

Chicago-Kent Law Review

Volume 91
Issue 1 *Congressional Dysfunction and
Executive Lawmaking During the Obama
Administration*

Article 4

1-29-2016

The Executive Power of Process in Immigration Law

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Recommended Citation

Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 Chi.-Kent L. Rev. 59 (2016).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol91/iss1/4>

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THE EXECUTIVE POWER OF PROCESS IN IMMIGRATION LAW

JILL E. FAMILY*

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I. INTRODUCTION

The role of the executive branch in enforcing immigration law is the subject of renewed focus. In the academic realm, the spotlight rests on the executive branch itself, as opposed to lumping together both Congress and the executive as the political branches.¹ This

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1. See, e.g., SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION* (Ediberto Román ed., 2015); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *Yale L.J.* (forthcoming 2015) [hereinafter Cox & Rodríguez, *Redux*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458 (2010) [hereinafter Cox & Rodríguez, *President and Immigration*]; Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 *SUP. CT. REV.* 31 (2012); Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 *UC IRVINE L. REV.* 1 (2012); Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Litigation Reform*, 116 *W. VA. L. REV.* 255 (2013); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of*

new focus on the executive branch alone creates space for scholars to approach thorny separation of powers and federalism questions surrounding *the president's*² exercise of discretion in enforcing immigration law. In the political realm, the contours of the executive's discretionary authority in immigration law have become a point of contention between the president and Congress and have seeped into the public discourse.³

This article adds to the renewed scholarly focus by examining across executive branch agencies the role of procedure in the president's exercise of authority over immigration law. This article extracts themes from some prominent procedural mechanisms that accompany executive power over immigration law.

Traditionally, separation of powers doctrine in immigration law has focused on the balance of power between the political branches (Congress and the president) and the courts. The nineteenth century plenary power doctrine helped to establish this dynamic. The plenary power doctrine established a plenary power to establish categories of entry and removability. It placed that unreviewable power with the political branches, and therefore not with the judiciary.⁴ As Adam Cox and Cristina Rodríguez have explained, however, the courts have not detailed how power over immigration law is, or should be, apportioned between the political branches.⁵

Turning attention away from the judiciary versus political branches question, and instead narrowing the field of view to the two political branches allows for examination of the roles of Congress and the president in immigration law. Decoupling Congress and the president in immigration law reveals that each plays a different role.

Executive Control over Immigration Policy, 59 DUKE L.J. 1787 (2010); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81 (2013); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

2. In this article, I refer broadly to the president as the head of the executive branch. This article takes a broad look at executive procedural power in immigration law and does not delve into the complexity of executive branch structure and the allocation of power within the executive branch.

3. See, e.g., WADHIA, *supra* note 1, at 88–108; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 21–27 (2012); Lawrence Downes, *On Immigration, It's Texas 2, Obama 0*, N.Y. TIMES: TAKING NOTE (May 27, 2015, 3:18 PM), <http://takingnote.blogs.nytimes.com/2015/05/27/on-immigration-its-texas-2-obama-0/>.

4. See generally Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, (1889); see also Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J. LAW & POL'Y 71, 95–101 (discussing the plenary power doctrine).

5. Cox & Rodríguez, *President and Immigration*, *supra* note 1, at 460–61.

The president's power over immigration law derives from a variety of sources. Some are more obvious than others. One fairly obvious source is that Congress has delegated discretion to the executive in enforcing immigration law. For example, Congress has charged the Department of Homeland Security with "establishing national immigration enforcement policies and priorities."⁶ Less obvious is that the president may have some inherent authority over immigration law based in the Constitution.⁷ This is authority that independently belongs to the president and does not depend on a delegation from Congress.

Perhaps even less obvious is the power recognized by Professors Cox and Rodríguez. While Congress has formal statutory control over the categories and conditions of legal entry and removability, Cox and Rodríguez argue that the authority delegated to the president to enforce those statutory prescriptions gives the president "tremendous authority" to control who is removed.⁸ The president has this authority because the executive branch decides who is placed in immigration removal proceedings, who is granted relief from removal, and who is actually physically removed from among the population of those with final removal orders. Because the number of those who could be placed into removal proceedings is much larger than the number of those who are actually removed, executive branch choices determine the immigration futures of many.⁹ Part of the president's immigration authority lies in this gap. The president's authority over the gap (and, depending on funding, to determine the size of the gap) has a major effect on the composition of the immigrant community in the United States.¹⁰

This article is less focused on the sources and boundaries of the president's power and more focused on the procedures used by the executive to carry out its power over immigration law. In immigration law, the executive branch implements and, at times, creates procedural decision-making frameworks. The executive branch makes choices about what procedures it will use to exercise its power over immigration law. For example, will a U.S. Citizen receive

6. 6 U.S.C. § 202(5) (2002); *see also* 8 U.S.C. § 1103(a) (2009) (charging the Secretary of Homeland Security with "the administration and enforcement" of immigration law).

7. Cox & Rodríguez, *President and Immigration*, *supra* note 1, at 461.

8. *Id.* at 485.

9. *Id.* at 511.

10. *Id.*

an explanation why her spouse will not receive permission to live in the United States? Will applicants for legal status be aware of how the executive branch will decide whether to grant them status? This article explores the nature and variety of executive procedural power over immigration law by looking at examples from executive agencies that contribute to executive action in immigration law. The agencies are the Department of Homeland Security, the Department of Justice, the Department of State, and the Department of Labor. This article identifies themes across the procedures that these agencies use to carry out immigration decision-making. These themes are that the structure of executive branch implementation of immigration law is complex, that the use of guidance documents is a popular procedural choice, and that minimal process is a prominent feature. Also, this article raises some questions for future inquiry.

The president's procedural choices to implement his power over immigration law deserve sustained attention. Just as congressional procedural choices can greatly affect any statutory substantive law, executive branch procedural choices are an essential element of the president's power over immigration law.

II. THE EXECUTIVE POWER OF PROCESS IN IMMIGRATION LAW

To describe all of the procedures used by each agency with authority over immigration law would fill a treatise (or two). By looking at examples of procedures from each agency, we can examine procedural power in immigration law *across agencies*, rather than focusing on one agency at a time. This sampling does not tell the whole story about the power of process in immigration law, but it allows us to begin to see patterns across agencies and to raise questions for future inquiry. For each agency, this article focuses on a prominent procedural approach that is the subject of recent or ongoing litigation, or that has otherwise raised controversy.

A. Executive Power Over Immigration Law Across Agencies

1. Department of Homeland Security: ICE, USCIS, and CBP

The Department of Homeland Security (DHS) contains three entities with power over the implementation of immigration law: (1) Immigration and Customs Enforcement (ICE); (2) United States Citizenship and Immigration Services (USCIS); and (3) Customs and Border Protection (CBP). This section will discuss how ICE has

made the procedural choice to use guidance documents to exercise its prosecutorial discretion, how USCIS relies on guidance documents in its adjudication of applications for immigration benefits, and how CBP uses procedures based in minimal process to adjudicate applications for admission to the United States.

a. Immigration and Customs Enforcement (ICE)

Immigration and Customs Enforcement is tasked with interior enforcement. Among other things, ICE conducts workplace enforcement raids, charges foreign nationals with removability, and maintains a vast network of immigration detention facilities.¹¹ In its operations, ICE exercises vast discretion over who is charged with removability and placed into enforcement proceedings. ICE exercises this power through prosecutorial discretion.¹²

Study of the exercise of prosecutorial discretion in immigration law makes up a significant part of renewed scholarly focus on executive power in immigration law.¹³ While the executive branch's use of prosecutorial discretion in immigration law is not new,¹⁴ the practice has recently received increased attention due to a stalemate over immigration reform in Congress and the president's announcement of two policies to provide temporary reprieve from removal to two groups. In the absence of legislative changes to the immigration law statutes, advocates have pushed for the president to use his sphere of power over immigration law to make all possible changes to immigration law policy.¹⁵

Again, prosecutorial discretion in immigration law is not new. For example, John Lennon received it in the 1970's, and the executive has used this power in varying forms for many years.¹⁶ Three

11. *What We Do*, U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., <http://www.ice.gov/overview> (last visited on Sept. 12, 2015).

12. As discussed below, USCIS and CBP exercise prosecutorial discretion as well.

13. See, e.g., Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 1.

14. *Id.* at 246–65; see also Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 101, 109–11 (2015).

15. See, e.g., Marshall Fitz, *What the President Can Do if Congress Fails to Act*, CTR. FOR AM. PROGRESS (July 2014); Elise Foley, *Dreamers at State of the Union Hope Obama Continues to Push Forward on Immigration*, HUFFINGTON POST (Jan. 21, 2015, 2:59 AM), http://www.huffingtonpost.com/2015/01/21/obama-dreamers_n_6508692.html; Wadhia, *Sharing Secrets*, *supra* note 3, at 27–32; Wadhia, *The History of Prosecutorial Discretion*, *supra* note 14, at 107–09.

16. Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 1, at 246–65; see also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 475–92 (2012).

recent prominent examples include the efforts of ICE in 2011 to better coordinate and centralize its prosecutorial discretion efforts, the executive branch's implementation of Deferred Action for Childhood Arrivals (DACA), and the proposed implementation of Deferred Action for Parental Accountability (DAPA).

In 2011, ICE announced to its field office directors that they should implement new prosecutorial discretion practices within their respective districts.¹⁷ Building on agency memoranda dating back to 1976, the "Morton Memorandum" (named after former ICE Director John Morton, the author of the memorandum) established guidance on the agency's prosecutorial discretion priorities and information about who within ICE may exercise prosecutorial discretion. According to the memo, its purpose is to "ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities."¹⁸ Citing limited resources, the Morton Memorandum explains that ICE must "regularly" exercise prosecutorial discretion.¹⁹ The memo lays out a non-exhaustive list of factors that authorized ICE agents "should" consider in deciding whether to exercise prosecutorial discretion, and thus not to pursue enforcement.²⁰ According to the memo, no one factor is determinative.²¹ Examples of factors include: age; criminal history; circumstances of arrival in the United States (did the person arrive as a child?); length of presence in the United States; pursuit of education in the United States; the existence of U.S. citizen children; and the person's ties to the community.²²

The Morton Memorandum also mentioned "the agency's civil immigration enforcement priorities" as a factor for consideration in determining whether to prosecute.²³ These priorities previously were discussed in another memorandum, also authored by then-Director

17. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (on file at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Morton.²⁴ In the memorandum, Morton explained that ICE has funds to remove less than four percent of the undocumented foreign national population.²⁵ The memorandum announced a hierarchal order of attention. The highest priority was assigned to those foreign nationals who “pose a danger to national security or a risk to public safety.”²⁶ Priority two was assigned to recent illegal entrants. Priority three was focused on fugitive foreign nationals or those who have otherwise obstructed immigration controls.²⁷

To further these policies, ICE announced a case-by-case review of pending enforcement actions in November 2011.²⁸ This memorandum directed ICE attorneys to look for cases where prosecutorial discretion would be appropriate, based on the standards laid out in previous ICE directives, including the two memoranda authored by Director Morton described above. ICE attorneys were directed to “decide whether [removal] proceedings . . . should continue or whether prosecutorial discretion in the form of administrative closure is appropriate.”²⁹ As described below, these prosecution priorities evolved again in November 2014.³⁰

In June 2012, then Secretary of Homeland Security Janet Napolitano authored a memorandum announcing the DACA initiative.³¹ The memorandum explains that “in the exercise of our prosecutorial discretion,” DHS (including ICE) should exercise its discretion and not pursue enforcement against certain individuals who arrived in the United States as children.³² Exercises of discretion are appropri-

24. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) (on file at <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>).

25. *Id.*

26. *Id.*

27. *Id.*

28. Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enft, to All Chief Counsel & Office of the Principal Legal Advisor, Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011) (on file at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf>).

29. *Id.*

30. See *infra* notes 43–49.

31. Memorandum from Janet Napolitano, Sec’y, Dep’t of the Homeland Sec., to David Aguilar et al., Acting Comm’r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>).

32. *Id.*

ate for those who: (1) arrived before the age of 16; (2) have continuously resided in the United States for five years before the date of the memorandum; (3) are present in the United States on the date of the memorandum; (4) are in school, have graduated from high school, have a GED, or who have been honorably discharged from the U.S. military; (5) have no felony convictions, no convictions for a significant misdemeanor offense, or no multiple misdemeanor offenses, or who otherwise are not a public safety threat; and (6) are less than the age of thirty-one.³³ In 2014, President Obama announced a “second generation” version of DACA that would eliminate the age cap, among other changes. DACA 2.0 has not been implemented due to ongoing litigation.³⁴

The original DACA memorandum set the stage for the implementation of a new application procedure within USCIS, also a part of DHS. While ICE is focused on charging, detention, and removal, USCIS administers the granting of immigration benefits, such as the grant of lawful immigration status.³⁵ Through a series of answers to “Frequently Asked Questions,” (FAQ) USCIS laid out how it would accept and consider applications for prosecutorial discretion under DACA, including a special application form with instructions.³⁶ As the answers to the FAQ reveal, a DACA grant does not result in a legal immigration status, but results in a revocable promise from the government not to enforce for a specific period of time.³⁷ Also, those foreign nationals granted deferred action under DACA are eligible to apply for permission to work in the United States pursuant to a pre-existing regulation governing work authorization.³⁸

Two years after the implementation of DACA, President Obama announced a similar initiative called DAPA.³⁹ DAPA also does not grant legal status, but it offers deferred action to the parents of U.S.

33. *Id.*

34. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/immigrationaction> (last visited Aug. 29, 2015); see *infra* note 56.

35. *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/aboutus> (last visited Aug. 29, 2015).

36. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated June 15, 2015).

37. *Id.*

38. *Id.*; 8 C.F.R. § 274a.12(c)(14) (2015).

39. *Fixing the System: President Obama is Taking Action on Immigration*, WHITE HOUSE (Nov. 20, 2014) (video available at <http://www.whitehouse.gov/issues/immigration/immigration-action#>).

citizen children and to the parents of children who are lawful permanent residents (“green card” holders) of the United States.⁴⁰ Those parents who are granted deferred action under DAPA are eligible to apply for work authorization based on a pre-existing regulation.⁴¹ Through an agency memorandum, the executive branch announced the DAPA eligibility criteria: (1) continuous residence in the United States since January 1, 2010; (2) an existing U.S. citizen or lawful permanent resident son or daughter as of November 20, 2014; (3) physical presence in the United States as of November 20, 2014 and at the time of application; and (4) that the individual is not an enforcement priority.⁴² USCIS would adjudicate applications for deferred action under DAPA.

Contemporaneously, DHS released a new priorities and prosecutorial discretion memorandum.⁴³ This memorandum rescinds the 2011 memoranda described above and establishes three priority categories. The highest priority, “Priority 1,” is reserved for individuals who the government categorizes as threats to national security, border security, or public safety.⁴⁴ Enforcement resources should be concentrated on this category, which includes terrorism suspects, those apprehended at the border, and foreign nationals convicted of an “aggravated felony” (as that term is defined in the Immigration and Nationality Act).⁴⁵ “Priority 2” belongs to misdemeanants and new immigration violators.⁴⁶ This category includes those convicted of three or more misdemeanors, those convicted of a “significant misdemeanor,” and foreign nationals who are apprehended after entering the United States without permission and who have not been

40. *Id.*

41. 8 C.F.R. § 274a.12(c)(14) (2015).

42. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Leon Rodriguez et al., Dir., U.S. Citizenship & Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 4, 5 (Nov. 20, 2014) (on file at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

43. See generally Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski et al., Acting Dir., Immigration & Customs Enf’t, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) (on file at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [hereinafter Enforcement Memo].

44. *Id.* at 3.

45. 8 U.S.C. § 1101(a)(43) (2015).

46. Enforcement Memo, *supra* note 43, at 3.

present in the United States since January 1, 2014.⁴⁷ “Priority 3” belongs to other immigration violators (including those whose legal status has expired) and represents the lowest priority for enforcement.⁴⁸ ICE maintains a list of frequently asked questions on its website that helps to explain its prosecutorial discretion policies.⁴⁹

While prosecutorial discretion is a mainstay feature of immigration enforcement, recent prosecutorial discretion efforts also are linked to the failure to achieve statutory reform of immigration law. For almost ten years, Congress has considered, but failed to achieve, statutory immigration law reform. DACA is not the statutory reform sought through the DREAM Act.⁵⁰ The DREAM Act would place undocumented foreign nationals who arrived as children on the path to legal status in the United States, and eventual possible U.S. citizenship. DACA, on the other hand, only grants a temporally limited, revocable promise not to enforce and is not a legal status itself. The ICE memoranda setting enforcement priorities are the product of a scenario where a failure to update the congressionally chosen legal immigration categories and quotas, in addition to other complex forces, led to an undocumented population in the United States estimated at 11 million.⁵¹ Because the immigration statutes are so harsh when it comes to the granting of relief from removal and are so broad in terms of who is eligible for removal, the statutes have made the executive branch the pressure point.⁵² A decision not to enforce is the only hope for millions.

These prosecutorial discretion policies are not without their critics. Critics challenge as unconstitutional President Obama’s efforts to exercise executive branch immigration power through these pros-

47. *Id.* at 3–4.

48. *Id.* at 4.

49. *Frequently Asked Questions Relating to Executive Action on Immigration*, U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., <https://www.ice.gov/immigrationAction/faqs> (last visited Aug. 29, 2015).

50. See generally IMMIGRANT LEGAL RES. CTR., COMPARISON CHART: DACA, CALIFORNIA DREAM ACT, AB 540, AND DREAM ACT (2012), http://www.ilrc.org/files/documents/ilrc-daca_comparison_chart-2012-10_10.pdf.

51. See generally Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (July 24, 2015), <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

52. See WADHIA, *supra* note 1, at 13; Jason Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661 (2015); Cox & Rodríguez, *President and Immigration*, *supra* note 1, at 511–19; Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 1, at 252–53, 256, 270–72.

ecutorial discretion initiatives.⁵³ Critics argue that congressional stalemate is not a constitutional justification for the executive branch to usurp the lawmaking power, and that the DACA and DAPA initiatives are unconstitutional breaches of the president's duty to execute the laws faithfully.⁵⁴ An additional argument is that DAPA violates the Administrative Procedure Act (APA).⁵⁵ A district court judge enjoined the implementation of DAPA and DACA 2.0 because the judge concluded that the executive's use of an agency guidance document, rather than notice and comment rulemaking, violated the APA.⁵⁶ That decision is under consideration by the U.S. Court of Appeals for the Fifth Circuit.⁵⁷ Others, including myself, have argued that these policies are well within the power of the executive and that DAPA does not violate the APA.⁵⁸

My purpose here is not to reiterate the debate over legality, but rather to emphasize that the exercise of prosecutorial discretion requires procedural choices. These choices include how, if at all, to formulate and announce prosecutorial discretion policies, and what kinds of procedural mechanisms, if any, will accompany the process to decide whether prosecutorial discretion should be granted to an individual. In the prosecutorial discretion examples discussed above, DHS chose to announce its policies through guidance documents,

53. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. Feb. 16, 2015); *Crane v. Napolitano*, 920 F. Supp. 2d 724, 730 (N.D. Tex. 2013); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

54. *Id.*

55. *Texas*, 86 F. Supp. 3d at 647.

56. *Id.* at 677.

57. Ariane de Vogue, *Legal Fight over Obama's Immigration Orders May Outlast His Presidency*, CNN POL. (Sept. 29, 2015) <http://www.cnn.com/2015/09/29/politics/immigration-obama-lawsuit-delays/>.

58. See *Hearing Before the S. Comm. on the Judiciary Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1, 2 (2015) (written testimony of Jill E. Family), <http://www.judiciary.senate.gov/imo/media/doc/03-19-15%20Family%20Testimony.pdf>; see also Open Letter from Shoba Sivaprasad Wadhia, Clinical Professor of Law, Pa. State Univ., et al. (Mar. 13, 2015) (on file at https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf); Open Letter from Hiroshi Motomura, Professor of Law, UCLA Sch. of Law, et al. (Nov. 25, 2014) (on file at <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>); see generally Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Litigation Over Administrative Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012), <http://www.yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade>; Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59 (2013).

rather than notice and comment rulemaking. Even though it chose guidance documents over public notice and comment, DHS chose to be transparent in its memoranda about the things it will think about when deciding whether to grant prosecutorial discretion.

b. Interlude: Guidance Documents

As the following discussion reveals, DHS is not the only immigration agency that relies on guidance documents. These rules are not formulated through the notice and comment procedures of the APA.⁵⁹ When an agency uses such rules correctly under the APA, the APA does not require the agency to seek comment from the public or to respond to any comments.⁶⁰ These rules therefore short-circuit what many think of as the “normal” rulemaking function under the APA—an agency posts a proposed rule, accepts public comment, considers those comments, and then publishes a final rule that responds to the comments.

One type of guidance document is a policy memorandum, which is a memorandum from a high-ranking agency official to lower ranking agency officials on some topic within the agency’s enforcement power.⁶¹ The APA recognizes “general statements of policy” as an exception to its notice and comment rulemaking requirements.⁶² The APA defines a “rule” to include both legislative (legally binding) and non-legislative (not legally binding) rules.⁶³ Therefore, a policy statement still contains a “rule” under the APA.

Guidance documents are helpful in that they allow for a form of communication from the agency to regulated parties and to the public in addition to notice and comment rulemaking.⁶⁴ Through policy memoranda, regulated parties and the public can get a sense of the agency’s ideas on a particular issue. Policy statements let regulated parties know how the agency plans to exercise its enforcement power. Given the enormity of the statutory gaps that agencies often must fill, the limited resources of agencies, and the cost and time commitments required to engage in notice and comment rulemak-

59. 5 U.S.C. § 553 (2015).

60. 5 U.S.C. § 553(b) (2015).

61. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 570–71 (2012).

62. 5 U.S.C. § 553(b) (2015).

63. 5 U.S.C. § 551(4) (2015).

64. Family, *Administrative Law*, *supra* note 61, at 578–79.

ing, guidance documents are an important tool both for agencies and regulated parties.⁶⁵

Guidance documents are not legally binding, however. That means that in an enforcement action where a policy statement is at issue, either the agency or a regulated party is free to argue that a different rule should apply other than that expressed in a policy statement.⁶⁶ Also, because a guidance document is not legally binding, it is relatively easy for an agency to change positions by issuing a new policy memorandum. Instead of enduring other rounds of notice and comment, an agency simply issues a new policy memorandum to update its plans or outlook towards a particular issue.⁶⁷

Elsewhere I have detailed the problems caused by reliance on guidance documents.⁶⁸ The use of guidance documents raises concern generally in administrative law that agencies are seeking to avoid the procedural obligations of notice and comment rulemaking. The procedural protections of notice and comment rulemaking are neutered if agencies regularly circumvent them through the use of guidance documents. For an agency short on resources, following the policy memorandum procedural path to make a rule is less cumbersome and time-consuming. It also may be less visible if the agency wants to keep a low profile on a particular issue.

Another concern is that agencies use policy memoranda to bind practically, even if not legally.⁶⁹ Even though rules announced through policy memoranda are not legally binding, a regulated party probably will feel obligated to comply with the policy announced in the memorandum. Following the memo presents the path of least resistance because the content of the memo represents the position the agency most likely will take in any enforcement action. Therefore, policy memoranda have a practically binding effect, even if they are not legally binding, and that practical effect arises without the procedural protections of notice and comment rulemaking.⁷⁰

65. *Id.*

66. *Id.* at 572.

67. *Id.* at 599–604.

68. Family, *Administrative Law*, *supra* note 61; see generally Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 MICH. J. L. REFORM 1 (2013).

69. See Family, *Administrative Law*, *supra* note 61, at 566; Family, *Easing the Guidance Document Dilemma*, *supra* note 68, at 35.

70. *Id.*

Transparency is also a problem when it comes to guidance documents. While issuing a guidance document is more transparent than saying nothing, regulated parties complain that they are unfamiliar with the process used to formulate guidance documents.⁷¹ This is true in both immigration law and administrative law generally.⁷² The formulation process is often a mystery, with a memorandum simply posted to an agency website or circulated through informed legal circles.⁷³

c. United States Citizenship and Immigration Services (USCIS)

ICE is not the only immigration agency to rely on guidance documents. Recent efforts at shaping enforcement priorities are high profile, but the executive exercises other types of discretion in immigration law that are just as consequential. While the executive does exercise control over removal, the executive branch also exercises control over who may gain legal status in the United States. USCIS exercises this power. The focus here shifts from those who are removable to those who are seeking legal status in the United States. These are individuals who are seeking approval, who are arguing that he or she fits within the categories and quotas of legal immigrants established by Congress. For example, a pharmaceutical company may wish to employ a foreign national scientist in the United States, a U.S. citizen may wish to sponsor his or her spouse for lawful permanent residence, a U.S. technology company may wish to temporarily employ a foreign national, a U.S. citizen may wish to employ a foreign national as a home health aide, or a foreign national may wish to apply for naturalization. While Congress sets the general categories and quotas, the executive branch fills in the details and actually adjudicates benefit applications.⁷⁴

USCIS maintains a network of adjudication offices and centers that process about seven million applications per year.⁷⁵ Overall, USCIS employs about 18,000 individuals at various types of facili-

71. Family, *Easing the Guidance Document Dilemma*, *supra* note 68, at 35–36.

72. See generally *id.* at 35–36, 44–48.

73. USCIS does post some draft memoranda for comment, but that practice raises its own questions. Family, *Administrative Law*, *supra* note 61, at 608–15.

74. *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., <http://www.uscis.gov/aboutus> (last visited Aug. 29, 2015).

75. Attachs. to Appellant's Emergency Mot. for Stay Pending Appeal, Attach. 6, Declaration of Donald Neufeld, at 2, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. Feb. 16, 2015).

ties. There are four service centers and eighty-seven field offices.⁷⁶ USCIS's budget is about \$3.2 billion.⁷⁷ About ninety-five percent of the budget comes from user fees.⁷⁸ For most cases, the foreign national selects the appropriate USCIS form, completes it, and mails it to a USCIS Service Center with the appropriate fee and supporting documentation.⁷⁹ USCIS then adjudicates the application, either granting it or issuing a Request for Evidence (RFE).⁸⁰ If the response to the RFE is not adequate, USCIS will deny the application. The field offices provide direct, in-person services to foreign nationals.⁸¹ In-person interviews, for example, take place at field offices. Sometimes an application requires adjudication at both a service center and a field office. There is an appellate administrative body within USCIS called the Administrative Appeals Office (AAO).⁸²

During an adjudication, a USCIS adjudicating officer looks to many sources of law. There is the Immigration and Nationality Act, regulations, and an array of agency guidance documents. Many important questions critical to the adjudication of immigration law benefits are in agency memoranda.⁸³ The USCIS Policy Manual contains twelve volumes.⁸⁴ For example, Volume 12, which covers citizenship and naturalization, contains twelve parts and sixty-three chapters.⁸⁵

A U.S. citizen who wishes to obtain lawful permanent resident status for his or her spouse might not know that many issues affecting such an application are addressed in policy memoranda. For example, if a U.S. citizen marries a foreign national who entered the United States without permission and has been unlawfully present,

76. *Id.* at 4.

77. *Id.* at 3.

78. *Id.*

79. See generally STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 302(4)(b)–(c), (e) (2015).

80. *Id.* at § 3.02(4)(e)(ii) (2015).

81. See generally *Field Offices*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., <http://www.uscis.gov/about-us/find-uscis-office/field-offices> (last visited Oct. 29, 2015).

82. See generally *Directorates and Program Offices, The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., <http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao> (last updated Oct. 7, 2015).

83. See generally *Family, Administrative Law*, *supra* note 61, at 593–99.

84. *Policy Manual, Table of Contents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC. (current as of July 21, 2015), <http://www.uscis.gov/policymanual/HTML/PolicyManual-TableOfContents.html> [hereinafter USCIS Policy Manual].

85. *Id.*

the amount of unlawful presence will be critical in determining whether it is safe for the spouse to leave the United States to apply for permanent residence.⁸⁶ If the spouse has too much unlawful presence, the spouse is subject to a three or ten-year bar from reentering the United States upon exit.⁸⁷ This bar is effective despite marriage to a U.S. citizen. The rules addressing the accumulation of unlawful presence are largely contained in a thick policy memorandum.⁸⁸

USCIS has worked to improve the transparency and accessibility of its policy memoranda in recent years. First, it implemented a Draft Memorandum for Comment procedure that allows the public to comment on policy memoranda before the documents become official.⁸⁹ Second, USCIS has created its Policy Manual that brings together its memoranda into one source that is accessible from the agency's website.⁹⁰

USCIS makes many procedural choices when deciding how to adjudicate applications for immigration benefits. It has established a vast adjudication system filled with technical procedural choices, including which mechanisms USCIS will use to establish these procedures and to fill in statutory gaps. One procedural favorite is clear: the guidance document. Just as DHS has used guidance documents to announce its prosecutorial discretion policies, through USCIS, DHS relies on guidance documents to run the benefits adjudication system.

86. The spouse is not permitted to "adjust" his or her status to lawful permanent resident while in the United States due to the illegal entry. 8 U.S.C. § 1255(a). That leaves the option of "consular processing" outside of the United States. If the spouse leaves the United States, however, the spouse may trigger a ban on re-entering the United States. If the spouse has more than 180 days of unlawful presence, the spouse is subject to a three-year ban. 8 U.S.C. § 1182(a)(9)(B)(i)(I). If the spouse has one year or more of unlawful presence, the ban is 10 years. 8 U.S.C. § 1182(a)(9)(B)(i)(II). See also Family, *Easing the Guidance Document Dilemma*, *supra* note 68, at 2–3.

87. 8 U.S.C. § 1182(a)(9)(B)(i)(I); 8 U.S.C. § 1182(a)(9)(B)(i)(II).

88. Interoffice Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., to Field Leadership, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009) (on file at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF).

89. Family, *Administrative Law*, *supra* note 61, at 610–15.

90. USCIS Policy Manual, *supra* note 84.

d. Customs and Border Protection (CBP)

The final component of DHS discussed here is U.S. Customs and Border Protection.⁹¹ CBP duties include patrol and surveillance of the U.S. borders and the inspection of individuals seeking entry to the United States.⁹² CBP provides an example of reliance on minimal process in immigration law.

CBP officers staff the U.S. ports of entry and examine the entry documents of foreign nationals who wish to enter.⁹³ At the border, CBP officers check for required documents and determine admissibility. Congress has created grounds of inadmissibility.⁹⁴ These are categories that describe behavior or circumstances that result in refused entry to the United States even if the foreign national qualifies for a lawful immigration category. For example, the spouse of a U.S. citizen qualifies in a lawful immigration category due to the spousal relationship, but if the foreign national spouse has a criminal history, that spouse may be inadmissible despite the marriage to a U.S. citizen.⁹⁵

If CBP determines that a foreign national is inadmissible, CBP may offer to allow the foreign national to withdraw his or her application for admission or CBP may place the foreign national in removal proceedings.⁹⁶ These removal hearings would determine whether the individual should indeed be denied lawful entry and be returned to his or her country. The adjudicators in these hearings are immigration judges, who are employees of another agency, the Department of Justice.⁹⁷ These hearings are more complex than might be expected. Questions of admissibility can be quite thorny.⁹⁸

Congress has delegated to the executive branch the power to procedurally expedite the removal of foreign nationals who it deter-

91. *About CBP*, U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., <http://www.cbp.gov/about> (last visited Nov. 4, 2015).

92. *Border Security*, U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., <http://www.cbp.gov/border-security> (last visited Oct. 29, 2015).

93. *Immigration Inspection Program*, U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., <http://www.cbp.gov/border-security/ports-entry/overview> (last visited Oct. 29, 2015).

94. 8 U.S.C. § 1182.

95. 8 U.S.C. § 1182(a)(2).

96. 8 U.S.C. § 1225(a)(4); 8 U.S.C. § 1225(b)(2)(A).

97. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 600–04 (2009).

98. 8 U.S.C. § 1182(a).

mines to be inadmissible in two different categories.⁹⁹ These expedited removal procedures allow CBP to avoid the relative formality of a removal hearing and to instead make a quick decision to remove, subject only to intra-agency supervisory review.¹⁰⁰ If a CBP officer believes an individual is inadmissible under the misrepresentation or lack of proper documents inadmissibility grounds, CBP may remove that individual without any hearing.¹⁰¹ There is an exception for those who express to a CBP officer that he or she has a fear of persecution. Those individuals are sent to a credible fear interview before an asylum officer.¹⁰² If the individual succeeds at the credible fear interview, he or she receives an asylum hearing, but may be detained until the hearing.¹⁰³ If the individual fails, he or she is subject to expedited removal unless an immigration judge reverses the determination of a lack of credible fear.¹⁰⁴

Expedited removal is an example of minimal process. While expedited removal is a congressional procedural choice, it still adds to our understanding of the procedures used across executive agencies to implement immigration law. Expedited removal provides minimal process because it pulls back from the standard level of process (a full removal hearing) and instead provides a procedural substitute that is less robust. Additionally, while expedited removal is a statutory creature, CBP has discretion in how it implements this statutory directive. CBP's implementation of expedited removal has been criticized as avoiding even the minimal procedural protections mandated by Congress for expedited removal.¹⁰⁵

Within DHS, we see ICE, USCIS, and CBP, which are three entities with diverse missions. While there are differences, the work of the three units ultimately comes together to exercise significant authority over the admission and removal of foreign nationals. In terms of procedure, reliance on guidance documents is prominent, as is the absence of robust procedural protections in the context of expedited removal.

99. 8 U.S.C. § 1225.

100. *Id.*; 8 C.F.R. § 253.3(B)(7).

101. 8 U.S.C. § 1225(b)(1)(A)(i).

102. 8 U.S.C. § 1225(b)(1)(A)(ii).

103. *Id.*; 8 U.S.C. § 1225(b)(1)(B)(i)–(ii).

104. 8 U.S.C. § 1225(b)(1)(B)(iii). There is no judicial review of the immigration judge's decision. 8 U.S.C. § 1252(a)(2)(A).

105. Family, *A Broader View*, *supra* note 97, at 624–27.

2. Department of Labor

The executive also exercises power over immigration law through the actions of the Department of Labor (DOL). DOL is charged with protecting U.S. workers and plays key roles in certain employment-based benefit applications and in employment-based workplace enforcement.¹⁰⁶ For example, DOL approves prevailing wages for certain types of temporary and permanent foreign workers.¹⁰⁷ DOL also audits U.S. employers to verify the implementation of wage obligations.¹⁰⁸

DOL uses a process called Permanent Labor Certification Program (PERM) to certify which employers may hire a foreign national on a permanent basis.¹⁰⁹ The PERM process is often the first step for an employer who wishes to sponsor a foreign national for lawful permanent residence.¹¹⁰ The PERM process may result in a certification that there are no qualified and willing U.S. workers for the proposed job, and that the employer is promising to pay the prevailing wage.¹¹¹ This DOL certification then is sent to USCIS with a petition to classify the potential employee as a lawful permanent resident.¹¹² PERM is an audit-based system.¹¹³ In the application for a labor certification, employers must complete several attestations, including that the employer conducted the required pre-filing recruitment efforts.¹¹⁴

In operating PERM, DOL has promulgated regulations,¹¹⁵ but also relies on guidance documents, including a series of 191 “FAQs.”¹¹⁶ In these questions and answers, DOL addresses a wide

106. *Wage and Hour Division Administered Immigration Programs, Wage and Hour Division*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/immigration/index.htm> (last visited Oct. 29, 2015).

107. *Id.*

108. *Id.*

109. *Permanent Labor Certification, Foreign Labor Certification*, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/perm.cfm> (last updated Aug. 22, 2014).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Electronic Code of Federal Regulations*, U.S. GOV’T PUBL’G OFFICE, http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title20/20cfr656_main_02.tpl (current as of Sept. 30, 2015).

116. *OLFC Frequently Asked Questions and Answers, Foreign Labor Certification*, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR,

variety of substantive issues that are crucial to the outcome of a labor certification application. Some of these FAQs are a summary of information from a regulation,¹¹⁷ but some provide the only source of authority on an issue. For example, an FAQ provides the source of instruction of how to report the licenses of a foreign worker to DOL.¹¹⁸ DOL does not clarify which FAQs provide the sole source of authority for an issue and which clarify a regulatory principle.

Also, DOL uses a policy memorandum to flesh out details of the prevailing wage determination, a key component of the labor certification process. DOL explains on its website that it uses a guidance document to issue prevailing wage determinations, and links to it.¹¹⁹ The document is thirty-six pages long. The document references a prevailing wage regulation but states that the document provides “policy and procedural guidance” to DOL employees making prevailing wage determinations.¹²⁰ According to DOL’s appellate administrative body that hears appeals of prevailing wage determinations,¹²¹ this guidance document “outlines a step-by-step, standardized approach for determining the appropriate [prevailing wage].”¹²²

As an example of the types of issues addressed in this guidance document, it directs agency adjudicators what to do when an employer’s job description contains supervisory duties. The memorandum states: “In this new guidance, an employer’s job requirement for supervisory duties will not automatically warrant a determination at the highest wage level because the wages for supervisory occupations already account for the supervision of employees.”¹²³

Like DHS, DOL makes a variety of procedural choices when it chooses how to administer its corner of immigration law. Those procedural choices include reliance on guidance documents.

http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm_Program (last updated Aug. 3, 2015).

117. See *id.*

118. See *id.*

119. *Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3)*, Foreign Labor Certification, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR,

<http://www.foreignlaborcert.doleta.gov/pwscreens.cfm> (last updated July 11, 2014).

120. *Prevailing Wage Determination Policy Guidance: Nonagricultural Immigration Programs*, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR (revised Nov. 2009), http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

121. 20 C.F.R. § 656.26(a); 20 C.F.R. § 655.11(a); 20 C.F.R. § 656.41(a).

122. Payless Shoe Source, 2013-PWD-00004 (U.S. Dep’t of Labor 2013) (Order Affirming Denial of Certification).

123. *Prevailing Wage Determination Policy Guidance*, *supra* note 120, at 13.

3. Department of Justice

The Department of Justice (DOJ), another executive branch agency, also exercises immigration law power. DOJ houses the Executive Office for Immigration Review (EOIR),¹²⁴ which is the home of immigration judges and members of the appellate Board of Immigration Appeals. Immigration judges and Board members are employees of DOJ and work for the Attorney General.¹²⁵ These adjudicators are not Administrative Law Judges and lack the decisional independence enjoyed by Administrative Law Judges.¹²⁶ In a removal proceeding, an immigration judge decides whether the Department of Homeland Security's charge of removability will stick, or whether a foreign national is entitled to relief from removal.¹²⁷ The availability of relief is limited, as Congress has set detailed, non-discretionary criteria,¹²⁸ but nevertheless, for those who do not receive a grant of prosecutorial discretion, it is up to an executive branch immigration judge to determine whether relief is available under the statute. The Board of Immigration Appeals is the appellate agency adjudicatory body and renders a final order of removal.¹²⁹

Problems with immigration adjudication within DOJ are well documented. Challenges include record-breaking case backlogs in the immigration courts,¹³⁰ too few immigration judges,¹³¹ a lack of lawyers for foreign nationals,¹³² a lack of decisional independence for immigration adjudicators,¹³³ inconsistent decision-making,¹³⁴ re-

124. *EOIR Mission*, EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir> (last visited Oct. 29, 2015).

125. Family, *A Broader View*, *supra* note 97, at 600–08.

126. 8 C.F.R. § 1003.10 ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges"); 8 C.F.R. § 1003.1(a)(1) ("The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.")

127. 8 C.F.R. § 1003.10; 8 C.F.R. § 1003.37.

128. *See, e.g.*, 8 U.S.C. 1229b.

129. The immigration judge's order becomes the final removal order if there is no appeal to the Board of Immigration Appeals.

130. As of September 2015, there were 456,644 cases waiting to be adjudicated in the immigration courts. *Backlog of Pending Cases in Immigration Courts as of September 2015*, TRACImmigration, TRAC REPORTS, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Oct. 29, 2015).

131. Family, *A Broader View*, *supra* note 97, at 600–04.

132. *Id.*

133. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

134. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

strictions on judicial review of removal decisions,¹³⁵ efforts to further restrict federal court oversight,¹³⁶ and applicable substantive law that is harsh and leaves little room for adjudicator discretion.¹³⁷

Even though DOJ's adjudication of immigration removal cases is deeply flawed, perhaps even more disturbing are efforts to divert cases from even receiving that flawed process.¹³⁸ Through waivers, expedited removal, and the criminalization of immigration law, many removal cases are decided outside of DOJ's adjudicatory process. For example, forty-four percent of removals in Fiscal Year 2013 were expedited removals.¹³⁹ If a foreign national is subject to expedited removal, waives the right to a hearing, or concedes removability through a criminal process, then the foreign national will never enter DOJ's civil immigration adjudication system.

Removal adjudication within DOJ, and efforts to divert foreign nationals from DOJ's adjudication processes, are examples of minimal process. Many of the problems with removal adjudication within DOJ can be traced back to Congress. For example, DOJ has not received sufficient increases in funding to cope with the increased enforcement efforts that have resulted in the need for more removal hearings.¹⁴⁰ And it is Congress, of course, who has limited judicial review of agency removal decisions. Regardless of the source, however, this troubled adjudication system is an example of a complex procedural system that provides minimal process, if any process at all.

135. 8 U.S.C. § 1252.

136. Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499 (2008); Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. UNIV. L. REV. 99 (2014).

137. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 UNIV. KAN. L. REV. 541, 551–63 (2011).

138. Family, *A Broader View*, *supra* note 97; see also Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 1–2 (2014).

139. John F. Simanski, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

140. Family, *Beyond Decisional Independence*, *supra* note 137, at 564–66; *Backlog of Pending Cases in Immigration Courts as of September 2015*, TRACImmigration, TRAC REPORTS, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Oct. 29, 2015).

4. Department of State

The Department of State (DOS) operates the U.S. consulates that adjudicate applications for visas to travel to the United States. Obtaining a visa is an essential yet independent step for many foreign nationals who are abroad and who wish to enter the United States legally.¹⁴¹ Even if USCIS approves a foreign national for a certain category (spouse of a U.S. citizen or temporary worker for a U.S. company, for example), that foreign national must obtain a visa from DOS in that category to be able to travel to the United States.

Obtaining a visa is a complex, multistep process.¹⁴² The process requires the completion of forms, paying fees, and often attending an in-person interview.¹⁴³ The decision whether to issue a visa depends on a foreign national's admissibility to the United States.¹⁴⁴ As explained above, Congress, through the Immigration and Nationality Act, has established categories of individuals who are not admissible, no matter whether they fall into a legal immigration category.¹⁴⁵

Despite the fact that DOS operates the consulates, the Department of Homeland Security also plays a large role in the visa issuance process. DHS has the authority to refuse to issue a visa, as does DOS.¹⁴⁶ Therefore, while visa applicants may interact only with DOS employees at the consulate, the Department of Homeland Security plays a role behind the scenes.

If a visa application is denied, the main recourse is to apply again. Because of the consular non-reviewability doctrine, judicial review is minimal. Under the purest form of this doctrine, executive consular decisions are untouchable; the courts play no role in reviewing them.¹⁴⁷ The Supreme Court has shown willingness, however, to at least demand a "facially legitimate and bona fide" reason

141. One exception to this requirement is the Visa Waiver Program, which allows nationals of certain countries to travel to the United States as a visitor without first obtaining a visa in the individual's passport. 8 U.S.C. § 1187 (2014).

142. See, e.g., *Applying for a Visa*, EMBASSY OF THE U.S. LONDON – UK, <http://london.usembassy.gov/niv/apply.html> (last visited Oct. 29, 2015).

143. *Id.*

144. 8 U.S.C. § 1182(a). Both CBP and DOS make admissibility determinations. If a foreign national needs a visa, the admissibility determination will be made twice.

145. *Id.*

146. RUTH E. WASEM, CONG. RESEARCH SERV., R41093, VISA SECURITY POLICY: ROLES OF THE DEPARTMENTS OF STATE AND HOMELAND SECURITY (2010), <http://fpc.state.gov/documents/organization/138767.pdf>.

147. MAILMAN & YALE-LOEHR, *supra* note 79, at § 3.11 (2015).

for a visa denial.¹⁴⁸ This minimal protection is at least greater protection than concluding that visa application decisions are non-justiciable.

The Supreme Court heard a procedural challenge to DOS' adjudication of a visa application during its October 2014 term in *Kerry v. Din*.¹⁴⁹ Din, a U.S. citizen, challenged the denial of her husband's application for an immigrant visa to join her in the United States.¹⁵⁰ DOS denied her husband's application for a visa because DOS determined her husband to be inadmissible to the United States.¹⁵¹ DOS cited to a statutory section in communicating the visa denial. The statutory section, 8 U.S.C. § 1182(a)(3)(B), addresses terrorist activities.¹⁵² It includes a range of activities, from engaging in terrorist activities to providing material support to a terrorist organization. Essentially, by citing to this broad statutory section, DOS told Din and her husband that he is inadmissible because he engaged in at least one of the many types of activities described in the statute, but did not tell him exactly which one.

Din argued that the DOS denial violated her procedural due process rights because DOS did not adequately explain the reason why it determined her husband to be inadmissible and therefore ineligible for a visa.¹⁵³ Citation to the statutory section alone, she argued, was not constitutionally adequate because the statutory section encompasses a wide range of behaviors.¹⁵⁴ Din believed that she was entitled to a more specific and detailed explanation of why DOS determined her husband to be inadmissible under that particular statute.¹⁵⁵

A fractured Supreme Court produced a majority only as to the result—Din lost. Three justices (Scalia, Thomas, and Roberts) believed that Din's interest in having her husband receive a visa does not qualify as "life, liberty or property" under the Due Process Clause.¹⁵⁶ According to these justices, Din had no eligible protected

148. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

149. *Kerry v. Din*, 135 S. Ct. 2128 (2015).

150. *Id.* at 2131. Din's husband did not challenge the visa denial because the plenary power doctrine eliminates the constitutional rights of foreign nationals applying for admission to the United States. Family, *Threats*, *supra* note 4.

151. *Kerry*, 135 S. Ct. at 2132.

152. *Id.*

153. *Id.* at 2132, 2140–42, 2144–45.

154. *Id.* at 2145–46.

155. *Id.*

156. *Id.* at 2138.

interest. Two justices (Kennedy and Alito) determined that the Court need not reach the issue of whether Din held an interest protected by the Due Process Clause, because even if she did, the process the government provided was adequate under the “facially legitimate and bona fide” standard.¹⁵⁷ Four justices (Breyer, Ginsburg, Sotomayor, and Kagan) dissented and explained that Din’s interest in her husband’s visa application is protected by the Due Process Clause and that the procedure provided (the citation to the broad statutory section) was inadequate.¹⁵⁸

While it is still an open question whether a U.S. citizen’s interest in a spouse’s visa application is a protected liberty interest, the result of this case is that it was adequate for the government only to provide cursory information about why it denied Din’s husband’s visa application. A simple citation to a broad statutory section that encompasses a variety of behavior was acceptable.

Din is another illustration of the force of minimal process in immigration law. For Din and her husband, enjoyment of their marriage inside of the United States is not a possibility. To be together, the two will need to live somewhere other than the United States. The possibility of living together in the United States was extinguished without a detailed explanation. According to the Court, she was not due anything more.

B. Procedural Themes Across Agencies and Questions for Further Inquiry

The procedures discussed in Part A lead to a few key themes. First, executive procedural power over immigration law is not a monolith. Second, guidance documents play a prominent role in the exercise of executive procedural power over immigration law. Third, minimal process also is a conspicuous feature.

Even this introductory discussion of the procedural choices and mechanisms that accompany the executive procedural power over immigration law reveals that referring to the “administration of immigration law” is overly broad. The administration of immigration law involves six different main components, each with a unique function and mission. At times some of these six units must work together; at times they are autonomous. At times, some units repeat tasks per-

157. *Id.* at 2139.

158. *Id.* at 2141–42.

formed by another unit. Despite that each of these six units ultimately report to one president, each has made its own procedural choices, and some have had procedural choices imposed by Congress. Improving executive procedural power over immigration law will require many tiny brush strokes, and not one large stroke.

As explained above, the implementation of immigration law relies on guidance documents. While this reliance is problematic, the use of guidance documents is common across administrative law. In fact, it would be more helpful conceptually to think of notice and comment rulemaking under the APA as the exception. This is actually an area where immigration law's troubles converge with the mainstream.¹⁵⁹ Agency use and reliance on guidance documents is a large question looming over all of administrative law.

The fact that the problem pervades administrative law is not an excuse to ignore the issue within the context of immigration law, however. USCIS has attempted some improvements, but the use of guidance documents in immigration law will present an important line of inquiry for years to come. Shoba Sivaprasad Wadhia and I have each called for USCIS to decrease its reliance on guidance documents, even if the APA would permit USCIS to use a guidance document.¹⁶⁰ Also, I have called on USCIS to develop Good Guidance Practices to steer its use of sub-regulatory rules.¹⁶¹

The use of guidance documents is tied closely to the issue of transparency in the administration of immigration law. Guidance documents in immigration law present a procedural mismatch. Guidance documents are a procedural mismatch because guidance documents are one of the most convoluted procedural mechanisms in administrative law, and immigration law arguably provides the least sophisticated group of regulated parties: immigrants who may lack resources and who may not even speak English. With guidance documents, the applicable rules are not as visible because they are in a memorandum. Unrepresented foreign nationals may not even know to look for a memorandum, and if they did, it is not clear if those individuals would understand the difference between a memo-based rule and a regulation or a statute.¹⁶² Additionally, even law-

159. Family, *Administrative Law*, *supra* note 61, at 616.

160. *Id.* at 615; WADHIA, *supra* note 1, chapter 7; Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 1, at 296 (recommending notice and comment rulemaking for deferred action); Wadhia, *Sharing Secrets*, *supra* note 3, at 21–27.

161. Family, *Easing the Guidance Document Dilemma*, *supra* note 68, at 8.

162. *Id.* at 6–7.

yers have complained that the memorandum formulation process is a mystery to them, and that memo-based rules may unexpectedly change.

Guidance documents and transparency concerns also converge in the context of prosecutorial discretion.¹⁶³ While the exercise of prosecutorial discretion gives the president the power to shape the population of foreign nationals in the United States, few procedural protections accompany the exercise of prosecutorial discretion. Professor Wadhia has raised important concerns about the lack of transparency surrounding prosecutorial discretion.¹⁶⁴

For an individual outside the DACA initiative (and perhaps eventually DAPA), there is no real application procedure short of asking an ICE officer to consider an exercise of prosecutorial discretion.¹⁶⁵ An unrepresented individual may not even know that prosecutorial discretion exists, let alone know how to ask for it. The non-DACA prosecutorial discretion memoranda envision a system where ICE officers themselves will initiate consideration.¹⁶⁶ Therefore, a foreign national might not even know whether prosecutorial discretion was considered at all, let alone be aware of reasons why ICE may have decided to prosecute anyway. Also, even if a foreign national or his or her attorney is aware of ICE's memoranda-based enforcement priorities, the recourse for being placed in removal proceedings even if a person does not fall within the enforcement priorities is a mystery.

DACA has a more transparent procedural framework (and perhaps DAPA would be more transparent). USCIS maintains a portion of its website dedicated to the DACA application procedure.¹⁶⁷ There is a designated application form accompanied by detailed application instructions as well as detailed explanation of the criteria for eli-

163. Cox & Rodríguez, *Redux*, *supra* note 1, at 60 (discussing how the Obama administration promotes transparency through its implementation of DACA and its proposed implementation at DAPA).

164. Wadhia, *Role of Prosecutorial Discretion*, *supra* note 1, at 294–97; Wadhia, *Sharing Secrets*, *supra* note 3, 48–60; see also Rodríguez, *Constraint Through Delegation*, *supra* note 1, at 1789–90.

165. WADHIA, *supra* note 1, at 17–18, 55–57; Wadhia, *Sharing Secrets*, *supra* note 3, at 48–51.

166. *Id.*

167. Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

gibility for consideration (including videos, infographics, and tables).¹⁶⁸ There is also some explanation that the “DA” in “DACA” stands for “Deferred Action,” which is not a legal immigration status.¹⁶⁹ Also, USCIS has published detailed reports containing data describing those who have applied for and those who have received deferred action under DACA.¹⁷⁰ Addressing review of a decision to deny deferred action to a DACA applicant, the website states: “If USCIS decides not to grant DACA in your case, you cannot appeal the decision or file a motion to reopen or reconsider. USCIS will not review its discretionary determinations.”¹⁷¹

While DACA is more organized and transparent in the sense that there is an application form and therefore an established adjudicatory process, and in the sense that USCIS issues reports on DACA, DACA is based on a memo. In fact, many of the details are contained in a “Frequently Asked Questions” document, and not even in an authored memorandum.¹⁷² While USCIS has been more open about how it will adjudicate DACA applications and what standards it will apply in deciding whether to grant deferred action under DACA, the process and the standards rest on easily-shifted ground. USCIS changes and updates its DACA Frequently Asked Questions simply by posting an updated version on its website. A new president may choose to eliminate the program altogether and may do so with little procedural fanfare.

Also, the efforts to be more transparent about deferred action have opened up DHS to criticism that because it has listed criteria and has established an application process, it has violated the APA by not using notice and comment rulemaking.¹⁷³ Because DHS really meant to establish a legally binding rule, the argument goes, DHS

168. *Id.*

169. *Id.*

170. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., CHARACTERISTICS OF INDIVIDUALS REQUESTING AND APPROVED FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2014), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/USCIS-DACA-Characteristics-Data-2014-7-10.pdf>.

171. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

172. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated June 15, 2015).

173. Cox & Rodríguez, *Redux*, *supra* note 1, at 60.

committed a procedural error by choosing to use guidance documents over the mechanism of notice and comment rulemaking.¹⁷⁴ Some believe that because DHS has laid out criteria, the central administration has extinguished the discretion of individual enforcement officers, forcing officers to grant deferred action if the criteria are met.¹⁷⁵ As explained above, a policy memorandum is not supposed to be legally binding.

These efforts at transparency, therefore, have potentially placed the agency at a litigation disadvantage when determining whether the agency properly invoked the guidance document exception to notice and comment rulemaking. If this argument succeeds, then an agency is better off to say nothing if it wants its procedural choice to be accepted. In implementing DACA, DHS could have said nothing, released no memoranda, and never posted answers to frequently asked questions. It could have let front line officers randomly decide when to grant deferred action with no guidance from central administration. Foreign nationals would be left to guess who might qualify, and would be unsure about the procedure for seeking deferred action. The resolution of this conundrum is especially important to immigration law, where the regulated parties are individual foreign nationals who are often unrepresented.¹⁷⁶ Transparency is tremendously important.

There is an issue here that cuts to the heart of an unresolved issue in administrative law. When courts say that a policy memorandum cannot be binding, who must not be bound?¹⁷⁷ Is central admin-

174. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. Feb. 16, 2015).

175. *Id.* at 668–70.

176. See Family, *Administrative Law*, *supra* note 61, at app. A (showing representation rates before USCIS); *FY 2014 Statistics Yearbook*, EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, at F1 (Mar. 2015),

<http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf> (showing a 55% representation rate in immigration court for fiscal year 2014).

177. See, e.g., *Gen. Elec. Co. v. Envtl. Prot. Agency*, 290 F.3d 377, 384–85 (D.C. Cir. 2002) (invalidating a guidance document because it bound applicants); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988) (invalidating a guidance document where the court determined the agency to be “close-minded and dismissive”); see also Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992) (arguing that policy memoranda should not be used to bind the public even if there is only a practical binding effect); *The President and Immigration Law Redux*, *supra* note 1, at 67–68, n.296 (describing critics of DAPA as promoting the idea “that enforcement discretion be located exclusively in the hands of line-level enforcement personnel”); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. (forthcoming 2016); Mark Seidenfeld, *Substituting Substantive for Proce-*

istration able to bind lower level agency adjudicators through policy memoranda? Or, is it acceptable for central administration to bind its own employees, as long as it leaves open two possibilities: (1) that central administration may change its mind and (2) that a regulated party may argue that a different rule, other than the one in the policy memorandum, should apply. For example, the DAPA memorandum instructs lower level DHS employees to consider certain criteria, and then to decide whether to exercise discretion to grant deferred action. Does the direction provided to the vast network of adjudicators doom the procedural choice? If the answer to that question is yes, that would present major organizational challenges, especially in an area of law where lower level adjudicators have not been shy to resist directives from central administration.¹⁷⁸ If the answer is yes, then what does that mean for prosecutorial discretion in immigration law in general? May central administration provide any guidance as to when prosecutorial discretion should be exercised?

The final theme, minimal process, is another one to watch. This theme of minimal process is not as developed across all agencies with authority over immigration law. As our view expands, we can see how minimal process creeps into various aspects of executive immigration power, including the visa adjudication process. This wider view gives us a fuller picture of the executive branch's posture towards procedural protections in immigration law. Reliance on minimal procedures signals that the executive is not investing resources in more robust protections.

This tendency toward minimal process becomes even more significant as we begin to imagine the potential future of executive power over immigration law. For executive power that relies on a delegation from Congress, the sources of procedural protection are any that Congress may provide and the Due Process Clause. But what if the Supreme Court clarifies what it has left cloudy: What if the Supreme Court clarifies that the President has some measure of inherent power over immigration law?¹⁷⁹ What procedural protec-

dural Review of Guidance Documents, 90 TEX. L. REV. 331, 348–49 (2011) (exploring the parameters of the binding nature of guidance documents).

178. See Cox & Rodríguez, *Redux*, *supra* note 1, at 74; Cuéllar, *supra* note, 1 at 53–54; Kagan, *supra* note 177, at Part III; Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUS. (2014).

179. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). In *Zivotofsky v. Kerry*, the Supreme Court confirmed the President's authority to recognize foreign sovereigns and struck down a congressional statute that interfered with that power. This case is instructive in that it repre-

tions would apply? Would only the Due Process Clause apply? Would there be some mechanism to influence the executive to voluntarily impose greater procedural protections?

III. CONCLUSION

The renewed scholarly focus on the executive branch's power over immigration law must include study of the procedures the executive uses to implement immigration law. Looking across executive branch agencies charged with enforcing immigration law, the overall picture is not one of robust procedural protections. This wider view is especially significant as scholars explore the potential boundaries of the president's inherent authority over immigration law.

While the APA may permit agencies to make the procedural choice to use guidance documents, immigration agencies should think carefully about when and how they use them. Guidance documents are a necessary and important feature of administrative law, but the drawbacks of this procedural mechanism have special importance in immigration law. Guidance documents can be a useful tool for explaining information in plain English, but guidance documents rest on shifting ground and foreign nationals may not even know they exist. Even if they are known, their legal significance may be confusing to foreign nationals, and they do not provide legally enforceable rights.

While courts may hold that immigration procedures that provide minimal process are constitutional, such as the expedited removal program and vague explanations for visa denials, the executive branch should provide more process. Political and historical forces have pushed us toward a time of strong executive discretionary power over immigration law. With that power is a need for greater procedural protections.

sents an effort to separate out power between the President and Congress and recognizes a type of power that belongs solely to the President.

