Immigration Enforcement and Discretion

A Primer

Every day, officers and employees within the Department of Homeland Security (DHS) carry out immigration laws. Congress created DHS as a cabinet-level agency in the wake of the September 11, 2001, terrorist attacks. DHS houses many different units of the federal government, but three units deal primarily with immigration. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) are two enforcement arms in DHS. While ICE focuses on interior enforcement and CBP on enforcement at or near a border, both agencies apprehend, detain, and deport people from the United States. According to the DHS Office of Immigration Statistics, CBP made 415,000 apprehensions and ICE made 110,000 arrests during fiscal year 2016.

A third unit within DHS is called U.S. Citizenship and Immigration Services (USCIS). While the focus of USCIS is to make decisions about applications for immigration benefits such as citizenship or asylum, USCIS also plays an enforcement role. In some cases, USCIS is required to issue charging documents known as the “Notice to Appear” (NTA). As described in chapter 3, the Trump administration issued a memorandum expanding the situations in which USCIS is required to issue NTAs. In short, ICE, CBP, and USCIS all have authority to enforce the immigration laws against a noncitizen. This authority is derived from many legal sources including the Immigration and Nationality Act (hereafter, “INA” or “immigration statute”).

Congress enacted the INA in 1952. It has been compared second in complexity to the U.S. tax code. While the language has been amended over the years, the immigration statute remains the primary frame-
work for immigration law. The opening language of the statute gives DHS the authority to enforce and administer the immigration laws of the United States.9

One goal Congress had in creating DHS was to separate the immigration enforcement and service functions once held under one umbrella in an agency known as Immigration and Naturalization Service (INS). In reflecting on the creation of DHS and how it functions in the time of Trump, government official 2, based on the East Coast, who formerly served in INS, shared, “One of the greatest ironies to me is that one of the arguments for breaking up the INS was that you need to split the service and enforcement because the enforcement was polluting the service side of the business. And that the service side of business was too enforcement minded. Well, now that it’s all in the Department of Homeland Security, look at what we’re seeing coming out of USCIS in the current era. You see an enforcement outlook and actions that USCIS is taking that would never have happened in INS days.”10

Immigration enforcement is not limited to deportation or what is formally called “removal.” Instead, there are ranges of actions that are considered “enforcement.” For example, street arrests, interrogation at a workplace, detention in a correctional facility, and prosecution as a trigger for removal proceedings are all actions that constitute immigration enforcement. DHS statistics indicate that in fiscal year 2016, one arm of ICE known as Enforcement and Removal Operations (ERO), booked about 350,000 people into detention and that DHS removed 340,000 noncitizens.11 Data from DHS shows that arrests of noncriminals made up 26 percent of ERO arrests in fiscal year (FY) 2017.12

The details of the immigration law and the agencies responsible for carrying them out are indeed complex—but the role of discretion is also significant. As Justice Anthony Kennedy noted in Arizona v. United States, “Discretion in the enforcement of immigration law embraces immediate human concerns. . . . The equities of an individual case may turn on many factors, including whether the alien has chil-
children born in the United States, long ties to the community, or a record of distinguished military service.”

Discretion is interwoven with deportation. Immigration scholar Daniel Kanstroom identifies three forms of discretion—prosecutorial, ultimate, and interpretative, all three of which are addressed in this book. One powerful form of discretion in immigration law is called “prosecutorial discretion.” Importantly, DHS has the prosecutorial discretion to refrain from taking action against a person at each enforcement stage. For example, if an ICE officer chooses to not detain a woman who is pregnant or nursing but who legally qualifies for detention, discretion is being exercised favorably.

Prosecutorial discretion is necessary because the government has limited resources it can use to carry out enforcement against noncitizens. According to the former director of ICE, in 2011, ICE has the resources to deport less than 4 percent or 400,000 of the roughly 11.2 million people living in the United States without authorization today. This number does not include the many lawful permanent residents (green card holders) who are eligible for immigration enforcement because of post-entry conduct.

As showcased in my first book, Beyond Deportation, the government has exercised discretion for largely humanitarian reasons that include a person’s family ties, age, or medical condition. Deferred action is one kind of prosecutorial discretion that existed for decades but came to light with President Barack Obama’s announcement of Deferred Action for Childhood Arrivals (DACA). DACA is a policy that was implemented by the secretary of Homeland Security and enabled nearly 800,000 people who came to the United States before the age of sixteen, have continuous residence, and are in school or graduated to receive deferred action for a renewable period of two years.

Deferred action is not the only way prosecutorial discretion can be exercised. Before a court hearing, DHS may exercise discretion by choosing not to bring charges against individuals who overstay their visa. After an immigration judge decides to grant asylum, DHS may ex-
exercise discretion by choosing not to file an appeal. DHS may also choose to grant a stay of deportation after a person has been ordered removed. Finally, DHS may exercise prosecutorial discretion invisibly. For example, discretion is opaque when DHS chooses not to enter a schoolhouse to carry out an enforcement action or chooses not to arrest a person who clearly lacks immigration status. The discretion exercised by DHS employees is often framed by memoranda and guidelines by the DHS secretary or the agency heads within ICE, CBP, and USCIS. For example, DACA requests are processed by USCIS and must satisfy a set of requirements set forth in a DHS memorandum for anyone seeking deferred action under DACA.

Beyond the significant relationship between prosecutorial discretion and immigration enforcement is the prominence of discretion in other immigration domains. DHS officers may be required to consider discretion or the balancing of positive and negative factors when deciding whether to grant someone a green card, asylum, or a waiver. For example, asylum seekers must prove that they have suffered persecution in the past or face a well-founded fear of persecution in the future because of race, religion, nationality, political opinion, or membership in a particular social group and further must show that they qualify for asylum as a matter of discretion.18 As explained in chapter 6, guidance from USCIS seeks to expand the number of discretionary denials made by asylum officers in certain asylum cases.

Discretion is also used by immigration judges (IJs) in the Department of Justice (DOJ). DOJ is an executive branch agency that houses fifty-eight immigration courts and employs more than three hundred IJs across the country.19 When individuals appear before an immigration judge for a hearing, they could respond to charges made by DHS and then request relief from deportation. Many of these defenses have specific criteria that must be proven by the applicant or noncitizen, as well as a discretionary component. Immigration judges also make discretionary decisions about how individual cases will proceed, such as whether to permit a noncitizen more time to prepare a case by granting
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a “continuance” or whether to remove a case from the active docket by granting “administrative closure.” The discretion exercised by immigration judges is often guided by agencywide directives by the U.S. attorney general and DOJ officials. For example, in guidance dated January 17, 2018, DOJ announced that immigration judges would be evaluated based on the speed and volume of cases they complete. The immigration law also gives broad power to the attorney general to make immigration policy unilaterally without a specific check.

Consular officers employed by the Department of State (DOS) also use discretion in deciding whether to issue or grant a visa for an individual to travel to the United States. For example, a foreign national from India who seeks admission to the United States as a student must apply for a nonimmigrant visa. Once a visa interview is scheduled, a consular officer will interview the person to determine if she qualifies for a student visa. If the Indian national can show that she meets the requirements for an F-1 but is ineligible because of an exclusionary ground listed in the immigration statute, the consulate will decide if she qualifies for a waiver and, in doing so, use discretion. Most decisions by a consular officer are final and cannot be challenged in a court.

At the macro level, the legislative and executive branches hold a great deal of power over immigration law and policy. Congress wrote the primary framework for immigration law when it passed the INA. The INA outlines who may be eligible for admission to the United States, reasons a person may be excluded, conduct that may trigger deportation after entry, and the bases under which a person may qualify for a waiver or pardon. Congress delegated immigration functions to many federal agencies, including the Departments of State, Justice, and Homeland Security, as illustrated above. In the White House, the president also wields great power over immigration policy decisions. Article II of the U.S. Constitution includes a provision known as the “Take Care Clause,” which has been interpreted as “placing an obligation on both the President and those under his supervision to comply with and execute clear statutory directives as enacted by Congress.” The INA authorizes the
president to set annual refugee numbers in consultation with other agencies like DOS. The INA also authorizes the secretary of DHS to designate any foreign state or a portion of a nation for a remedy known as “Temporary Protected Status (TPS).” As described in detail in chapter 4, the choice by the Trump administration to end policies that have historically granted temporary protection or status to people reflects a priority shift that, in practical terms, could uproot an estimated one million noncitizens who have lived in the United States for well over a decade and further expand the number of people living in the United States without immigration status. As a final example, the president is authorized to designate, extend, or end a prosecutorial discretion policy known as “Deferred Enforced Departure (DED).” During President Trump’s tenure, the administration used each of these authorities to make changes to the refugee, TPS, and DED programs. Importantly, no administration can make changes that violate or conflict with the Constitution, immigration statute, or existing regulations.