



JUSTICE BARRETT AND THE FATE OF THE MAYORKAS PROSECUTORIAL DISCRETION MEMO

Posted on August 16, 2022 by Cyrus Mehta

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On July 21, 2022, the Supreme Court [granted certiorari](#) in *United States v. Texas*, which involves a challenge to the U.S. Immigration and Customs Enforcement (ICE) enforcement priorities as originally laid out in the 2022 [Mayorkas Memo](#). Pursuant to these priorities, ICE would have prioritize the apprehension and removal of noncitizens who pose a threat to “national security, public safety, and border security”. In [previous blogs](#), we have discussed some of the implications of the priorities. The attorneys general of Texas and Louisiana soon challenged these enforcement priorities, arguing that ICE would be allowed to overlook noncitizens for whom detention was required, which would subject the citizens of these states to crime committed by noncitizens who should be in detention, and force the state to spend resources providing education and medical care to noncitizens who should be detained. Judge Drew Tipton of the Southern District of Texas [issued a decision](#) precluding the enforcement priorities in the Mayorkas Memo from going into effect, and the Fifth Circuit affirmed Tipton’s order. The Department of Justice asked for a stay of Tipton’s order halting the implementation of the enforcement priorities, but the Court [denied](#) the request in its order granting certiorari, offering no explanation.

It appears that [federal judges are running US immigration policy](#) these days. Our esteemed colleague Steve Yale-Loehr was quoted by [Time](#) in “Why Judges Are Basically in Charge of U.S. Immigration Policy Now.” He said, “This is a manifestation of our broken immigration system. Today, almost every executive action on immigration is being challenged in the courts.” He also noted that judges having so much power to determine immigration policy puts

the U.S. judicial system in a delicate spot, since federal judges are often wary of being drawn into issues of national sovereignty or of impinging on the executive branch's authority to conduct foreign policy. But these days, they often have no choice. "Courts are loath to weigh in," he said. Another reason for the recent explosion of court challenges was the pace at which the Trump administration moved on immigration issues, the article notes. That "unprecedented pace" led to an unprecedented wave of new lawsuits. "That really accelerated the legal challenges," Steve said. And now, he said, "Conservative states are suing every chance they get to challenge everything that the Biden administration is doing on immigration."

Given the current composition of the Court, it may come as no surprise that the DOJ's requested stay in *United States v. Texas* was denied. What is, surprising, though, is that Justice Amy Coney-Barrett voted in favor of granting the stay, along with the Court's liberal justices, Sotomayor, Kagan, and Brown Jackson. Prior to Justice Barrett's ascension to the Supreme Court, she had a history of voting to uphold President Trump's oppressive immigration policies, including the [public charge rule](#). A notable exception to her record, however, is the Seventh Circuit's [opinion](#) in *Meza-Morales v. Barr*, which Justice Barrett authored. *Meza-Morales* challenged Attorney General Jeff Sessions' ruling in [Matter of Castro-Tum](#), which held that immigration judges cannot "administratively close" cases under most circumstances. Administrative closure allows immigration judges to avoid wasting resources on low priority cases or those awaiting action by another agency by indefinitely suspending removal proceedings. We have extensively covered administrative closure and the trajectory of *Castro-Tum* in previous blogs, see [here](#), [here](#), and [here](#). Barrett, writing for the majority, rejected Sessions' arguments in *Castro-Tum* and held that administrative closure is "plainly within an immigration judge's authority to take "any action" that is "appropriate and necessary for the disposition of ... cases" pursuant to 8 C.F.R. § 1003.10(b). The opinion emphasizes that immigration judges are afforded discretion to dispose of cases as they see fit. Given that Justice Barrett championed discretion in one context, it may not be such a stretch to think that she also recognizes the importance of allowing ICE prosecutors the discretion to decide which removal cases to pursue, a key tenet of the Mayorkas enforcement priorities.

Last year, Matthew Kacsmark, a Trump appointed judge, like Tipton, issued a similar order that required the Biden administration to reinstate Trump's

“Remain in Mexico” policy. The Supreme Court eventually [ruled](#) against Kacsmark, but it allowed his order to remain in effect for 10 months, leaving Remain in Mexico in place for that entire time. Six justices — the three liberal justices plus Chief Justice John Roberts, and Justices Brett Kavanaugh and Barrett — [all agreed](#) that Kacsmark misread federal immigration law when he held that the federal government is required to maintain the Trump-era program. Barrett actually dissented from the Court’s holding, stating in her opinion that she agrees “with the Court’s analysis of the merits,” but she would have sent the case back to lower courts to consider a jurisdictional issue.

It is hoped that Tipton’s order will suffer the same fate. Even if Justice Barrett does not prove to be an unexpected supporter of prosecutorial discretion, it will not be so easy for the courts to kill the longstanding doctrine. ICE Office of the Principal Legal Advisor (OPLA) attorneys have the inherent authority to exercise prosecutorial discretion, whether or not the Mayorkas Memo ultimately remains in place. Because ICE has finite resources, OPLA attorneys will need to continue choosing which cases to aggressively prosecute. Even after the Supreme Court refused to stay Tipton’s injunction, the ICE OPLA [provided guidance](#) on prosecutorial discretion indicating that the doctrine will remain in place even though Mayorkas’ priorities will not explicitly be applied. This guidance states that “OPLA attorneys... may – consistent with longstanding practice – exercise their inherent prosecutorial discretion on a case-by-case basis during the course of their review and handling of cases.”

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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