The Supreme Court's immigration imperative: The executive branch necessarily exercises tremendous discretion in deciding whom to deport; Obama is right to try to formalize it

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Recently, the U.S. Supreme Court heard arguments in U.S. vs. Texas, the case challenging President Obama's policy deferring deportation proceedings against children and some other categories of immigrants.

Commentators who witnessed the arguments reported that the case seems headed to a 4-to-4 tie. That would resolve nothing.

A tie vote would provide no guiding principle of law, and would leave in place a lower-court ruling preventing the President from enforcing his policy, with nothing to replace it. And that would be a tragedy.

As Justice Ruth Bader Ginsburg noted during the arguments, there are currently approximately 11.3 million undocumented immigrants in the United States. Congress has provided funds to remove perhaps 400,000, which leaves the administration with a huge pool of undocumented immigrants, funding to remove a tiny fraction, and limited guidance from Congress regarding how to prioritize removal procedures.

The result of that disconnect is exactly what you would expect: a travesty. Removal cases pour into immigration courts in a flood, with little hope of resolution.

The number of pending cases in immigration courts has increased every year since 2006, so that now nearly half a million immigrants await the resolution of their cases.

Today, the average case in immigration court has been pending for 664 days — a year and 10 months — without resolution.

Those immigrants who have valid claims to remain in the United States face even more daunting delays. The average length of time to process their claims to a successful conclusion is 871 days.

In high-volume states like New York, Arizona, Illinois, Nevada and California, the delays are even crazier: more than 1,000 days. And those are for cases where the immigrant is found to have a valid claim for relief.

One immigration attorney in California told me of the time the court adjourned one of his cases to a date certain. The attorney was left to ask, “What year, Judge?”

Adding an additional 10 million cases to that backlog would accomplish nothing but more chaos. And so someone — be it Congress, the President or the courts — has to prioritize the cases.

Congress has passed legislation wisely prioritizing deportation of convicted criminals and others who are detained at the border with no claim to asylum. Such policies make good sense.

But beyond that, Congress has given scant guidance, no doubt for fear that by carving out categories of cases for greater attention, they might be criticized by anti-immigrant forces as being soft on the remainder. And so the administration has done what it simply must: It has devised a reasonable plan, put in writing and released to the public, to prioritize its very scarce enforcement resources.

Before anyone seeks to criticize the administration, they should take a few minutes to read those memorandums. They set out as a top priority for removal those immigrants who pose a threat to “national security, border security and public safety.”

The second priority is removal of those with long misdemeanor rap sheets, and those who reenter after a previous removal or have otherwise egregiously violated immigration laws.

The third priority is deportation of those who have received a final order of removal but do not represent any threat to our safety or the integrity of the immigration system.

Of course, that leaves many millions of immigrants who under any realistic scenario will be living in America for years — those for whom the immigration authorities have “deferred action.”

Who are these people? As Homeland Security Secretary Jeh Johnson puts it, many are “hardworking people who have become integrated members of American society.”

They include those who came to America as children, and have lived here for years. They include adults who, while themselves lacking legal status, have a son or daughter who is a U.S. citizen or lawful permanent resident. There is virtually no likelihood that these people will be removed anytime soon, and it is simply hypocritical to pretend otherwise.

And so, Johnson has proposed making open and subject to rules what would otherwise be an exercise of unreviewable discretion. Under the principles he set forth, those who satisfy listed criteria would be eligible for “deferred action” for a period of three years, with a possibility for renewal.

During the period of deferred action, immigrants could apply for work authorization. Both deferral and work authorization would be determined on a case-by-case basis.

In the absence of clear congressional direction to prioritize the very scarce resources it has allocated, these are sound policies.

Supreme Court observers of all political stripes have long admired Chief Justice John Roberts' deep commitment to the prestige of the court he leads. Certainly, this is a moment where such commitment is urgently needed.

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