

To File or Not to File a Notice to Appear:

Improving the Government's Use of Prosecutorial Discretion

PENNSTATE



The Dickinson
School of Law

Prepared for
The American Bar Association
Commission on Immigration

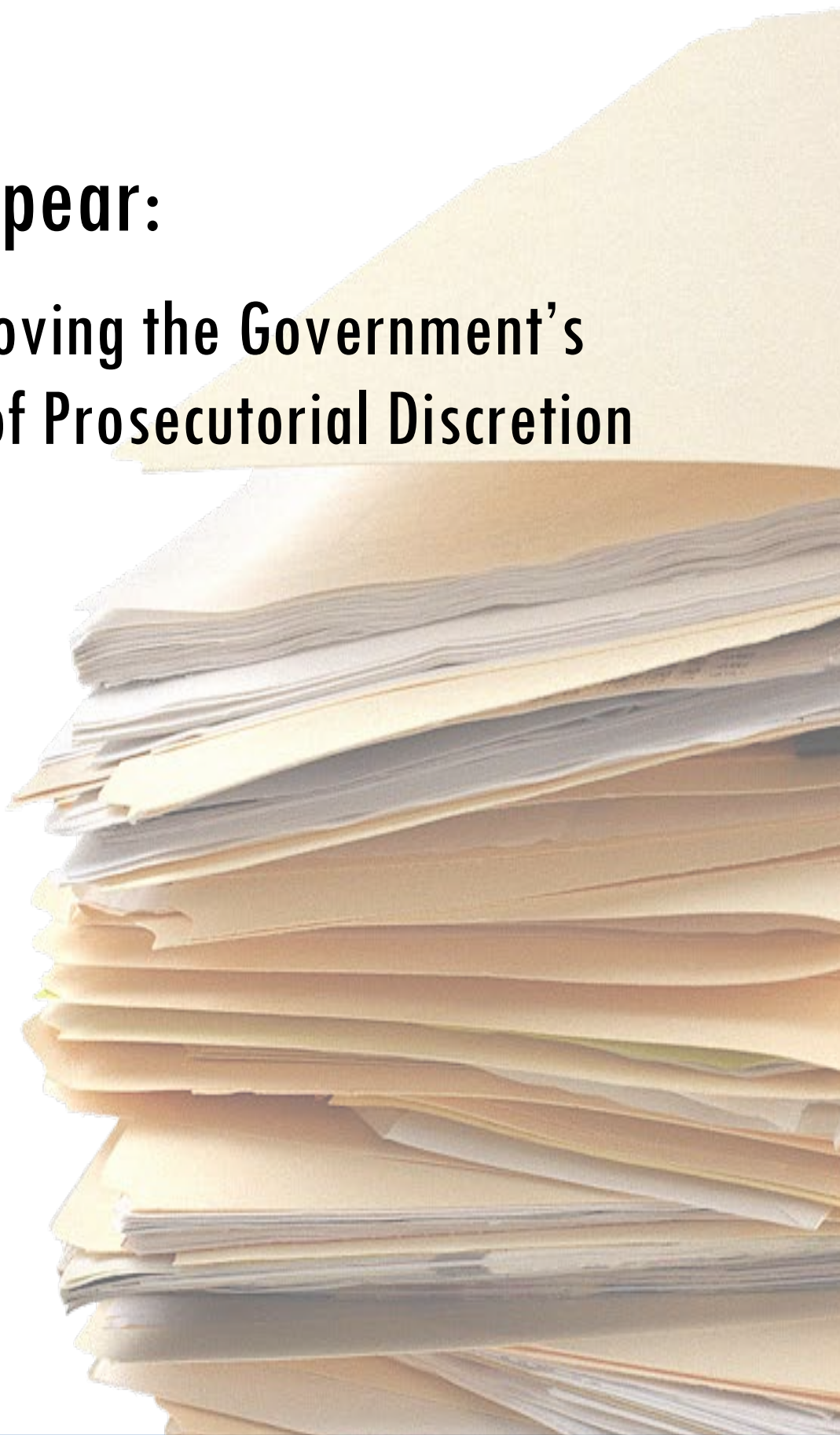


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I. ABOUT THE AUTHORS

Center for Immigrants’ Rights, Pennsylvania State University’s Dickinson School of Law

The Center for Immigrants’ Rights (the Center) is an immigration policy clinic at Penn State’s Dickinson School of Law.¹ Students work on behalf of local and national organizations to produce white papers, practitioner toolkits, and primers relevant to current issues in immigration law. Students have also led community legal education on remedies such as deferred action for childhood arrivals and options for immigrant survivors of domestic violence and sexual assault. Working in teams, students build professional relationships with government and nongovernmental policymakers, academics, individual clients, and others. Since the Center’s establishment in 2008, clients have included the American Bar Association (ABA), the American-Arab Anti-Discrimination Committee (ADC), the American Civil Liberties Union (ACLU), the American Immigration Council (AIC), Human Rights First, Kids in Need of Defense (KIND), the National Guestworker Alliance (NGA), the National Immigrant Justice Center (NIJC), and the National Immigration Project (NLGNIP), among others.² This report was drafted by Yesoo Kim (’13) and Stephen Coccoresse (’12) with supervision and supplemental writing from Professor Shoba Sivaprasad Wadhia, the Center’s Director; editorial assistance was provided by Rachel Keung (’13).

¹ *Center for Immigrants’ Rights*, PENN STATE THE DICKINSON SCHOOL OF LAW, <https://law.psu.edu/practice-skills/clinics/center-immigrants-rights> (last visited Oct. 20, 2013).

² *Id.*

American Bar Association, Commission on Immigration

The Center prepared this report for the American Bar Association Commission on Immigration (the Commission). The Commission directs the ABA's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States.³ Guided by resolutions adopted by the ABA House of Delegates, the Commission works to coordinate and strengthen the ABA's response to legal developments and to address the needs of immigrants and newcomers. Among the Commission's greatest concerns are threats to due process, the growing reliance on detention, and the lack of access to legal information and counsel for individuals in immigration proceedings, including vulnerable groups such as unaccompanied immigrant children and mentally disabled individuals.⁴

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³ *About the Commission*, ABA COMMISSION ON IMMIGRATION, http://www.americanbar.org/groups/public_services/immigration/about_us.html (last visited Feb. 23, 2013).

⁴ *Id.*

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II. EXECUTIVE SUMMARY

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise “prosecutorial discretion” if it is to prioritize its efforts.

- ICE Director John Morton, June 17, 2011.⁵

Prosecutorial discretion in the immigration context involves Department of Homeland Security (DHS) officers deciding whether or not to enforce the immigration laws to their full extent against specific noncitizens who might otherwise be subject to immigration enforcement, detention, and/or deportation. Through numerous policy memoranda, DHS has urged its officers to exercise favorable prosecutorial discretion (i.e., refrain from taking enforcement action) in appropriate cases. DHS has additionally mandated that its officers exercise prosecutorial discretion favorably as much and as early in a case as possible for both humanitarian purposes and for achieving cost-effective and focused law enforcement.

This report focuses on decisions to issue, cancel, or file a Notice to Appear (NTA), a form of prosecutorial discretion that has not yet been given the attention it deserves. An NTA is

⁵ John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

not a mere piece of paper but is the key that initiates removal proceedings against a noncitizen. The earliest stages of the removal process involve the most discretion—for example, decisions on whether to apprehend and detain noncitizens, issue NTAs, and to initiate removal proceedings.⁶ DHS's exercise of prosecutorial discretion in the process of issuing and filing NTAs plays an important role in meeting the agency's enforcement goals: by deciding early on not to issue or file an NTA to a noncitizen who should be deemed a low priority for immigration enforcement, DHS may choose not to initiate removal proceedings against someone who has many positive equities, such as being the parent of U.S. citizen children or having deep roots in the United States, and may allocate its limited resources to enforcing the law against noncitizens who merit a prioritized enforcement response, such as dangerous felons.

This report argues that DHS should consistently consider prosecutorial discretion possibilities and should increase its use of favorable prosecutorial discretion in the issuance and filing of NTAs in appropriate cases. To study the rate and circumstances around which DHS exercises prosecutorial discretion during the NTA process, the authors circulated a survey requesting attorneys and advocates to share specific examples of cases involving the issuance and filing of NTAs and to identify related trends; filed Freedom of Information Act (FOIA) requests and requests for specific information pertaining to NTAs with various DHS units; and interviewed attorneys, advocates, and scholars about their individual experiences with NTA issuance and/or efforts to obtain related data from the agency.

The picture painted by the case scenarios and studies featured in this report suggests that DHS officers are underutilizing, and at times ignoring, this important prosecutorial discretion

⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE NONCITIZEN REMOVAL DECISION MAKING 2 (2007), *available at* <http://www.gao.gov/assets/270/268081.pdf>.

tool. First, the survey responses revealed that noncitizens against whom NTAs were issued and filed with the Executive Office for Immigration Review (EOIR)⁷ often do not fit into the description of high-priority individuals identified by DHS. All noncitizens identified in the surveys presented strong equities, many of which track DHS's own guidance on the factors that should lead to a favorable exercise of discretion, such as being a long-time Lawful Permanent Resident, having a U.S. citizen spouse or children, having resided in the United States for over ten years and/or since one's early childhood, having strong ties with the community, manifesting physical or psychological health conditions, being eligible for an immigration benefit and relief from removal, and so on. Among negative factors, a few individuals identified in the surveys had criminal histories consisting of a misdemeanor, driving without a license, minor crimes, non-violent crimes from many years ago, or drug-related crimes. Yet, none of the clients appear to have committed violent crimes or present negative equities that should have outweighed the positive equities to make them a target of DHS's enforcement resources.

Second, as far as we can tell, none of the cases we reviewed involved NTAs that were issued and thereafter cancelled before being filed with EOIR. Third, once NTAs were filed with EOIR, ICE moved to dismiss or joined in a motion to dismiss in only a few cases. Fourth, most of the noncitizens against whom the NTAs were issued and filed with EOIR were ultimately not removed and ended up being granted some form of relief later in the process.

On the whole, the survey responses support our concern that DHS is not favorably exercising prosecutorial discretion in issuing and filing NTAs as NTAs are being issued to individuals who do not reflect DHS's highest priorities. The fact that most clients mentioned in

⁷ See *Executive Office for Immigration Review*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/eoir> (last visited May 11, 2013) ("The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."). Throughout this report we will use the terms "EOIR" and "Immigration Court" interchangeably.

the survey responses were spared removal raises the question of why these individuals were issued NTAs in the first place and seems to suggest that DHS officers are not exercising their prosecutorial discretion authority as early in the process as possible. Our analysis is more anecdotal than quantitative for two reasons: first, many of the survey respondents and people who were interviewed for this report spoke in broad terms about an unidentifiable number of clients, and second, much of the information about NTAs that the authors sought to uncover was difficult to obtain because DHS has not made the information publicly available.

However, the information we received allowed us to identify several problematic patterns in the current NTA issuance and filing process, namely a lack of available data pertaining to NTAs, lack of transparency about the NTA process, problems with implementation of DHS policies, and lack of attorney review of NTAs. These problems cause DHS difficulty in monitoring the process of NTA issuance and filing to ensure that their officers are exercising prosecutorial discretion consistently, and where appropriate favorably, to accomplish the goals stated in their own policies. The report recommends the following solutions:

- DHS should amend the NTA form to require new “fields” addressing specific information pertaining to issuance, cancellation, and filing of NTAs and should upgrade DHS’s data systems for better tracking of NTA information.
- DHS should stop issuing and filing NTAs against noncitizens who are prima facie eligible for an immigration benefit before USCIS, Lawful Permanent Residents who are eligible for relief from removal, and migrants with strong equities who do not clearly fall into one of DHS’s highest priority categories.
- DHS should establish a permanent program requiring approval of a DHS lawyer before DHS officers file NTAs.

III. INTRODUCTION

[T]he appropriate time for the exercise of prosecutorial discretion is prior to the institution of proceedings. The primary reason for this is the humanitarian factor: it makes little sense to put an alien through the ordeal and expenses of a deportation proceeding when his actual removal will not be sought.

- **Sam Bernsen, former INS General Counsel, July 15, 1976.⁸**

When DHS fails to consider a favorable exercise of prosecutorial discretion before the issuance and filing of NTAs, precious enforcement resources are expended against individuals who are not of high priority, including those who have resided in the United States for over ten years, are parenting U.S. citizen children, have developed strong ties with the community, and do not have a criminal record. Moreover, initiating removal proceedings against such individuals increases court backlogs and threatens the efficiency of the immigration system as it makes the adjudication process slower and more tedious for both the immigration courts and ICE, thereby delaying execution of removal orders in those cases where removal is unquestionably desirable.⁹

⁸ Memorandum from Sam Bernsen, General Counsel, Immigration & Naturalization Service, on Legal Opinion Regarding Service Exercise of Prosecutorial Discretion 7 (July 15, 1976), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

⁹ Importantly, however, an exercise of prosecutorial discretion may actually favor filing an NTA with the immigration court when a noncitizen appears eligible for relief that is only available in immigration court. For example, “cancellation of removal part B” is a remedy that is available to certain noncitizens who can show continuous physical presence for 10 years, good moral character, no deportability or inadmissibility for crime or national security reasons, and who can show that a qualifying family member would suffer “exceptional and extremely unusual hardship.” *See* INA § 240A, 8 U.S.C. § 1229b (2006). An analysis about how to address such cases is beyond the scope of this report.

Furthermore, DHS enjoys discretion to place a person who is legally eligible for a truncated removal process such as “expedited removal” or “administrative removal” into formal removal proceedings under INA § 240. In this scenario, the latter may be preferable because the former results in less process and a greater likelihood for immediate removal. *See Matter of E-R-M & L-R-M*, 25 I. & N. Dec. 520 (BIA 2011) (“[W]e find that Congress’ use of the term “shall” in section 235(b)(1)(A)(i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. . . . [B]ased on the prosecutorial discretion given to the DHS and the [section 235(b)(1)(A)(i)], we find that it was permissible for the DHS to file a Notice to Appear commencing section 240 removal proceedings against the respondents and that the Immigration Judge has jurisdiction over them.”). *See also* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest*

a. REPORT GOALS AND METHOD OF RESEARCH

The goals of this report are to (1) highlight the important role of NTAs in the overall prosecutorial discretion framework, (2) profile individuals and families who have been adversely impacted by DHS's failure to exercise prosecutorial discretion at the NTA stage, and (3) urge DHS to consistently consider prosecutorial discretion when deciding to issue or file NTAs and to increase its use of favorable prosecutorial discretion, while improving its transparency regarding the NTA stage.

This report will begin by providing a brief background about the role of NTAs within the immigration system. Next, the report will review the relevant legal authorities, policies, and agency guidelines relating to NTAs, including sections of the Immigration and Nationality Act, the Code of Federal Regulations, case law, and memoranda published by the immigration agencies. The report will then analyze data and information obtained through the Center's survey, interviews, and requests for information from the agencies. The report will proceed to highlight how agency failure to exercise prosecutorial discretion at the NTA stage adversely affects individuals and families. Finally, the report will conclude by offering recommendations for how the problems can be addressed and fixed under the existing immigration law framework.

Before preparing this report for the Commission, the Center researched existing statutes, regulations, case law, and agency policy memoranda to become familiar with the role and place of NTAs within the immigration system. After reviewing relevant laws and policies, the authors studied the rate and circumstances surrounding NTA filings with immigration courts. To achieve

Crusade, 122 YALE L.J. ONLINE 167 (2012), *available at* <http://www.yalelawjournal.org/images/pdfs/1119.pdf>; KATE M. MANUEL AND TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013), *available at* <http://www.fas.org/sgp/crs/misc/R42924.pdf>. Again, an analysis of these situations is beyond the scope of this report.

this goal, the authors solicited information from attorneys, advocates, and DHS about the decisions made by Customs and Border Protection (CBP), Immigration Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS) to issue NTAs and to file NTAs with the immigration courts and analyzed the information received. As elucidated in greater detail later in this report, CBP, ICE and USCIS are components of DHS responsible for carrying out the immigration enforcement function and notably, all enjoy broad prosecutorial discretion power. The authors also researched primary sources, secondary sources, and related literature on the role of prosecutorial discretion in immigration law.¹⁰

Obtaining data and information was primarily achieved by three methods: (1) circulating a survey consisting of a short questionnaire to immigration attorneys and advocates;¹¹ (2) conducting telephone interviews with survey respondents, research institutions, and immigration scholars; and (3) submitting e-mails and/or official FOIA requests to ICE, CBP, USCIS, and DHS.¹²

¹⁰ *Cases and Projects*, PENN STATE THE DICKINSON SCHOOL OF LAW, http://law.psu.edu/academics/clinics/center_for_immigrants_rights/cases_and_projects (last visited Apr. 9, 2013).

¹¹ See Appendix C.

¹² See Appendices D and E. Both USCIS and CBP requested that we limit the timeframe on the requests to the last two fiscal years (2010-2012) and we provided a limited response thereafter. USCIS limited the scope of our requests as certain requested information is not tracked, such as the number of NTAs that could have been but were not issued/filed. This lack of data availability is itself emblematic of part of the problem this report addresses.

IV. BACKGROUND

A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.

- **Arizona v. United States, 2012.**¹³

a. BASIC TERMS PERTAINING TO THE PROCESS OF NTA ISSUANCE AND FILING

The authors discovered that the terms describing the immigration agencies' actions involving NTAs are not used consistently. Thus, to minimize readers' confusion, this Section will begin by providing definitions of some basic terms pertaining to the process of NTA issuance and filing mentioned throughout this report.

- **Notice to Appear (NTA)** – An NTA is a charging document which includes information about the charges levied against him/her as the basis for removability. The NTA is also required to include the time and place the removal proceedings will be held.
- **Issue an NTA** – An immigration officer issues an NTA to a noncitizen who is believed to be removable. INA § 239(a)(1) uses the phrase “shall be given” and the term “service” to mean issuance of an NTA. On the other hand, 8 C.F.R. § 239.1 uses the terms “issuance” and “issue.” Often, the terms “issue,” “prepare,” and “serve” are used interchangeably. In this report, the terms “issue,” “prepare,” and “serve” are used interchangeably unless quoted from other sources.
- **Cancel an NTA** – An immigration officer authorized to issue an NTA may cancel it before the NTA is filed with an immigration court.¹⁴

¹³ Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (citations omitted).

- **File an NTA** – An immigration officer files an NTA with an immigration court, and filing of the NTA officially commences a removal proceeding against a noncitizen.¹⁵
- **Dismiss a matter before the immigration court** – Once a removal proceeding is commenced, any party may move for dismissal of the matter.¹⁶ Ultimately, the jurisdiction to dismiss a matter lies with the immigration judge. Often, the terms “dismiss” and “terminate” are used interchangeably. In this report, the term “dismiss” is used to mean “terminate,” unless quoted from other sources.
- **Administratively close a matter** – Once removal proceedings are commenced, any party may move for administrative closure of the matter. Ultimately, the jurisdiction to close a matter lies with the immigration judge. Administrative closure is only a temporary resolution of the proceedings, as the case remains on the immigration court docket and additional hearings may be scheduled later.¹⁷ In this report, the term “administrative closure” or “administratively closed” is used to mean “administrative closure,” unless quoted from other sources.

¹⁴ See 8 C.F.R. § 239.2(a) (2013).

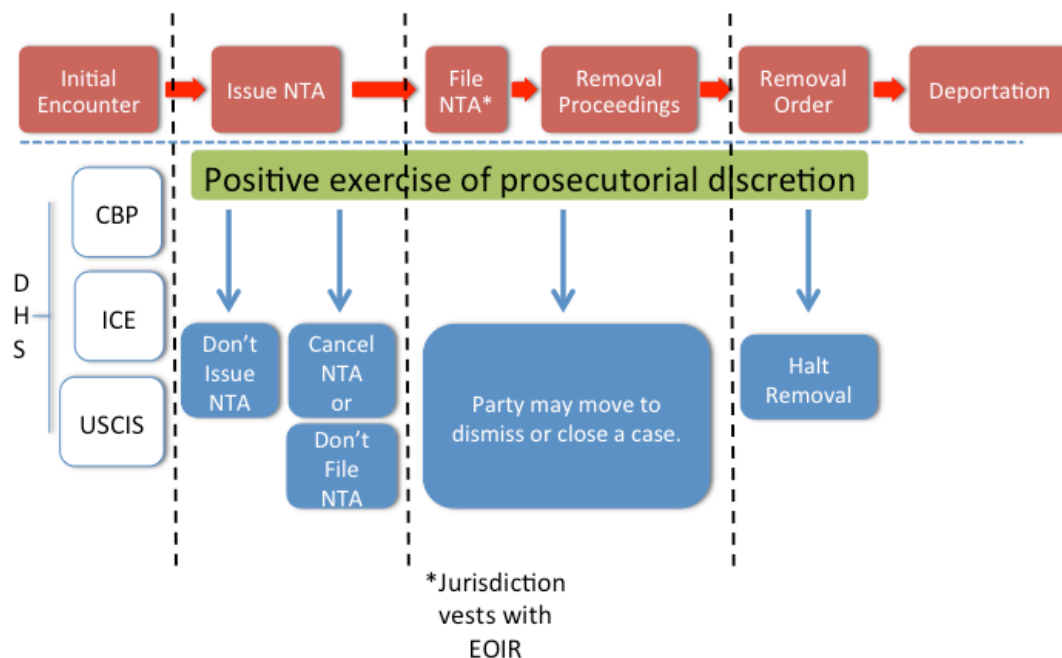
¹⁵ See 8 C.F.R. § 1003.14 (2013).

¹⁶ See 8 C.F.R. §§ 239.2(c), 239.2(a) (2013).

¹⁷ For more details on administrative closure, see Memorandum from Brian M. O’Leary, Chief Immigration Judge, U.S. Department of Justice Executive Office for Immigration Review, on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure (Mar. 7, 2013), available at <http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf>.

b. BROAD OVERVIEW OF REMOVAL PROCEEDINGS¹⁸ AND THE ROLE OF NTAS

Removal proceedings are one way in which the government can remove noncitizens from the country. Removal proceedings are adversarial with ICE representing DHS in prosecuting the removal and the noncitizen either representing him/herself or retaining private or pro bono legal counsel to defend against removal. The removal process is officially commenced when DHS files a charging document, called a Notice to Appear (NTA), or Form I-862, with an immigration court. An NTA specifies “the charge against the alien and the statutory provisions alleged to have been violated.”¹⁹ When an NTA is filed with the immigration court, jurisdiction vests with the immigration judge.²⁰ The accompanying chart provides a rough overview of the removal



¹⁸ For a more detailed discussion of removal proceedings, see Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1 (2011); Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (2012), available at <http://www.acus.gov/sites/default/files/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> [hereinafter Benson & Wheeler].

¹⁹ INA § 239(a)(1)(D), 8 U.S.C. § 1229 (2006).

²⁰ 8 C.F.R. § 1003.14 (2013).

process and the options available for DHS to exercise prosecutorial discretion.²¹

c. WHO HAS THE AUTHORITY TO ISSUE NTAS

Three components of DHS, U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE), can play a significant role in removal proceedings because all three have the authority to initiate a removal proceeding by filing an NTA with the immigration court.²² All officers with the authority to issue NTAs may also choose to cancel²³ or not to file already-issued NTAs. Even after an NTA is filed with an immigration court, any officer of these three components with authority to issue NTAs may move for dismissal²⁴ or administrative closure of the removal proceeding.

i. USCIS

USCIS adjudicates immigration benefits such as change and extension of visas and applications for permanent resident status, naturalization, and asylum. Several units within USCIS, including Service Centers, Asylum Offices, and Field Offices have authority to issue NTAs.²⁵ Likewise, there are multiple situations that might trigger a USCIS officer to issue an NTA. To illustrate, the Asylum Office may issue an NTA to an asylum applicant stopped at or

²¹ This chart does not reflect the possibility that a noncitizen could be granted relief from removal, in which case he would not be removed.

²² 8 C.F.R. §§ 1003.14, 239.1 (2013). Other DHS components can file an NTA as well, but are not discussed in this report.

²³ 8 C.F.R. § 239.2(a) (2013).

²⁴ 8 C.F.R. § 239.2(c) (2013).

²⁵ *See generally* Letter from Jill A. Eggleston, Freedom of Information Act Director, U.S. Customs & Enforcement, to Shoba Sivaprasad Wadhia (May 30, 2013), *available at* http://law.psu.edu/_file/Wadhia/FOIA_Letter_May_30_2013.pdf [hereinafter FOIA Response from USCIS on Notices to Appear].

near the border and placed in expedited removal proceedings if the asylum officer finds that the applicant has a credible fear of persecution, placing the person in removal proceedings before an immigration judge for full adjudication of the asylum claim.²⁶ The USCIS Asylum Office also must issue an NTA if the asylum officer “denies” an applicant’s affirmative asylum application.²⁷ Furthermore, USCIS’s Domestic Operations Directorate, which is responsible for handling applications for immigration benefits, such as applications for employment authorization, lawful permanent residency, and naturalization, issues NTAs to noncitizens who are denied benefits and have no other status. Similarly, Domestic Operations Directorate refers noncitizens to ICE to initiate removal proceedings if a background check conducted during adjudication of an application reveals grounds for removal.²⁸ In addition, USCIS will issue NTAs in cases involving fraudulent applications.²⁹ The situations described above are not exhaustive but instead demonstrate the variety of circumstances when USCIS may issue an NTA.

Between fiscal year 2008 and 2012, USCIS issued 276,089 NTAs.³⁰ In response to a FOIA request made by the authors of this report, USCIS provided further data on the various types of NTAs that are issued by USCIS and the distribution of these NTAs by field office.³¹

²⁶ INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2006).

²⁷ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 9 (2005), *available at* <http://www.fas.org/sgp/crs/misc/RL32621.pdf>.

²⁸ USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (November 7, 2011), *available at* [http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA PM](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA_PM) (Approved as final 11-7-11).pdf [hereinafter USCIS Policy Memo].

²⁹ *Id.* at 3. *See also* 8 C.F.R. §§ 216.3(a), 216.3(a)(5), 207.9 (2013).

³⁰ FOIA Response from USCIS on Notices to Appear, *supra* note 25, at 175.

³¹ *Id.* at 176-82.

There were more than 20 case types subject to NTAs by USCIS during fiscal year 2012.³² Of the 43,845 NTAs issued by USCIS in fiscal year 2012, the bulk of cases involved family “adjustment of status” cases, asylum cases, and credible fear cases.³³ The number of NTAs issued by USCIS increased from 32,008 (15% of the NTAs issued by DHS) in fiscal year (FY) 2006 to 53,185 (24% of the NTAs issued by DHS) in FY 2009³⁴, and back down again to 43,845 in FY 2012.³⁵

ii. ICE

ICE investigates violations of immigration laws and enforces immigration laws against individuals already inside the United States. ICE plays multiple important roles in the enforcement of the immigration laws: ICE officers may order and execute the removal of noncitizens with aggravated felony convictions, ICE officers may grant voluntary departure relief to removable noncitizens, ICE attorneys serve as prosecutors in removal proceedings before immigration judges,³⁶ ICE officers detain noncitizens, and ICE officers are responsible

³² *Id.* at 176.

³³ *Id.*

³⁴ ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 1-12 (2010), available at http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [hereinafter ABA, *Reforming the Immigration System*].

³⁵ FOIA Response from USCIS on Notices to Appear, *supra* note 25, at 176.

³⁶ While ICE officers are not prosecutors in the literal sense, they retain broad prosecutorial authority over enforcement decisions. See Memorandum from Bo Cooper, General Counsel, U.S. Immigration & Naturalization Service, on INS Exercise of Prosecutorial Discretion 2-3 (July 11, 2000) (on file with authors) (“Often, an individual who is not actually a prosecutor has broad “prosecutorial” discretion. . . . Because [ICE] is simultaneously in removal and detention matters the investigating agency, the prosecuting agency, the custodian, and the removing agency, the administrative enforcement discretion generally deferred to by courts extends far more broadly to a wide variety of [ICE] decisions than the strictly “prosecutorial” decision to initiate removal proceedings.”).

for the physical removal of noncitizens with final orders of removal.³⁷ In addition, ICE has authority to make decisions on whether to issue NTAs in certain types of cases referred by USCIS, namely national security cases, egregious public safety cases, and non-egregious public safety criminal cases.³⁸ USCIS will not issue an NTA if ICE declines to issue an NTA on cases belonging to the latter two categories.³⁹ The portion of all NTAs issued by ICE has steadily increased. Since FY 2005, the number of NTAs issued by ICE increased from 44,015 (16.3% of total number of NTAs issued) to 168,299 in FY 2009 (76.0% of total number of NTAs issued).⁴⁰ As of this writing, ICE has not provided the authors of this report with recent totals for the number of NTAs it issues.

iii. CBP

CBP secures the borders and ports of entry from the illegal entry of noncitizens by inspecting arriving people and goods. CBP plays an important role in the removal of noncitizens because CBP officers, along with ICE officers, may order the removal of a noncitizen convicted of an aggravated felony and the expedited removal of other noncitizens, or may grant voluntary departure relief to removable noncitizens.⁴¹

³⁷ ABA, *Reforming the Immigration System*, *supra* note 34, at 1-9, 1-19.

³⁸ USCIS Policy Memo, *supra* note 28, at 3-6.

³⁹ *Id.* at 4 (“All [Egregious Public Safety (EPS)] cases must be referred to ICE . . . ICE will have an opportunity to decide if, when, and how to issue an NTA and/or detain the alien. USCIS will not issue an NTA in these cases if ICE declines to issue an NTA.”); *id.* at 5 (“If it appears that the alien is inadmissible or removable for a criminal offense not included in the EPS list, USCIS will complete the adjudication and then refer the case to ICE . . . ICE will decide if, and how, it will institute removal proceedings and whether or not it will detain the alien. USCIS will not issue an NTA if ICE declines to issue an NTA.”).

⁴⁰ ABA, *Reforming the Immigration System*, *supra* note 34, at 1-13.

⁴¹ *Id.* at 1-18.

At ports of entries, a CBP officer is authorized to issue an NTA upon determining that the grounds of inadmissibility apply to an arriving noncitizen.⁴² According to an excerpt from the Border Patrol Training Academy provided to the authors in a CBP FOIA response, examples of reasons for issuing an NTA include: subject refuses voluntary return, subject makes a non-frivolous false claim to CBP, subject is not Mexican, and subject possesses false documents.⁴³ If an arriving noncitizen may be able to overcome a finding of inadmissibility, a CBP officer may refer the person's inspection to a CBP deferred inspection office.⁴⁴ If the noncitizen fails to appear for the deferred inspection, the CBP officer issues an NTA.⁴⁵ A CBP officer may also issue an NTA during a deferred inspection interview if the CBP officer determines that the noncitizen is inadmissible.⁴⁶

The number of NTAs issued by CBP has decreased over time from 114,407 in FY 2004 (74.5% of total number of NTAs issued) to 58,552 in FY 2008 (20.1% of total number of NTAs issued).⁴⁷ A review of data obtained by CBP in response to a FOIA request made by the authors

⁴² INA § 235(b)(2), 8 U.S.C. § 1225(b)(2) (2006); 8 C.F.R. § 235.3(b)(3) (2013).

⁴³ Letter from Martha Terry, U.S. Customs & Border Protection FOIA Division, to Shoba Sivaprasad Wadhia 2 (July 10, 2013), *available at* http://law.psu.edu/_file/Immigrants/FOIA-CBP-NTA.pdf [hereinafter USBP Apprehensions with a Notice to Appear Disposition, FY2011 - FY2012].

⁴⁴ 8 C.F.R. § 235.2(b) (2013).

⁴⁵ U.S. CUSTOMS & BORDER PROTECTION, INSPECTOR'S FIELD MANUAL, CHAPTER 17: INADMISSIBLE ALIENS § 17.1(d), *available at* <http://foiarr.cbp.gov/streamingWord.asp?j=237> ("If an alien fails to appear for his or her deferred inspection, a Form 1-862, Notice to Appear shall be executed using the information listed on the Form 1-546 and mailed to the address provided.").

⁴⁶ *Id.* at § 17.6(a) ("If [the officer] determine[s] that an alien is inadmissible, and the grounds of inadmissibility cannot be resolved readily and the alien does not elect to withdraw (or is not afforded the opportunity), [he or she] must prepare necessary paperwork [which includes three copies of a Notice to Appear] for a removal proceeding before an immigration judge or for prosecution.").

⁴⁷ ABA, *Reforming the Immigration System*, *supra* note 34, at 1-12. This report explains that the significant decrease in the number of NTAs issued by CBP is due to the Strategic Border Initiative program that eliminated the "catch and release" approach of CBP and required removal, often expedited,

indicates that about 32,000 NTAs were issued in FY 2011 and that 32,000 NTAs were issued in 2012.⁴⁸ Based on the entry dates included in the data, CBP issued NTAs to people who had been in the United States anywhere from one day to more than 20 years.⁴⁹ While the majority of NTAs issued by CBP during FY 2011-2012 appear to be against citizens of Mexico, the data indicates that CBP also prepared NTAs for citizens from more than 45 countries during these years.⁵⁰

d. WHAT HAPPENS AFTER THE NTA IS FILED

Once an NTA is filed, the immigration court obtains jurisdiction over the noncitizen.⁵¹ A practical implication of the court taking jurisdiction is that it “modifies and in some cases shrinks the number of prosecutorial tools available to DHS.”⁵² ICE attorneys are free to initiate or join a motion to dismiss proceedings, yet the ultimate decision to grant this motion lies with the immigration judge.⁵³

of “every single illegal entrant amenable to removal—no exceptions.” Moreover, the reduction in apprehensions at the border may also affect the rate of NTAs issued by CBP. *See, e.g., UNITED STATES BORDER PATROL, SOUTHWEST BORDER SECTORS: TOTAL APPREHENSIONS BY FISCAL YEAR, available at* http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/appr_swb.ctt/appr_swb.pdf.

⁴⁸ *See generally*, USBP Apprehensions with a Notice to Appear Disposition, FY2011 - FY2012, *supra* note 43, at 2-1172.

⁴⁹ *See generally id.*

⁵⁰ *See generally id.*

⁵¹ *See* 8 C.F.R. § 1003.14 (2013).

⁵² Shoba Sivaprasad Wadhia, *Board Offers New Standard for Administrative Closure, and Highlights the Importance of Decisional Independence*, AILA IMMIGRATION SLIP OPINION BLOG (Feb. 2, 2012, 11:13 AM) (on file with authors).

⁵³ *See* 8 C.F.R. § 239.2(c) (2013); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); Brian M. O’Leary, Chief Immigration Judge, U.S. Department of Justice Executive Office for Immigration Review, on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure (Mar. 7, 2013), *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf>.

e. PROSECUTORIAL DISCRETION IN THE NTA ISSUANCE AND FILING PROCESS

In the immigration context, prosecutorial discretion is “the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone.”⁵⁴ The term prosecutorial discretion thus applies “to the decision to issue, serve, or file a Notice to Appear (NTA)” as well as to many other enforcement decisions.⁵⁵ It serves as an important tool for targeting law enforcement resources and providing relief from deportation for individuals who present desirable qualities or humanitarian circumstances.⁵⁶ Policies and guidelines from DHS mandate their officers to exercise prosecutorial discretion favorably, in appropriate cases, in several ways and at multiple points of the removal process.⁵⁷ The earliest stages of the removal process involve the most discretion—for example, decisions on whether to apprehend and detain noncitizens, issue NTAs, and to initiate removal proceedings.⁵⁸ Thus, USCIS, ICE, and CBP may decide not to initiate removal proceedings against a noncitizen by

⁵⁴ Memorandum from Doris Meissner, Commissioner, Immigration & Naturalization Service, on Exercising Prosecutorial Discretion 2 (Nov. 17, 2000) (on file with authors).

⁵⁵ *Id.* See also Memorandum from Marcy M. Forman, Acting Director, U.S. Immigration & Customs Enforcement, Office of Investigations, on Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service 2 (June 21, 2004), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/aliens-us-military-service.pdf> (“The decision not to issue an NTA . . . is an exercise of prosecutorial discretion.”); KATE M. MANUEL AND TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013), *available at* <http://www.fas.org/sgp/crs/misc/R42924.pdf> (“[C]ertain decisions are within the prosecutorial discretion of [DHS,] [including] whether to cancel a Notice to Appear or other charging document before jurisdiction vests with an immigration judge.”).

⁵⁶ Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

⁵⁷ For more discussion on DHS’s exercise of prosecutorial discretion, see ABA, *Reforming the Immigration System*, *supra* note 34.

⁵⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE NONCITIZEN REMOVAL DECISION MAKING 2 (2007), *available at* <http://www.gao.gov/assets/270/268081.pdf>.

not issuing or filing NTAs.⁵⁹ DHS officers' authority to exercise prosecutorial discretion with NTA filings does not end even after the issuance of NTAs, as DHS may choose to cancel or not to file the NTAs.⁶⁰

V. LEGAL AUTHORITIES, POLICIES, AND GUIDELINES

Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders

- **Former INS Commissioner Doris Meissner, November 17, 2000.**⁶¹

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. . . . Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

- **Former ICE Principal Legal Advisor, William J. Howard, October 24, 2005.**⁶²

a. STATUTES

The Immigration and Nationality Act (INA) regulates the content and procedural requirements surrounding an NTA.

⁵⁹ See John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memo I].

⁶⁰ *Id.* at 2.

⁶¹ Memorandum from Doris Meissner, Commissioner, Immigration & Naturalization Service, on Exercising Prosecutorial Discretion 2 (Nov. 17, 2000) (on file with authors).

⁶² Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion 8 (Oct. 24, 2005) (on file with authors).

INA § 239(a) states that in removal proceedings under INA § 240, a written notice, called a “Notice to Appear,” shall be given in person, or by mail to the noncitizen or to the noncitizen’s attorney. A Notice to Appear contains the following information: the nature of the proceedings, the legal authority under which the proceedings are conducted, the noncitizen’s acts alleged to be in violation of law, the charges against the noncitizen and the statutory provisions alleged to have been violated, notice that the noncitizen may be represented by counsel, notice that the noncitizen must immediately notify the government if there is a change in address and telephone number, and the consequences of failure to provide such information, the time and place the proceedings will be held,⁶³ and the consequences of the failure to appear at such proceedings.⁶⁴

INA § 242(g) states that the government’s decision or action “to commence proceedings, adjudicate cases, or execute removal orders against any alien” is not subject to judicial review.⁶⁵

⁶³ Although it is outside the scope of this report, it is worth mentioning that some detained noncitizens do not get to see an NTA issued to them until their first court hearing. One respondent described this situation in detail:

[Some] detained individuals do not get a copy of their NTA until, [or even after], their first court hearing. This is a problem for them because they cannot get thorough immigration legal advice from an attorney or accredited representative before their court hearing. . . . [When we first meet these] people almost nobody has their NTA. We explain what the NTA is, but this has always been a problem for us because the detainees do not have their own NTA to follow

“Respondent M” Survey Response. The law does not require DHS officers to issue an NTA prior to a removal proceeding nor does it “contain a timeframe during which that [an NTA] service must be performed.” Although some internal guidelines require an immigration agency to issue NTAs within a certain timeframe, for example, 48-hour or 72-hour windows, many detainees “[do] not receive their NTA for weeks.” Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 408 (2007). The immigration agency officers’ failure to give the NTA to the noncitizen definitely defeats the purpose of the NTA, which is to inform the noncitizen of his alleged violation of immigration law and to provide sufficient time to find legal counsel at his expense.

⁶⁴ See INA § 239(a), 8 U.S.C. § 1229(a) (2006).

⁶⁵ INA § 242(g), 8 U.S.C. § 1252(g) (2006). For more details on judicial review and prosecutorial discretion, see Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the*

b. REGULATIONS

8 C.F.R. § 239.1 provides a list of immigration officers who are authorized to issue a Notice to Appear.⁶⁶

8 C.F.R. § 239.2 states that any officer who is authorized to issue an NTA under 8 C.F.R. § 239.1 may cancel such notice *before jurisdiction shifts to the immigration judge* under certain circumstances, such as when the officer is satisfied that “the respondent is a national of the United States” or is “not deportable or inadmissible under the immigration laws.” The officer may also cancel an NTA when “the notice to appear was improvidently issued” or “circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.”⁶⁷ This regulation also states

Role of the Judiciary in Prosecutorial Discretion Decisions 16 HARV. LAT. L. R. 39 (2013), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1050&context=shoba_wadhia.

⁶⁶ 8 C.F.R. § 239.1 (2013). The number of officers authorized to issue NTAs is breathtaking and includes: "Any immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear: (1) District directors (except foreign); (2) Deputy district directors (except foreign); (3) Chief patrol agents; (4) Deputy chief patrol agents; (5) Assistant chief patrol agents; (6) Patrol agents in charge; (7) Assistant patrol agents in charge; (8) Field operations supervisors; (9) Special operations supervisors; (10) Supervisory border patrol agents; (11) Service center directors; (12) Deputy service center directors; (13) Assistant service center directors for examinations; (14) Supervisory district adjudications officers; (15) Supervisory asylum officers; (16) Officers in charge (except foreign); (17) Assistant officers in charge (except foreign); (18) Special agents in charge; (19) Deputy special agents in charge; (20) Associate special agents in charge; (21) Assistant special agents in charge; (22) Resident agents in charge; (23) Supervisory special agents; (24) Directors of investigations; (25) District directors for interior enforcement; (26) Deputy or assistant district directors for interior enforcement; (27) Director of detention and removal; (28) Field office directors; (29) Deputy field office directors; (30) Supervisory deportation officers; (31) Supervisory detention and deportation officers; (32) Directors or officers in charge of detention facilities; (33) Directors of field operations; (34) Deputy or assistant directors of field operations; (35) District field officers; (36) Port directors; (37) Deputy port directors; (38) Supervisory service center adjudications officers; (39) Unit Chief, Law Enforcement Support Center; (40) Section Chief, Law Enforcement Support Center; or (41) Other officers or employees of the Department or of the United States who are delegated the authority as provided by 8 CFR 2.1 to issue notices to appear."

⁶⁷ 8 C.F.R. § 239.2 (2013).

that any officer with authority to issue a notice to appear may move for dismissal of the matter *after commencement of proceedings* on the grounds set out above.⁶⁸

8 C.F.R. § 1003.14 explains that when an NTA is filed with the immigration court, jurisdiction vests in the immigration court and removal proceedings officially commence.⁶⁹ An NTA must include a certificate that shows service on the noncitizen and indicate in which immigration court the NTA is filed.⁷⁰

c. CASE LAW

Case law clarifies and restates the statutory authority and the regulations. Deportation or removal proceedings commence when the NTA is filed with the immigration court.⁷¹ Decisions of DHS officers who are authorized to issue an NTA or cancel the NTA before it gets filed are not subject to review.⁷²

Finally, jurisdiction vests in the immigration court once the NTA is filed.⁷³ Once the immigration court has jurisdiction, DHS's ability to exercise prosecutorial discretion is limited

⁶⁸ *Id.* (emphasis added).

⁶⁹ See 8 C.F.R. § 1003.14 (2013) (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court . . .”).

⁷⁰ See *id.* (“The charging document must include a certificate showing service on the opposing party . . . which indicates the Immigration Court in which the charging document is filed.”).

⁷¹ See, e.g., *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597-98 (9th Cir. 2002) (“[A] removal proceeding is commenced when the INS files a Notice to Appear (‘NTA’)”); *Cortez-Felipe v. INS*, 245 F.3d 1054, 1056-57 (9th Cir. 2001) (Removal proceedings commence on the date a Notice to Appear is filed and not on the date it was served on the applicant.).

⁷² See *Matter of G-N-C*, _____ (BIA 1998) (“A decision by the Immigration and Naturalization Service to institute removal or other proceedings, or to cancel a Notice to Appear or other charging document before jurisdiction vests with the Immigration Judge, involves the exercise of prosecutorial discretion and is not a decision that the Immigration Judge or this Board may review.”).

⁷³ See *Matter of G-N-C*, _____ (BIA 1998) (“Once the charging document is filed with the Immigration Court and jurisdiction is vested in the Immigration Judge, the Service may move to terminate the proceedings, but it may not simply cancel the charging document.”).

since the ultimate decision to dismiss or administratively close a case lies with the immigration judge and not with DHS.⁷⁴

d. AGENCY POLICY AND GUIDELINES

The immigration agencies have published guidance on the use of prosecutorial discretion for at least forty years.⁷⁵ The following section highlights some of the most frequently-cited agency memoranda on the exercise of prosecutorial discretion.

i. Early Guidance

The Meissner Memo

On November 17, 2000, Doris Meissner, former Commissioner of the Immigration and Naturalization Service (INS), issued a memorandum discussing the exercise of prosecutorial discretion in compelling cases.⁷⁶ This memo lays out the legal framework and practical theories underlying the favorable use of prosecutorial discretion by immigration officers and emphasizes the agency's inability to pursue all immigration violations because of its "finite resources."⁷⁷ Moreover, the Meissner memo highlights the numerous stages at which the use of prosecutorial discretion is applicable, including the stage of deciding whether to issue, serve, or file an NTA. The memo instructs that "[a]s a general matter, it is better to exercise favorable discretion as

⁷⁴ See *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012) (An immigration judge has the authority to administratively close a case even if either party opposes.).

⁷⁵ See, e.g., Memorandum from Sam Bernsen, General Counsel, Immigration & Naturalization Service, on Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

⁷⁶ Memorandum from Doris Meissner, Commissioner, Immigration & Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000) (on file with authors).

⁷⁷ *Id.* at 4.

early in the process as possible, once the relevant facts have been determined.”⁷⁸ According to the memo, immigration officers have an obligation to make fair and consistent discretionary judgments because they are “expected to exercise discretion in a judicious manner at all stages of the enforcement process.”⁷⁹ This memo also provides a non-exhaustive list of compelling factors an immigration officer may consider in deciding whether or not to favorably exercise prosecutorial discretion.⁸⁰

ii. ICE Guidance

The Forman Memo

On June 21, 2004, Marcy M. Forman, then-Director of the ICE Office of Investigations, issued a memorandum, “Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service” (the Forman Memo), providing additional guidance on the exercise of prosecutorial discretion in the issuance of an NTA.⁸¹ Among other factors, military service and eligibility for naturalization are factors that should be considered in determining whether to issue an NTA under this guidance.⁸² The Forman Memo further advises that a noncitizen’s criminal history should be considered “as well as any evidence of rehabilitation, family and financial ties to the United States, employment history, health, [and] community service.”⁸³ Moreover, it requires ICE officers to record “the

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 7-8.

⁸¹ Memorandum from Marcy M. Forman, Acting Director, U.S. Immigration & Customs Enforcement, Office of Investigations, on Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service 2 (June 21, 2004), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/aliens-us-military-service.pdf>.

⁸² *Id.* at 1-2.

factors considered and the decision made in each specific case into a memorandum of investigation . . . [and place a copy] in the alien's A file.”⁸⁴ Although the Forman Memo addresses cases of noncitizens with military service, the principle behind it applies to non-military service cases as it is consistent with the Morton Memo's mandate to exercise various forms of prosecutorial discretion, including decisions to issue NTAs “as early in the case” as possible.⁸⁵

The Howard Memo

On October 24, 2005, William J. Howard, at the time the Principal Legal Advisor of the Office of the Principal Legal Advisor (OPLA),⁸⁶ issued a memo titled “Prosecutorial Discretion” (the Howard Memo). The Howard Memo is worth highlighting because it establishes how ICE attorneys can exercise prosecutorial discretion at different stages of the NTA process. It mandates consideration of prosecutorial discretion *before* issuing an NTA, providing that all ICE attorneys “should attempt to discourage issuance of NTAs where there are other options available such as . . . clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.”⁸⁷ It further

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 3.

⁸⁵ Morton Memo I, *supra* note 59, at 2.

⁸⁶ OPLA “is the largest legal program in the Department of Homeland Security, providing legal advice, training and services in cases related to the ICE mission. OPLA also is the exclusive legal representative for the U.S. government in exclusion, deportation and removal proceedings before the Department of Justice’s Executive Office for Immigration Review. Moreover, OPLA attorneys litigate immigration-related hearings that involve criminal aliens, terrorists and human rights abusers.” *Office of the Principal Legal Advisor*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/leadership/opla> (last visited Apr. 21, 2013).

⁸⁷ Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion 3 (Oct. 24, 2005) (on file with authors) [hereinafter Howard Memo].

encourages ICE attorneys not to file an NTA until a decision is made on certain visa applications like U or T visas. *Even after the NTA is filed*, the Howard Memo reminds ICE attorneys that they have regulatory authority to exercise prosecutorial discretion to dismiss a matter under 8 C.F.R. §§ 239.2(c) and 1239.2(c).⁸⁸

The Morton Priorities Memo

In recent years, former ICE Director John Morton has released a series of important memos that develop and expand on the earlier guidance regarding prosecutorial discretion. First, on June 30, 2010 (and reissued in March 2011), John Morton published a memo (the Morton Priorities Memo) emphasizing the importance of prioritizing the use of ICE’s enforcement resources to make sure that removals “promote the agency’s highest enforcement priorities.”⁸⁹ This memo defines ICE’s civil enforcement priorities: the agency’s highest priority—“Priority 1”—being “[a]liens who pose a danger to national security or a risk to public safety;” second highest priority—“Priority 2”—being “recent illegal entrants;” and third highest priority—“Priority 3”—being “[a]liens who are fugitives or otherwise obstruct immigration controls.”⁹⁰

⁸⁸ *Id.* 8 C.F.R. § 239.2(c) states: “Motion to dismiss. After commencement of proceedings . . . ICE counsel, or any officer [authorized to issue an NTA], may move for dismissal of the matter on the grounds set out under paragraph (a) of this section.” 8 C.F.R. § 239.2(c) (2013). Similarly, 8 C.F.R. 1239.2(c) states: “Motion to dismiss. After commencement of proceedings . . . government counsel or an officer [authorized to issue an NTA] may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the alien or the Department of Homeland Security.” 8 C.F.R. § 1239.2(c) (2013).

⁸⁹ See John Morton, Director, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [hereinafter Morton Priorities Memo]. For a more detailed discussion of the objections to DHS’s definitions of its priorities, see Shoba Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, IMMIGRATION POLICY CENTER (December 1, 2010), <http://www.immigrationpolicy.org/special-reports/reading-morton-memo-federal-priorities-and-prosecutorial-discretion>.

⁹⁰ Morton Priorities Memo, *supra* note 89, at 1-2.

Expanding further on “Priority 1” individuals, the memo includes the following hierarchical subcategories of priorities:

- aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
- aliens not younger than 16 years of age who participated in organized criminal gangs;
- aliens subject to outstanding criminal warrants; and
- aliens who otherwise pose a serious risk to public safety.⁹¹

In addition, this memo noted that “lawful permanent residents, juveniles, and the immediate family members of U.S. citizens” are people who need “[p]articular care” when ICE employees exercise prosecutorial discretion.⁹²

The Morton Memos on Prosecutorial Discretion

In June 2011, John Morton, former Director of ICE, issued a new and more detailed memorandum titled “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (Morton Memo I), for all field office directors, special agents in charge, and chief counsel.⁹³ Morton Memo I defines prosecutorial discretion as “the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual.”⁹⁴ It

⁹¹ *Id.* at 2 n.1. Director Morton further instructed ICE employees that the “serious risk to public safety” category “is not intended to be read broadly, and officers, agents, and attorneys should rely on this provision only when serious and articulable public safety issues exist.”

⁹² *Id.* at 4.

⁹³ See Morton Memo I, *supra* note 59. For a detailed summary of the Morton Memo I, see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>.

⁹⁴ *Id.* at 2.

stresses the importance of the agency's exercise of prosecutorial discretion to prioritize its enforcement efforts "as early in the case or proceeding as possible in order to preserve government resources."⁹⁵ Further, Morton Memo I also provides several ways of exercising prosecutorial discretion, including "deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA)," "settling or dismissing a proceeding," and "responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit."⁹⁶

The hallmark of Morton Memo I is a non-exhaustive list of 19 factors to consider when exercising prosecutorial discretion. This list includes "the agency's civil immigration enforcement priorities," the person's "length of presence in the United States," "criminal history," "ties and contributions to the community," "age," and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent."⁹⁷ Certain groups of people call for "prompt particular care and consideration," and among these groups are veterans of the U.S. armed forces, long-time Lawful Permanent Residents, minors and elders, individuals who have been present in the United States since their childhood, and victims of domestic violence.⁹⁸ Under the terms of the memo, none of the factors listed are determinative; ICE officers are mandated to consider prosecutorial discretion on a case-by-case basis under the totality of the circumstances.⁹⁹ Morton Memo I also elucidates a list of adverse factors that require particular care.¹⁰⁰

⁹⁵ *Id.* at 2, 5.

⁹⁶ *Id.* at 2, 3.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 5.

⁹⁹ *Id.*

Morton Memo I identifies ICE attorneys as “[a]uthorized ICE personnel”¹⁰¹ who may exercise prosecutorial discretion, as Director Morton’s prescription of prosecutorial discretion is always targeted towards “ICE officers, agents, and attorneys.”¹⁰² Thus, as with any other ICE agent, ICE attorneys are required to exercise prosecutorial discretion “as early in the case or proceeding as possible.”¹⁰³ In addition, Morton Memo I explains that ICE attorneys may exercise their prosecutorial discretion authority “in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal court,” by dismissing, suspending, or closing a particular case.¹⁰⁴

Morton Memo I also notes that an ICE attorney “should notify” the relevant CBP, ICE, or USCIS charging official of his/her decision to exercise prosecutorial discretion to dismiss, suspend, or close a particular matter.¹⁰⁵ If the charging official and the ICE attorney disagree on the ICE attorney’s decision, the ICE Chief Counsel¹⁰⁶ attempts to resolve the dispute with the charging official’s supervisors. If the ICE Chief Counsel attempt at a resolution is unsuccessful, then the matter is submitted to the Deputy Director of ICE for resolution.¹⁰⁷

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 3.

¹⁰⁵ *Id.*

¹⁰⁶ ICE’s Office of the Principal Legal Advisor (OPLA) has 26 offices throughout the country, each of which is led by a Chief Counsel. *Office of the Principal Legal Advisor*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/leadership/opla> (last accessed Oct. 18, 2013).

¹⁰⁷ *Id.*

Director Morton issued another significant memo on prosecutorial discretion also on June 17, 2011, titled “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (Morton Memo II).¹⁰⁸ This memo promulgates that, absent aggravating factors, it is against ICE policy to initiate removal proceedings against victims and witnesses of domestic violence, human trafficking, and individuals in non-frivolous lawsuits regarding civil rights or liberties.¹⁰⁹ The Morton Memo II directs ICE officers to exercise “favorable” prosecutorial discretion, which may take different forms, including decisions relating to issuance of a Notice to Appear.¹¹⁰

Finally, in November 2011, ICE issued guidance to address the Administration’s announcement regarding immigration enforcement priorities. To effectuate case review of incoming and pending cases on the immigration court docket, “ICE attorneys nationwide will review all incoming cases in immigration court. . . . This process is designed to identify the cases most clearly eligible and ineligible for a favorable exercise of discretion and will focus on cases appearing on the master calendar and those cases that have not yet been filed in immigration court.”¹¹¹

¹⁰⁸ See John Morton, Director, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion: Certain Crime Victims, Witnesses and Plaintiffs (Jun. 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> [hereinafter Morton Memo II]. For a detailed summary of the Morton Memo II, see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview>.

¹⁰⁹ Morton Memo II, *supra* note 108, at 1-2.

¹¹⁰ *Id.* at 2.

¹¹¹ *Next Steps in the Implementation of the Prosecutorial discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, U.S. Immigration & Customs Enforcement (Nov. 17, 2011), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>. See also Peter Vincent, Principal Legal Advisor, U.S. Immigration & Custom Enforcement, on Case-By-Case Review of Incoming and Certain Pending Cases 1 (Nov. 17, 2011), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>; Shoba Sivaprasad Wadhia, *Reflections on Prosecutorial Discretion One Year After the Morton Memo*, in 2012 EMERGING ISSUES ANALYSIS 6417 (June 2012).

iii. USCIS

After John Morton issued the ICE memos on prosecutorial discretion, USCIS also issued related guidance. On November 7, 2011, USCIS issued a memorandum, “Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens,” which focused on USCIS’s policy of NTA issuance.¹¹² The USCIS Policy Memo is designed to “ensure that [USCIS] issuance of NTAs fits within and supports the Government’s overall removal priorities, while also ensuring that [USCIS] NTA policies promote national security and the integrity of the nation’s immigration system.”¹¹³

The USCIS Policy Memo identifies the circumstances under which USCIS will issue NTAs and the circumstances under which it will refer a case to ICE for NTA issuance.¹¹⁴ In particular, it requires USCIS officers to consider certain factors when deciding to issue NTAs to U.S. citizenship applicants who are also deportable under section 237 of the INA. It further requires the review of an officer’s recommendation for the issuance of an NTA by a review panel in which ICE attorneys play an advisory role in finalizing the recommendation.¹¹⁵ Finally, it encourages ICE attorneys to exercise prosecutorial discretion *even before* an NTA is issued when an ICE attorney reviews a USCIS officer’s decision to issue an NTA.¹¹⁶

¹¹² See USCIS Policy Memo, *supra* note 28.

¹¹³ *Id.* at 1.

¹¹⁴ *Id.* For a brief summary of these circumstances, please refer to Section III. C. i and ii.

¹¹⁵ *Id.* at 7.

¹¹⁶ *Id.* at 7 (emphasis added).

Notably, in response to a FOIA request by the authors of this report, USCIS provided detailed internal policy guidance on the implementation of this USCIS Policy Memo: Standard Operating Procedures (SOP) on NTA Referrals by the Vermont Service Center, an NTA Instructor Guide produced by the Nebraska Service Center, internal correspondence about NTAs within USCIS, and other policy documents.¹¹⁷ These documents illustrate that USCIS has a rigorous instrument for identifying cases requiring issuance of an NTA, referral to ICE, or cases where an NTA should not be issued in the favorable exercise of prosecutorial discretion.¹¹⁸ In particular, the SOP from the Vermont Service Center includes a separate section on prosecutorial discretion and states boldly that “USCIS has prosecutorial discretion when deciding whether to issue, serve or file Form I-862 Notice to Appear. . . . USCIS is under no legal requirement to institute removal proceedings for every denied application.”¹¹⁹ The SOP also includes separate processing instructions for assessing whether prosecutorial discretion is appropriate for three types of “Humanitarian Factors”: pending or approved applications/petitions that may lead to the alien obtaining permanent residence, alien is a juvenile (under 18 years of age), and alien’s spouse is in the U.S. Armed Forces.¹²⁰ Additional USCIS guidelines on NTA issuance are found in the USCIS officers’ workshop material on Deferred Action for Childhood Arrivals (DACA).¹²¹ Explaining the post-denial process of a DACA request, USCIS directs its officers to

¹¹⁷ See FOIA Response from USCIS on Notices to Appear, *supra* note 25.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 91.

¹²⁰ *Id.* at 92-7.

¹²¹ See Letter from James Holzer, Disclosure and FOIA Operations Director, U.S. Department of Homeland Security, to Shoba Sivaprasad Wadhia (Mar. 4, 2013), *available at* http://law.psu.edu/_file/2013-HQFO-00305_Document.pdf.

refer to the USCIS Memo when determining whether to issue an NTA and implicitly discourages issuing an NTA for denied cases which *do not* involve criminal, national security, or public safety issues “fraud.”¹²²

VI. ANALYSIS

ICE took custody [of the child] and decided to issue an NTA but release him to his mother. When his mother came to pick him up, ICE issued an NTA for her, too. They are both now in removal proceedings

- Survey Respondent.

This section analyzes data and information obtained through the Center’s survey, interviews, and requests for information from the immigration agencies to provide an overview of current trends in NTA issuance and to illustrate that DHS is not always considering prosecutorial discretion possibilities in the early stages of a case and is not consistently exercising favorable prosecutorial discretion in issuing and filing NTAs when it would be appropriate to do so. The data and information analyzed in this section was primarily achieved by three methods: (1) circulating a survey consisting of a short questionnaire to immigration attorneys and advocates;¹²³ (2) conducting telephone interviews with survey respondents, research institutions, and immigration scholars; and (3) submitting e-mails and/or official FOIA requests to ICE, CBP, USCIS, and DHS.¹²⁴

¹²² *Id.* at 327.

¹²³ *See* Appendix C.

¹²⁴ *See* Appendices D and E. At the time of this report, all three agencies have acknowledged receipt of our FOIA requests. USCIS and CBP asked us to limit the scope and timeframe of the information sought and provided data considered in Section IV.C. i and iii.

a. THE CENTER'S NTA SURVEY

The Center's NTA Survey (the Survey) included a questionnaire for attorneys and advocates, which was designed to discover whether there has been any change in issuance or filings of NTAs since June 2011, when the Morton Memos were issued. The questions inquired whether, since June 2011¹²⁵, an attorney/advocate had a client who was issued an NTA but otherwise presented strong positive equities. If so, the survey further asked which agency issued the NTA, what factors the client had in his/her favor, what factors the client had working against him/her, and whether the client was removed.

The authors paid particular attention to characterizing the NTAs in question as: an NTA that was issued and filed with EOIR, an NTA that was issued and later cancelled, or an NTA that was issued but not filed with EOIR.¹²⁶ The goal was to identify factors influencing DHS officers' decision to issue/cancel/file an NTA and to identify at which stage of the removal adjudication system DHS officers exercise their prosecutorial discretion. Furthermore, the authors wanted to know what happens to those cases presenting strong equities after removal proceedings are commenced. Thus, the authors asked the respondents to identify whether a NTA was reviewed by a DHS attorney before it was issued or filed with EOIR, and whether ICE moved to dismiss the removal proceedings after the NTA was filed with EOIR. Finally, the questionnaire also asked attorneys/advocates to provide specific case examples where available.¹²⁷

¹²⁵ Note that in at least one reported response, the date was in May 2011 instead of June 2011. Nevertheless, we included the response in our study because we still find it relevant to the subject matter of this report and in any event are not making a statistical finding.

¹²⁶ For a definition of issue, cancel, and file, see Basic Terms Pertaining to the Process of NTA Issuance and Filing in Section IV.A.

¹²⁷ The analysis section will mainly be anecdotal and qualitative, rather than quantitative. The authors received responses from 15 respondents during the one-semester time frame. It is important to note that while some respondents filled-out a separate survey for each individual case, as requested, some chose to

b. RESULTS OF THE SURVEY

The results analyzed below reflect the substance of 15 responses during the survey period and one e-mail response after this period. The total number of cases represented in each survey response is difficult to pinpoint. Most survey responses used broad terms such as “dozens” or “several” when referencing their clients, while others only gave specific examples about one or two of their clients. All of the cases reported involved an NTA that was issued and then filed with EOIR. To our knowledge, none of the cases identified through the survey involved an NTA that was issued and later cancelled or an NTA that was issued but not filed with EOIR. These responses suggest that once the immigration agencies issue an NTA, they do not necessarily cancel the NTA or refrain from filing it with the immigration courts in cases where a robust exercise of prosecutorial discretion is appropriate according to agency guidelines. As a result, the immigration agencies’ favorable exercise of prosecutorial discretion, if any, may not be occurring at the earliest possible stage of the enforcement process.

All of the clients identified in the survey presented strong favorable factors but nonetheless received an NTA. None of the individuals had criminal histories that caused them to fall clearly within DHS’ highest priority categories for immigration enforcement. For purposes of this report, we understand DHS’ highest priority categories as those listed in the Morton Priorities Memo—individuals who pose a threat to national security, including through terrorism

provide an overview of the total cases they have been handling. Thus, unless specifically noted, we are unable to provide statistics on the total number of clients represented by our survey respondents. It should also be noted that the responses are based on the cases in which NTAs were being issued after June 2011. Although the number of responses is low, the quality of each response is rich and resourceful. Second, we were unable to obtain most of the information about NTAs we sought from DHS because, to the extent it is tracked by DHS in the first place, the information is not publicly available.

or espionage, as well as persons convicted of serious crimes (delineated by DHS as “violent criminals, felons, and repeat offenders”).¹²⁸

For instance, one attorney shared a story of her experience involving a client who is a citizen from Canada and is in his early 30s.¹²⁹

*He is charged with entering the United States without permission when he was only five years old. This man was arrested for carrying a gravity knife which he uses as a construction worker. With a hold, he was transferred to immigration custody. I contacted ERO/DRO on several occasions to alert them that [the client] was DACA eligible, but received no return call. . . . I contacted the Public Advocate’s office [and ICE] decided to [release the client on his own recognizance]. He was scheduled for a master calendar [hearing 30 days after the NTA was issued].*¹³⁰

This man exhibited positive qualities outlined in Morton Memo I as he had resided in the United States for over ten years since his early childhood, is eligible to request DACA, has children who are U.S. citizens, and has no criminal history.

Another attorney-respondent provided a story of a client who appears to fall within a class that Morton Memo I deems worthy of “particular care and concern.” This man was elderly, had a U.S. citizen wife, had a serious medical condition, and had resided in the United States for over ten years. Other than some non-violent convictions that were 30-years old, he possessed no other criminal history, but he was still issued an NTA.¹³¹ Notably, this example also raises an important question about how humanitarian factors in a particular case interact with potentially

¹²⁸ These categories fall within the Priority 1 category for enforcement laid out in the John Morton Priorities Memo from March 2011. Morton Priorities Memo, *supra* note 89, at 1-2. As such, they serve as a good baseline for this report. However, we note that these high priorities identified by DHS may appear reasonable on their face but may be applied so broadly in practice as to lose their essence as targeting only dangerous individuals.

¹²⁹ “Respondent B” Survey Response.

¹³⁰ *Id.*

¹³¹ “Respondent C” Survey Response.

adverse ones. While this man has a criminal history, it did not appear that ICE conducted a serious and individualized balancing test under its guidelines. A balancing test under its guidelines would have considered this man's numerous positive qualities and would have compared that to the negative mark on his record, a criminal activity that is not of the type labeled by ICE as high priority.

The following story of a long-time Lawful Permanent Resident (LPR) illustrates our concern that the immigration agencies sometimes decide to issue/file NTAs without giving adequate consideration to a noncitizen's strong equities.

*[My client] is an [African] male who has been an LPR for 12 years. He had been in and out of the United States for [the] past 2 years. He was charged with abandonment [of his LPR status]. My client submitted various documents showing his continued intent to reside in the United States, but when he refused to provide a written statement of his intention due to his psychological condition, a CBP supervisor [was] instructed to place him in removal proceedings. The immigration judge found that the government could not establish abandonment.*¹³²

This man had the following equities identified by Morton Memo I as positive factors: a U.S. citizen spouse, U.S. citizen children, long-term residence in the United States, long-time Lawful Permanent Resident status, and a potentially serious mental disability.¹³³ In this case, a favorable and early exercise of prosecutorial discretion would have saved resources because the court ultimately found for the noncitizen.

The authors also received other anecdotes about NTAs being filed against LPRs (Lawful Permanent Residents) who embody the positive qualities identified in agency memoranda and lack the adverse factors listed as DHS's highest priorities for enforcement. Someone who is already in a permanent and lawful status and with strong equities, like a U.S. citizen family

¹³² "Respondent D" Survey Response.

¹³³ *Id.*

member, should not be targeted for enforcement under DHS guidance. An LPR with sufficient equities may even qualify for the formal remedy of “LPR Cancellation of Removal” which enables an immigration judge to forgive and return an individual to his LPR status if he can show sufficient ties to the United States, good character, and the lack of a serious criminal history.¹³⁴ DHS wastes resources by placing LPRs in removal proceedings and having them exhaust the administrative process just to have their green cards returned.

Notably, three of the cases we examined involved a situation where a DHS attorney reviewed the NTA and still issued the NTA or filed the NTA with EOIR.¹³⁵ That a DHS attorney reviewed an NTA before it was issued or filed with EOIR suggests that DHS had an opportunity to consider whether or not the NTA should be issued or filed, but failed to exercise discretion at this stage of the enforcement process. Below is a summary of the three cases (provided by two respondents) that involved DHS attorney review:

Case 1 involved:

*A Palestinian male who was born in the [late 1960's] and entered the U.S. in the [early 1990's]. He has lived in the country for 20 years, and the alleged charge that appeared on his NTA, issued by USCIS, was [visa] overstay.*¹³⁶

This man presented the following favorable factors identified by Morton Memo I: U.S. citizen children, few or no family members in his native country, and residence in the U.S. for well over ten years. He also had legal counsel and no criminal history.¹³⁷

¹³⁴ See INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).

¹³⁵ However, the fact that only two respondents had cases (three total) in which an NTA was being reviewed by a DHS attorney before its issuance or filing does not necessarily indicate that thirteen other respondents' cases were not reviewed. The authors acknowledge that there is no way to know whether DHS attorneys are reviewing the NTAs unless DHS says so.

¹³⁶ “Respondent E” Survey Response.

¹³⁷ *Id.*

Case 2 involved:

[A] young man in his early 20's from Mexico who has lived in the United States for approximately 14 years after entering as a child. He graduated high school in the United States and is involved in volunteer work. He is charged on the NTA issued in September 2011 with being present without admission. He came into ICE custody as a result of Secure Communities¹³⁸ after being held for a brief period in regular jail on a criminal charge that was eventually dismissed. ICE detained him at a detention center and filed an NTA with the Immigration Court. We helped him to obtain bond after about three weeks in detention. After attending several hearings and providing an extensive prosecutorial discretion advocacy packet, we finally reached an agreement with ICE to administratively close the case a year later (fall 2012). He has now applied for DACA.¹³⁹

As with the Palestinian man in Case 1, this young man in Case 2 presented several favorable factors: he was involved in the community, had resided in the U.S. for over ten years since childhood, and had legal counsel.¹⁴⁰

Case 3 involved:

[A] young man in his late-teens from Mexico who has lived in the United States for approximately 13 years after entering as a child. He graduated from public high school in the United States. He is charged on the NTA with being present without admission. He came into ICE custody as a result of Secure Communities after being held for a brief period in regular jail. ICE took custody and decided to issue an NTA but release him to his mother. When his mother came to pick him

¹³⁸ Secure Communities is “a Department of Homeland Security (DHS) program designed to identify immigrants in U.S. jails who are deportable under immigration law. Under Secure Communities, participating jails submit arrestees’ fingerprints not only to criminal databases, but to immigration databases as well, allowing Immigration and Customs Enforcement (ICE) access to information on individuals held in jails.” *Secured Communities: A Fact Sheet*, IMMIGRATION POLICY CENTER, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last updated Nov. 29, 2011).

¹³⁹ “Respondent A” Survey Response. Deferred Action for Childhood Arrivals (DACA) is a program created when President Obama signed a memo in June 2012 calling for deferred action for “certain people who came to the United States as children and meet several key guidelines.” For more information on DACA, see *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD> (last updated Jan. 18, 2013).

¹⁴⁰ “Respondent A” Survey Response.

*up, ICE issued an NTA for her, too. They are both now in removal proceedings before an Immigration Court with an initial hearing in fall 2013.*¹⁴¹

This young man in Case 3 presents at least three positive qualities recognized by Morton Memo I: he had resided in the U.S. for over ten years since his childhood, graduated from an American high school, and entered the U.S. at a tender age. He was also represented by counsel. That said, the misdemeanor convictions on his record are negative factors, though these convictions were related to troubled family circumstances.¹⁴²

These cases illustrate situations where the individual did not appear to fit within DHS's highest priority categories and probably should not have been issued an NTA in the first place. Even with attorney review, NTAs were filed, suggesting that further measures should be implemented to ensure that effective attorney review of NTAs takes place with full consideration of the prosecutorial discretion factors set out by DHS.

Although our questionnaire did not ask whether a client to whom an NTA was issued and later filed with EOIR was eligible for an immigration benefit and relief from removal, several responses revealed that DHS officers filed an NTA with the immigration court and initiated proceedings against such individuals. For example, the Canadian man who entered the U.S. without inspection when he was five years old had removal proceedings started against him despite being eligible to request DACA. DHS proceeding with the removal process against such noncitizens is at odds with several agency memoranda directing DHS officers to exercise their prosecutorial discretion in favor of noncitizens who are eligible for some form of relief.¹⁴³

¹⁴¹ "Respondent A" Survey Response.

¹⁴² *Id.*

¹⁴³ *See, e.g.,* Morton Memo I, *supra* note 59.

As briefly mentioned above, most of the clients to whom the NTAs were issued and filed possessed no record of violent crimes. Some clients presented a criminal history involving driving without a license, minor crimes, non-violent crimes from many years ago, or drug-related crimes. None of them, to our knowledge, committed an aggravated felony or violent crime. One attorney-respondent shared her frustration over the immigration agencies placing noncitizens with no criminal history or minor traffic violations into the removal process:

*I am tired of police arresting persons for nothing more than driving without a license and then [being] placed in proceedings Why do they bother [serving] NTAs on people that have no criminal history, and families to support? Just because the local police call ICE to let them know that they have an undocumented person in custody does not mean that ICE needs to act upon that call and issue an NTA. It just seems like a waste of resources*¹⁴⁴

In a follow-up phone conversation with this attorney, she explained that one of her clients is currently facing the situation described above, and two thirds of people she represents per semester fit into a similar scenario of being placed in proceedings in spite of having no criminal history.¹⁴⁵

The survey responses did include some cases of clients who presented both positive and negative factors identified by Morton Memo I, including criminal histories. The Morton Memos do not suggest that a criminal history is fatal to a favorable prosecutorial discretion decision, especially when the criminal history does not fall within the highest priority categories (violent crimes, felonies, repeat offenders) and the noncitizen presents strong equities. Instead, DHS guidance suggests that balancing of individualized circumstances is required in such circumstances, but it does not appear that the immigration agencies always follow this guidance. For example, one of the attorneys answering the survey has:

¹⁴⁴ “Respondent H” Survey Response.

¹⁴⁵ Followup Phone Conversation with “Respondent H.”

[A] client in his early 50's who is from Central America and entered the United States 25 years ago. He has three non-aggravating DUIs which occurred more than 10 years ago. He had applied for adjustment of status through current 4th preference 245(i) eligible immigration visa. USCIS never adjudicated his application and referred the client to ICE which issued an NTA, charging him for entry without admission.¹⁴⁶

This client presented various favorable factors: he suffered a stroke and now is disabled with limited communication ability, has U.S. citizen family members, has resided in the United States for over ten years, and has cooperated with local law enforcement by testifying against the defendant in a trial for the murder of his sister which led to the conviction and incarceration of the murderer. On the other hand, he had three DUIs that were over 10 years old. As of today, the client's case is still pending before the immigration judge.¹⁴⁷ While it is uncertain as to how much weight the history of the three DUIs were given in deciding to issue an NTA to this client, his case suggests the possibility that criminal history weighs disproportionately in the prosecutorial discretion determination.

We learned that many of the individuals reported by attorney-respondents were ultimately not removed because they were eventually granted some relief from a judge or DHS. During our survey period, only two respondents reported having clients who were removed.¹⁴⁸ One of the attorneys answering the survey questioned, "Why charge noncitizens if the government is going to let them go later?" He opined that the biggest change he has recently

¹⁴⁶ "Respondent I" Survey Response. A "4th preference" visa is a family-based immigrant visa available to "Brothers and sisters of U.S. citizens, and their spouses and minor children, provided the U.S. citizens are at least 21 years of age." *Family-Based Immigrant Visas*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/visa/immigrants/types/types_1306.html (last visited Apr. 20, 2013).

¹⁴⁷ *Id.*

seen is the favorable grant of prosecutorial discretion at the latest possible stage. For example, noncitizens are first ordered removed, and then later a stay of removal is granted.¹⁴⁹

Although the number of noncitizens eventually removed is not the focus of this report, the sentiments of attorney-respondents regarding the number of noncitizens forced to leave is worth mentioning because it highlights the real benefits of favorably exercising prosecutorial discretion at the earliest stage possible. First, it raises the question again of why NTAs were issued to such noncitizens in the first place. In fact, ICE's recent release of noncitizens who are non-criminal "low-risk offenders" in response to budget cuts¹⁵⁰ supports the argument that many individuals currently in removal proceedings, and possibly in detention as a result, should not have been issued NTAs in the first place.¹⁵¹ ICE's own acknowledgement that detaining these individuals was not a high priority, given the cost, reinforces the importance of spending its limited resources on targeting the highest-priority offenders.

A recent Second Circuit case shows that it is not just attorneys, but also judges who are frustrated with DHS decisions to prosecute cases that will probably not result in a removal:

[I]t is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal. This state of affairs undermines the Court's ability to allocate effectively its limited resources and determine whether adjudication of the petition will be merely an empty exercise tantamount to issuing an advisory opinion.¹⁵²

¹⁴⁹ Follow-up Phone Conversation with "Respondent K."

¹⁵⁰ Lawrence Downes, *Low-Risk Offenders on the Loose*, N.Y. TIMES, THE EDITORIAL PAGE EDITOR'S BLOG (Feb. 27, 2013, 5:09 PM), <http://takingnote.blogs.nytimes.com/2013/02/27/low-risk-offenders-on-the-loose>.

¹⁵¹ *ICE Prosecutorial Discretion Initiative: Latest Figures*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/immigration/reports/278> (last visited April 19, 2012).

¹⁵² *In re Immigration Petitions for Review Pending in U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160-161 (2d Cir. 2012) (footnotes and internal quotations omitted).

The reasoning behind the Second Circuit’s opinion “is equally applicable to the Immigration Court.”¹⁵³ Where NTAs are not leading to removal, both enforcement resources and judicial resources are saved if DHS exercises prosecutorial discretion earlier in the process.

The survey results also raise the issue of the lack of availability of adequate legal representation. The results suggest that noncitizens win relief or obtain prosecutorial discretion late in the process were able to obtain these results only or primarily because they were represented by legal counsel. Under DHS guidance, it should not be necessary to obtain an attorney to obtain a favorable exercise of discretion, but it appeared that such discretion was only exercised after attorneys became involved in the later stages of the proceedings. If such individuals had not been represented by qualified counsel, it is possible they could have been removed despite their strong equities simply because noncitizens likely lack the legal knowledge to adequately defend themselves.¹⁵⁴ On the other hand, if ICE had exercised favorable prosecutorial discretion to avoid issuance of an NTA, these individuals would not have faced daunting immigration court proceedings that required the intervention of legal counsel.

Cumulatively, the survey responses and anecdotes suggest that DHS may not be consistently exercising favorable prosecutorial discretion in issuing and filing NTAs in appropriate cases as prescribed in various memoranda. As the survey results show, instead of focusing their limited enforcement resources exclusively on high priority individuals, DHS has

¹⁵³ Memorandum from Brian M. O’Leary, Chief Immigration Judge, U.S. Department of Justice Executive Office for Immigration Review, on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 4 (Mar. 7, 2013), *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf>.

¹⁵⁴ *See, e.g.*, Letter from Thomas M. Susman, Governmental Affairs Office Director, American Bar Association, to John Morton (Dec. 15, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscretion_1.aut_hcheckdam.pdf.

initiated removal proceedings against low priority individuals without sufficiently considering the equities.

VII. PROBLEMS

a. LACK OF DATA PERTAINING TO NTAS

DHS lacks a mechanism to track data pertaining to NTAs (at least in a publicly-available form). As such, the current system does not provide a mechanism for ensuring that the immigration agencies are consistently exercising favorable prosecutorial discretion, in appropriate cases, as they decide whether to issue, cancel, or file an NTA. As an initial matter, the NTA form itself does not explicitly and consistently indicate which agency issued the NTA.¹⁵⁵ Moreover, under the current system, the exact number of NTAs being issued by each immigration agency is not publicly available. More importantly still, there is no public data on the number of cases where NTAs might have been issued but were not or on the number of NTAs issued but not filed with the immigration courts. DHS data tracking systems and methods are indispensable in (i) implementing agency policy pertaining to the NTA process, (ii) holding the immigration agencies accountable for their issuance of NTAs, and (iii) evaluating the immigration agencies' effectiveness in targeting their resources in accordance with the agencies' priorities.¹⁵⁶

In preparation of this report, we made several requests to the various immigration agencies hoping to get detailed information about NTAs issued, cancelled, and filed with the immigration courts. However, we were not able to obtain the requested information. An email was sent to DHS Office of Immigration Statistics, but they were unable to provide us with the

¹⁵⁵ In some cases, the title of the person filling out the NTA form will also give away details about the issuing DHS component.

¹⁵⁶ Morton Priorities Memo, *supra* note 89, at 4.

requested information.¹⁵⁷ Following an email to ICE seeking information about NTAs, we were advised to go through the FOIA process.¹⁵⁸ Finally, formal FOIA requests were sent to ICE, CBP, and USCIS.¹⁵⁹ Notably, and as described at various points in this report, USCIS and CBP provided responses to our FOIA request.¹⁶⁰ However, the responses did not include crucial data regarding NTA issuance and filing. ICE did not respond to the FOIA request. According to a status check made on October 10, 2013, the FOIA request is still “pending” with 1344 requests from others ahead of our request in line.¹⁶¹

Given these difficulties, other researchers who have sought information pertaining to issuance and filing of NTAs have taken creative steps in discovering the information. One example is the approach taken by Professor Lenni Benson, an Administrative and Immigration Law Scholar of New York University Law School, and Russell Wheeler, the President of the Governance Institute and The Brookings Institution, who served as Consultants for the Immigration Adjudication Project.¹⁶² When conducting research for their report to the Administrative Conference of the United States, Professor Benson and Mr. Wheeler approached individual clerks at major immigration courts and government agencies about the source of NTAs, circulated a survey to immigration judges and individual clerks, and interviewed the ICE

¹⁵⁷ See Appendix D.

¹⁵⁸ See Appendix D.

¹⁵⁹ See Appendix E. On March 12, 2013, the Center received a request from CBP and from USCIS asking that we narrow the information sought, in part because certain data is not available. Both agencies provided a partial response to our request.

¹⁶⁰ FOIA Response from USCIS on Notices to Appear, *supra* note 25.

¹⁶¹ See *ICE FOIA Status*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/status> (last visited Oct. 10, 2013).

¹⁶² See Benson & Wheeler, *supra* note 18.

OPLA general counsel.¹⁶³ These interviewees' estimates "of the source of NTAs varied considerably."¹⁶⁴ While the originating source was unknown, many judges recognized signatures or titles of the people signing the charging documents, and then, identified the agency from which the NTA originated.¹⁶⁵

Another example is the approach taken by the authors of the ABA's Reforming the Immigration System Report (the ABA Report).¹⁶⁶ Realizing that there was no publicly available information on the number of NTAs issued per fiscal year, the ABA authors first started reviewing publicly reported data on apprehensions of deportable noncitizens by CBP and ICE.¹⁶⁷ Because the data did not tell an accurate picture as to the number of NTAs issued as not all apprehended noncitizens are issued NTAs, the ABA authors submitted to DHS a written request for the number of NTAs issued by USCIS, CBP, and ICE.¹⁶⁸

While the data obtained by the authors of this report and the ABA Report provides an approximate number of NTAs issued by DHS component, it does not tell us about NTAs that could have been issued but were not. Nor does it explain what happened to issued NTAs - some might have been cancelled while some might have not been filed with the immigration courts

¹⁶³ Phone Interview with Lenni Benson, February 15, 2013.

¹⁶⁴ Benson & Wheeler, *supra* note 18, at 12.

¹⁶⁵ Phone Interview with Lenni Benson, February 15, 2013.

¹⁶⁶ See ABA, *Reforming the Immigration System*, *supra* note 34. Incidentally, the cited portion of this report was also included in one of the authors' emails to DHS, and is included in Appendix D as part of the "Second Email to DHS Office of Immigration Statistics."

¹⁶⁷ *Id.* at 1-12.

¹⁶⁸ *Id.* at 1-13.

either as a matter of prosecutorial discretion or because they were legally deficient.¹⁶⁹ What the data does not tell us—for example, how many of the issued NTAs were actually filed and by which agency—is quite significant in determining whether the immigration agencies are exercising their prosecutorial discretion at an operational level and at each stage of enforcement.

Furthermore, there is a dearth of information regarding NTAs filed with the immigration courts. According to Professor Susan Long, Co-Director of the Transactional Records Access Clearinghouse (TRAC), a data gathering, data research, and data distribution organization at Syracuse University, nearly all data relied on by TRAC reports on deportation filings come from EOIR, which tracks immigration court proceedings, including ICE and CBP filings. EOIR's database, however, does not record whether a case was initiated by ICE or CBP.¹⁷⁰ Thus, while the EOIR database provides a number of NTAs filed with the immigration courts, a comprehensive tracking mechanism that records which component filed (or chose not to file) a certain number of NTAs is still missing.

¹⁶⁹ For a list of information that is required to be included in the NTA, see INA § 239(a), 8 U.S.C. § 1229(a) (2006). Legally deficient NTAs are distinguishable from NTAs that should not be filed as a matter of discretion. “Legally deficient” NTAs could include those unsigned NTAs those signed by an unauthorized party; illegible NTAs; NTAs signed with inaccurate information (i.e., the person's nationality is wrong). Screening out the deficient NTAs could also be useful to obtain related data and to identify agency training needs.

¹⁷⁰ Phone Interview with Susan Long, Feb. 5, 2013. According to Professor Long, the data on which agency, CBP or ICE, initiated a case is “of course kept separately by CBP and by ICE in an integrated database maintained for both agencies by ICE. ICE is currently claiming that this database is not subject to FOIA, and we are challenging that contention in a lawsuit currently pending before the DC court.” Follow-up Email from Professor Long to Authors (Apr. 6, 2013, 17: 06 EST) (on file with authors). For more details about TRAC’s FOIA activities and its lawsuit against ICE, see *TRAC FOIA Activities*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/foia/> (last visited Apr. 11, 2013).

b. LACK OF TRANSPARENCY

Lack of transparency in prosecutorial discretion processes has long been considered problematic¹⁷¹ and is also apparent in the NTA stage of the process. While DHS has been producing more refined memoranda on the importance of exercising prosecutorial discretion favorably in appropriate cases, each sub-agency has been less willing to provide information on the individuals who were or were not granted prosecutorial discretion.¹⁷² Our requests for information did not lead to transparency regarding numbers of individuals granted prosecutorial discretion in the NTA stage; nor did they offer information about the factors or process used to assess possibilities for prosecutorial discretion in individual cases.

Lack of transparency in the NTA process prevents the accountability necessary to ensure that immigration agencies are exercising their prosecutorial discretion authority consistently and efficiently. As Professor Benson noted, “consistency, not only of outcome, but also of treatment along the way, is required to maintain fairness among and between participants, and thus, is necessary to foster respect for and trust in the system.”¹⁷³ Applying her statement to the context of prosecutorial discretion in removal proceedings and in the NTA process in particular, consistency in decisions of DHS officers to issue and file NTAs is indispensable not only in ensuring that removal proceedings are focused on cases that clearly qualify as one of DHS’s highest priorities, but also in “maintain[ing] fairness among and between”¹⁷⁴ noncitizens. One of the survey respondents highlighted this problem, noting that even where other factors are the

¹⁷¹ See Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1 (2012).

¹⁷² *Id.* at 48.

¹⁷³ Lenni Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 263 (2002).

same, “one client who has resided for eight years was allowed to stay, while another client with the same years of residency was not. Sometimes lesser crimes result in removal, while more serious crimes are forgiven.”¹⁷⁵ He stressed the importance of setting a bright line identifying which circumstances should trigger the issuance of an NTA.¹⁷⁶ DHS officers should keep in mind that one of the goals in exercising prosecutorial discretion in enforcement stages is to promote “the integrity of the immigration system.”¹⁷⁷

c. LACK OF ATTORNEY APPROVAL BEFORE NTAS ARE FILED WITH THE IMMIGRATION COURT

Another problem relates to the apparent lack of attorney approval before NTAs are filed with the immigration court. While the foregoing law and policy guidance cited enable an attorney to reconsider a DHS employee’s decision to issue an NTA, cancel an NTA, file an NTA or later move for dismissal or closure after removal proceedings have been initiated, a mandatory policy of attorney review of NTAs before they are filed with the immigration court is lacking. The consequences are striking and have led to what retired Immigration Judge Bruce Einhorn calls “one of the great regulatory flaws.” Judge Einhorn remarks:

In federal district court cases, complaints and all subsequent pleadings by the government MUST be signed and approved by the U.S. Attorney or his [Assistant U.S. Attorneys], who are therefore accountable for the filing and substance of the documents. . . . The walling-off of government attorneys from the composition and issuance of NTAs means that the decision to initiate removal proceedings—i.e., the decision to prosecute cases in federal immigration courts—is made by non-attorneys who use the cookie-cutter language of preprinted NTAs to crowd the calendars of Immigration Judges with every manner of proceedings, however minor the mistake of the respondent. Prosecutorial discretion is essential for the reform of removal proceedings. Such reform will occur only when government

¹⁷⁵ Phone Interview with “Respondent K.”

¹⁷⁶ *Id.*

¹⁷⁷ Morton Memo I, *supra* note 59, at 2.

lawyers, trained in exercising their judgment and not just their power, take charge of the approval and issuance of NTAs.¹⁷⁸

Judge Einhorn further points out how the absence of attorney review can result in substandard NTAs.

The “split-personality” character of these NTAs was a direct result of their mass production by non-attorney investigators who employed the preprinted, form language of the charging documents without any lawyerly judgment as to their content.¹⁷⁹

While the problem of “legally deficient” NTAs is distinguishable from “legally sufficient” NTAs suitable for prosecutorial discretion, both scenarios highlight the importance of attorney review during the NTA process. Lamenting about the number of shoddy NTAs he encountered during his years on the bench, Judge Einhorn concludes:

Once again, these many gross inconsistencies were a direct byproduct of non-attorney involvement in the preparation and issuance of NTAs whose language represented a triumph of form over substance. Indeed, many ICE trial attorneys were as surprised as the Immigration Judges before whom they appeared regarding the sloppy and legally muddled contents of the NTAs they were assigned to prosecute. Moreover, since Immigration Judges could only terminate such NTAs without prejudice to their resubmission, the dockets of the Immigration Courts remained overcrowded and there existed no incentive for the government to get their charging documents right in the first place.¹⁸⁰

d. IMPLEMENTATION PROBLEMS

Beyond the problems discussed above are the implementation problems associated with the NTA process. Inadequate application of prosecutorial discretion on the ground leads DHS officers to issue NTAs to individuals who are often hard working, who may be parents of U.S. citizen children, who often have minor or no criminal history.

¹⁷⁸ Email from Judge Bruce Einhorn to Authors (May 10, 2013, 20:27 EST) (on file with authors).

¹⁷⁹ Email from Judge Bruce Einhorn to Authors (May 10, 2013, 21:38 EST) (on file with authors).

¹⁸⁰ *Id.*

If DHS enjoyed unlimited resources, it might be feasible for DHS officers to enforce the full scope of the immigration law against all individuals who are removable from the country. Yet, as the memoranda released by DHS components have accentuated, the reality has been that the immigration agencies have limited resources to remove all noncitizens who are residing in the United States without authorization.¹⁸¹ At most, ICE “only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States”¹⁸² and “extremely limited” case preparation time, “averaging about 20 minutes a case.”¹⁸³ Under these circumstances, the exercise of prosecutorial discretion should be real and not just theoretical.

Yet, DHS’s policy and guidelines on prosecutorial discretion in the NTA process are not being implemented adequately or consistently. DHS’s practice of not adequately considering positive equities identified in Morton Memo I was prevalent in nearly all responses that we received to our survey. If DHS is focusing its resources on cases falling into its highest priority categories (involving terrorism, national security and serious crimes), then a majority of NTAs should be issued against individuals who have histories demonstrating that they fall into these categories.

Thus, despite various agency memoranda having stressed the importance of considering positive factors before exercising the full scope of enforcement against a noncitizen, the current data may suggest that, first, DHS officers are acting upon a “[b]ureaucratic incentive to keep the

¹⁸¹ Morton Memo I, *supra* note 59, at 2.

¹⁸² Morton Priorities Memo, *supra* note 89, at 1.

¹⁸³ Howard Memo, *supra* note 87, at 1.

deportation assembly line moving and increasing,”¹⁸⁴ and second, DHS officers do not necessarily consider humanitarian factors in a meaningful way, meaning that in practice “there is no room for balancing enforcement with equities.”¹⁸⁵

The increasing number of NTAs issued may also indicate that DHS is not exercising prosecutorial discretion at the earliest possible stage and rather, DHS may wait to exercise prosecutorial discretion at a later stage in the removal process. For instance, one of the respondents opined that “ICE is willing to consider the Morton Memo [I] factors after the NTA has already been issued but not before.”¹⁸⁶ This attorney’s opinion poses a question of why the agencies should not want to consider the discretion factors as early as possible to maximize savings in resources and time. Some suggest that the answer lies in ICE’s “willingness to ‘let the court sort it out’”¹⁸⁷ and “a reluctance to terminate any effort underway to remove a non-citizen because of the possibility, however slight, that the person might later commit a brutal crime that the press and others would attribute to ICE’s failure to remove the individual.”¹⁸⁸ According to Professor Benson and Mr. Wheeler, if ICE “lets the court sort it out,” (meaning that the immigration judge, rather than DHS, ends the case by closing or terminating removal proceedings) then the responsibility in releasing an individual from removal shifts away from ICE.¹⁸⁹

¹⁸⁴ “Respondent I” Survey Response.

¹⁸⁵ “Respondent H” Survey Response.

¹⁸⁶ “Respondent F” Survey Response.

¹⁸⁷ Benson & Wheeler, *supra* note 18, at 39.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Several survey responses highlighted the lack of implementation of prosecutorial discretion guidance in a particularly interesting setting involving CBP and ICE practices of “scooping up” children apprehended after crossing the border and issuing and filing NTAs without regard to individual circumstances:

For example, children are apprehended in Texas by CBP, detained in Florida by ICE, and later end up in New York. ICE has stated that they keep the children in [removal] proceedings, in part to make sure they are not being victimized or trafficked yet the agency has no resources for investigation. It is hard for me to imagine that any of these children deserve an NTA.¹⁹⁰

I think that trafficking and violence along the border is a concern of CBP, but how they respond to it may send a different message. . . . A lot of kids are sent across the river by their smugglers and are on their own once in the U.S. Most girls that I represent are victims of sexual violence, in their home countries and/or by their smugglers. Many are victims of gang violence. Many are reuniting [with] parents. Many children voluntarily turn themselves in so they are not on their own anymore. Yet, when [CBP] find[s] someone who has been victimized on the U.S. side of the border, they generally refuse to investigate or issue a U or T-Visa certification to these individuals.¹⁹¹

The above two responses raise the concern that DHS is spending its limited enforcement resources on the very individuals for whom Morton Memo I urges particular care and concern. DHS’s targeting of children at the border is deeply concerning. To the extent that DHS places young people in removal proceedings to protect them from being victimized or trafficked, DHS should consider alternatives to removal proceedings as a tool for protecting them from their abusers but does not appear to have done so.

¹⁹⁰ “Respondent L” Survey Response.

¹⁹¹ “Respondent H” Survey Response.

VIII. RECOMMENDATIONS

Just because the local police call ICE to let them know that they have an undocumented person in custody does not mean that ICE needs to act upon that call and issue an NTA. It just seems like a waste of resources

- Survey Respondent.

The problems examined in this report stem from the immigration agencies' inadequate exercise of favorable prosecutorial discretion during the issuance and filing of NTAs pursuant to their policies, failure to implement prosecutorial discretion policy on the NTAs at an operational level, lack of attorney review of NTAs and lack of a mechanism for tracking NTAs that are issued. The following recommendations are designed to address these problems:

- a. Amend the NTA form to require new "fields" addressing specific information pertaining to issuance, cancellation, and filing of NTAs and upgrade DHS's data systems for better tracking of NTAs.
 - b. Stop issuing and filing NTAs against noncitizens who are prima facie eligible for an immigration benefit before USCIS, Lawful Permanent Residents who are eligible for relief from removal, and migrants with strong equities who do not fall clearly into one of DHS's highest priority categories (terrorism, national security, serious crimes).
 - c. Establish a permanent program requiring approval of a DHS lawyer prior to the filing of any NTA by a DHS officer.
- a. AMEND THE NTA FORM TO REQUIRE NEW "FIELDS" ADDRESSING SPECIFIC INFORMATION PERTAINING TO ISSUANCE, CANCELLATION, AND FILING OF NTAS AND UPGRADE DHS'S DATA SYSTEMS FOR BETTER TRACKING OF NTAS.**

The current NTA form includes the information required by law¹⁹² and the name and title of the DHS officer filing it. Yet, the form does not contain explicit information on the originating

¹⁹² See INA § 239(a), 8 U.S.C. § 1229(a) (2006).

agency nor does it contain any information reporting what happened to the NTAs after they have been issued. Moreover, there is no readily available database that tracks the NTAs issued and factors considered by DHS officers in deciding to issue, cancel, or file the NTAs.¹⁹³ Thus, this report recommends that DHS amend the NTA form to include information: (1) regarding the originating agency; (2) regarding any decision on cancellation of the NTA, such as the cancelling agency, the date of cancellation and positive factors contributing to the decision to cancel; and (3) the date of the decision to file the NTA or to decline to file, including the decision-making or filing agency and the date of filing with the court where pertinent. Importantly, our recommended amendments to the NTA form must work alongside a system with well-defined and communicated prosecutorial discretion criteria where appropriate cases never reach the NTA issuance stage.

By amending the form to include the above information, DHS will be able to monitor how many NTAs are issued by each sub-component in a fiscal year and identify whether these NTAs were issued in accordance with DHS' stated priorities. On the other hand, knowing the source of the NTAs issued would allow each immigration sub-component to scrutinize more carefully its decisions to issue NTAs as it will be held accountable for NTAs under its purview.

¹⁹³ See, e.g., Phone conversation with USCIS FOIA Officer on March 12, 2013. USCIS FOIA Officer tried to help obtain the information we sought, but was constrained by the lack of formal tracking procedures or a publicly accessible database. As to our request seeking the total number of NTAs issued and the factors that played a role in the decision to issue an NTA, USCIS FOIA Officer explained that there is no separate field in the NTA form asking why a person was issued an NTA, so she would have to go back to the individual case files to see if there are any notes on the factors influencing USCIS's decision to issue the NTA. USCIS FOIA Officer said that she is not aware of an electronic database containing this information. As to our request seeking the number of cases in which the agency declined to issue an NTA, she said there is no way to track this information. As to our request relating to the number of NTAs that were cancelled after being issued and the reason or factors considered, USCIS FOIA Officer said USCIS also does not track this information.

Lastly, amending the form as recommended would also help DHS identify at which stages of removal proceedings its limited resources can be saved.

Furthermore, a database tracking the NTA process should be created or updated to reflect the above information plus factors that played a role in DHS officers' decisions to issue or file a particular NTA. Under the current data system, while one may obtain information about the NTAs that were issued¹⁹⁴ or filed with the immigration courts,¹⁹⁵ it is nearly impossible to get information about NTAs that were issued but later cancelled,¹⁹⁶ NTAs that were issued but never filed, or, to go even further, NTAs that were never issued in the first place although they might have been.¹⁹⁷

An updated data system tracking the NTA process reflecting the above information will permit DHS to evaluate the agencies' effectiveness in implementing priorities and in using enforcement resources. Consideration of the specific factors listed in the various DHS prosecutorial discretion memos should be specifically documented in the database. An updated or newly created database might include all factors listed in the Morton Memo I as a check box to ensure that the issuing/filing agency has considered all relevant factors before reaching a decision regarding an NTA.

DHS officers' decisions pertaining to NTAs can have a significant impact upon the removal proceedings overall as NTAs serve as a key to initiating those proceedings. A

¹⁹⁴ See, e.g., ABA, *Reforming the Immigration System*, *supra* note 34, at 1-12, 1-13.

¹⁹⁵ See, e.g., *New Filings Seeking Removal Orders in Immigration Courts through March 2013*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php (last visited Apr. 11, 2013).

¹⁹⁶ Phone conversation with USCIS FOIA Officer on March 12, 2013. USCIS does not keep information on NTAs that were issued but later cancelled or the reason or factors that contributed to USCIS' decision.

¹⁹⁷ *Id.* "There is no way to track this information."

comprehensive database on NTAs would allow DHS to better assess and evaluate each immigration agency's exercise of prosecutorial discretion and more efficiently monitor enforcement resources.

b. STOP ISSUING AND FILING NTAs AGAINST NONCITIZENS WHO ARE PRIMA FACIE ELIGIBLE FOR AN IMMIGRATION BENEFIT BEFORE USCIS, LAWFUL PERMANENT RESIDENTS WHO ARE ELIGIBLE FOR RELIEF FROM REMOVAL, AND MIGRANTS WITH STRONG EQUITIES WHO DO NOT FALL CLEARLY INTO ONE OF DHS'S HIGHEST PRIORITIES.

Refraining from issuing NTAs to noncitizens who are prima facie eligible for immigration benefits before USCIS and noncitizens of low priorities is not only mandated by several agency memoranda,¹⁹⁸ but is also one of the most effective ways to process and complete cases efficiently and equitably. Fewer NTAs issued would mean that fewer individuals are placed into the removal system, which would allow limited enforcement resources to be used more efficiently on adjudicating cases that DHS itself identifies as its highest priorities.¹⁹⁹ This recommendation is consistent with the ABA's earlier report on reforming the immigration system.²⁰⁰

This recommendation would ameliorate the implementation problems of highlighted in this report in the following ways: first, such practice would allow prosecutorial discretion in the NTA process to be exercised, not arbitrarily, but consistently and robustly in a manner consistent with DHS policy; second, by drawing a clear line, this practice would ensure that prosecutorial discretion in the NTA process would be practiced top-down and bottom-up in accordance with DHS policy. Despite the increased availability of memoranda on the importance of exercising

¹⁹⁸ See, e.g., Howard Memo, *supra* note 87, at 3; Morton Memo I, *supra* note 59, at 4.

¹⁹⁹ See also, ABA House Delegates Report No. 114A (Feb. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/114A.aut_hcheckdam.pdf.

²⁰⁰ See ABA, *Reforming the Immigration System*, *supra* note 34, at 1-12, 1-13.

prosecutorial discretion at each enforcement stage, this report shows that DHS policy is not being implemented at an operational level among officers who actually issue/file NTAs. DHS should take steps to ensure that its officers stop issuing and filing NTAs against the specific categories of individuals named here as a means of ensuring implementation of national guidance.

c. ESTABLISH A PERMANENT PROGRAM REQUIRING APPROVAL OF A DHS LAWYER PRIOR TO FILING OF ALL NTAS BY DHS OFFICERS.

A permanent program requiring review by a DHS attorney of each and every NTA, before filing, would help ensure that DHS enforcement resources are used in an efficient and consistent manner to target only high priority categories of individuals who might be subject to removal. The benefits of a permanent attorney review program are high when considering the broad swath of non-attorney employees authorized to issue NTAs and the resources wasted when NTAs are arbitrarily filed with the immigration court and removal proceedings are initiated. One possible model for attorney review would be USCIS' N-400 Review Panel. USCIS directs its officers to consult the Review Panel, to which an ICE attorney is invited to participate, before issuing an NTA.²⁰¹

ICE has attempted to implement an attorney review program in the past, but only in pilot (experimental) form. In response to the Administration's announcement on immigration enforcement priorities on August 18, 2011, ICE implemented an initial test review of incoming cases that lasted until January 13, 2012.²⁰² While ICE's effort to initiate prosecutorial discretion

²⁰¹ USCIS Policy Memo, *supra* note 28, at 7.

²⁰² *Next Steps in the Implementation of the Prosecutorial discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, U.S. Immigration & Customs Enforcement (Nov. 17, 2011), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>. This test was "designed to identify the cases most clearly eligible and ineligible for a favorable exercise of discretion and [focused] on cases appearing on the master calendar and those cases that [had] not yet

on cases that were scheduled in master calendar and/or cases that were not yet being filed was a positive step forward, the program itself lacked the kind of transparency needed to determine its success. A full review of NTAs *before filing* would allow DHS to filter out the cases that do not fit within DHS's highest priority categories. Our recommendation would take advantage of the opportunity to exercise prosecutorial discretion, save resources at an earlier stage of the enforcement process, and not initiate removal proceedings at all, thereby allowing DHS to efficiently control the number and categories of individuals placed in the removal system.

Furthermore, this program would help ameliorate the problem of lack of transparency. As studies on the trend of NTA filing and several anecdotes in this report show, NTAs are being filed for people who, absent aggravating factors, deserve particular care in DHS officers' decisions to exercise prosecutorial discretion, such as long-time Lawful Permanent Residents, individuals without criminal history, and individuals with U.S. citizen spouses and children. Such practices of DHS officers directly contradict DHS policy and raise concerns that DHS officers have not adequately considered the prosecutorial discretion factors set out in the national policy memos on a case-by-case basis. By having DHS attorneys review NTAs before filing and by keeping accurate records of the results, it will become clearer which factors form the basis for

been filed in immigration court.” Each Office of Chief Counsel was instructed to review “(1) cases in which the Notices to Appear have not been filed with EOIR; (2) all cases on the master docket; and (3) all non-detained cases with merits hearings scheduled up to seven months from the date of issuance of this memorandum.” The result of this program was disappointing, however. The data from the immigration courts in Baltimore and Denver eleven weeks after the program ended showed a striking finding that “only a small proportion of pending caseloads in either court has been closed as a result of this initiative thus far,” and “hearings on many non-detained cases were postponed” resulting in longer average waiting times from 513 days in September 2011 to 523 days in March 2012. Moreover, while providing data on the number of cases that were closed, no public data is available on the number of NTAs that were not filed in the first place as a result of the attorney review program. A more widespread and long-lasting program, with greater transparency and record-keeping about the implementation and results, would allow for thorough evaluation of the effectiveness of attorney review of NTAs. *See* Peter Vincent, Principal Legal Advisor, U.S. Immigration & Custom Enforcement, on Case-By-Case Review of Incoming and Certain Pending Cases 1 (Nov. 17, 2011), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>.

filing/not filing an NTA. Knowing this information would make the process of NTA filing more transparent and would allow for monitoring of DHS officers' effectiveness in using their enforcement resources.

IX. CONCLUSION

This report began by providing a brief background of the U.S. removal proceeding system, specifically, the practice of prosecutorial discretion and the role of NTAs within the immigration system. As the filing of an NTA officially commences a removal proceeding against a noncitizen, the immigration agencies' favorable exercise of prosecutorial discretion in deciding to issue and file the NTA is indispensable and encouraged in ensuring that the agencies' resources are tightly focused on their stated enforcement priorities. The decision of whether or not to issue an NTA is the earliest possible step of the NTA process at which the immigration agencies can exercise their prosecutorial discretion and save their limited enforcement resources. Yet, our survey results and the anecdotes provided by respected attorneys and organizations indicate that the immigration agencies are not consistently and robustly exercising favorable prosecutorial discretion in their decisions to issue and file NTAs in appropriate cases.

Thus, this report identified the problems with the current NTA issuance and filing process: lack of data pertaining to NTAs, lack of transparency, and implementation problems. These identified problems are detrimental to both the immigration agencies and noncitizens, because the immigration agencies face difficulties in monitoring the process of NTA issuance and filing to ensure that their officers are consistently exercising favorable prosecutorial discretion pursuant to the goals stated in their policies, and because noncitizens who do not meet DHS's enforcement priorities are being placed in the removal system.

Our recommendations aim to resolve the problem of lack of data pertaining to NTAs by urging DHS to amend the NTA form and engage in better tracking of NTAs issued and factors that led to a decision to issue, cancel, or file those NTAs. The recommendations also aim to resolve the problem of inadequate prosecutorial discretion implementation by ensuring that DHS officers refrain from issuing NTAs to individuals who are prima facie eligible for an immigration benefit before USCIS, who are Lawful Permanent Residents eligible for relief, or who do not clearly fit within DHS's highest priority categories.

X. APPENDIX

a. TABLE OF ABBREVIATIONS

- i. BIA - Board of Immigration Appeals
- ii. C.F.R. - Code of Federal Regulations
- iii. CBP - Customs and Border Protection
- iv. DHS - Department of Homeland Security
- v. EOIR - Executive Office for Immigration Review
- vi. FOIA - Freedom of Information Act
- vii. ICE - Immigration and Customs Enforcement
- viii. INA - Immigration and Nationality Act
- ix. INS - Immigration and Naturalization Service
- x. NTA - Notice to Appear
- xi. OPLA - Office of the Principal Legal Advisor
- xii. USCIS - United States Citizenship and Immigration Services

b. A COPY OF AN NTA

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: A055-555-555

In the Matter of:

Respondent: RAMOS, Jorge currently residing at:
Port Isabel, SPC, 27991 Buena Vista Blvd., Los Fresnos, TX 78566
(Number, street, city and ZIP code) (Area code and phone number)

- ☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

- 1) You are not a citizen of the United States.
- 2) You are a native of Mexico and a citizen of Mexico.
- 3) You entered the United States at or near Hidalgo, TX on or about 6/11/2010.
- 4) You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.
- 5) You were not then admitted or paroled after inspection by an immigration officer.
- 6) You were, on August 18, 2009,, convicted in the Superior Court of Los Angeles for the offense of Receive Etc Known Stolen Property.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I)- of the Immigration and Nationality Act, as amended, as immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the AG.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Harlingen EOIR, 2009 West Jefferson, Ste. 300, Harlingen, TX 7855

(Complete Address of Immigration Court, including Room Number, if any)

on to be set at to be set to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

Date: 9/21/10

Harlingen, TX

(Signature and Title of Issuing Officer)

SDDO

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

c. SURVEY TO THE LISTSERV ATTORNEYS/ADVOCATES

PENNSSTATE



Shoba Sivaprasad Wadhia
Director, Center for Immigrants' Rights
Clinical Professor of Law

The Pennsylvania State University
329 Innovation Park
State College, PA 16803

Office: 814-865-3823
Fax: 814-865-9042
ssw11@dsl.psu.edu

**The American Bar Association Commission on Immigration and
Penn State Law's Center for Immigrants' Rights Project on NTA Filings, Spring 2013**

Authors: Professor Shoba Sivaprasad Wadhia, Steve Coccoresse, and Yesoo Kim

A Questionnaire for Attorneys and Advocates:
Is DHS Exercising Enough Prosecutorial Discretion in the NTA Process?

Note: Please fill out a separate survey for each individual case. Please note that we may use a compilation of the survey results, but will remove all identifying information before doing so. We would greatly appreciate if you could return the questionnaire by **February 4, 2013** to Yesoo Kim (yxk194@psu.edu).

1. In which state, district, or field office jurisdiction do you primarily practice?
2. Since June 17, 2011, have you had a client who was issued a Notice to Appear (NTA) but otherwise presented strong positive equities? **Yes () No ()**
 - a. If so, please provide us with some basic factual information on your client (for example, sex, nationality or country of birth, date of birth, date of entry to U.S., length of stay in U.S., and the alleged charge that appeared on the NTA) and the immigration court or ICE field office involved.
 - b. Which agency issued the NTA?
 - c. Which one of the following best describes your case involving a legally sufficient NTA? (Mark all that apply.)
 - i. An NTA was issued and filed with the EOIR. ()
 - ii. An NTA was issued and later cancelled. ()
 - iii. An NTA was issued but not filed with the EOIR. ()
 - iv. ICE joined to dismiss the removal proceedings after the NTA was filed with the EOIR. ()
 - v. ICE moved to dismiss the removal proceedings after the NTA was filed with the EOIR. ()
 - vi. An NTA was reviewed by a DHS attorney before it was issued or filed with the EOIR. ()
 - d. What factors did your client have in their favor? (Mark all that apply.)

- i. Tender age ()
- ii. Elderly ()
- iii. Medical condition ()
- iv. Psychological condition ()
- v. DACA eligible ()
- vi. Widow of USC ()
- vii. Military Service ()
- viii. Involvement in community ()
- ix. Has children who are USCs ()
- x. Has other family members who are USCs ()
- xi. Has little or no family in native country ()
- xii. Has resided in the United States for over ten years ()
- xiii. Has resided in the United States since childhood ()
- xiv. A long time Lawful Permanent Resident (LPR) ()
- xv. Victim of domestic violence ()
- xvi. Strong showing of community support ()
- xvii. Compelling contributions to the United States ()
- xviii. Media coverage of the case ()
- xix. Counsel ()
- xx. Others () (please specify: _____)

e. What factors did your client have working against him/her? (Mark all that apply.)

- i. Criminal history () (please specify: _____)
- ii. Medical condition ()
- iii. Psychological condition ()
- iv. Suspected of gang activity ()
- v. Has only resided in the United States for a short time ()
 - 1. How short was your client's residency? _____
- vi. Has little or no family in the United States ()
- vii. Could be easily removed to native country (or other country) ()
- viii. No counsel/Pro se ()
- ix. Others () (please specify: _____)

f. Was your client removed? **Yes** () **No** ()

- i. If your client was removed, which reasons or factors played a role in the decision to remove or not remove the client?

3. In your practice area, have you seen a trend towards or against the issuance of NTAs or the filings of NTAs once they are issued? **Yes** () **No** ()

- a. If so, in your opinion, what would be the reasons explaining this trend?
4. In the space provided below (or on a separate page), please feel free to discuss any particularly interesting or troublesome experiences you have had with a client involving an NTA.
5. Is there quote, statement, or anecdote you would like to offer for advocacy purposes?
6. May we contact you for additional information or to follow-up about your answers?
Yes () No ()
7. First and Last Name:
8. Phone Number:
9. Email:

Thank you very much for your time and attention to this matter.

d. EMAILS TO ICE AND DHS

i. Email to ICE ERO Public Advocate Andrew Lorenzen-Strait

PENNSTATE



Shoba Sivaprasad Wadhia
Director, Center for Immigrants' Rights
Clinical Professor of Law

The Pennsylvania State University
329 Innovation Park
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Office: 814-865-3823
Fax: 814-865-9042
ssw11@dsl.psu.edu

January 28, 2013

Andrew Lorenzen-Strait
Public Advocate for Enforcement and Removal Operations
By Email: Andrew.R.Strait@ice.dhs.gov, Andrew.Strait@dhs.gov

Dear Mr. Lorenzen-Strait:

We are writing on behalf of the Penn State Dickinson School of Law's Center for Immigrants' Rights, working in conjunction with the American Bar Association's Commission on Immigration to produce a report for the Commission about Notices to Appear. We hope that you can provide us with some information about NTAs. If you believe the questions addressed in this letter are best handled by the Office of the Principal Legal Advisor, we would be grateful if you could forward this letter to their attention.

As a brief background, the Center for Immigrants' Rights ("the Center") is an immigration policy clinic at Penn State's Dickinson School of Law. At the Center, students produce white papers, practitioner toolkits, and primers of national impact on behalf of client organizations. This semester, the Center will be working with the ABA's Commission on Immigration to study the issuance of (or decisions not to issue) a Notice to Appear (NTA) in immigration proceedings.

Due to the limited window the students will have to participate in this study, we are hoping that you can provide some of this information to save us the time of proceeding with a formal FOIA request. In addition, or alternatively, if you could address which information ICE does or does not track it could help the students narrow the FOIA request. Below is an outline of the information we would like to obtain. We are grateful for any assistance you can provide. If you are able to provide some of the information below (e.g., certain number of years or the aggregate totals but not data on individual cases) please proceed with providing such information as early as you can.

Specifically, we seek disclosure of any and all records that were prepared, received, transmitted, collected, and/or maintained by Immigration and Customs Enforcement (ICE) that describe, refer, or relate to the issuance or cancellation of an NTA.

The requested records include, but are not limited to:

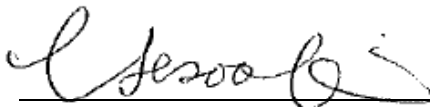
1. The total number of cases in which an NTA was considered
2. The total number of NTAs that have been issued
 - a. The reasons or factors that played a role in the decision to issue an NTA
3. The total number of cases in which the agency declined to issue an NTA
 - a. The reasons or factors that played a role in the decision not to issue an NTA
4. The total number of NTAs that were cancelled after being issued
 - a. The reasons or factors that played a role in the decision to cancel NTAs after being issued.
5. The total number of NTAs that ICE declined to file with the EOIR
 - a. The reasons or factors that played a role in the decision to refrain from filing NTAs after being issued.
6. The total number of removal proceedings that ICE moved to dismiss after the NTA was filed with the EOIR
 - a. The reasons or factors that played a role in the decision to join or move to dismiss the removal proceeding
7. Any internal agency correspondence and/or documents pertaining to or discussing each potential NTA case
8. Any internal training, guidance, correspondence, and/or other documents discussing the decision-making process or providing guidelines for deciding whether to issue an NTA or whether to cancel an NTA that has been issued

Thank you again for your attention to this matter. Please let us know if you will be able to provide any of the information we seek. Please also feel free to contact us if you have any questions or clarifications.

Respectfully,



Stephen T. Coccorese, Esq.
Research and Advocacy Fellow
Center for Immigrants' Rights: <http://law.psu.edu/immigrants>
The Pennsylvania State University
The Dickinson School of Law
908-399-5612



Yesoo Kim
Center for Immigrants' Rights
The Pennsylvania State University School of Law
yxk194@psu.edu

ii. *Email to DHS Office of Immigration Statistics*

PENNSTATE



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Fax: 814-865-9042
ssw11@dsl.psu.edu

January 30, 2013

Department of Homeland Security
Office of Immigration Statistics
800 K Street, NW
10th Floor, Suite 1000
Washington, DC 20536
By Email: ImmigrationStatistics@dhs.gov

We are writing on behalf of the Penn State Dickinson School of Law's Center for Immigrants' Rights, working in conjunction with the American Bar Association's Commission on Immigration to produce a report for the Commission about Notices to Appear. We hope that you can provide us with some additional information about NTAs.

As a brief background, the Center for Immigrants' Rights ("the Center") is an immigration policy clinic at Penn State's Dickinson School of Law. At the Center, students produce white papers, practitioner toolkits, and primers of national impact on behalf of client organizations. This semester, the Center will be working with the ABA's Commission on Immigration to study the issuance of (or decisions not to issue) a Notice to Appear (NTA) in immigration proceedings.

For a starting reference point, we have reviewed data on NTAs in an existing ABA report, which the ABA obtained from the Office of Immigration Statistics.²⁰³ The data provides a breakdown of NTAs issued by each DHS subcomponent, but lacks any information about the outcome of the NTA, including whether the NTA was filed with the immigration court (and by whom) or was cancelled or dismissed after being issued.

Because the clinic students will only have one semester to participate in this study, we are hoping that you can provide some of this information more expeditiously than the formal FOIA process. In addition, or alternatively, if you could address which information DHS does or does not track it could help the students narrow the FOIA request. Below is an outline of the information we would like to obtain. We are grateful for any assistance you can provide. If you are able to provide some of the information below (e.g., certain number of years or the aggregate

²⁰³ See American Bar Association, Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, pages 1-11 through 1-13 (2010) available at <http://goo.gl/QPz5I>.

totals but not data on individual cases) please proceed with providing such information as early as you can.

Specifically, we seek disclosure of any and all records that were prepared, received, transmitted, collected, and/or maintained by Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) that describe, refer, or relate to the issuance or cancellation of an NTA dating from FY 2004 until the present.

The requested records include, but are not limited to:

9. The total number of cases in which an NTA was considered
10. The total number of NTAs that have been issued
 - a. The reasons or factors that played a role in the decision to issue an NTA
11. The total number of cases in which the agency declined to issue an NTA
 - a. The reasons or factors that played a role in the decision not to issue an NTA
12. The total number of NTAs that were cancelled after being issued
 - a. The reasons or factors that played a role in the decision to cancel NTAs after being issued.
13. The total number of NTAs that CBP, ICE, or UCIS declined to file with the EOIR
 - a. The reasons or factors that played a role in the decision to refrain from filing NTAs after being issued.
14. The total number of removal proceedings that CBP, ICE, or USCIS moved to dismiss after the NTA was filed with the EOIR
 - a. The reasons or factors that played a role in the decision to join or move to dismiss the removal proceeding
15. Any internal agency correspondence and/or documents pertaining to or discussing each potential NTA case
16. Any internal training, guidance, correspondence, and/or other documents discussing the decision-making process or providing guidelines for deciding whether to issue an NTA or whether to cancel an NTA that has been issued

Thank you again for your attention to this matter. Please let us know if you will be able to provide any of the information we seek. We will follow-up with a phone call to your office in the next few days to check on the status of our request. Please also feel free to contact us if you have any questions or clarifications.

Respectfully,

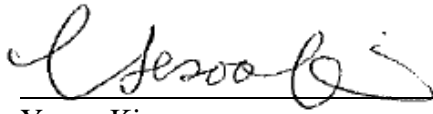


Stephen T. Coccocorese, Esq.

Research and Advocacy Fellow

Center for Immigrants' Rights: <http://law.psu.edu/immigrants>

The Pennsylvania State University
The Dickinson School of Law
908-399-5612

A handwritten signature in black ink, appearing to read 'Yesoo Kim', is positioned above a horizontal line.

Yesoo Kim
Center for Immigrants' Rights
The Pennsylvania State University School of Law
yxk194@psu.edu

iii. *Second Email to DHS Office of Immigration Statistics*

PENNSTATE



Shoba Sivaprasad Wadhia
Director, Center for Immigrants' Rights
Clinical Professor of Law

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ssw11@dsl.psu.edu

February 14, 2013

John Simanski
Office of Immigration Statistics
Department of Homeland Security
800 K Street, NW
10th Floor, Suite 1000
Washington, DC 20536
(202) 786-9900
By Email: immigrationstatistics@HQ.DHS.GOV

Dear Mr. Simanski,

Thank you for your email responding to our request for information about NTAs. Although you stated that many of our questions cannot be answered by your office, we remain hopeful that you will be able to answer at least *some* of our questions more expeditiously than our pending formal FOIA requests to CBP, ICE, and USCIS.

You correctly pointed out that many of our questions seek information on the factors contributing to the cancellation of an NTA. Would you instead be able to provide us with the raw numbers of cases that meet the criteria specified in our request?

As a reminder, the original information we requested was:

1. *The total number of cases in which an NTA was considered*
2. *The total number of NTAs that have been issued*
 - a. *The reasons or factors that played a role in the decision to issue an NTA*
3. *The total number of cases in which the agency declined to issue an NTA*
 - a. *The reasons or factors that played a role in the decision not to issue an NTA*
4. *The total number of NTAs that were cancelled after being issued*
 - a. *The reasons or factors that played a role in the decision to cancel NTAs after being issued.*
5. *The total number of NTAs that CBP, ICE, or UCIS declined to file with the EOIR*
 - a. *The reasons or factors that played a role in the decision to refrain from filing NTAs after being issued.*
6. *The total number of removal proceedings that CBP, ICE, or USCIS moved to dismiss after the NTA was filed with the EOIR*
 - a. *The reasons or factors that played a role in the decision to join or move to dismiss the removal proceeding*
7. *Any internal agency correspondence and/or documents pertaining to or discussing each potential NTA case*

8. *Any internal training, guidance, correspondence, and/or other documents discussing the decision-making process or providing guidelines for deciding whether to issue an NTA or whether to cancel an NTA that has been issued*

We believe your office may be able to provide us with this portion of the information because the ABA has received similar information from DHS in the past.¹ At the very least, would you be able to provide us with updates for FYs 2010-2012 for the same information previously given to the ABA? (See Appendix, below, for an excerpt from the ABA report)

We thank you again for your attention to this matter.

Respectfully,



Stephen T. Coccorese, Esq.
Research and Advocacy Fellow
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Appendix – Excerpt from Report: American Bar Association, Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*

¹ See American Bar Association, Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, pages 1-11 through 1-13 (2010) available at <http://goo.gl/QPz5L>.

Thereafter, any USCIS, CBP, or ICE officer, or any ICE attorney, may move for dismissal of the removal proceeding.⁶³

The number of removal proceedings received by the immigration courts per fiscal year increased approximately 14% from 249,839 in fiscal year 2004 to 285,178 in fiscal year 2008,⁶⁴ which suggests that the

number of NTAs issued per fiscal year increased over the same period. Because DHS does not publicly report the number of NTAs issued per fiscal year by its programs, we reviewed publicly reported data on apprehensions of deportable noncitizens by CBP and ICE for fiscal years 2004 through 2008, which are summarized in the following table.⁶⁵

DHS PROGRAM	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
CBP – Border Patrol					
Southwest sector	1,139,282	1,171,428	1,072,018	858,722	705,022
Percentage of total number of deportable noncitizens apprehended by Border Patrol	98.2%	98.5%	98.4%	97.9%	97.4%
Other sectors	21,113	17,680	17,118	18,065	18,818
Total	1,160,395	1,189,108	1,089,136	876,787	723,840
Percentage of total number of deportable noncitizens apprehended	91.8%	92.1%	90.3%	91.3%	91.4%
ICE – Office of Investigations (1)(2)	103,837	102,034	101,854	53,562	33,573
Worksite enforcement (3)	685	1,116	3,667	4,077	5,184
ICE – Office of Detention and Removal (4)	–	–	15,467	30,407	34,155
Total	1,264,232	1,291,142	1,206,457	960,756	791,568

(1) The number of apprehensions reported in fiscal year 2008 does not include arrests under ICE's 287(g) program.

(2) Beginning in fiscal year 2007, the number of apprehensions reported no longer included apprehensions under ICE's Criminal Alien Program.

(3) Number of administrative arrests for immigration violations during worksite enforcement actions. U.S. Immigration & Customs Enforcement, Office of Investigations – Worksite Enforcement Overview, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last modified Apr. 30, 2009).

(4) Discloses arrests of noncitizens under ICE's National Fugitive Operations Program. Does not include NTAs issued under ICE's Criminal Alien Program, which was transferred from ICE's Office of Investigations to ICE's Detention and Removal Office in June 2007. See *infra* Section II.C.3.d.

⁶³ 8 C.F.R. § 239.2(c).

⁶⁴ EOIR FY2008 STATISTICAL YEAR BOOK, *supra* note 29, at C3.

⁶⁵ See generally OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 93-94 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 2-3 (2009) [hereinafter DHS 2008 ENFORCEMENT ACTIONS], available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

Such data are an imperfect proxy for data on the number of NTAs issued because, among other things: (1) such data relate to events rather than individuals; (2) they exclude NTAs issued under ICE's Criminal Alien Program and 287(g) program, as well as NTAs issued by USCIS; and (3) apprehensions can be disposed of in ways other than by the initiation of removal proceedings by the issuance of NTAs (e.g., expedited removal and administrative removal

proceedings and voluntary departures).⁶⁶ Accordingly, on May 14, 2009, we submitted to DHS a written request for the number of NTAs issued by DHS for each of the past five fiscal years, including the number of NTAs issued by each of USCIS, CBP, and ICE and by each of their respective programs and operations. On November 18, 2009, we received from DHS the requested data, which are included in the table below:

Continued on page 1-15

DHS COMPONENT	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
USCIS						
<i>Asylum</i>						
Number of NTAs issued (1)(2)	Not available	Not available	32,008	39,364	30,212	23,696(3)
Number of affirmative asylum cases referred to immigration courts (4)	39,259	35,869	37,020	40,126	33,392	Not available
Affirmative asylum cases referred to immigration courts, less asylum-issued NTAs (5)	Not available	Not available	5,012	762	3,180	Not available
<i>Domestic Operations</i> – Number of NTAs issued (1)(6)	Not available	Not available	Not available	Not available	22,947	29,489(3)
Number of NTAs issued by USCIS (1)(2)	39,259	35,869	32,008	39,364	53,159	53,185(3)
Percentage of total number of NTAs issued (7)	25.5%	13.4%	15.0%	16.1%	18.3%	24.0%
CBP (1)						
<i>Office of Field Operations</i> – Number of NTAs issued (8)	20,267	22,811	24,148	24,864	22,368	Not available
<i>Office of the Border Patrol</i> – Number of NTAs issued (9)	94,140	166,969	92,360	43,350	36,184	Not available
Number of NTAs issued by CBP (1)	114,407	189,780	116,508	68,214	58,552	Not available
Percentage of total number of NTAs issued (7)	74.5%	70.4%	54.5%	27.9%	20.1%	Not available

Table continued on page 1-13

⁶⁶ See DHS 2008 ENFORCEMENT ACTIONS, *supra* note 65, at 2-3.

Table continued from page 1-12

DHS COMPONENT	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
ICE (10)						
<i>Office of Detention and Removal</i>						
Fugitive Operations – Number of NTAs issued (11)	Not provided	1,779	4,145	8,885	5,971	5,903
Criminal Alien Program – Number of NTAs issued (11)(12)	–	–	–	74,008	123,670	113,367
Percentage of NTAs issued by ICE	–	–	–	54.2%	68.9%	67.4%
<i>Office of Investigations – Number of NTAs issued (11)(13)</i>						
	Not provided	42,236	55,427	38,512	26,466	16,775
<i>Office of State and Local Coordination – 287(g) program – Number of NTAs issued</i>						
	Not provided	–	5,799	15,187	23,429	32,254
Number of NTAs issued by ICE (10)	Not available	44,015	65,371	136,592	179,536	168,299
Percentage of total number of NTAs issued (7)	Not available	16.3%	30.6%	55.9%	61.7%	76.0%
Number of charging documents issued against noncitizens in U.S. prisons (14)	Not available	Not available	67,850	164,296	221,085	Not available
Percentage of total number of NTAs, adjusted (15)	Not available	Not available	31.4%	60.4%	66.4%	Not available
All DHS Components						
Number of NTAs issued (16)	153,666	269,664	213,887	244,170	291,217	221,484
Number of NTAs issued, adjusted (17)	153,166	269,664	216,366	271,874	332,796	221,484

(1) Data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security in November 2009 (on file with the American Bar Association Commission on Immigration) ("OIS Data").

(2) Excludes NTAs issued in connection with credible fear interviews and denials of applications for relief under the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). In the OIS Data, the numbers of NTAs issued by USCIS's Asylum Division for fiscal years 2004 and 2005 were reportedly not available.

(3) For the stub period from October 1, 2008 to August 31, 2009.

(4) OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPT OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK I1 (2009), available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

Continued on page 1-14

Continued from page 1-13

(5) Represents the difference between the number of affirmative asylum cases referred to the immigration courts in the applicable fiscal year reported by EOIR in its FY 2008 Statistical Year Book and the number of NTAs issued by USCIS's Asylum Division in such fiscal year reported in the OIS Data. These differences may arise from the lag in time between a DHS officer issuing an NTA and the filing of such NTA with the applicable immigration court.

(6) USCIS's Domestic Operations Directorate ("DOD") manages the processing and adjudication of benefit applications submitted to USCIS (other than asylum applications and other benefit applications that are the responsibility of USCIS's Refugee, Asylum and International Operations Directorate). See U.S. CITIZENSHIP & IMMIGRATION SERVICES, ANNUAL REPORT FOR FISCAL YEAR 2008 56, 64 (2009).

In the OIS Data, it was reported that USCIS did not collect the number of NTAs issued by DOD for any of fiscal years 2005, 2006, and 2007. The number of NTAs issued annually by DOD, however, prior to fiscal year 2007 is unlikely to have been significant. In 2007, the USCIS Ombudsman noted that the number of NTAs issued by USCIS had increased over the years and that USCIS issued 6,969, 10,008, and 13,350 NTAs for the 12-month periods ended March 2005, March 2006, and March 2007, respectively. U.S. CITIZENSHIP & IMMIGRATION SERVICES OMBUDSMAN, 2007 ANNUAL REPORT TO CONGRESS 96 (June 11, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

(7) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components. The calculation of the total number of NTAs issued by all DHS components in any fiscal year is described below in note (16).

(8) CBP's Office of Field Operations is responsible for operations at ports of entry. See U.S. Customs & Border Protection, Office of Field Operations – Assistant Commissioner, Thomas S. Winkowski, http://www.cbp.gov/xp/cgov/about/organization/assist_comm_off/field_operations.xml.

(9) CBP's Office of Border Patrol is responsible for enforcing immigration laws between official ports of entry. See U.S. Customs & Border Protection, Assistant Commissioners' Offices, http://www.cbp.gov/xp/cgov/about/organization/assist_comm_off/.

(10) Data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration) (the "ICE Data").

(11) The ICE Data with respect to the Office of Detention and Removal – Fugitive Operations, the Office of Detention and Removal – Criminal Alien Program and the Office of Investigations reportedly represent data from a "snap shot" of the data in the respective ICE Law Enforcement System ("LES") at the time the ICE Data were compiled, and the data within LES may be modified at any time by authorized ICE personnel, which could result in a change in the data reported.

(12) The ICE Data for ICE's Criminal Alien Program ("CAP") are subject to the following: (i) guidelines to effectively track statistics for CAP-related NTAs issued did not exist for ICE's Office of Detention and Removal prior to 2007; (ii) CAP can only currently run data for fiscal years 2008 and 2009 to determine the number of NTAs issued pursuant to CAP; and (iii) the CAP-related NTA data were obtained by filtering the total number of NTAs in the CAP apprehension report for each fiscal year to provide only NTAs issued pursuant to CAP. Because CAP began in June of 2007, ICE officers did not issue NTAs pursuant to CAP in fiscal years 2005 and 2006, and the number of NTAs issued in fiscal year 2007 under CAP covers the period from June 2007 to September 30, 2007.

(13) Includes NTAs issued in connection with ICE's worksite enforcement.

(14) U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 3 (2009), *available at* http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

(15) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components, adjusted. The calculation of the total number of NTAs issued by all DHS components, adjusted in any fiscal year is described below in note (17).

(16) The total number of NTAs issued by all DHS components in any fiscal year equals the sum of: (i) the number of NTAs issued by USCIS reported in the OIS Data; (ii) because the number of NTAs issued by USCIS's Asylum Division in each of fiscal years 2004 and 2005 is not included in the OIS Data (see note (2) above), only for fiscal years 2004 and 2005, the number of affirmative asylum cases referred to the immigration courts in such fiscal year (see note (4) above); (iii) the number of NTAs issued by CBP reported in the OIS Data; and (iv) the number of NTAs issued by ICE reported in the ICE Data.

(17) The total number of NTAs issued by all DHS components, adjusted, in any fiscal year is calculated in accordance with note (16) above, and adjusted to include the number of charging documents issued against noncitizens in U.S. prisons, in place of the number of NTAs issued by ICE reported in the ICE Data, for each of fiscal years 2006, 2007, and 2008. See note (14) above.

Continued from page 1-12

Based in part on the data set forth above, we observed the following trends in the issuance of NTAs:⁶⁷

- *Increase in the number of NTAs issued by USCIS Service Centers.* The number of NTAs issued by the USCIS Domestic Operations Directorate increased since the issuance of a USCIS policy memorandum in 2006.⁶⁸ In fiscal year 2006, the number of NTAs issued by USCIS's Asylum Division and Domestic Operations Directorate represented approximately 15.0% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 18.3% of the NTAs issued by DHS.
- *Significant decrease in the number of NTAs issued by CBP's Border Patrol.* While the number of apprehensions by CBP's Border Patrol declined approximately 38.1% from 1,139,282 in fiscal year 2004 to 705,022 in fiscal year 2008, the number of NTAs issued by CBP's Border Patrol declined approximately 61.6% from 94,140 in fiscal year 2004 to 36,184 in fiscal year 2008. In fiscal year 2006, NTAs issued by CBP's Border Patrol and Office of Field Operations represented approximately 54.5% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 20.1% of the NTAs issued by DHS.⁶⁹
- *Significant growth in the number of NTAs issued by ICE.* The number of NTAs issued by ICE nearly quadrupled, from 44,015 in fiscal year 2005 to 168,299 in fiscal year 2008.

- *Change in the component that issued the largest number of NTAs in a fiscal year.* In fiscal year 2006, CBP issued approximately 54.5% of the NTAs issued by DHS, and ICE issued approximately 30.6% of the NTAs issued by DHS. In fiscal year 2008, however, ICE issued approximately 61.7% of the NTAs issued by DHS, and CBP issued approximately 20.1% of the NTAs issued by DHS.

1. Removal Proceedings Initiated by USCIS Officers

a. Credible Fear Determinations by USCIS Asylum Officers

If, during the course of an expedited removal inspection,⁷⁰ an arriving noncitizen expresses an intent to apply for asylum or has a fear of persecution or torture if he or she is returned to his or her country of origin, DHS must refer the person to an asylum officer for a "credible fear" interview,⁷¹ which is intended to establish whether the person has a credible fear of persecution if removed to that country. Detention of the applicant by ICE is required pending the credible fear interview. USCIS requires a wait of at least 48 hours after the applicant arrives at the detention center before conducting a credible fear interview, so that the applicant may recover from travel and contact an attorney or other advisor.⁷² The 48-hour period may be waived by the applicant.⁷³ Although an applicant does not have a right to legal representation during a credible fear interview, he or she is allowed to have an

⁶⁷ The numbers of NTAs, and the percentages related to such data, set forth in the following bullet points and later in this Section of the Report are derived from the OIS Data and the ICE Data summarized in the table above. Consequently, such numbers and percentages are subject to the exclusions, limitations, and qualifications described in the notes to the table above.

⁶⁸ See *infra* Section II.C.1.c.

⁶⁹ Although the number of NTAs issued by CBP's Border Patrol declined, the number of criminal prosecutions for immigration matters more than doubled over the same period from 37,884 in fiscal year 2004 to 79,431 in fiscal year 2008, and the growth in immigration prosecutions was largely driven by apprehensions by CBP along the border. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009 (2009), available at <http://trac.syr.edu/immigration/reports/218/>. Furthermore, immigration prosecutions increased 15.7% from 79,431 in fiscal year 2008 to 91,899 in fiscal year 2009. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, FY 2009 FEDERAL PROSECUTIONS SHARPLY HIGHER: SURGE DRIVEN BY STEEP JUMP IN IMMIGRATION FILINGS (2009), available at <http://trac.syr.edu/tracreports/crim/223/>. This surge in criminal prosecution for immigration matters also coincided with the launch in December 2005, and subsequent expansion, of Operation Streamline, which targets illegal noncitizens apprehended by CBP's Border Patrol in enforcement zones at the Mexican border for immediate criminal prosecution, incarceration, and removal. See U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2008 11 (2008), available at http://cbp.dhs.gov/linkhandler/cgov/newsroom/publications/admin/par_fy08_pub.ctt/par_fy08.pdf (describing Operation Streamline).

⁷⁰ See discussion of expedited removal in *infra* Section III.E.

⁷¹ INA § 235(b)(1)(A)(ii), (B); 8 U.S.C. § 1225(b)(1)(A)(ii), (B). See U.S. Citizenship & Immigration Servs., Q: When Do Credible Fear Interviews Take Place?, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ef1b0f953f9c110VgnVCM1000004718190aRCRD&vgnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD> (last modified Sept. 26, 2008).

⁷² See *id.*

⁷³ *Id.*

e. THE FOIA LETTER TO ICE, CBP, AND USCIS

PENNSTATE



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February 12, 2013

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Freedom of Information Act (FOIA) Division
90 K Street NE, 9th Floor
Washington DC 20229-1181

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

U.S. Citizenship and Immigration Services
National Records Center (NRC)
FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officer:

The Penn State Dickinson School of Law's Center For Immigrants' Rights ("the Center"), under the direction of Professor Shoba Sivaprasad Wadhia and in conjunction with the American Bar Association's Commission on Immigration ("the Commission"), submit this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*

Requesters seek information pertaining to Notices to Appear ("NTAs"). Specifically, requesters seek to study the frequency with which the immigration agencies choose to issue or not issue an NTA, the factors or considerations that play a role in the decision to issue or not to issue an NTA, and any internal guidance or training regarding the issuance of an NTA, to name a few areas of interest. This request is made for a scholarly purpose and not for commercial use.

Requesters

The Center for Immigrants' Rights ("the Center") is an immigration policy clinic at Penn State's Dickinson School of Law. Immigration law expert Shoba Sivaprasad Wadhia directs the Center, where students produce practitioner toolkits, white papers, and primers of national impact on behalf of client organizations and build professional relationships with government and nongovernmental policymakers, academics, individual clients, and others. Professor Wadhia researches the role of prosecutorial discretion in immigration law; the association between detention, removal and due process; and the intersection between immigration, national security, and race. Prior to joining Penn State Law, Professor Wadhia was deputy director for legal affairs at the National Immigration Forum in Washington, D.C., where she worked on issues surrounding the creation of the U.S. Department of Homeland Security, "post 9-11" executive branch policies impacting immigrant communities, and comprehensive immigration reform.

The ABA Commission on Immigration directs the ABA's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States. Acting in coordination with other ABA entities, as well as governmental and non-governmental bodies, the Commission: 1) advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; 2) provides continuing education and timely information about trends, court decisions and pertinent developments for members of the legal community, judges, affected individuals and the public; and 3) develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

Request for Information

Requesters seek disclosure of any and all records that were prepared, received, transmitted, collected, and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE) that describe, refer, or relate to the issuance or denial of a notice to appear.

The requested records include, but are not limited to:

17. The total number of cases in which an NTA was considered
18. The total number of NTAs that have been issued
 - a. The reason or factors that played a role in the decision to issue an NTA
19. The total number of cases in which the agency declined to issue an NTA
 - a. The reason or factors that played a role in the decision not to issue an NTA
20. The total number of NTAs that were cancelled after being issued
 - a. The reason or factors that played a role in the decision to cancel NTAs after being issued.
21. The total number of NTAs that ICE declined to file with the EOIR

- a. The reason or factors that played a role in the decision to cancel NTAs after being issued.
- 22. The total number of removal proceedings that ICE moved to dismiss after the NTA was filed with the EOIR
 - a. The reasons or factors that played a role in the decision to join or move to dismiss the removal proceeding
- 23. Any internal agency correspondence and/or documents pertaining to or discussing each potential NTA case
- 24. Any internal training, guidance, correspondence, and/or other documents discussing the decision-making process or providing guidelines for deciding whether to issue an NTA or whether to cancel an NTA that has been issued

In addition to the above requested records, the requesters seek the following information about each person:

- 1. Nationality or country of birth
- 2. Date of birth
- 3. Gender
- 4. Date of entry to U.S.
- 5. Length of stay in U.S.
- 6. Whether the applicant has legal counsel or a Form G-28 on file
- 7. Whether the applicant has U.S. citizen family members
- 8. Status
 - a. If NTA was issued or filed, reasons/factors for deciding to issue or file
 - b. If NTA was not issued or filed, reasons/factors for deciding not to issue or file
 - c. If pending, reasons/factors for pending status
- 9. Any comments about the person or decision

Requesters ask that any records that exist in electronic form be provided in their native electronic format on a compact disc (CD), digital video disk (DVD), or equivalent electronic medium. Requesters ask that any documents stored in Portable Document Format (“PDFs”) be provided as individual files in a searchable PDF format. Ideally, the information requested above would be provided in an Excel spreadsheet.

Finally, because of the limited window of participation available to the Center’s students, the requesters ask that responsive information be sent to the requesters as it becomes available, rather than waiting to send all of the information together at a later date.

All requested records that are responsive may be provided with personally identifying details redacted.

Request for Fee Waiver

A waiver of fees is requested under 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which “is in the public interest because

it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* The requested information will be used to prepare a scholarly article and to further the public understanding of prosecutorial discretion in the context of removal proceedings and the NTA process.

Congress intended the FOIA fee waiver provision to encourage “open and accountable government.” *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Therefore, agencies should “apply the public-interest waiver liberally.” *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DHS regulations clarify that fee waivers are appropriate if disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and is “not primarily in the commercial interest of the requester.” 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

1. Disclosure of the Information is in the Public Interest

To determine whether the requested information satisfies the first requirement, DHS has identified four relevant factors: (i) whether the subject of the request concerns “the operations or activities of the [federal] government;” (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is “likely to contribute” to an understanding of such government functions; (iii) whether disclosure of the information will contribute to “public understanding,” meaning a reasonably broad audience of interested persons beyond just the requester; and (iv) whether the disclosure will “significantly” increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

i. *The subject directly concerns the operations of the federal government.*

The requested documents and information concern identifiable “operations or activities” of the government. Requesters seek records of NTAs being issued to immigrants, including factors and considerations that play a role in the decision to issue or not issue an NTA, cancel an existing NTA, or other forms of prosecutorial discretion that may relate to NTAs.

ii. *The informative value will contribute to an understanding of government activities.*

The requested documents and information will contribute to an understanding of government activities by allowing the requesters to analyze the demographic and biographic profile of NTA recipients, while also examining the role of prosecutorial discretion in the NTA process.

iii. *This information will contribute to the understanding of a broad audience.*

The requested documents and information will contribute to the understanding of the public as a whole, not just a limited subsection of individuals. The American Bar Association is the world’s largest voluntary professional organization, with nearly 400,000 members and over 3,500 entities. The research conducted by the requesters regarding NTAs will ultimately be

distributed among a broad network of legal professionals, immigration advocates, and interested members of the public.

iv. ***This information will significantly increase public understanding.***

The requested documents and information will significantly increase public understanding of NTAs and the process surrounding their issuance. By studying the requested data, requesters hope to give the public a better understanding of the NTA process and identify any potential patterns or problems present in the process. The end result will be to provide a series of findings and/or recommendations surrounding NTAs that will help educate the public about the role of NTAs in the national immigration discussion.

2. **Disclosure of the Information is Not Primarily in the Commercial Interest of the Requester.**

To determine whether the request satisfies the second requirement, DHS has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

- i. ***The American Bar Association is the world's largest voluntary professional organization. The Commission on Immigration is a part of the ABA's Division for Public Services, an ABA department dedicated to applying the knowledge and experience of the legal profession to promotion of the public good.***

The American Bar Association is the world's largest voluntary professional organization, with nearly 400,000 members and more than 3,500 entities. It is committed to improving the legal profession; eliminating bias and enhancing diversity; advancing the rule of law throughout the United States and around the world; and supporting the legal profession with practical resources for legal professionals while improving the administration of justice, accrediting law schools, establishing model ethical codes, and more.

- ii. ***Shoba Sivaprasad Wadhia is the director of the Penn State University Dickinson School of Law's Center for Immigrants' Rights and is a leading scholar in the field of immigration law, focusing specifically on prosecutorial discretion and deferred action.***

The Center for Immigrants' Rights is an immigration policy clinic at Penn State's Dickinson School of Law. At the Center, students produce white papers, practitioner toolkits, and primers of national impact on behalf of client organizations. Professor Shoba Sivaprasad Wadhia is the clinic's director.

The requested information is to be used solely for scholarly research by the individuals and organizations discussed above. The requesters do not stand to gain financially from any of

the information hereby requested.

Given that FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. *See Judicial Watch, Inc., v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). If you deny the fee waiver request, we respectfully ask for a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media . . .").

Please inform us if the charges for this FOIA production will exceed \$25.00.

Expedited Processing

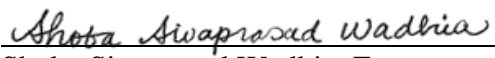
Also requested is expedited treatment of this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. There is a compelling need for expedited processing of this request, namely an "urgency to inform the public concerning the actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

* * * * *


Thank you for your consideration of this request. If this request is denied in whole or in part, the requestors ask that the government justify all redactions by reference to the specific exemptions of FOIA. We expect the government to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or waiver of fees.

If you have any questions about this request you may contact Shoba Sivaprasad Wadhia at (814) 865-3823 or ssw11@dsl.psu.edu. Thank you in advance for your cooperation and timely consideration of this request.

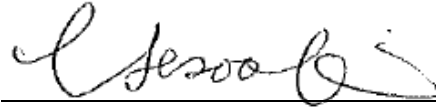
Sincerely,


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