

## Shadow Immigration and the Power of the Presidency A Talk with Professors Adam Cox and Cristina Rodriguez

- Overview
  - Though immigration laws are created by Congress, the President has broad power over immigration policies as head of the enforcement bureaucracy.
  - Over time, the U.S. immigration system has become largely centered around deportation.
  - Estimates of half of the immigrant population in the U.S., nearly 11 million, are deportable without a path to legal status. A large deportable population has created a “shadow” immigration system in the U.S.
  
- The shadow immigration system
  - Regulatory and demographic changes over the last century have resulted in a large undocumented population in the U.S., particularly from Mexico and Central American countries. Without a path to legalization, they remain in the shadows of the American immigration system.
  - Prior to early 1900s, there existed relatively free migration between Mexico and the U.S. Over the 20<sup>th</sup> century, immigration policies created cycles of restrictions and recruitments of Mexican laborers based on U.S. labor needs.
  - 1917 Immigration Act<sup>1</sup>
    - Created exclusion rules
    - Made inadmissible anyone “likely to become a public charge” or illiterate in their own language
    - Contract labor law prohibiting anyone under a pre-existing labor contract to enter
    - Eliminated Mexican exemption from head tax
  - Bracero program
    - Established by an FDR executive order in 1942, the program recruited millions of Mexicans to migrate to the U.S. to work on short-term labor contracts, particularly in the agricultural sector. Program was spurred by labor shortages in the U.S. during WWII.
    - Codified in 1951 under Public Law 78<sup>2</sup> during the Korean War.
    - Program ended in 1964. By the end of the program, Border Patrol officers were already enforcing rules in place to restrict Mexican migration, using the tools codified under the 1917 Immigration Act.
  - Immigration and Nationality Act of 1965 (Hart-Cellar Act)<sup>3</sup>

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<sup>1</sup> Pub. L. No. 64-301, 39 Stat. 874 (1917), <https://www.loc.gov/law/help/statutes-at-large/64th-congress/session-2/c64s2ch29.pdf>.

<sup>2</sup> Pub. L. No. 82-78, 65 Stat. 117 (1951) <https://www.govinfo.gov/content/pkg/STATUTE-65/pdf/STATUTE-65-Pg119.pdf>.

- Eliminated national origins quota system that favored migration from Western European countries.
    - Replaced with preference system based on family relationships and with a cap of visas based on hemispheres. Eastern Hemisphere capped at 170,000 (and single country in the hemisphere capped at 20,000) and Western Hemisphere capped at 120,000.
    - 20,000 cap from single Western Hemisphere country instituted in 1976.
  - Effect over time in the last half century was rising rates of Mexican immigration, driven in part by economic and political conditions in Mexico, far exceeded the cap, resulting in an ever-growing population of immigrants without legal status in the country.
    - Factors that contributed to rising migration over that period
      - Relative youth of population in Mexico
      - Mexico's labor market underdevelopment
      - Labor demands of agriculture, service, and construction industries in the U.S.
      - Long-standing social and families ties in the U.S.
    - This population has also become more settled. Economic migrants who might otherwise choose to go back and forth from their home countries stay because migration has been made harder.
- Rise of the deportation state legal regime
  - Prior to late 1800s and early 1900s, federal immigration laws generally included provisions to exclude or screen people at the border but did not include deportation provisions. Over time, deportation becomes central to immigration in the U.S., with an expanding list of deportable conduct and time.
  - Exclusion based on national origin and quotas
    - 1882 Chinese Exclusion Act<sup>4</sup> and enforcement tools
      - Suspended entry of most Chinese immigrants for 10 years, exempting merchants and others not considered laborers
      - Preserved rights of Chinese immigrants already living in the U.S. but made deportable any person who entered the country after the Exclusion Act
    - 1892 Geary Act<sup>5</sup>
      - Extended the 10-year period.

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<sup>3</sup> Pub. L. No. 89-236, 79 Stat. 911 (1965) <https://www.govtrack.us/congress/bills/89/hr2580/text>.

<sup>4</sup> Pub. L. No. 47-126, 22 Stat. 58 (1882) <https://www.loc.gov/law/help/statutes-at-large/47th-congress/session-1/c47s1ch126.pdf>.

<sup>5</sup> Pub. L. No. 52-60, 27 Stat. 25 (1892) <https://www.loc.gov/law/help/statutes-at-large/52nd-congress/session-1/c52s1ch60.pdf>.

- Required Chinese immigrants to apply for a certificate of residence within 1 year of the passage of the Act. Anyone not found with a certificate was deportable.
  - Extended reach of enforcement and deportation to the interior.
  - National origin quotas
    - Congress first established national origin quotas in 1921 through the Emergency Immigration Act, restricting immigration to 3% of that country's nationals present in the U.S. as recorded in the 1910 census.<sup>6</sup> The law targeted immigrants from southern and eastern Europe and Asia.
    - The stopgap measure was made permanent in the comprehensive 1924 Immigration Act, further restricting immigration to 2% of the country's nationals present in the U.S. as recorded in the 1890 census.<sup>7</sup>
  - Grounds for removal and extension into post-entry conduct in the early 1900s
    - E.g. Act of Feb. 5, 1917<sup>8</sup>
      - Made deportable anyone found within 5 years from entry to be a member of one or more of the classes excludable
      - Made deportable anyone found imprisoned for at least one year for a "crime involving moral turpitude" within 5 years from entry and anyone found to have been sentenced for such a crime more than once at any time after entry
    - 1924 Immigration Act
      - Makes deportable anyone who is found at anytime after entry to have entered when "not entitled"
      - Rule remains in effect today under INA § 237(a)(1) and § 212(a)(6)(A)(i)
    - Congress removed time limits on deportation grounds over the next decades and expanded types of conduct that puts a person at risk of deportation.
      - E.g. "anarchists" and communist party members during the 40s
      - E.g. minor drug offenses post War on Drugs
- Enforcement bureaucracy

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<sup>6</sup> Pub. L. No. 67-5, 42 Stat. 5 (1921) <https://www.loc.gov/law/help/statutes-at-large/67th-congress/Session%201/c67s1ch8.pdf>.

<sup>7</sup> Pub. L. No. 68-139, 43 Stat. 153 (1924) <https://www.loc.gov/law/help/statutes-at-large/68th-congress/session-1/c68s1ch190.pdf>.

<sup>8</sup> Pub. L. No. 64- 301, § 19, 39 Stat. 874, 889 (1917) <https://www.loc.gov/law/help/statutes-at-large/64th-congress/session-2/c64s2ch29.pdf>.

- Till the late 1800s early 1900s, deportation was not widespread, and screenings were done mostly at the state and local level to keep out immigrants from certain states. The federal enforcement bureaucracy was largely non-existent.
  - Coastal states where immigrants tended to arrive, like Massachusetts and New York, enacted laws to screen and deport people, using their poor laws.
  - Other states in the Midwest that needed residents to settle their territories welcomed new immigrants.
- Enforcement agencies
  - As Border Patrol developed and enforcement operations enlarged in the 20<sup>th</sup> century, deportation enforcement became more centralized and focused on the interior.
  - Border Patrol created in 1924 through an appropriations bill. Number of Border Patrol officers ballooned within a decade.
  - Immigration and Naturalization Service (INS) created in 1933 under the Department of Labor to centralize all border and interior enforcement. INS transferred from the Labor Department to the Department of Justice in 1940.
  - Department of Homeland Security (DHS)
    - Post September 11, 2001, the INS was abolished and DHS created. Within DHS, Customs and Border Protection (CBP) polices the border and Immigration and Customs Enforcement (ICE) polices the interior.
    - Today, DHS budget is significantly larger than all the other federal law enforcement agencies combined.
- Rise in deportation numbers
  - Until the latter 1900s, the federal government concentrated apprehension and deportation efforts mostly at the border and raids on businesses and worksites.
  - In the 90s, the federal government built partnerships with state and local law enforcement agencies to better identify, locate, and apprehend deportable people.
    - Criminal Alien Program (CAP) identifies incarcerated noncitizens who committed serious crimes using biometric and biographic data. In 2013, CAP expanded to include incarcerated noncitizens who have pending charges of any kind.
    - Secure Communities program used fingerprint data housed in state and local agencies to identify deportable people.
- President's powers over immigration policy
  - Constitutional powers over immigration

- Congress has extensive power to regulate immigration and naturalization.
  - Congress derives its power to regulate immigration from its powers to regulate interstate and foreign commerce.
  - It may set quotas, the grounds for deportation, among other things.
- President's enforcement powers
  - President's power to "take Care that the Law be faithfully executed." Article II, Section 3.
  - President sits atop immigration enforcement bureaucracy to enforce immigration laws. Gives president immense power to shape immigration policy.
- Enforcement priorities of administrations
  - Administrations of the past several decades have issued immigration enforcement priorities that give indications of how the administration will prioritize removals.
  - Obama administration
    - Deferred Action for Childhood Arrivals (DACA)
      - Policy that allowed people who arrived in the U.S. as children to be eligible for deferred action for a renewable 2-year period and apply for work authorization. Applications processed by USCIS rather than ICE. In a memo released in 2012, DHS Secretary Janet Napolitano outlined the list of criteria that would make the person eligible for the exercise of prosecutorial discretion.<sup>9</sup> Shifted discretionary decision-making higher up the chain within DHS from line ICE agents by setting clear list of eligibility criteria.
      - ICE agents filed suit against Napolitano challenging the directive, alleging that deferred action violates federal law. The district court found it lacked jurisdiction over the claims, and the Fifth Circuit affirmed.<sup>10</sup>
    - Deferred Action for Parents of Americans and Lawful Permanent Resident (DAPA)

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<sup>9</sup> Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/sites/default/files/publications/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>10</sup> See *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

- In 2014, the Obama administration unveiled DAPA, a policy to allow an undocumented parent of a U.S. citizen or permanent resident to be eligible for deferred action and apply for work authorization. Similar program to DACA setting clear eligibility criteria.
- United States v. Texas<sup>11</sup>
  - 22 states, 4 governors, and the AG of Nevada challenged DAPA in a Texas district court, alleging that DAPA violates the notice-and-comment rulemaking requirements of the Administrative Procedure Act and the Take Care Clause.
  - The district court agreed that the states had shown a substantial likelihood of success that DAPA violated the notice-and-comment rulemaking requirements and temporarily enjoined DAPA. The Fifth Circuit affirmed. The Supreme Court deadlocked.
- Trump administration
  - DHS Secretary Elaine Duke issued a memo rescinding DACA in September 2017. It cited Attorney General Jeff Sessions' determination that DACA was unlawful and the Fifth Circuit and Supreme Court rulings on DAPA as the reason for rescission.<sup>12</sup>
  - Department of Homeland Security v. Regents of the University of California<sup>13</sup>
    - The Regents of the University of California and other groups challenged the rescission on the grounds that it was arbitrary and capricious in violation Administrative Procedure Act (APA) and infringed on Fifth Amendment due process. Similar lawsuits were filed in district courts in New York and D.C.
    - The district courts in California in New York sided with the plaintiffs and enjoined the rescission. The Ninth Circuit affirmed in *Regents*.
    - The Supreme Court, in a 5-4 opinion, evaluated the Duke memo as the explanation for the DACA

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<sup>11</sup> United States v. Texas, 809 F.3d 134 (5th Cir. 2015), *affirmed by an equally divided Court*, 136 S.Ct 2271 (2016) (per curiam).

<sup>12</sup> Memorandum from Elaine C. Duke, Secretary, Department of Homeland Security, to James W. McCament, Acting Director, U.S. Citizenship and Immigration Services, et al., *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (September 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

<sup>13</sup> 140 S. Ct. 1891 (2020), [https://www.supremecourt.gov/opinions/19pdf/18-587\\_5ifl.pdf](https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf).

rescission and found it was arbitrary and capricious, in violation of the APA. The Court found that the memo did not provide a reason for terminating forbearance when it relied on Sessions' determination that DACA benefits were unlawful and did not consider the possibility of continuing forbearance while eliminating benefits. It also noted that the decision failed to take into account reliance interests on the DACA memo. DHS need not have explored every policy alternative, but the agency failed to make an assessment at all.

- Role of the courts
  - How central have the courts historically been in shaping immigration policy
    - Common perception that the courts have played a large role in shaping the sphere of the president's immense power in immigration policy by taking a hands-off approach.
    - In the Chinese Exclusion cases, the courts affirmed congressional power to make immigration laws and presidential power to enforce those laws. Cox and Rodriguez contend that the courts were enforcing then-ordinary principles of constitutional and administrative law. They believe that until *Trump v. Hawaii*, the Supreme Court had never authorized the government to engage in discrimination on the basis of national origin, race, sex, etc., during a time when that type of discrimination would not be permitted outside the immigration context.
  - *Trump v. Hawaii*<sup>14</sup>
    - In 2017, Trump issued a series of executive orders suspending for periods of time entries from certain countries. Executive Order 13,769 (EO-1) suspended entry for 90 days nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. A Washington district enjoined EO-1 and the Ninth Circuit affirmed. Trump then issued Executive Order 13,780 (EO-2) suspending entry for nationals from the same countries except Iraq. Two district courts enjoined EO-2, and circuit courts affirmed. The Supreme Court stayed the injunctions only with respect to nationals without a bona fide relationship with the U.S. Trump then issued Proclamation No. 9,645, restricting entries from Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen. The stated purpose was to motivate those nations to improve vetting practices to assess security threats. Hawaii and other parties filed suit alleging violations of the Immigration Nationality Act (INA) and the Establishment Clause. The Hawaii district court issued an injunction. The Ninth Circuit

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<sup>14</sup> 138 S. Ct. 2392 (2018), [https://www.supremecourt.gov/opinions/17pdf/17-965\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf).

- stayed the injunction with respect of nationals with a bona fide relationship with the U.S.
- The Supreme Court reversed. The Court found that INA § 1182(f) gives deference to the president to exclude foreign nationals based on his determination that their entry would be detrimental to U.S. national security, and here, the administration conducted a multi-agency review to make the determination. It also found that while § 1152(a)(1)(A) prohibits discrimination of visa issuance on the basis of nationality, the Proclamation concerns admissibility, not visa issuance, and does not apply. As to the Establishment Clause claim, the Court applied a rational basis review and found the administration provided “facially legitimate and bona fide” reasons for its action.
  - Department of Homeland Security v. Thuraissigiam<sup>15</sup>
    - Vijayakumar Thuraissigiam from Sri Lanka entered the U.S. in 2017 without documentation and was detained within the U.S. for expedited removal. He claimed a fear of returning to his home country because he had been abducted and beaten in the past. The asylum officer determined that he lacked a “credible” fear of persecution as defined under 8 U.S.C. §1225(b)(1)(B)(v) and signed the removal order. An immigration judge affirmed on *de novo* review. 8 U.S.C. § 1252(e) limits habeas review for expedited removals to: (a) whether petitioner is an alien, (b) whether petitioner was ordered removed, and (b) whether petitioner can provide he was lawfully admitted as a permanent resident, refugee, or asylee. It does not allow substantive reviews. Thuraissigiam filed a habeas petition, asserting a fear of persecution based on his ethnicity and political views. The district court dismissed. The Ninth Circuit reversed, finding that as applied here, 8 U.S.C. § 1252(e) violates the Suspension Clause and the Due Process Clause.
    - The Supreme Court reversed and remanded. Alito, writing for the majority, found that, as applied here, 8 U.S.C. § 1252(e) does not violate the Suspension Clause because habeas was historically a means to seek release from unlawful detention. Here, Thuraissigiam sought to obtain an additional opportunity for asylum. Alito also found that Due Process does not protect him because even though he was apprehended within the U.S. and not at the border, he had not “effected an entry” and thus has only the due process rights afforded noncitizens seeking entry. In Justice Sotomayor’s dissent, she argued that habeas has long protected immigrants’ rights to challenge unlawful executive actions. She also criticized the majority opinion’s line drawing of due process

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<sup>15</sup> 140 S. Ct. 1959 (2020), [https://www.supremecourt.gov/opinions/19pdf/19-161\\_g314.pdf](https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf).

protections, noting that the Constitution guarantees due process to all “persons.”

- Executive powers over immigration
  - Immigration and Nationality Act (INA) §212(f) suspension power
    - Authorizes the president to suspend entry of all aliens if he deems their entry would be detrimental to the interests of the U.S. Grants broad power and discretion to impose suspensions and restrictions on entry/
    - On the basis of this authority, Trump issued travel bans, the subject of *Trump v. Hawaii*, and the bans related to COVID-19 pandemic.
  - INA § 212(d)(5) parole power
    - Permits the Attorney General to “parole” any noncitizen into the U.S. for urgent humanitarian reasons or significant public benefit.
    - Since Eisenhower, the parole power has been used to admit refugees into the country.
  - CDC authority to exclude during the pandemic
    - Public Health Service Act § 362 (42 U.S.C. § 265)
      - The Surgeon General is authorized to prohibit entry to any person from countries where he determines that a communicable disease exists and the introduction of this person poses a serious danger of introducing the disease into the U.S.
    - The law has been invoked to restrict entry during the pandemic. It has also been invoked to ban asylees from Mexico. In March 2020, the CDC issued an order banning entry to the U.S. by land from Canada or Mexico of anyone without valid travel documents. The order applies to persons “who would otherwise be introduced into a congregate setting in a land POE or Border Patrol station at or near the United States border with Canada or Mexico” with exceptions for U.S. citizens, permanent residents, and their families; foreign nationals with valid travel documents; and foreign nationals from countries in the visa waiver program.<sup>16</sup>

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<sup>16</sup> CDC Order Under Sections 362 & 365 Of The Public Health Service Act (42 U.S.C. 265, 268): Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists (March 20, 2020), [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).