

# ‘Prosecutorial discretion’ barely dents immigration case backlog after a year

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Immigration and Customs Enforcement officers last week prepared to hand over a Mexican man, arrested in Atlanta, who was accused of murder in his country. He is the sort of high-risk suspect that ICE officials hope to focus on under their policy of “prosecutorial discretion.” (Photo courtesy Immigration and Customs Enforcement)

WASHINGTON – A year after federal officials announced a program of “prosecutorial discretion” aimed at reducing nearly 300,000 pending immigration cases, only 1.5 percent of the backlogged cases have been closed.

The [Immigration and Customs Enforcement policy](#) allows prosecutors to exercise discretion on which cases to pursue, meaning they could choose to dismiss or put on hold cases that did not meet the agency’s top priority of finding and deporting serious criminals.

Of the 298,173 cases that were pending at the end of September, only 4,585 had been closed under the program by the end of May, according to the Transactional Records Access Clearinghouse at Syracuse University. Arizona accounted for 69 of the closed cases.

The number is far fewer than opponents of the policy feared, and far fewer than supporters had hoped for.

Frank Sharry, who said he was doing “back handsprings” when the prosecutorial discretion policy was announced, said this week that it is “clear that it failed.”

“The idea was to focus the limited resources on the worst of the worst, but that promise was clearly unfulfilled,” said Sharry, executive director of [America’s Voice](#), an organization that advocates for immigrants.

But ICE spokeswoman Gillian Christensen said it can be “somewhat of a lengthy process” from the time the agency decides a person is a good candidate for discretion and the time a motion is filed in court.

“This is not something that happens over night,” she said. “It takes some time.”

Christensen said ICE’s numbers are actually slightly lower than [TRAC’s](#), with the agency reporting 4,363 cases have been closed. ICE has identified more than 20,000 cases that are “amenable” to discretion, she said, but a lot of the cases are stuck somewhere in the pipeline.

Opponents, meanwhile, were not comforted by the small percentage of cases that have been closed under the program.

“I find it ridiculous that they (ICE) even release them on their own recognizance,” said state [Sen. Ron Gould](#), R-Lake Havasu City. “That’s saying, ‘We’ve caught you, now we’re going to release you and send you on your merry way.’”

Gould said the policy allows illegal immigrants to be “released back into the public and never seen again.”

Kansas Secretary of State Kris Kobach, an architect of Arizona’s SB 1070 immigration law and similar measures, said the concept of prosecutorial discretion was flawed to begin with.

“Taxpayers have spent a lot to get those cases to court, and to drop them mid-stream doesn’t make a lot of sense,” Kobach said.

ICE Director John Morton proposed the policy last year, saying it would allow the agency to focus its energies on its top priority – apprehending serious criminals. He directed ICE officials to exercise discretion when faced with cases of low-priority illegal immigrants, such as those with children who are U.S. citizens, those who came to the country as minors or served in the military, among other categories.

The Obama administration approved the program in August and immigration officials began a review of the backlogged cases in December.

If a prosecutor decides to exercise discretion in a case, it can either be completely dismissed or closed administratively, meaning it is shelved for now but can be reopened at any time. About 75 percent of closed cases have been administrative closures, according to TRAC, and the rest have been dismissals.

While individuals whose cases have been closed administratively are not prosecuted, they are also not generally granted a work permit.

To date 3,998 individuals eligible for prosecutorial discretion have declined the offer, according to ICE. Crystal Williams, executive director of the American Immigration Lawyers Association, said those people probably “calculated they are better off going in front of a judge” where they could be eligible to become legal residents instead of granted temporary relief, she said.

After his initial optimism over the program, Sharry said he quickly became dismayed.

“We were thinking, ‘This is a big deal, we’re thrilled,’” he said of the program’s unveiling. “It promised to usher in a whole new era in immigration enforcement.”

But Christensen said ICE is keeping to its promise of focusing on the “top-priority” illegal immigrants.

“I think what is really important is the incredible work our agency has done over the past few years,” she said.

For now immigration reform advocates appear to be putting their hopes on another [Obama administration announcement](#), made this June, that it would stop deporting young illegal immigrants who meet similar criteria, but are under age 30.

Williams said there is some overlap between the groups eligible for prosecutorial discretion under the ICE program and those eligible under the program announced last month by the president, but that one is not a subset of the other.

“There are early signs that the (newer) program is working quite well,” Williams said. “There seems to be a clear understanding of who it is that will benefit from it and what is that will happen to them ... the June 15 announcement changes the landscape.”

But Kobach said they might not want to pin too much hope on the newer program – he claims it ignores a 1996 law that forbids prosecutorial discretion in the handling of immigrant removal cases.

### **‘Discretion’ location**

#### **A breakdown of cases closed by prosecutorial discretion in immigration courts in Arizona:**

- Florence Immigration Court:

#### **Total cases closed based on prosecutorial discretion: 1**

Closed via termination: 1

#### **Administratively closed: 0**

- Phoenix Immigration Court:

#### **Total cases closed based on prosecutorial discretion: 49**

Closed via termination: 0

#### **Administratively closed: 49**

- Phoenix Juvenile Immigration Court:

#### **Total cases closed based on prosecutorial discretion: 1**

Closed via termination: 1

#### **Administratively closed: 0**

- Tucson Immigration Court:

#### **Total cases closed based on prosecutorial discretion: 18**

Closed via termination: 4

Administratively closed: 14

<http://azcapitoltimes.com/news/2012/07/16/prosecutorial-discretion-barely-dents-immigration-case-backlog-after-a-year/>