Shoba Sivaprasad Wadhia, *Banned: Immigration Enforcement in the Time of Trump.* New York University Press: 2019

My Notes:

- Importance of *discretion* as a humanitarian tool: this is the main difference now.
- Prosecutorial discretion: who gets rounded up, detained, deported?
- Deferred action: for childhood arrivals, medical needs, hardship

Chapter One: Immigration Enforcement and Discretion: A Primer

- USCIS as enforcement arm: sometimes instructed by Trump admin to issue NTAs.
- INA: enacted in 1952
    - Amended 1965 to eliminate national origin & nationality quotas
- DHS: created after Sept. 11, 2001 for enforcement
- ERO: arm of ICE = Enforcement and Removal Operations
- DED: Deferred Enforced Departure = prosecutorial discretion policy

Chapter Two: Banning Muslims (7-28)

- **Muslim Ban 1.0:** EO, 01/27/2017 = immediate; led to airport chaos
    - Iran, Iraq, Libya, Sudan, Somalia, Yemen, Syria: foreign nationals banned for 90 days
    - Syria: admission of refugees suspended indefinitely
    - General refugee admission suspended for 120 days
    - Confusion re. LPRs & others

- **Muslim Ban 2.0:** EO, 03/06/2017 = delay of 10 days before implementation
    - Iran, Libya, Sudan, Somalia, Yemen, Syria: foreign nationals banned 90 days
    - Refugee admissions halted for 120 days
    - Spelled out exemptions better: LPRs, parolees into US, travel permits, dual nationals traveling on other passport, diplomatic visas, refugee relief
    - Waiver re. undue hardship (vaguely defined)
    - "In allowing part of Muslim Ban 2.0 to go into effect in June 2017, the Supreme Court determined that individuals from the six countries and all refugees could be blocked from entering the United States if they lacked a 'bona fide relationship' to a person or organization. The bona fide relationship standard was a creation of the Supreme Court." (13)
    - Gov't defined "bona fide relationship," excluding grandparents. (Hawaii District Court rejected this narrow definition: "Indeed, grandparents are the epitome of close family members." 15)

- **Muslim Ban 3.0:** Presidential proclamation, 09/24/2017

- Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, Yemen: indefinite ban (Chad later dropped)
- Exemptions spelled out, but no guidance on who will adjudicate/when/how
- Oct. 2017: Hawaii & MD blocked portions of it
- Dec. 4, 2017: SCOTUS allowed full version to take effect
  - "Procedurally, reinstating the ban before the appellate courts heard oral arguments on appeal about the legality of the ban complicated a process that ordinarily might start at a lower court, be raised to a higher court, and then only considered by the Supreme Court." (16)
- April 25, 2018: SCOTUS heard oral arguments
  - "The nondiscrimination clause prohibits discrimination on the basis of nationality and other facts in the issuance of immigrant visas. The nondiscrimination clause was passed by Congress in 1965, the same year it abolished national origin quotas from the INA. By contrast, the ban excludes millions of immigrants for no other reason than nationality." (20)
- June 26, 2018: SCOTUS reversed & remanded *Trump v. Hawaii*.

Chapter Three: Everyone is a Priority

- "Historically, when individuals were labeled 'low priority' for immigration enforcement, they were granted a form of prosecutorial discretion." (30)
- "Previous guidelines . . . were more tailored by specifying which categories of crimes are of a higher or lower priority." (31)
- "For those with a removal order, prosecutorial discretion may be exercised invisibly, or more concretely, by a DHS decision to grant deferred action, stays of removal, or orders of supervision." (33)
- "An order of supervision (OSUP) is one form of prosecutorial discretion in immigration law and is processed after the government orders removal. DHS may issue an OSUP after a person has been ordered to be removed and, when granted for discretionary purposes, might require the grantee to report to a local immigration office for 'check-in' appointments periodically. Many individuals with an OSUP have resided in the United States for ten years or more." (34)
- "In a universe of limited resources, the government should not target people with strong ties to the United States." (34)
- "Notably, previous guidance not only highlighted the multiple stages of enforcement at which prosecutorial discretion could be exercised but also cabined enforcement 'priorities' to a list more focused on national security threats and criminal convictions." (35)
- 2014: Jeh Johnson memo: criteria such as "humanitarian factors, length of time since conviction, length of time in US, family & community ties in the US, and status as a victim" (35)
- "In sharp contrast, the Trump administration issued guidance that lists those with removal orders as *actual priorities* without mentioning that discretion can be exercised and without any list of equities officers can consider." (35)
- Feb. 2017: DHS rescinded previous guidelines and priorities

    - "…the current guidance by DHS under the Trump administration does not articulate positive equities or factors that may be considered in making enforcement decisions." (39)
- "Another memo rescinded by ICE is a 2016 policy to release pregnant detainees. . . . The current ICE position . . . is that pregnant women may be detained." (41)
- "All of those present in violation of the immigration laws may be subject to immigration arrest, detention, and, if found removable by final order, removal from the United States." (DHS fact sheet, q. 41)
    - "This language signifies a shift from previous administrations by making any person a 'priority' without regard to equities such as long-term residence, employment, and service in the military." (41)
- "Prosecutorial discretion has long been exercised toward immigrants . . . [who are] primary caregivers to U.S. citizen children." (42)
- ". . . uptick in collateral arrests and detentions in the time of Trump" (44)
- "Despite a continuing sensitive locations policy, stories of those affected by immigration enforcement suggest DHS is ignoring its own policy." (45)
- "The increased use of sweeps or raids in the workplace, streets, and homes is also significant to the location of immigration enforcement." (46)
- June 28, 2018: NTA memo by USCIS
    - "The memo gives USCIS a much greater enforcement role. In doing so, the guidance blurs the lines between the various functions within DHS. The updated NTA memo will increase the number of cases already pending at the court and create additional backlogs. Importantly, the memo is not required by law and is a choice being exercised by the agency." (51)
- "Prosecutorial discretion is in many ways inevitable because the government simply lacks the resources to carry out enforcement against every person who may be removable from the United States." (53)
- "Beyond prosecutorial discretion is the discretion used by executive branch agencies to sustain, change, or terminate existing immigration policies within their domain." (54)
- "For certain noncitizens seeking admission as an immigrant but otherwise ineligible because of an immigration violation, DHS has discretion to grant a 'waiver' if they can meet certain requirements." (55)
    - "Extreme hardship" to relative who is USC or LPR
- Unlawful Presence & leniency
    - Present after expiry, or EWI
    - "Individuals who accrue 180 days or more of unlawful presence while in the United States and then seek to reenter are barred from admission for three years. Those who seek admission following one year in unlawful presence are barred from entering the United States for ten years." (56)
    - Legacy INS & previous DHS: "followed a policy where students and exchange students would generally accrue unlawful presence only *after* an immigration judge decides their status." (56)

        - "The choice by USCIS to increase the number of situations where a student or exchange visitor will face the three- or ten-year bars is discretionary and breaks away from more than twenty years of a contrary application of the law." (57)
- DOJ & discretion
    - Oct. 1, 2018: Quotas for IJs
    - "Quotas are concerning because they undermine the adjudicatory role of immigration judges and the time needed to properly consider a case involving an application for relief based on equities." (57)
        - Discretionary waiver of deportation
    - "Another example of discretion within DOJ relates to the power of the attorney general to reverse decisions made by his own immigration judges." (58)
- DOS & discretion:
    - ". . . consular officers use discretion in assessing waiver eligibility." (60)
    - "Consular officers are not required to provide a reason to applicants about why their visas are denied. For those denied a visa, challenging consulate decisions in a federal court is tough. The doctrine of 'consular nonreviewability' refers to the concept that courts have no authority to review decisions by consular officers." (60)

Chapter Four: Deporting Dreamers (62-78)

- DACA = Deferred Action for Childhood Arrivals (August 2012)
    - <31 as of June 15, 2012
    - Came to US <16
    - Continuous residence since June 15, 2007
    - No lawful status as of June 15, 2012
    - In school or have completed high school/GED/armed services
    - No felony, significant misdemeanor, or 3/more other misdemeanors
    - Granted deferred action for 2 years and work permit
- DAPA = Deferred Action for Parents of Americans and LPRs (never operational, but rescinded by Trump admin anyway for show on June 15, 2017—this became legal basis for suggesting canceling DACA.)
- TPS:
    - "Any person convicted of a felony or two or more misdemeanors committed in the United States is ineligible for TPS. A person who receives TPS obtains temporary legal status in the United States and the ability to work and travel outside the United States." (73)
    - TPS scheduled by Trump admin to end for El Salvador, Honduras, Haiti, Nicaragua, Nepal, Somalia, Sudan, Yemen.
    - USCIS will begin issuing NTAs to former holders of TPS
- DED = Deferred Enforced Departure
    - Country-specific policy in use five times since 1990.
    - "Unlike TPS, which originates from the immigration statute and provides a formal benefit, DED stems from presidential powers and provides a tenuous status identical to prosecutorial discretion." (75)

    - Liberians: DED for more than 2 decades—Trump admin is ending this.
- Voluntary departure
    - "'Voluntary departure' is a term in the immigration statute that applies to people who agree to leave the country within a certain time period and on their own expense. When a person fails to leave on time, the voluntary departure turns into an order of deportation and the penalties are significant. Consequently, no person who seeks to remain in the United States or fears return to her or his home country should be advised to take voluntary departure." (76)

Chapter Five: Speedy Deportations (79-97)

- "This chapter . . . examines the extent to which the government has discretion to give individuals who present compelling equities, including eligibility for relief, a more complete court proceeding before an immigration judge." (79)
- "'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, foreign nationals placed in removal proceedings have several rights, including the right to access counsel at their expense, the right to examine and present evidence, the right to challenge removability charged by the [DHS], and the right to apply for any type of relief within the jurisdiction of the immigration judge." (80)
- Speedy removals: "These programs, created by Congress, permit the agency to remove or deport a person from the United States without a court hearing. While each of these programs applies to a different set of individuals, their common feature is a limited set of procedural protections leading to speedy removals."
- **Expedited Removal**
    - "applies to persons who arrive at a port of entry or within one hundred miles of the border (within fourteen days of arrival) and are inadmissible for reasons of misrepresentation or insufficient documents." (83)
    - Advise of charge; provided opportunity to respond.
    - If indicate fear, may have credible fear interview.
    - "Verified lawful permanent residents, refugees, asylees, or U.S. citizens may not be removed pursuant to expedited removal." (83)
    - "**Claimed Status Review**" = if person in removal proceedings says they're a USC
        - Judicial review limited to habeas cases based on status claims

- **Administrative Removal**
    - "applies to noncitizens who are not permanent residents of the United States and have been classified by DHS as convicted of an aggravated felony." (83)
    - Provide with reasonable notice of the charges, right to counsel, right to inspect, examine, rebut evidence, right to service of the record in person or by mail.
    - Notice of Intent to Issue a Final Administrative Removal Order: includes info about counsel, ability to challenge or claim fear of persecution

- "In the absence of a challenge by the noncitizen, or if DHS finds that the noncitizen's rebuttal lacks a genuine issue affecting its findings of removability, the removal order is executed within fourteen days unless the fourteen-day period is waived." (86)
- "DHS must refer individuals to an asylum officer for additional screening if such individuals request to apply for protection under withholding of removal." (86)
- May file petition for review
- "since the timeline for administrative removal is a short one (fourteen days), the likelihood is very high that people are wrongfully removed before a court of law can conclude that a particular crime is not, in fact, an aggravated felony." (87)

- **Reinstatement of Removal**
  - "applies to persons who 'reenter' the United States without authorization after having departed the United States voluntarily or under a previous removal order. The order of removal is 'reinstated' from the date of the person's original departure or removal order." (83)
  - DHS must make these findings:
    - Noncitizen subject to prior order of removal
    - Is same person as the one named in prior order
    - Unlawfully reentered the country
  - Provide written notice & notice that they may contest a reinstatement.
  - "Additionally, individuals who express a fear of persecution upon return must be referred to an asylum officer for additional screening." (84)
  - "Individuals who receive a reinstatement order may challenge its legality in a federal court of appeals through a legal vehicle called a '**petition for review**.' A petition for review must be filed within thirty days after a reinstatement of removal order becomes final." (85)
  - "filing a petition for review does not automatically 'stay' a person's deportation, so DHS can execute a removal order even after a petition is filed." (85)

- **Discretion and Removal:**
  - "DHS has discretion in deciding whether to subject an individual to speedy deportation. Individuals who have equities such as a spouse who is a U.S. citizen, a serious medical disability, or eligibility for formal relief should be given a full court proceeding and the opportunity to apply for relief from removal that they may otherwise be prohibited from seeking." (88)
  - *Arizona v. U.S.*: "Removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all." (88)
  - "While a decision by DHS to refrain from filing an NTA is often viewed as a favorable exercise of prosecutorial discretion, the filing of an NTA is a *positive* act for individuals otherwise subject to administrative, expedited, or reinstatement of removal because it provides them with the opportunity to apply for relief in a full and fair hearing before a neutral trier of fact." (90)

    - "The benefit of an NTA for someone is the opportunity to apply for relief from removal such as adjustment of status based on marriage to a U.S. citizen or a waiver of inadmissibility based on his criminal conviction. When DHS chooses an NTA over a speedy deportation, the individual receives a day in court and the opportunity to seek relief and related waivers from an immigration judge." (90)

- "The human consequences of speedy deportations cannot be underestimated. They can result in the forced expulsion of people who bear strong equities such as tender age, community ties, intellectual promise, and family members who are U.S. citizens. The legal framework that governs speedy deportations does not contain exceptions for individuals who have other equities or even eligibility for a benefit such as adjustment of status through marriage to a U.S. citizen or sponsorship by a U.S. employer." (91)
- "The act of someone leaving the United States after a removal order and then coming back into the United States without admission might be grave enough to make the reinstatement sound reasonable. The challenge is that these same individuals may be otherwise law-abiding but still choose to enter unlawfully to reunite with their family, flee from persecution, escape poverty, or access medical care for a serious condition. Individuals who bear these equities should have the opportunity to present them to an immigration judge—as opposed to a DHS officer—and apply for relief for which they are eligible (based on these equities) before deportation." (92)

- "If there is a significant risk of error under the existing framework, the next question is whether additional procedural safeguards can prevent or minimize this risk. The existing statutory and regulatory framework arguably contains enough process to minimize the risk of error. If adding more procedure does not reduce the risk of erroneous deportation, there may be room to argue that speedy deportation programs should be dissolved altogether." (93)

- Categorical approach & aggravated felons:
    - "an important question is whether DHS, as opposed to a judge, should determine whether a person is an aggravated felon." (95)

- "The examples above illustrate the complex analysis involved in applying expedited removal, reinstatement of removal, and administrative removal, and raise legitimate concerns about sustaining a paradigm in which people can be deported without any process or court proceedings." (95)
- Re. mistaken deportations of USCs: "Scholars have identified the legal and factual complication of citizenship, especially when individuals are claiming derivative citizenship or citizenship by acquisition, or when they do not know they have a claim to citizenship. The possibility of error is higher when this complexity is combined with speed." (95f.)

Chapter Six: Rejecting Refugees (98-115)

- **Refugee Act: 1980** – "served as implementing legislation for international treaties." (99)
    - "Under the statute, the number and nature of admissions is to be determined exclusively through consultation between the president and Congress at the start of each fiscal year." (100)
    - Created Office of Refugee Resettlement

- "As with refugees outside the United States, asylum seekers inside the United States must meet the statutory definition of a refugee." (103)

- "Individuals who pass their **credible fear interview** are served with an NTA and placed into formal removal proceedings once the NTA is filed with the immigration court. In this way, asylum seekers who ordinarily may have been subject to expedited removal are instead placed into regular removal proceedings accompanied with the variety of procedural safeguards described earlier." (105)
- "Persons subject to administrative removal or reinstatement who indicate a fear of persecution or torture in their home country must be given a "**reasonable fear" interview** before an asylum officer. If successful, they are placed in a limited proceeding known as a 'withholding-only' proceeding." (106)

- **Zero Tolerance Policy:** May 2018
    - "A blanket policy of prosecution is troubling to the rule of law and leads to a failure of discretion in a universe of limited resources. It also means that people who are legally eligible to apply for asylum may be prosecuted criminally before having the opportunity to do so." (108)
    - "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." (109)

Chapter Seven: Reform: A Way Forward (116-127)

- "Congress can make several changes to immigration that expand the discretion held by immigration judges and officers. Because of laws enacted by Congress in 1996, immigration judges and officers lack the discretion to consider individual circumstances in a particular case, such as the presence of family in the United States, steady employment ties, community ties, and the conditions of a home country to decide that deportation is unsuitable. Congress should expand their flexibility to decide whether immigrants qualify for waivers or relief from removal." (120)
- "For example, the immigration statute currently allows for an undocumented individual to seek 'cancellation of removal' after meeting requirements that include ten years of continuous physical presence and a showing of 'exceptional and extremely unusual hardship to a qualifying relative. Congress should expand this remedy so that seven years of continuous physical presence and substantial hardship to self can serve as qualifying factors for removal." (120)

- “The Immigration and Nationality Act already provides a number of reasons a person can be denied a visa by a consulate and by extension admission into the United States. Under the current framework, consular offices make decisions every day about whether a person is eligible for a visa and waiver under the immigration statute. Muslim Ban 3.0 is, at best, redundant and, at worst, discriminatory as it excludes people for no other reason than nationality.” (121)

- “Congress should also modify the language in INA § 212(f), the suspension clause, to limit the scope and duration the president can suspend the entry of noncitizens.” (122)

- “Congress recognized the positive element of residence in 1891, when it passed a statute authorizing deportation against those who became public charges within one year of arrival. As described by historian Mae Ngai, ‘Deportation was thus conceived as appropriate only for persons with limited length of stay in the country.’ Congress later extended the statute of limitations from one to five years, still recognizing that after a period of time noncitizens establish ties to the United States that no longer make deportation desirable or suitable.” (125)

- “DHS has the statutory authority in some cases and the prosecutorial discretion in all cases to place a person legally eligible for speedy deportation into a regular removal proceeding instead.” (126)