Immigration Enforcement Under Trump: A Loose Cannon

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The Trump administration’s immigration enforcement policy is a loose cannon, targeting noncitizens who have long been protected under prosecutorial discretion. The President has unleashed a policy that routinely targets anyone who is undocumented, not just “[bad hombres](https://www.youtube.com/watch?v=AneeacsvNwU).”

This post examines the discretion used *after*a person has received a deportation (“removal”) order and how the landscape has changed under the Trump administration.

**What Is Prosecutorial Discretion?**

Prosecutorial discretion has been the [central focus of my research](http://www.beyonddeportation.com/) and [refers](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341) to a choice made by the Department of Homeland Security about the extent to which the laws should be enforced against a person or group of persons. This type of discretion is [customary in immigration law](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf) because there are limited resources and personal circumstances can make deportation inhumane. As Justice Anthony Kennedy wrote in [*Arizona v. United States*](https://www.law.cornell.edu/supct/pdf/11-182.pdf): “A principal feature of the removal system is the broad discretion exercised by immigration officials . . . who must decide whether it makes sense to pursue removal at all.” As American Bar Association President Hilarie Bass [describes](https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/statement_of_hilarie.html) it, “[s]easoned prosecutors know that prosecutorial discretion is an essential part of any humane justice system.”

For those with a removal order, prosecutorial discretion may be exercised invisibly, when the Department of Homeland Security (“DHS”) makes a choice to not enforce immigration laws; or put another way, leaves the noncitizen alone. More concrete forms of discretion sought after a removal order include [deferred action](https://my.uscis.gov/helpcenter/article/what-is-deferred-action), [stays of removal](https://www.ice.gov/sites/default/files/documents/Document/2017/ice_form_i_246.pdf), and [orders of supervision](http://yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/). Sometimes, one or more of these discretionary forms are sought together. Historically, [thousands of people](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758) have been granted protection under one or more of these forms of discretion. Nearly twenty years ago, I worked on my first request for stay of deportation and order of supervision before the former Immigration and Naturalization Service (“INS”). It was a challenging and complex case involving long term residents with many equities and one that shaped and sharpened my view on the importance of discretion.

Deferred action and orders of supervision have also served as a basis for employment. According to [one data set](http://yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/) obtained through the Freedom of Information Act, between 1999 and 2014, 48,692 applications for work authorization were based on an order of supervision and 114,563 were based on deferred action.

The legal validity of using discretion at the post-removal stage is underscored by the Supreme Court’s analysis of section [242(g) of the Immigration and Nationality Act](https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html) (“INA”), which precludes federal court review over the following acts of prosecutorial discretion: “commence proceedings, adjudicate cases, or execute removal orders.” In [*Reno v. AADC*](https://www.law.cornell.edu/supct/pdf/97-1252P.ZO), the Supreme Court explained that the section was “directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.” The Court, in an opinion by the late Justice Antonin Scalia, concluded that “[a]t each stage the Executive has discretion to abandon the endeavor.”

**The Trump Administration’s New Policy**

Today, any person with a removal order remains highly vulnerable to immigration enforcement in the Trump administration. [Guidance from the DHS](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf), issued by now-Chief of Staff John Kelly shortly after President Trump’s inauguration, lists as one of its enforcement priorities individuals who “are subject to a final order of removal but have not complied with their legal obligation to depart the United States.” Further, DHS has repeatedly published [guidance](https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states) with the following language: “All of those 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.” Thomas D. Homan, deputy director of Immigration Customs Enforcement, or “ICE,” a hub within DHS, told the [*New York Times*](https://www.nytimes.com/2018/02/09/nyregion/federal-courts-deportation-ragbir-indonesians-stays-ice.html): “I am increasingly troubled by orders from federal judges halting the deportation of certain groups of individuals, all of which appear to ignore the fact that each alien in question was lawfully ordered removed from the United States after full and fair proceedings, many of which lasted several years or longer, at great taxpayer expense.”

This kind of language and statement is deeply troubling because it signals a policy that singles out post-removal for enforcement without regard to the longstanding use of prosecutorial discretion. A review of guidance documents issued in previous administrations reveals just how common uses of prosecutorial discretion were tied to the post-removal stage. For example, the prosecutorial discretion guidance from former [DHS Secretary Jeh Johnson](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) under President Obama instructed that “DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—from the earliest investigative stage *to enforcing final orders of removal*” (emphasis added).

An even earlier opinion issued by former [INS General Counsel Sam Bernsen](https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf) in 1976 instructed: “In addition to the discretion not to institute deportation proceedings, prosecutorial discretion may be exercised in connection with various other discretionary remedies, such as voluntary departure, and stays of deportation.” Similarly, the previous DHS policy issued by [former ICE head John Morton](https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf) stated that “the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings.”

Notably, previous guidance not only highlighted the multiple stages of enforcement at which prosecutorial discretion could be exercised, but limited its enforcement “priorities” to a list more focused on national security threats and criminal convictions while also describing the equities officers should consider when making a prosecutorial discretion decision. For example, the Johnson memo listed humanitarian factors, length of time since a conviction, length of time in the United States, family and community ties in the United States, and status as a victim as among the factors officers should consider in making a determination. To be clear, the implementation of guidance under previous administrations was not perfect, but the starting point was a policy that understood how prosecutorial discretion works, when it can be exercised, and which circumstances should be considered.

In sharp contrast, the Trump administration has issued guidance that lists those with removal orders as *actual priorities*, without mention of when discretion can be exercised and without any list of equities officers can consider. While existing DHS guidance does suggest that prosecutorial discretion can be exercised on a case by case basis, there are more than a handful of cases to reveal that this discretion has been ignored or even worse, abused.

**The Consequences of the Change**

On the ground, the administration’s hyper-enforcement against those with removal orders has been devastating to [individuals](https://www.nytimes.com/2018/02/09/nyregion/federal-courts-deportation-ragbir-indonesians-stays-ice.html) and [families](https://www.northjersey.com/story/news/2018/02/14/rally-set-mother-three-facing-deportation-bangladesh/323599002/) who were [previously protected](https://www.cnn.com/2018/02/08/us/family-kansas-professor-deportation-cnntv/index.html) from deportation. The enforcement is “hyper” both in *where*people are being targeted (i.e., on the street, during a raid) but also in *who*the government is targeting (i.e., long-term residents, parents, those previously granted prosecutorial discretion). [Ravi Ragbir](https://ravidefense.wordpress.com/about/) is a native of Trinidad and resident of the United States. Ragbir [received](https://www.nytimes.com/2018/01/29/nyregion/judge-released-immigrant-ragbir.html) his lawful permanent residency in 1994 but received a final order of removal in 2006 based on a single nonviolent conviction for wire fraud several years earlier. He was released from immigration custody in 2008 with an order of supervision and became an immigrant rights activist. He is a father, husband, and executive director of the New Sanctuary Coalition of New York City.

For the last decade-plus, Ragbir has lived in the United States under an order of supervision and employment authorization, and had also been granted multiple stays of removal from ICE—the most recent one [was set to expire](https://www.nytimes.com/2018/01/29/nyregion/judge-released-immigrant-ragbir.html) January 19, 2018, eight days before he was abruptly detained. On January 11 and during a routine “check-in” with ICE under an order of supervision, Ragbir was taken into custody in the presence of [his wife](https://www.nytimes.com/2018/01/18/opinion/ravi-ragbir-immigration-ice.html) and attorney. As a result of immense advocacy and litigation, Ragbir was granted a stay of removal and [now awaits a hearing](http://www.latimes.com/nation/nationnow/la-na-immigration-activist-deportation-20180209-story.html) in March.

Alina Das, Ragbir’s attorney, described to me how the rules have changed: “ICE now seems to consider immigrant rights activism as a reason to deny or even revoke discretion for people whose presence in this country was long deemed to be in the public interest.”

Many who are living in the United States under an order of supervision or other discretionary form of protection have built families and made the United States home. Targeting everyone with a removal order is unsuitable as a matter of law and unconscionable when conducted abruptly and without regard to a person’s equities in the United States.

As Judge Katherine B. Forrest [wrote last month](https://www.scribd.com/document/370271251/Ragbir-Order) in her opinion granting Ragbir relief: “It ought not to be—and it has never before been—that those who have lived without incident in this country for years are subjected to treatment we associate with regimes we revile as unjust, regimes where those who have long lived in a country may be taken away without notice from streets, home, and work. And sent away. We are not that country; and woe be the day that we become that country under a fiction that laws allow it.”