

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, DC 20528

February 2, 2021

Re: Law Professors and Legal Experts Analysis of State of Law Regarding DHS's Authority to Exercise Discretion After a Removal Order Has Been Issued

Dear Secretary Mayorkas:

On Day 1 of the Biden-Harris administration, the White House and the Department of Homeland Security (DHS) issued an Executive Order and a memorandum intending to restore the use of humane and sensible discretion in immigration enforcement. Since the issuance of this order and memorandum, immigrant communities and their advocates and legal service providers have been saddened to see U.S. Immigration and Customs Enforcement (ICE) continue to engage in enforcement activities, including deportations, that appear at odds with the policies issued.

In this memo, the undersigned law professors and legal experts share our analysis of the current state of law regarding DHS's authority to refrain from executing removals in individual cases and to implement its interim enforcement priorities.

Importantly, the recent Temporary Restraining Order entered in *Texas v. United States* does not undo or limit the longstanding and unchallenged authority of DHS to exercise prosecutorial discretion favorably towards a person or group of persons after they have received a removal order (and beyond the removal period). We urge DHS to use this authority to halt deportations scheduled to take effect today, tomorrow and in the coming weeks whenever they conflict with the Biden Administration's commitment to a humane immigration system and with years of legal precedent and agency practice recognizing the importance of prosecutorial discretion in immigration enforcement.

I. Background

On January 20, 2021, Acting DHS Secretary David Pekoske issued a memorandum to senior leadership with three policy directives: (1) a comprehensive, agency-wide review of all enforcement priorities and policies; (2) a set of narrow interim-enforcement priorities to be followed during the agency-wide review; and (3) a 100-day pause on removals of individuals present in the United States with final removal orders, subject to certain exceptions. *See* Memorandum from David Pekoske, Acting Secretary of U.S. Dep't of Homeland Sec., *Review of*

and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [hereinafter January 20 Memorandum].

Importantly, the January 20 Memorandum recognizes the limited resources of the agency and, consistent with years of how prosecutorial discretion has functioned in the immigration system, that prosecutorial discretion may be exercised at every stage of immigration enforcement, including after a final removal order has been issued, such as in decisions pertaining to defer action, join in motions, or the like. *See* Shoba Sivaprasad Wadhia, *Prosecutorial Discretion in a Biden Administration*, Yale J. Reg. (Jan. 21, 2021), <https://www.yalejreg.com/nc/prosecutorial-discretion-in-a-biden-administration-by-shoba-sivaprasad-wadhia/>.

On January 26, 2021, a federal judge in the Southern District of Texas issued a temporary restraining order enjoining the department from “enforcing and implementing the policies described in the January 20 Memorandum in Section C entitled ‘Immediate 100-Day Pause on Removals.’” *Texas v. United States et al*, ___ F. Supp. 3d ___, No. 6:21-cv-00003 (S.D.Tex. Jan. 26, 2021) [hereinafter TRO]. In preserving the status quo, the District Court indicated its intention to return to the “Defendants’ removal policy prior to issuance of the January 20 Memorandum’s 100-day pause on removals.” TRO at 4. The Court did not enjoin Section A of the January 20 Memorandum calling for a comprehensive review of immigration enforcement policies and priorities or Section B, which establishes a series of interim civil immigration enforcement guidelines that are currently in effect.

II. The Injunction Against the “Pause on Removals” Does Not Eliminate DHS’s Preexisting Authority to Exercise Prosecutorial Discretion, Including Staying Individual Removal Orders

As the TRO by its own terms enjoined only the nationwide 100-day pause on removals and ordered a return to the “last uncontested status quo” before the January 20 Memorandum, it left undisturbed the significant legal authority for DHS to exercise prosecutorial discretion and decline to execute removal orders in particular circumstances and in myriad ways. TRO at 4 (quoting *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). Prior to the January 20 Memorandum, DHS had authority to stay removals in individual cases and groups of cases. The TRO did not purport to overturn regulations or to alter any pre-January 20 authority possessed by DHS.

It is well-established that DHS has prosecutorial discretion and authority to decide how to use its enforcement resources. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (explaining that “the Executive has discretion to abandon” execution of removal orders); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Supreme Court has recognized that

“the broad discretion exercised by immigration officials” is a “principal feature of the removal system” under the Immigration and Nationality Act. *Arizona v. United States*, 567 U.S. 387, 396 (2012).

The immigration statute, regulations, and guidance documents from as early as 1976 underscore the authority of DHS to exercise this discretion generally. The history also shows that humanitarian factors have long guided how this discretion is applied. *See, e.g.*, Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (2017), <https://nyupress.org/9781479829224/beyond-deportation/>.¹ Further, well-established regulations authorize DHS to employ its discretionary authority to grant a stay of removal. *See, e.g.*, 8 C.F.R. § 241.6 (2002). DHS continued exercising its authority to stay removals in individual cases during the Trump administration.

Because those authorities existed prior to the January 20 Memorandum, DHS may continue to exercise them without hindrance.

Likewise, the TRO did not purport to enjoin any aspect of the January 20 Memorandum other than the categorical pause to effectuating removal. TRO at 17 n.7. The January 20 Memorandum also ordered a review of enforcement priorities and set “Interim Civil Enforcement Guidelines.” The Interim Civil Enforcement Guidelines, which remain in effect, explicitly encompass individualized determinations relevant to individuals with final orders of removal, including decisions whether to release from detention, parole, defer action, or join in motions. To the extent that those guidelines are now in effect, it follows that the agency must be able to make individualized determinations to forestall the removal of individuals who are not enforcement priorities.

While the Court preliminarily found that “‘shall means ‘must’” in 8 U.S.C. § 1231(a)(1)(A)—a conclusion at odds with decades of Supreme Court precedent² and agency practice—the TRO itself does not purport to enjoin the Defendants from using its pre-January 20 authorities to forbear from removing individuals either within or beyond the removal period, but instead

¹ *See also* Immigration and Nationality Act of 2011 (INA) § 103(a), 8 U.S.C. § 1103(a) (2011); INA § 237(d)(4), 8 U.S.C. § 1227(d)(4); INA § 242(g), 8 U.S.C. § 1252(g); 8 C.F.R. § 274.12(c)(14) (2020); Memorandum from John Morton, Director, U.S. Immigr. and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from Sam Bernsen, General Counsel, Immigr. and Naturalization Serv., *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

² *See, e.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761–65 (2005) (finding that local law enforcement officers maintain discretion to refrain from engaging in an enforcement action even in light of statute stating “shall arrest...”, and discussing the “deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands”).

merely enjoins the implementation of a categorical pause. Indeed, it would be unreasonable to interpret the TRO as holding that § 1231(a) is inconsistent with agency stay authority.

The TRO did not purport to enjoin any regulation or pre-January 20 practice. To rule that way would not be to enforce the status quo ante, but to adopt a new rule inconsistent with pre-January 20 practice. It follows that the stay regulation remains in force. It also follows that § 1231(a) does not create an inexorable command to remove all noncitizens with final removal orders within 90 days, and was not interpreted by the TRO to create such a command.

III. The TRO Does Not Impact DHS's Ability to Implement Its Stated Interim Enforcement Priorities

It is also relevant to note that the TRO does not purport to impact DHS's ability to implement the interim enforcement priorities. Numerous removal orders have been entered and remain in place because DHS has failed to exercise discretion to join a motion to reopen, to agree to grant a new credible fear interview, or to take other administrative actions. In such cases, the TRO in no way precludes DHS from taking action to exercise discretion on an enforcement action that would in practice result in the person not being removed.

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On the campaign trail, President Biden spoke passionately about reasserting “America’s commitment to asylum-seekers and refugees” and doing better to “uphold our laws humanely and preserve the dignity of immigrant families, refugees, and asylum-seekers.” These same values were included in his Immigration Platform, his agenda for the Latino Community,³ and the Biden-Sanders Unity Task Force Recommendations on immigration,⁴ along with President Biden’s own 2020 World Refugee Day message.⁵ Realizing these commitments will require that DHS utilize the full scope of tools available to it to exercise prosecutorial discretion in the interests of justice. Unnecessarily restricting agency discretion, without legal justification, will inevitably result in the continuation of enforcement practices that send asylum seekers back to their persecutors and destabilize families and communities.

Sincerely,

* Titles and affiliations are for informational purposes only

³ *The Biden Agenda for the Latino Community*, Biden-Harris (2021), <https://joebiden.com/latino-agenda/>.

⁴ Caitlin Oprysko, *Biden, Sanders unity task forces release policy recommendations*, Politico (July 8, 2020), <https://www.politico.com/news/2020/07/08/biden-sanders-unity-task-force-recommendations-353225>.

⁵ Joe Biden, *My Statement of World Refugee Day*, Medium (June 20, 2020), <https://medium.com/@JoeBiden/my-statement-on-world-refugee-day-fddb4abddf5>.

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