A Need for Equity in Immigration Law (Congress, are you listening?)

Author : Jill Family

Tagged as : Immigration

Date : November 10, 2015

Jason A. Cade, *Enforcing Immigration Equity*, 84 **Fordham L. Rev.** (forthcoming 2015), available at SSRN.

In the late twentieth century, Congress amended the immigration laws to severely limit the power of immigration judges, the agency's adjudicators, to grant relief from removal on equitable grounds. At the same time, Congress expanded the categories of activities that render a foreign national removable. The result of the statutory tinkering was that it was much easier to be removable and much harder to be granted relief from removal.

The severity of those reforms is well known. Professor Jason Cade's contribution to the discussion is that he persuasively argues that those statutory reforms from twenty years ago are linked to the most visible controversy in immigration law right now: President Obama's executive actions creating the chance for a temporary reprieve from removal.

Through Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), the executive branch has established criteria that agency adjudicators should consider in deciding whether to grant deferred action to an individual foreign national. Deferred action is a time-out from removal. It lets a foreign national know that he or she is a low priority for removal, but it does not erase removability, and provides no lawful immigration status. Deferred action is a revocable promise not to remove for a certain period of time. DACA is aimed at individuals who were brought to the United States as children but who do not have legal status. DAPA is aimed at parents of US citizens or parents of "green card" holders who do not have legal status.

Both DACA and DAPA are executive exercises of prosecutorial discretion. Congress does not appropriate to the executive sufficient funds to remove all 11 million individuals who are in the United States without permission. The executive prioritizes its removal efforts. DAPA has not been implemented, however, because a US District Court judge issued a preliminary injunction against it. According to the judge, DAPA violates the Administrative Procedure Act.

Professor Cade acknowledges this dispute about the legality of DAPA, but does not focus on it. Instead, Professor Cade ties DACA and DAPA back to those statutory reforms of the late twentieth century. His argument is that because Congress removed considerations of fairness and proportionality from the arena of immigration court adjudication, the pressure to inject equity into the system shifted to the executive officials who decide whether to begin removal proceedings. Back-end adjudicators used to be able to consider factors such as the nature of the offense, the length of residence and rehabilitation. Congress eliminated that kind of inquiry and replaced it with very high hurdles to cross to achieve cancellation of removal in immigration court. To Professor Cade, DAPA and DACA represent an effort to exercise prosecutorial discretion in a system where the "prosecutors"[1] know that there is little chance for equity during adjudication. It is up to those deciding whether to place an individual in removal proceedings, then, to balance equities. If the initiation of removal proceedings surely will result in

removal, then the executive branch may exercise its prosecutorial discretion to refrain from starting removal proceedings in the first place.

Professor Cade identifies several drawbacks to the status quo. He takes serious issue with the executive's use of criminal history as a litmus test for whether an individual is worthy of prosecutorial discretion. Equity misses an entire population of foreign nationals, even if the encounter with the criminal justice system occurred tens of years ago and/or was a misdemeanor. Professor Cade argues that "*some* balancing should take place in individual cases, even for criminal aliens, in order for the removal system to be just."(P. 45.) While Professor Cade acknowledges that it is good idea to give immigration enforcement agents the power to remove dangerous individuals, he stresses that "it does not follow that all removals of noncitizens with criminal history are justified. . . . [N]ot all noncitizens with convictions or arrests are similarly situated."(P. 45.)

Also, Professor Cade is uncomfortable with the inherent characteristics of what he calls "enforcement-based equity."(P. 6.) He cites to the law enforcement bias of immigration prosecutors and their intense workloads as two reasons why equitable considerations and immigration enforcement are not a good fit. Professor Cade additionally observes that while equitable relief obtained from an immigration judge typically results in final, stable legal status in the United States, equitable relief obtained from an immigration prosecutor results only in a time out; it results in preservation of the status quo.

To ease the problems presented by enforcement-based equity, Professor Cade suggests statutory reform that would reinstate the ability of immigration judges to weigh equitable considerations in deciding whether an individual should be removed. This would release some of the pressure on front end enforcement officers, as there would be other avenues for equitable considerations to play a role. A parallel reform would be a statutory legalization program that would allow individuals to apply to become legal based on certain equities. This would shrink the pool of those eligible to be removed, allowing the executive to better focus on who of the remaining population should be removed.

I might dream a little bigger. I agree with Professor Cade that Congress stripped equity from the immigration court system and that we are feeling the repercussions. If there were a constitutional right to be with family, something akin to the Article 8 right to family life contained in the European Convention on Human Rights, then the entire analytical framework changes. Proportionality would become central to any decision to remove that involves the separation of family members. Congress would not be able to legislate away that kind of right. So far the Supreme Court has not acknowledged such a right, however.

Professor Cade is prudent to express his preferred solution, statutory reform, but at the same time to acknowledge that the congressional paralysis that has plagued immigration law reform likely will continue. In the absence of statutory reform, Professor Cade suggests that it will be up to executive exercises of discretion to inject equity into the removal process. He hopes that the executive branch continues to take seriously the burden Congress has placed on it by improving how it does so.

Congress, are you listening? It is time to reform the immigration statutes to inject equity back into the immigration court system. As Professor Cade observes, doing so not only would restore fairness to the system, but also would properly realign the equitable adjudication function to the immigration courts.

1. Because immigration removal proceedings are civil, the government attorneys pursuing removal are not criminal law prosecutors.

Cite as: Jill Family, *A Need for Equity in Immigration Law (Congress, are you listening?)*, JOTWELL (November 10, 2015) (reviewing Jason A. Cade, *Enforcing Immigration Equity*, 84 **Fordham L. Rev.** (forthcoming 2015), available at SSRN), https://lex.jotwell.com/a-need-for-equity-in-immigration-law-congress-are-you-listening/.