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IMMIGRATION ENFORCEMENT AND PROSECUTORIAL DISCRETION GO HAND IN HAND: WILL THE SUPREME COURT UPSET THIS BALANCE?

Posted on December 6, 2022 by Cyrus Mehta

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On Tuesday, November 29th, the Supreme Court heard oral arguments in *US v. Texas*, which involves a challenge to the Biden administration's Immigration and Customs Enforcement (ICE) enforcement priorities. Originally laid out in the 2021 Mayorkas Memo, this list of enforcement priorities would have allowed ICE to focus its efforts on the apprehension and removal of noncitizens who pose a threat to "national security, public safety, and border security". The attorneys general of Texas and Louisiana swiftly challenged these enforcement priorities, arguing that ICE would be allowed to overlook noncitizens for whom detention was required, which would subject the citizens of these states to crime committed by noncitizens who should be in detention, and force the state to spend resources providing education and medical care to noncitizens who should be detained. In previous blogs, we have discussed the procedural history of the case.

The Court first addressed the issue of whether the states have standing to challenge the enforcement priorities. General Elizabeth Prelogar, Solicitor General of the United States asserted that states should not have standing to challenge any federal policy that "imposes even one dollar of indirect harms on their own taxing or spending". The conservate majority was unmoved by this argument, with Justice Alito even suggesting that the government's reasoning demonstrates a "special hostility" to the states' standing.

The arguments then turned to the crux of the case – whether the Biden administration's enforcement priorities contradict two statutory provisions - 8

U.S.C. § 1226(c) and 8 U.S.C. § 1231(a). 8 U.S.C. § 1231(a) pertains to the detention and removal of those who have been ordered removed. § 1226(c) lays out a list of noncitizens who "shall" be taken into custody by the Attorney General, including those who have committed certain criminal offenses.

The "shall" language of § 1226(c) was a point of particular contention for the Court. Justice Kavanaugh, in particular, argued that this language is mandatory, requiring the Court to take into custody noncitizens who fall within one of the categories enumerated in the statutory provision. Chief Justice Roberts, too, seemed to agree that "shall means shall", leaving little room for the executive to exercise discretion in immigration enforcement. This interpretation, however, is entirely out of step with the usual interpretation of the statute and could have disastrous consequences if implemented.

A first problem with Justice Kavanaugh's interpretation of the language of § 1226(c) is that it fails to read the statutory language in the context of the earlier provision at § 1226(a). § 1226(a) states that the noncitizens "may" be arrested and detained pending a decision on whether to put them in removal proceedings. This language is plainly permissive and affords the agency the discretion to decline to detain a noncitizen who is in removal proceedings. Indeed, the agency can elect not to place a noncitizen in removal proceedings at all, or to terminate removal proceedings that have already commenced. If the government must arrest and detain all noncitizens, and especially those who fall within § 1226(c)'s scope, the earlier provision affording it discretion to detain those same noncitizens pending the commencement of removal proceedings makes little sense. Statutes should be construed so that, on the whole, no clause, sentence, or word is rendered "superfluous, void, or insignificant" (*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)), and no provision "entirely redundant." (*Kungys v. United States*, 485 U.S. 759, 778 (1988)). The same should be true for regulatory provisions. *See Baude v. United States*, 955 F.3d 1290, 1305 (Fed. Cir. 2020) (applying this canon of interpretation to a regulation); *U.S. v. CITGO Petroleum Corp.*, 801 F.3d 477, 485 (5th Cir. 2015) (same).

Moreover, Justice Kavanaugh's interpretation of 8 U.S.C. § 1226(c) contradicts established case law, namely *Reno v. ADC*, which held that discretion applies at every stage of removal proceedings. Justice Sotomayor pointed out this conflict, noting that the Court's holding in *Reno* affords the executive the discretion to choose when and if to initiate removal proceedings, and when to terminate

them. If discretion applies throughout the process, it follows that the executive can choose which noncitizens to target for enforcement in the first place.

If the government cannot choose which noncitizens to target for removal, perverse practical consequences will result, as well. General Prelogar argued that the government simply lacks the resources to target every removable noncitizen. Justice Kavanaugh appeared to give credence to this argument, stating: "So the government says we don't have the money to comply. Then -- then what do you do?" If the Supreme Court rules in favor of Texas, the government will never be able to detain all noncitizens subject to 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a). The Supreme Court will lose credibility if it issues a ruling that it and the government knows will never be followed. Prosecutorial discretion and enforcement go hand in hand. In order for enforcement to be rendered effective, the government focuses its efforts and resources on those who it believes should be prosecuted. Even on a highway with a speed limit of 55 miles per hour, state troopers enforce the speed limit on those who blatantly and dangerously violate the limit as opposed to every car on the highway that may be going slightly over the 55 miles per hour speed limit. Moreover, in criminal law enforcement, the police cannot apprehend every violator of the law and no court has forced them to. Why should immigration enforcement be viewed any differently? Indeed, since a violation of immigration law is a civil rather than a criminal violation, more prosecutorial discretion ought to be accorded and other factors considered, such as the noncitizen's family members who may become destitute if the noncitizen who provides for them is detained.

As immigration law is civil, its violators have not committed crimes. Those who have already been convicted of crimes have served their sentence under the penal system and can be further detained under 8 U.S.C. § 1226(c) only because they are noncitizens. The purpose of this detention is to deport them rather than to further punish them. They are deserving of prosecutorial discretion, which permeates immigration policy in every aspect. The administration can parole noncitizens into the US for humanitarian grounds or defer the deportation of noncitizens on similar humanitarian grounds. It has recently allowed Ukrainians fleeing the Russian invasion of their country to come to the US on humanitarian parole. It has terminated removal cases on behalf of those who may be eligible for immigration benefits in the future. The Deferred Action for Childhood Arrivals (DACA) program that has allowed young

people who came to the US before the age of 16 with no status or fell out of status to remain in the US is also grounded in prosecutorial discretion. The newly promulgated provision at 8 CFR §236.21(c)(1) aptly describes the basis for DACA:

> *Deferred action is an exercise of the Secretary's broad authority to establish national immigration and enforcement priorities under 6 U.S.C. 205(5) and section 103 of the Act. It is a form of enforcement discretion not to pursue the removal of certain aliens for a limited period in the interest of ordering enforcement priorities in light of limitations on available resources, taking into account humanitarian considerations and administrative convenience. It furthers the administrability of the complex immigration system by permitting the Secretary to focus enforcement on high priority targets. This temporary forbearance from removal does not confer any right or entitlement to remain in or reenter the United States. A grant of deferred action under this section does not preclude DHS from commencing removal proceedings at any time or prohibit DHS or any other Federal agency from initiating any criminal or other enforcement action at any time.*

If the Supreme Court allows Texas and Louisiana to prevail, DACA, which is already in legal jeopardy, will be the next major immigration policy involving prosecutorial discretion to fall. If a state hostile to immigrants does not like noncitizens who have been paroled into the US because they have been victims of war, then this state too can sue in federal court to dismantle a worthwhile humanitarian policy that may have foreign policy implications that are broader than a state's narrow agenda. The Supreme Court should not allow one state to derail a national immigration policy. The trend that we are seeing goes well beyond preemption of state law that may conflict with federal law. This is a case of a state blatantly challenging a federal immigration policy rather than the federal government seeking to preempt a conflicting state law. Even so, it is hoped that the Supreme Court will be guided by its own affirmation of prosecutorial discretion in the leading preemption case of *Arizona v. USA*:

> *Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who*

> *commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.*

As esteemed colleague Shoba Sivaprasad Wadhia noted in her article for the American Constitution Society, "prosecutorial discretion is inevitable, so it does not stop functioning with litigation". Earlier in the case's history, Judge Drew Tipton of the Southern District of Texas had issued a decision precluding the enforcement priorities in the Mayorkas Memo from going into effect. The Supreme Court refused to stay Tipton's injunction, but the ICE OPLA nonetheless provided guidance on prosecutorial discretion indicating that the doctrine will remain in place even though Mayorkas' priorities will not explicitly be applied. This guidance states that "OPLA attorneys… may – consistent with longstanding practice – exercise their inherent prosecutorial discretion on a case-by-case basis during the course of their review and handling of cases." Nonetheless, the majority's reading of § 1226(c) carries worrying implications for how discretion in removal proceedings will be interpreted, and applied, going forward.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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