



PROSECUTORIAL DISCRETION IN CONTEXT

HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM

By Hiroshi Motomura

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ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

ABOUT THE AUTHOR

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ABOUT THE IMMIGRATION POLICY CENTER

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Introduction

After the failure of the Senate to pass a comprehensive immigration reform bill in 2007, Secretary of Homeland Security Michael Chertoff declared that it would be necessary to enforce existing law fully. His successor, Janet Napolitano, has frequently emphasized enforcement, saying that federal immigration authorities would deport any unauthorized migrant they detected. But in the last two years, those attitudes in the executive branch have gradually been replaced by a recognition that discretion holds an important place in immigration enforcement.

This is an important focus, but it represents an incomplete picture of discretion, which takes many forms throughout the process of immigration enforcement. Understanding the distinctions among them is important not only in individual cases, but also in how policymakers write regulations and draft laws. Knowing how the enforcement system anticipates and incorporates discretion is key to understanding how our immigration laws work.

There are many points in the entire system for the enforcement of federal immigration law when the government can exercise discretion. Indeed, every removal of a noncitizen from the United States reflects a series of complex choices, all of which reflect discretion. To understand discretion fully, we need to examine the entire range of opportunities to exercise discretion in immigration enforcement and the cast of decision makers who make discretionary decisions. These decision makers include an array of federal actors, such as members of Congress who enact laws, Department of Homeland Security (DHS) officers who make arrests, Immigration and Customs Enforcement (ICE) trial attorneys who represent the government in removal proceedings, and immigration judges who preside over those proceedings. These decision makers also include state and local law-enforcement personnel, who have become increasingly involved in the enforcement of federal immigration law.

In understanding enforcement discretion, we first need to distinguish between what we might call “micro” and “macro” discretion. *Micro-level* discretion involves decisions to proceed—or not to proceed—against identified individuals. Micro-level discretion is the focus of the recent “Morton memos,” which announced factors to guide various enforcement decisions within ICE—such as issuing or canceling a Notice to Appear, or agreeing to the administrative closure of a removal proceeding. In contrast, *macro-level* discretion is what government agencies and officials exercise when they make systemic choices to set various enforcement priorities, and to commit resources accordingly. For example, DHS decisions responding to terrorism-related concerns after the September 11 attacks emphasized national security, especially with regard to certain nationality groups. The Obama administration has continued prior administrations’ emphasis on border enforcement and has reinvigorated efforts to prioritize the removal of noncitizens with criminal convictions.

In addition to the distinction between micro- and macro-discretion, we also should recognize that the *time dimension* plays a crucial role in the exercise of discretion. Figure 1 illustrates how discretionary decisions are made at various points in time, progressing in the chart from left to right. The figure draws on the stages of enforcement discretion in criminal law, and applies those stages to non-criminal immigration law enforcement. (Though there are immigration-related crimes, the “immigration law” line in this figure refers to immigration removal proceedings, which are civil, not criminal, proceedings.)

FIGURE 1. Stages of Enforcement Discretion

	Legislation	Arrest	Prosecution	Adjudication	Outcome
Criminal Law					
Immigration Law					

Time 

Figure 1 depicts how the imposition of penalties for violations of criminal law or immigration law starts with the decision to legislate. In criminal law, legislatures enact laws that define criminal conduct and establish penalties for violators. In immigration law, Congress passes federal laws that define violations and provide for removal or some other sort of penalty. Next, a government officer must decide whether to arrest or otherwise expose an individual to the penalties authorized by legislation. The third stage is the decision whether to prosecute the individual, or instead to seek some alternative disposition or drop the matter entirely. Fourth, decision makers must adjudicate the prosecuted cases, determining whether a violation has occurred and, if so, what penalty to impose, if any. The fifth stage is the actual outcome. A sentence after a guilty verdict in a criminal case may be carried out, or it might be commuted. A noncitizen who is issued a civil removal order may or may not actually leave the United States.

The distinction between macro- and micro-discretion is closely connected to the dimension of time. The early stages of discretion tend to involve macro-level, systemic discretion. The later stages tend to involve the sorts of individualized discretion to which the “prosecutorial discretion” label is usually applied. This connection between the time dimension and the macro/micro dimension becomes clear from a closer look at the five stages of immigration enforcement discretion.

Legislation

The first stage of discretion involves the enactment of legislation. Legislation is not what is normally called prosecutorial discretion, but it clearly is a type of discretion and the essential first step in any chain of events that results in a noncitizen’s removal from the United States. This is macro-level or systemic discretion that speaks in general terms without operating on specific named individuals. Over time, Congress has enacted numerous provisions of the Immigration and Nationality Act (INA) that reflect discretionary choices about admission to the United States. These provisions set forth who and how many may be admitted, who may not be admitted, as well as the conditions imposed on those admitted. The discretionary choices made in the exercise of legislative authority result in the creation of the immigration system that determines who is lawfully or unlawfully present in the United States. Other INA provisions reflect discretionary choices by Congress to establish general eligibility rules for the subsequent exercise of more individualized discretion, such as waivers and cancellation of removal.

The basic set of laws creating the immigration system in the U.S. are federal legislative choices, but the role of state and local legislation has grown in recent years. Starting in the 1970s, but with more intensity after 2000, numerous states and localities passed laws to limit unauthorized migrants' access to education, jobs, and housing. States have also passed laws that enforce federal immigration laws more directly. For example, laws that restrict eligibility for drivers' licenses have greatly expanded the potential number of non-immigration-related stops and arrests. In turn, state and local police have more chances to initiate a check of federal immigration status of any unauthorized migrant who drives, and then to convey information about potential immigration law violators to federal immigration authorities. More recently, some states and localities have asserted a role in directly enforcing federal immigration law. Prominent in this regard are state laws like Arizona's SB 1070, enacted in April 2010. If SB 1070 overcomes serious constitutional challenges, it would require state and local police to verify federal immigration status of anyone they lawfully stop, detain, or arrest, if they have reasonable suspicion that the individual is an unauthorized migrant. Similar laws have been enacted—and are currently being challenged—in Alabama, Georgia, South Carolina, and Utah.

Arrests and Stops

The second stage of enforcement discretion is a decision by federal immigration agents (generally Border Patrol agents or ICE agents), or by a local law-enforcement officer, to arrest or stop an individual. There are millions of immigrants who could be subject to enforcement action by federal immigration agents, but which of these immigrants will law-enforcement officers actually target? The answer reflects the exercise of discretion in various forms. Some of this arrest-and-stop discretion consists of macro-level, systemic choices. The memo issued by Doris Meissner in 2000, when she served as Immigration and Naturalization Service (INS) Commissioner in the Clinton administration, acknowledged that such systemic choices were a form of discretion. Border or interior enforcement may be funded at varying levels of intensity, which helps to determine the probability that any one individual will be arrested. Other systemic choices are narrower in scope, such as a decision to raid worksites in a particular industry or location. Discretion to arrest or stop is sometimes more targeted and individualized, and can therefore be considered more micro-level.

Traditionally, stop-and-arrest discretion has been a matter of decision-making by federal immigration agencies and officers. Recently, however, state and local exercise of this discretion has grown in importance for several reasons. One is the express delegation of some aspects of immigration enforcement to state and local police through the 287(g) program. Local law-enforcement agencies that participate in the 287(g) program are trained and deputized to enforce federal immigration laws, under the supervision of ICE agents. More generally, ICE relies increasingly on state and local police to identify noncitizens for potential immigration enforcement. This can be done through a partnership with ICE such as a 287(g) agreement, or local police can provide information to ICE. As an example of the latter category, the Secure Communities program is set in motion when state and local police make arrests. Under Secure Communities, the fingerprints of those arrested are provided to ICE, which uses that information for federal immigration-enforcement purposes. These state and local arrests, even if not immigration-related, expose arrestees to federal immigration enforcement. Thus the decision by local police to make or not make an arrest has become a critical opportunity for the exercise of discretion. For example, at least one study has shown that local law-enforcement agents, knowing

that information about arrestees will be provided to ICE, may engage in profiling or pretextual arrests in order to bring certain people that they believe to be immigration law violators to the attention of federal immigration authorities.¹

Prosecution

The third stage of immigration enforcement discretion is the decision to take enforcement action against a particular, identified noncitizen who has come to the attention of federal immigration officials. Such discretionary action might be to initiate civil removal proceedings in immigration court before an immigration judge. Or it might be to seek removal of the noncitizen through reinstatement of a prior removal order, or by invoking expedited removal. Or discretion might be exercised to press criminal charges.

The term “prosecutorial discretion,” as it is used today, almost always refers to a decision in this decision-making stage. Specific examples include deciding not to issue a Notice to Appear, agreeing to the suspension or termination of removal proceedings, or acquiescing in an individual’s application for cancellation of removal or some other form of discretionary relief. The factors and circumstances that are relevant to this stage of discretion are the focus of the various Morton memos and similar federal government documents. The Morton memo of June 17, 2011, for example, directs ICE officers, agents, and attorneys to consider, among other factors, the noncitizen’s length of presence in the United States (especially presence in lawful status), pursuit of education in the United States, and military service. The same memo announced that it is generally preferable to exercise discretion as early in the case or proceeding as possible.

Adjudication

The fourth stage of enforcement discretion is adjudication. This is the stage when an immigration judge determines whether the noncitizen will be subject to deportation or allowed to remain in the United States. At this stage, an immigration judge might exercise discretion to grant some form of relief from removal, such as cancellation of removal or asylum. DHS also plays a role at this stage. For example, DHS might acquiesce in a grant of relief by an immigration judge in immigration court, or decide not to appeal a grant of relief or other outcome favorable to the noncitizen respondent in a removal proceeding.

Outcome

Fifth and finally, enforcement discretion is exercised at what I call the outcome stage. A removal order issued at the adjudication stage might or might not result in the noncitizen’s actual removal from the United States. DHS might track down an individual noncitizen who has failed to appear for removal after being ordered to do so, or it may seek to avoid that uncertainty by detaining a noncitizen in order to assure his or her availability for removal.

Even if a noncitizen is in federal custody, other types of discretion might allow him or her to avoid physical removal from the United States. For example, discretionary choices might mean delaying removal, perhaps indefinitely, for noncitizens who cannot, without U.S. government intervention, obtain travel documents that are necessary for their transportation to another country.

The Stages of Enforcement Discretion

To summarize, immigration enforcement discretion can be macro-level or micro-level discretion. It can be exercised at any of five different stages of decision-making from legislation to the outcome in an individual case. In turn, any assessment of what is typically called prosecutorial discretion must begin by putting prosecutorial discretion into broader context, especially by recognizing that this term typically refers to just one of the many types of immigration enforcement discretion.

Identifying the five stages of discretion raises two key questions, both central to current policy debates:

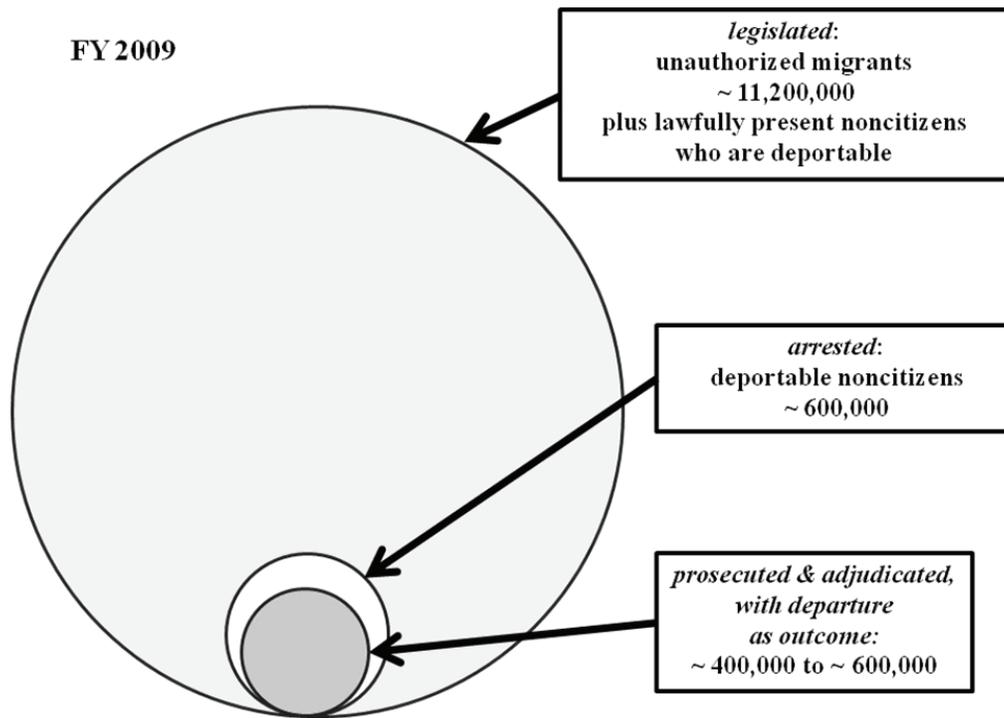
1. What stages of discretion matter?
2. Who exercises that discretion?

To answer the first question, we first need to compare the discretion being exercised at various stages. What, in other words, are the chances any given unauthorized migrant:

1. Will be arrested?; or
2. Once arrested, will be put into removal proceedings?; or
3. Once put into proceedings, will be ordered to leave the United States?; or
4. Once ordered to leave the United States, ultimately will be forced to do so?

It is difficult to find reliable supporting data for exact statistical comparisons of this sort, but rough estimates suggest that *the discretion to arrest* is the discretion that matters. Figure 2 is a rough depiction of the numbers of persons who are removable, as compared to the number arrested by federal immigration authorities and then prosecuted and ultimately forced to leave the United States. The analysis must start with the number of unauthorized migrants in the United States—an estimated 11.2 million as of March 2010. In addition, a significant number of lawful immigrants may be deportable for various reasons, such as on criminal convictions. In Fiscal Year (FY) 2009, Border Patrol and ICE administrative arrests totaled 613,003, or less than six percent of the unauthorized population. In other words, of the millions of noncitizens against whom the federal government could take enforcement action, a relatively small number are actually arrested and identified for possible deportation. But of those arrested in FY 2009, a relatively high percentage—between 400,000 and 600,000 noncitizens, or roughly 65 to 95 percent—were prosecuted and adjudicated and ultimately forced to leave the United States.²

FIGURE 2. The Discretion That Matters



The second question in assessing the discretion exercised at various stages of immigration enforcement is *who* exercises the arrest discretion that matters. Historically, the federal government has been responsible for discretion at nearly every stage from legislation through outcome. However, in recent years, state and local police are playing an increasingly important role with respect to exercising discretion. States are enacting laws that directly address immigration. Moreover, the Secure Communities program operates to allow state and local law enforcement to exercise discretion in deciding to make arrests that will bring noncitizens into contact with federal immigration enforcement.

Conclusion

Discretion is much broader than the decision by DHS to prosecute. If we focus only on the usual understanding of prosecutorial discretion, we will miss seeing that discretion is exercised at many other stages, some of which are more significant. In fact, what is normally called prosecutorial discretion, exercised after a particular person has come to the attention of federal immigration authorities, matters much less than whether he or she comes to the attention of those authorities in the first place.

Because the discretion to arrest is the discretion that matters, policymakers need to ensure fairness not only in prosecutorial discretion but also in the making of arrests and stops that expose noncitizens to federal immigration enforcement. Better guidelines and limits on arrest authority

are an important step toward achieving such fairness. More fundamentally, fairness demands that policymakers think carefully about who is allowed to exercise discretion at all. When the federal government allows stop-or-arrest discretion to be exercised by state and local officials in ways that are beyond effective federal control, the troubling result is a serious crisis of confidence in the fairness of the overall system of immigration law enforcement.

ENDNOTES

¹ Trevor Gardner II & Aarti Kohli, "[The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program](#)," *Policy Brief*, Warren Institute, Berkley Law (2009).

² Hiroshi Motomura, "[The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line](#)," *UCLA Law Review* 58 (2011): 1828–41. I use figures from FY 2009 in order to assess the context of discretionary enforcement in which the Secure Communities initiative took effect.