

Excerpts from *BANNED: Immigration Enforcement in the Time of Trump*

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Following are excerpts from the book *"BANNED: Immigration Enforcement in the Time of Trump"* by [Professor Shoba Sivaprasad Wadhia](#), to be published September 2019 by NYU Press.

The Executive Branch has broad authority to determine how U.S. immigration laws are administered. However, no administration can make policy that violates the U.S. Constitution, immigration statute, or existing regulations. Following are some of the major changes the Trump administration has implemented in its first two years, the ways in which the judiciary has served as a check and balance; and what a more rational set of policies and laws might look like.

Banning Muslims

"Muslim Ban" refers to three separate policy changes made by the president, where most of the nations targeted have populations that are overwhelmingly Muslim. The first was issued as an EO on January 27, 2017, banning entry into the U.S. of nationals from Iran, Iraq, Libya, Sudan, Somalia, Yemen, and Syria, and suspending all refugee admissions regardless of country. Effective immediately, and implemented with no guidance or training, the ban created chaos at our nation's gateways. Attorneys dispatched to airports to help individuals who had valid visas for entry but were being turned away. After one week, a federal court judge from Seattle issued a nationwide injunction blocking the most controversial sections of the ban.

Eventually this ban was rescinded, but two more versions were tested out by the Trump administration. Courts blocked parts of the bans for a time, but the Supreme Court allowed Muslim Ban 3.0 to take effect. This version of the Muslim Ban did not include a bar to refugees.

As of this writing all immigrants and certain nonimmigrants from Iran, Libya, North Korea, Syria, Somalia, and Yemen, as well as certain visitors from Venezuela, are blocked from entering the United States, regardless of whether they are eligible for a visa due to a qualifying relationship with a family member or employer. The final version of the Muslim ban includes the possibility to apply for a waiver that would allow entry, but documentation from affected individuals, attorneys, and judges raises questions about the degree to which this discretion is being used.

Everyone is a Priority

Change in Policy Impacts Long-Settled Immigrants

Congress directed the Secretary of Homeland Security to set priorities for immigration enforcement. Historically, when individuals were labeled "low priority," they were granted a form of prosecutorial discretion. For example, the Department of Homeland Security (DHS) may issue an order of supervision (OSUP) to a person who has been ordered to be removed but is not considered a "priority." The individual is required to report to a local immigration office for "check-in" appointments periodically, as a way to ensure she is complying with the conditions of her "supervision." She may also apply for a work permit. Many individuals with an OSUP have

resided in the United States for ten years or more and have American children or spouses.

On January 25, 2017, President Trump signed an executive order (EO) focused on interior immigration enforcement, making every person without status into an enforcement priority. This is a complete rejection of the very concept of prioritization. This policy replaced a 2014 memo from Secretary Jeh Johnson which provided a very different framework for determining who was a priority for immigration enforcement. The Johnson memo instructed DHS to consider the amount of time spent living in the United States, and “compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative,” when evaluating who should and should not be considered an enforcement priority.

Now, individuals living in the U.S. for years under Orders of Supervision are being abruptly deported, even if they have strong ties and equities here.

Restrictive Immigration Policy Carried Out By Federal and State Actors

Immigration enforcement is a federal responsibility mainly carried out by DHS. CBP and ICE are the two units within DHS responsible for law enforcement at the border and interior of the United States, but the Trump administration has expanded more enforcement functions to USCIS. The administration is also using local and state police as force multipliers, although some departments restrict their roles due to the negative impact on public safety and likelihood of constitutional violations.

Two other federal departments are involved in immigration: the Department of Justice (DOJ) and Department of State (DOS). DOJ houses the court system known as the Executive Office for Immigration Review (EOIR), and Immigration Judges are employees of the DOJ. Under the Trump administration, Immigration Judges are now required to complete at least seven hundred deportation cases per year in order to earn a “satisfactory” job rating. This prioritizes speed over careful deliberation in what are often life or death matters.

State Department consular officers also apply U.S. immigration laws every day, around the world. They enjoy considerable discretion in deciding whether a noncitizen will be granted or refused a visa, and are also responsible for considering waiver requests under the Muslim Ban. Consular officers are not required to provide a reason for why visas are denied, and challenging these decisions in a federal court is difficult at best.

Deporting Dreamers

The Birth of DACA

Deferred Action for Childhood Arrivals (DACA) is a policy announced in 2012 by former president Barack Obama and implemented by the secretary of Homeland Security. DACA is a form of prosecutorial discretion. To qualify for DACA, individuals must have been under the age of 31 as of June 15, 2012, entered the U.S. before the age of 16, and be at least 15 years old to apply.

DACA confers eligibility for a two-year work permit, and protection from deportation (unless the beneficiary commits a crime). DACA has served as a gateway for nearly 800,000 immigrant

youth to continue building their lives in the country they know as home.

During the campaign, Donald Trump indicated that he would end DACA if elected president. Under pressure by conservative state attorneys general (led by Texas' Ken Paxton), he did so on September 5, 2017, via announcement by Attorney General Jeff Sessions. A DACA recipient used her lunch break to listen to Sessions's speech. "Just hearing everything that he said knowing that that was such a lie, such an excuse, such bull ... It was... a pretty defeating, dehumanizing moment," she said.

Since then, thousands of people have lost DACA status or barred from applying. Several court cases have led to injunctions that kept a renewal process in place for those who already had DACA, but the program is not open to new applicants.

Temporary Protected Status

Other long-term residents in United States are vulnerable to immigration enforcement in the time of Trump. In 1990, Congress created Temporary Protected Status (TPS) for nationals of designated countries who live in the United States and are unable to return to their homeland because of a specific event such as a civil war or a natural disaster. Many individuals with TPS have lived in the United States for decades because of ongoing conflicts in their home countries. The Trump administration announced that TPS will end for nationals from El Salvador, Haiti, Honduras, Nicaragua, Nepal, Somalia, Sudan, and Yemen.

Court cases have also been filed to prevent this from happening, citing racial animus, constitutional, and statutory grounds. The combined effect of ending TPS and DACA could leave one million people who previously had legal work permits suddenly vulnerable to deportation.

Deferred Enforced Departure

The Trump administration also announced termination of Deferred Enforced Departure (DED) for Liberians. Again, the choice to end DED for Liberians is striking as this population has lived in the United States for more than two decades.

One court case was filed and on March 28, 2019, the White House issued a Memorandum extending the "wind down" period for DED by 12 months.

Speedy Deportations

Conventional wisdom about the U.S. legal system may be that any person deported has a "day in court" before such a significant decision is made. The reality, however, is that the majority of deportations (formally called "removals") take place outside of the courtroom.

"Regular" removal proceedings are governed by the immigration statute and are triggered when DHS files a Notice to Appear (NTA), or charging document, with the immigration court. While the procedural safeguards are fewer than the criminal justice system, individuals placed in removal proceedings have several rights, including the right to access counsel at their expense, to examine and present evidence, to challenge their removability, and to apply for any type of "relief" within the jurisdiction of an immigration judge.

The policies of “expedited removal,” “administrative removal,” and “reinstatement of a removal order,” created by Congress, permit the government to deport a person without a court hearing and therefore much faster.

On June 24, 2018 President Trump tweeted: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order.” What he does not seem to understand is that, even if a person is placed in a speedy deportation program, the government must still screen and protect those who face persecution or torture in their home countries.

The human consequences of speedy deportations can result in the ejection of people who would otherwise qualify for relief before an immigration judge or present strong equities like family ties, long-term residence, and steady employment in the U.S. Moreover, the government may wrongly classify a person as a candidate for speedy deportation—including U.S. citizens.

Rejecting Refugees

A refugee is a person who seeks admission from outside the United States after being subjected to persecution and being identified as a refugee by an international agency. An asylum seeker is a person who is physically present in the United State at the time he or she requests protection from persecution. Both refugees outside the United States and asylum seekers inside the United States must satisfy the definition of “refugee.”

Definition of a Refugee

Congress wrote the Refugee Act in 1980, which served as implementing legislation for international treaties. Under the statute, the number and nature of refugee admissions to the U.S. is to be determined by the President, in consultation with Congress. Annual caps can vary dramatically from year to year due to the president’s discretion.

The Immigration and Nationality Act defines “refugee” as: “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

Refugees are screened and interviewed by multiple agencies over a period of eighteen to twenty-four months before arriving in the United States. These security checks make refugees among the most heavily screened populations entering the United States.

Although the President did not include a bar to refugees in his final Muslim Ban, he set the number of refugees to be resettled in the U.S. for Fiscal Year 2019 at a record low of 30,000. This comes at a time when the number of people in need of protection from violence and persecution across the world is at an all-time high.

Asylum Protection

Asylum seekers must also meet the statutory definition of a refugee. Asylum seekers may apply for protection “defensively,” before an immigration judge, or “affirmatively,” before an asylum officer, depending on the posture they are in.

Asylum seekers must apply for protection within one year of arrival to the United States. They are ineligible if they have been convicted of serious crimes, committed serious criminal acts outside of the U.S., or engaged in terrorist-related activity. Many of these restrictions were included in legislation and passed by Congress in 1996, 2001, and 2005. Even when a person has a credible claim for asylum, gaining protection is a challenge given the legal standard, statutory restrictions, and reality that many navigate the system without legal representation.

Those barred from asylum but still fearing persecution or torture may be eligible for other, lesser forms of relief such as “withholding of removal” and protection under the United Nations Convention against Torture (CAT). The likelihood of succeeding in these cases is very low. Only 7% of withholding of removal claims and <2% of requests for CAT relief were granted in FY16.

Asylum in the Time of Trump

Most of the asylum rules have been in place since 1996. What has magnified in the time of Trump is the degree to which the administration is further restricting access to asylum through its powers of decision-making and discretion.

In May 2018, attorney general Jeff Sessions announced a “zero tolerance” policy for those crossing the borders without immigration documents. Said Sessions, “If you cross this border unlawfully, then we will prosecute you. It’s that simple.” This policy extended to asylum seekers. A policy of mandatory prosecution is contrary to the rule of law and creates a misuse of resources in a universe of limited capacity.

Related to the “zero tolerance” policy was a new practice by the Trump administration to separate parents and their children at the border. As with the policy choice by Sessions to refer irregular entrants for prosecution, the administration’s decision to separate parents and children is a policy choice. There is no statute, regulation, or case law that requires family separation.

Due in large part to the public outcry against these separations by a range of voices like the American Academy of Pediatrics, former first ladies, former U.S. attorneys from Republican and Democratic administrations, and celebrities, President Trump signed an EO on June 20, 2018 proposing to detain entire families, instead of separating them and detaining only the parents. Lawsuits lead to a nationwide injunction requiring reunification of children separated from their parents. However, this process was complicated by many factors, including the fact that many parents had already been deported without their children.

Rolling Back Asylum Standards

Attorney General Sessions also used his certification authority to roll back BIA case law, as in

the *Matter of A-B-*, regarding asylum eligibility for certain victims of domestic violence. In his decision, the Attorney General Sessions criticized the awarding of asylum based on victimization of what he referred to as “private violence.”

Sessions’ argument completely ignores a standard for asylum that protects those who are persecuted by groups or individuals that the government is unwilling or unable to control. In asylum cases involving domestic violence, the perpetrator involves a private actor such as a spouse or family member. The key point is whether the victim is unable to obtain protection from the state. Sessions’ decision in *Matter of A-B-* does not completely foreclose an asylum seeker from making a claim based on domestic or gang violence, but it certainly makes it more difficult.

Reform: A Way Forward

Some of the proposals below can be executed by the president or an agency in the executive branch--potentially under a different administration. Others require an act of Congress.

Enforcement Priorities and Prosecutorial Discretion

The Department of Homeland Security (DHS) must narrow its enforcement priorities and recommit to the use of prosecutorial discretion. See my first book, *Beyond Deportation*, for a prescription for a sound policy on prosecutorial discretion.

DHS must limit the locations where immigration enforcement takes place, reaffirm the “Sensitive Locations” memo, and expand the guidance to include courthouses.

DHS must limit enforcement actions in workplaces, inside or around homes, and on the street, absent exigent circumstances.

DHS must reinstate policies from legacy INS and DHS that allowed for prosecutorial discretion to be exercised more meaningfully and more consistently, such as Deferred Action for Childhood Arrivals.

Congressional Reforms and Discretion

Congress should expand flexibility for determining whether immigrants qualify for waivers or relief from removal. Congress should make more people with deep family and other ties to the United States eligible for “cancellation of removal,” and eliminate the absolute bars to relief.

Congress should make the immigration court system a completely independent judiciary.

Exclusion and Discretion

The White House must terminate Muslim Ban 3.0. Congress should also modify the language in INA § 212(f), the suspension clause, to limit the scope and duration for which the president can suspend the entry of noncitizens.

Legalization for Long-Term Residents

Congress must provide a legislative solution for long-term residents by creating a legal channel for individuals who have lived in the United States for at least a decade. Legal channels should be open for people with prior removals and removal orders if they are otherwise eligible.

Congress must provide a permanent immigration status for beneficiaries of DACA, TPS, and DED.

Limit Speedy Deportations

Congress should revise the statute to limit speedy deportation programs or, in the alternative, create similar safeguards and options for relief similar to those placed in regular proceedings. DHS should also consider other equities, such as age, health factors, military service, family ties in the United States, and whether a person is a victim of domestic violence, sexual assault, or other crime when deciding if speedy deportation is appropriate.

Refugees, Asylum Seekers, and Discretion

The president must increase the number of refugees resettled in the United States.

The Department of Justice must stop prosecuting asylum seekers who enter the United States irregularly. DHS must stop detaining individual asylum seekers or families seeking protection.

Congress should codify a standard for social group claims and recognize gender as a basis for asylum.

For More, Read [BANNED: Immigration Enforcement in the Time of Trump](#)

This brief outline of immigration policy changes in the time of Trump was taken from the forthcoming book by Professor Shoba Sivaprasad Wadhia: *BANNED: Immigration Enforcement in the Time of Trump*, published by NYU Press in September 2019.

Read the entire book for the author's own legal analysis and real-life experiences, as well as perspectives from the former government officials, lawyers, advocates, and affected individuals she interviewed. Professor Wadhia closes her book with a message that will resonate with many living through the Time of Trump:

I am grateful to be raising a family of my own. I pause often to lock the eyes of my children with mine and take in my fortune. I can only imagine the wounds that have grown in the hearts of parents forced to flee their homes, children separated from a mom or dad (or both) without explanation, and families broken apart or vulnerable to the same after living in the U.S. for decades. The image is heartbreaking; and the justice, splintered but not hopeless. Moving forward means believing that the rule of law matters and that moral arcs indeed bend toward justice -- [Shoba Sivaprasad Wadhia](#), author of "[BANNED: Immigration Enforcement in the Time of Trump](#)," and "[Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases](#)" (NYU Press, 2015).