing this guidance to the U.S. Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) attorneys assigned to handle proceedings before the Executive Office for Immigration Review (EOIR), to guide them in appropriately executing DHS's enforcement priorities and exercising prosecutorial discretion.³

Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance DHS's mission of administering

¹ Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, [Guidelines for the Enforcement of Civil Immigration Law](#) (Sept. 30, 2021). Upon its effective date, the Mayorkas Memorandum rescinded then-Acting Secretary of Homeland Security David Pekoske's memorandum, *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), and U.S. Immigration and Customs Enforcement Acting Director Tae D. Johnson's memorandum, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). At that time, OPLA personnel were advised via an [internal email broadcast message](#) to apply the Mayorkas Memorandum priorities to their litigation activities. This memorandum supersedes that broadcast message.

² Memorandum from Jonathan E. Meyer, General Counsel, DHS, [Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law](#) (Apr. 3, 2022).

³ Upon the effective date of this memorandum set forth in Section V, *infra*, the memorandum issued by former Principal Legal Advisor John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), shall be automatically rescinded.

and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence. As DHS's representative before EOIR with respect to exclusion, deportation, and removal proceedings, 6 U.S.C. § 252(c), OPLA plays a critical role in advancing the Department's enforcement priorities and exercising the Secretary's prosecutorial discretion.⁴ In performing their duties, including through implementation of this memorandum, OPLA attorneys should remain mindful that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."⁵ As a result, they are both authorized by law and expected to exercise discretion in accordance with the factors and considerations set forth in the Mayorkas Memorandum, the Meyer Memorandum, and this guidance at all stages of the enforcement process.

I. The Civil Immigration Enforcement Priorities

The Mayorkas Memorandum establishes three priorities for civil immigration enforcement. Consistent with those priorities, OPLA attorneys are directed to focus efforts and prioritize cases involving noncitizens who pose a threat to our national security, public safety, or border security. This section recites those priorities, provides interpretative guidance surrounding the priorities, and discusses how OPLA personnel are to make priority determinations.

A. The Mayorkas Memorandum Priorities

The three priorities are defined as follows:

Priority A - Threat to National Security. A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.

Priority B - Threat to Public Safety. A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal. Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

⁴ Indeed, [OPLA's recently issued Strategic Plan for 2022 - 2026](#) specifically includes as our second overarching strategic goal, the "Comple[ion of] Litigation Activities Efficiently and in the Pursuit of Justice."

⁵ *Matter of S-M-J*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc). In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said, "Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18-19 (1940).

Priority C - Threat to Border Security. A noncitizen who poses a threat to border security is a priority for apprehension and removal. A noncitizen is a threat to border security if: (a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or (b) they are apprehended in the United States after unlawfully entering after November 1, 2020. There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

These priorities are not intended to require or prohibit taking or maintaining a civil immigration enforcement action against any individual noncitizen or to contravene any legal obligations. Rather, OPLA attorneys are expected to focus their efforts and limited resources consistent with the law and ICE's important national security, public safety, and border security mission.

B. Construing the Three Enforcement Priorities

The Mayorkas Memorandum provides DHS personnel with significant discretion in construing the three enforcement priorities. In order to promote consistency and a common understanding of those priorities within OPLA, I am elaborating on their meaning for purposes of our work before EOIR.

1. Priority A: Threat to National Security

In assessing whether a noncitizen is a threat to national security, OPLA attorneys must consider all available information indicating that the noncitizen is engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or otherwise poses a danger to national security. For purposes of the national security enforcement priority, the terms "terrorism or espionage" and "terrorism-related or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)–(iv) of the Immigration and Nationality Act (INA) and (2) the manner in which the term "espionage" is generally applied in the immigration laws. In evaluating whether a noncitizen is a potential national security priority, OPLA attorneys should consider whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. Consideration may also be given to whether the noncitizen would be ineligible for an exemption from certain terrorism-related inadmissibility grounds pursuant to INA § 212(d)(3)(B)(i).

When determining whether a noncitizen *otherwise* poses a danger to national security, OPLA attorneys should include in their determination process whether the noncitizen is engaged in or suspected of serious human rights violations. The values of our nation as a place of refuge for those fleeing persecution do not support providing a safe haven to those who have voluntarily participated in persecution or other human rights violations. The presence of such perpetrators in the United States not only poses an ongoing threat to their fleeing victims, but also risks the stability of our communities and threatens our strong national interest in welcoming refugees.

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