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Deportation in the United States: A Historical Analysis and Recommendations

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Abstract

Since September 11th, 2001, the United States has relied on the deportation of noncitizens as a central component of its national security strategy. Over the past decade, the deportation system has expanded the scope of noncitizens deportable by law while simultaneously restricting the rights of those noncitizens to challenge their deportation. The recent surge in deportation is part of a longer history of xenophobic³ politics that have facilitated the creation of an exceptionally rigid system existing outside of traditional judicial checks and balances. This paper traces the history of xenophobic deportation policies and explores the critical legal decisions that have expanded the scope and power of deportation authority. In light of this history, the United States should create a more democratically accountable system that guarantees judicial review and reverses past policies influenced by xenophobia.

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³ For the purpose of this paper, xenophobia refers to fear or prejudice directed towards those perceived as ‘foreign’ or ‘other’. Although xenophobia is distinct from racism, they are both interconnected and the discussion of xenophobia in this paper will often also involve a discussion of race. Policies that are xenophobic or racialized refer both to the prejudice and bias that influence the policies, as well as their disparate effect among non-white or foreign populations.

Introduction

As a result of post 9/11 policies, the rate of deportation has steadily increased every year, with official statistics having yet to show a reversal of this general trend. For example, in 2013, the United States deported 438,421 immigrants, a number that is well over twice the amount of deportees a decade ago (Gonzalez-Barrera and Manuel-Krogstad 2014). In total, the Obama administration has deported over 2 million immigrants, more than any other president in United States history (Gonzalez-Barrera and Manuel-Krogstad 2014). If one were to factor in ‘voluntary departures’, those who leave on their own accord, the United States expels far more immigrants than it admits annually (Parker 2012, 188).⁴

Deportation is not limited to undocumented immigrants; rather, it targets the immigrant population as a whole. Hundreds of thousands of noncitizens with legal immigration status are deported for minor criminal offenses such as drug possession and petty larceny (Kanstroom 2014, 213). Of the over 400,000 individuals deported in 2013, 198,000 were criminal offenders (Gonzalez-Barrera and Manuel-Krogstad 2014). Often, these individuals are lifetime American residents stripped from their families and deported to foreign countries where they do not speak the language and have little, if any, family (Kanstroom 2014, 214-215).

What is most striking is not only the growth of the deportation system, but also the unchecked legal authority that the system wields. Although deportation is classified as an administrative procedure, rather than a criminal one, the distinction between the two serves as a legal fiction. In criminal and deportation law, features such as indefinite detention, the issuing of warrants, and court proceedings are nearly identical (Moloney 2012, 16). However, deportation’s classification as administrative law allows the government to bypass typical judicial safeguards associated with criminal trials. If arrested, immigrants are provided few of the democratic rights guaranteed under the Constitution. A noncitizen under immigration proceedings will not be protected from unreasonable search and seizures, will not be read ‘Miranda rights’, and will never have the right to a jury trial (Kanstroom 2007, 3-4). If a noncitizen has been targeted due to their race, religion or political opinion, they will not be able to raise a ‘selective prosecution’ defense in court (Kanstroom 2007, 3-4).⁵

In order to understand how the United States has built such a system, this paper presents a historical analysis of immigration law and deportation. The most recent surge in deportation has been the direct result of policies enacted in the post-9/11 security environment. However, this expansion of deportation is a culmination of policies that have normalized an undemocratic and unchecked treatment of noncitizens. The United States’ decision to capitalize on the deportation system as a component of national security is not an anomaly, but the logical extension of the

⁴ A ‘voluntary departure’ refers to immigrants in removal proceedings who depart on their own accord instead of waiting for a judge to order their deportation. If an immigrant is deported, they are automatically inadmissible from the United States for a set number of years in accordance with the ‘3-10 years bar’ of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. A voluntary departure is preferable to many immigrants because it will not automatically trigger this bar.

⁵ Selective prosecution is a procedural defense in which a defendant argues that the prosecutor’s decision to bring charges was an act of discrimination based on the defendant’s race, gender, age, etc.

expansive deportation powers the United States has asserted for decades. The problem with deportation law is not simply a set of specific policies enacted after 9/11, but the legal framework and norms that guide deportation.

A Legal History of Deportation

The growth of the American deportation system can in part be attributed to the ambiguous status of immigration law in the Constitution. Although the Constitution empowers Congress “to establish an uniform Rule of Naturalization,” it says nothing about admission or deportation of noncitizens (U.S. Const. Art I Sec 8). A similar problem arises when assessing the rights of noncitizens vis-à-vis citizens, a distinction only touched upon in the Constitution. The only instance in which the Constitution does distinguish between the rights of citizens and noncitizens is in the right to vote and the right to run for a federally elected position, both of which are reserved to citizens (Cole 2003, 370-375). With a lack of clearly defined rights and with ambiguous limits to government power, America’s first deportation laws set long-lasting precedents in deportation policy.

Early Deportation: From Forced Migration to Sovereign Control (1798-1899)

The earliest forms of deportation established strong powers for the federal government to forcibly remove noncitizen populations. The first laws claiming the power to deport were the *Alien and Sedition Acts* of 1798, a series of laws enacted only a decade after the Constitution. Wary of foreign influence in the United States, the *Alien and Sedition Acts* empowered the president to deport foreigners “dangerous to peace and safety of the United States” without trial (Alien Friends Act 1798). Vigorous political debates ensued over the legitimacy of these acts, and although some viewed these far-reaching deportation powers as undemocratic, this policy was ultimately accepted because, as noncitizens, foreigners could easily be denied constitutional protection (Cole 2003, 371-372). In addition to establishing expansive powers for the federal government to deport noncitizens, the *Alien and Sedition Acts* also legitimized a status-based distinction between citizens and noncitizens that could deny noncitizens the liberties that the Constitution guaranteed to all (Kanstroom 2007, 82-83).

Although forced expulsion under the *Alien and Sedition Acts* is akin to deportation, it differs in that these powers existed outside of any relation to immigration law. Until the mid-19th century, immigration was a matter of state authority. Various states enacted laws regulating immigration in order to prevent entry of undesirable populations – the poor, the sick, and the criminal – into their respective states (Chacon 2014, 3-4). States chose to impose taxes on immigrants until, in a series of court cases, the judicial system began to challenge their power to do so. In one of the first cases concerning these taxes, the Supreme Court struck down a New York statute as a usurpation of the congressional power to regulate commerce (Chacon 2014, 3-4). When the federal government attempted to create its own taxes, the Supreme Court unanimously decided that Congress has exclusive power to regulate immigration pursuant to the commerce clause, thus ending state involvement in immigration (Kanstroom 2007, 94-95).

However, as the federal government expanded its presence in immigration law, a new justification for this authority gained popularity: one based in sovereign authority rather than the commerce clause. This shift in legal authority had long-lasting consequences on how immigration law would function. In the Supreme Court case *Chae Chan Ping v. United States* (1889), the court determined that “the power of exclusion of foreigners [was] an incident of sovereignty belonging to the federal government,” and that this power could not be “restrained on behalf of anyone” (*Chae Chan Ping v. U.S.* 1889). According to this ‘plenary power doctrine,’ the Supreme Court granted the political branches of government exclusive authority in immigration affairs and would defer ruling on executive or congressional action. As a matter of sovereign authority, the power to deport was not subject to the same judicial checks that restrained the government in other areas of law. Through this logic, deportation would be treated as an administrative procedure rather than criminal law, thus excluding noncitizens from constitutional rights normally guaranteed in a criminal trial (Gardner 1981, 398-403).

Yet the plenary power doctrine alone cannot explain the explosive growth of deportation. Even in the late 1800s, deportation was still a comparatively small enterprise that deported at most a few thousand immigrants annually (Parker 2012, 188-189). However, with immigration law existing outside of judicial review, immigration policy could expand the scope and power of deportation without the constitutional limitations that constrain other areas of policy. The next turning point in deportation law concerned a shift in the function and purpose of deportation itself.

Beyond the Border: Deportation as Social Control (1900-1999)

As it was originally conceived, deportation acted as a mechanism of extended border control, enforcing laws that excluded certain noncitizens from entering the United States. Deportation under the Chinese Exclusion Act (1882), for example, was concerned with removing those noncitizens the law had barred from entry. Beginning in the 20th century, deportation acquired a new function. Instead of simply regulating illegal entry, the United States used deportation in order to regulate behavior among immigrants who were already within the United States’ borders. The United States began to create laws permitting the deportation of ‘unfit,’ criminal noncitizens legally residing in the United States. The first of these laws was a 1910 statute that deported any noncitizen found to be a prostitute (Kanstroom 2007, 126). Over the course of the century, the idea of deporting criminal noncitizens grew in popularity. In the 1920’s, a series of laws expanded the number of deportable crimes to include espionage, explosives, wartime offenses and crimes involving ‘moral turpitude’ (Kanstroom 2007, 134).

In this sense, deportation was no longer limited to unwelcome foreigners. Any noncitizen who had already been admitted into the United States now faced the possibility of deportation. The threat of deportation itself marginalized immigrant populations, encouraging them to become silent in politics out of a fear of being targeted (Moloney 2012, 10). In the early 20th century, 10 percent of the United States’ population was foreign born, meaning millions of Americans now feared their own expulsion (Moloney 2012, 11). By employing deportation as a tool of the criminal justice

system, the United States created the conditions for the dramatic expansion in the scope and power of the deportation system.

Although post-entry social control is more readily analogized to criminal punishment, this shift in deportation law did not alter the court's opinion as to whether deportation necessitated basic due process. In *Bugajewicz v. Adams* (1913), a case related to the aforementioned prostitution statute, the Court held that even though deportation was now based on criminal conduct, this did not make deportation proceedings criminal (Kanstroom 2007, 126). In what could have been a critical turning point in immigration law, the Court instead deferred to the status quo. Deportation law continued to exist as administrative law, ensuring that noncitizen rights in deportation were minimal.

The second half of the 20th century witnessed dramatic liberal reforms in immigration law. In the post-World War II political environment, liberal intellectuals and activists created broad coalitions that demanded the elimination of the racialized quota based system that had governed immigration law since the 1920's (Ngai 2004, 241). This system of visa distribution had allotted nearly 70 percent of all slots to white European immigrations, attempting to solidify the racial homogeneity of American society (Campi 2014). After years of political debate, the Immigration Act of 1965 proved to be a watershed moment in American history by replacing quotas with a preference system that prioritized family unity and high skilled labor (Kanstroom 2007, 225).

Nevertheless, the development of deportation law was an important exception to this liberal trend. Throughout this period, policymakers continued to focus on the issue of 'criminal aliens.' In the late 1980s, the fear of criminal aliens culminated in several historic pieces of immigration legislation. The first of these was the Anti-Drug Abuse Act of 1988, a law that created a list of 'aggravated felony' crimes that subjected a noncitizen to immediate deportation. At this point, only the most serious offenses, such as murder, drug trafficking, and firearms trafficking, were included (Kanstroom 2007, 227). However in 1996, the tough on crime mentality pushed Congress to pass two dramatic reforms to immigration law. The Anti-Terrorism and Effective Death Penalty Act (AEDP) and the Illegal Immigration Reform and Responsibility Act (IIRRA) expanded the list of deportable crimes to include nonviolent misdemeanors such as shoplifting or drug possession (Miller 2004, 81-84).

These reforms not only expanded the criteria for deportation, they also pushed the legal and constitutional limits of deportation authority. Although deportation proceedings had few judicial safeguards prior to 1996, these reforms virtually eliminated the ones that remained. Those convicted of an 'aggravated felony' were subject to immediate deportation without any traditional avenues of relief offered in other deportation hearings (Miller 2004, 81-84). Prior to 1996, immigration judges could exercise compassion by offering probation in lieu of a conviction. In the 1996 immigration reforms, Congress legally redefined the scope of 'conviction' so that even if a judge offered probation, the noncitizen would still be deportable (Cook 2003, 307-309). One of the most striking elements of these reforms was their retroactive application, meaning that any noncitizen previously convicted of a crime now faced imminent deportation (Miller 2004, 81-84). Many criticized this provision as an ex-post facto law prohibited by the Constitution. However, because immigration law was still conceived of as administrative rather than criminal law, the courts have regularly upheld Congress' authority to retroactively apply these measures (Miller 2004, 84-85).

The War on Terrorism: Deportation Expanded (2000-Present)

By September 11th, 2001, the United States had already created an expansive system of deportation that could easily be deployed for national security. Over the past two centuries, the deportation system had been established as a tool to expel ‘threatening’ noncitizens. After September 11th, the United States capitalized on deportation as a mechanism for crime control in order to respond to a new form of crime, international terrorism. Once deportation became an issue of national security rather than traditional crime, the United States asserted unprecedented power in responding to potential noncitizen threats. For example, the PATRIOT Act, signed in October 2001, included sections that allowed the deportation of any “alien” for wholly innocent associational activity with a terrorist organization (Cole 2002, 966). The act expands the definition of “terrorist activity” to include virtually any use (or threat of use) of a weapon and gives the Secretary of State unreviewable authority to designate a “terrorist organization” (Cole 2002, 966-970). Combined, these provisions have the power to subject virtually any noncitizen to arbitrary deportation.

In addition to expanding the federal government’s power to deport, Congress also ensured that authorities would have the resources necessary to carry out these deportations. In 2002, the United States created the Department of Homeland Security. This agency, whose “primary mission...is to prevent terrorist attacks,” was granted the authority to oversee immigration law enforcement (Homeland Security Act 2002). The two agencies that deal with deportation – Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) – have received billions of dollars in order to ramp up deportation of noncitizens (Gonzalez-Barrera and Manuel-Krogstad 2014). In fiscal year 2012 alone, the federal government spent 18 billion dollars on federal immigration enforcement, 24 percent more than all other forms of criminal law enforcement combined (Meissner et al. 2014).

This long history of deportation policy, dating as far back as 1798, is what allowed the conditions for the unprecedented growth in the deportation regime that we see today. Early policies established the authority to deport and soon after asserted this authority as a form of irrefutable sovereign power. Free from traditional judicial checks, the deportation regime expanded, acquiring a new function as a tool for the post-entry social control of immigrants. The policies thereafter dramatically expanded the criteria for deportable noncitizens, leading to large spikes in deportation. In 1995, the year before the AEDP and the IIRRA were enacted, less than 50,000 immigrants were deported annually. That number increased to over 100,000 in 1997 (The Economist 2014). In 2003, one year after the Department of Homeland Security was formed, the annual number of deportations increased to 211,000 (The Economist 2014). As a result of these policies, millions of immigrants have been deported over the course of a few years.

Sociological Context

The legal history of deportation law in the United States runs counter to the liberal democratic narrative of progress that Americans espouse. Over time, the deportation system has grown in size

and in power, became decidedly less democratic, and secured fewer rights for noncitizens to challenge their deportation. To understand this trend, this section advances a sociological history to accompany the preceding legal analysis. The development of deportation law cannot be separated from the racial and xenophobic attitudes that have pervaded American society. Xenophobia has not only prompted the deportation of certain racialized populations; it has also facilitated their exclusion from proper democratic consideration. As noncitizens these populations have been placed on the periphery, becoming the target of governmental power instead of earning its protection. As subjects marginalized from political participation, noncitizens have been deported in the name of “national interest.”

At its inception, the United States was remarkably homogeneous, in culture, religion, and race. In 1790, 75 percent of the population had roots in the English-speaking states of the British Isles (Steinberg 1981, 10). Although there was some degree of ethnic diversity in select parts of the United States, British Protestants enjoyed political and cultural dominance in American society and numerically outnumbered any other demographic (Steinberg 1981, 10). Perhaps because of this ethnic homogeneity, xenophobic fears had a powerful influence on U.S. policy, including the initial development of deportation powers under the *Alien and Seditions Act*. The power to deport was in fact established as a solution to the fear of French influence in the United States. From 1789 to 1799, the French Revolution invoked fear of political upheaval and anarchy in the United States, a fear coupled with racial stereotypes of the French as brute and threatening (Kanstroom 2007, 52-53). The French were perceived as alien, a “colored breed” that threatened the political and physical security of the United States (Kanstroom 2007, 52-53).

In this light, the power to deport and the power to secure the nation’s racial cultural and religious homogeneity were effectively one and the same. Other forms of forced deportations like the *Indian Removal Act* (1830) or the *Fugitive Slave Act* (1850) leveraged the precedent created by the *Alien and Sedition Acts* in order to target entire noncitizen populations for deportation (Kanstroom 2007, 83). The logic that justified the forced removal of threatening noncitizens was extended in the forced migrations of indigenous and slave populations (Kanstroom 2007, 63-80). In each case, migration and movement of these nonwhite populations were controlled and regulated in order to secure social and political order. These deportations reinforced the social and political divisions between ‘citizens’ and ‘aliens,’ racialized divisions that segregated those included and those excluded from American society (Peutz and De Genova 2010, 4).

Although the development of immigration law under sovereign authority was by no means inevitable, it coincides with the same logic that has guided deportation policy since its inception. Deportation itself reaffirms state sovereignty and territoriality by invoking an irrefutable state right to expel undesirable, threatening noncitizens (Peutz and De Genova 2010, 7). So irrefutable, in fact, that even judicial review would not hinder this power.

Following historical precedents, the widespread desire to control and restrict foreign influence facilitated the expansion of governmental power to deport in the late 1880’s. This was the case when the Supreme Court ultimately held in *Chae Chan Ping v. United States* that the political branches would have unreviewable authority to set immigration law. At this time, xenophobic sentiments were especially powerful in the West where there were a great number of Chinese

immigrants. Although the Chinese were originally welcomed, a surge in their population led to hostility, racial stereotyping, and outright violence: in 1850 there were approximately 7,500 Chinese immigrants nationwide, while in 1880 that number had risen to 105,000 (Kanstroom 2007, 98). Chinese immigration soon became a national ‘problem’, prompting Congress to pass the Scott Act, a law that prohibited the reentry of all Chinese laborers. When Chae Chan Ping attempted to return to the United States after a visit to China, he was denied entry and chose to challenge the law in court. It was only then, in a case intimately connected with anti-Chinese racism, that the Supreme Court affirmed the plenary power of the federal government in immigration (Kanstroom 2007, 98).

When deportation became concerned with regulating noncitizen behavior within the United States, sovereign power became articulated as a justification to not only secure state borders and territory, but also as a justification to cleanse American society of unfit, undesirable noncitizens. As a tool of the criminal justice system, deportation was used to target ‘criminal aliens.’ Again, xenophobia played an important role in the development of these deportation policies and in the very way that policymakers constructed the problem of ‘criminal aliens’ in the United States.

The flurry of legislation that facilitated the deportation of noncitizens throughout the 20th century was justified by a perceived increase in immigrant crime rates, although a review of the data shows that no such increase occurred (Cook 2003, 305). These policies more so reflected anti-immigrant sentiment of the time. Many Americans were inherently unsettled by the changing ethnic composition of modern immigrants, who were increasingly non-white and did not readily embrace assimilation like their earlier counterparts (Cook 2003, 306). Accordingly, the American public largely believed immigrants were to blame for the ills of American society, such as drug abuse, crime and unemployment (Marley 1998, 857).

Through these policies, policymakers blurred the division between noncitizens and criminals by treating them as one and the same. The post-entry deportation laws that created such a rigid system were grounded in the assumption that noncitizens were predisposed to crime and that deportation was the most efficient way to deal with this threat (Miller 2004, 120). The conflation between noncitizens and criminals was a product of the discourse policymakers employed. The very idea of the ‘criminal alien’ discursively linked the two concepts – criminal and alien – together in order to construct a national problem in need of intervention (Lytle 2003).

The same discursive tactics employed against ‘criminal aliens’ were later applied and perfected in the War on Terror. Instead of being labeled as ‘deviant criminals’, every noncitizen is now considered a potential terrorist and a potential threat to national security. The consolidation of counterterrorism and immigration under the Department of Homeland Security is emblematic of this trend. In this frame, immigration is always an issue intimately linked to national security. Under the auspices of national security, deportation agencies target the noncitizen population as a whole, including undocumented immigrants and ‘criminal aliens’ deportable under the 1996 reforms. Through this linkage, all noncitizens have borne the consequences of post-9/11 counterterrorism policies, whether physically or psychologically by nature of their precarious situation.

Enforcement of deportation has become increasingly discriminatory in the 21st century, reflecting the same xenophobic fears that prompted Congress to expand the government’s powers

to deport noncitizens in the 1700's (Miller 2004, 84 and Golash-Bozaa 2013, 11).⁶ In the name of national security, the PATRIOT Act gives almost unreviewable authority to deport any 'threatening' noncitizen, and in light of the trauma caused by the September 11th terrorist attacks, American citizens have been more willing to accept these xenophobic policies. Whereas before September 11th, circa 2000, about 80 percent of the American public considered racial profiling wrong, polls taken immediately after 9/11 reported that nearly 60 percent of the public then supported these measures given the current security environment (Cole 2002, 974-975).

Such toleration of xenophobic policy is indicative of the ways in which deportation has been influenced since the late 1700's. The legal history of deportation law displays the many critical junctures that influenced future policy, but only by combining this with sociological analysis can we understand exactly how the deportation system has evolved into its present iteration. Xenophobic fears have allowed policymakers to justify unprecedented increases in governmental power targeted at marginalized populations. Any recommendations moving forward must reflect on both of these analyses in order to create a more democratically accountable system of deportation.

Recommendations

The United States' deportation system has long existed outside the process of judicial review in order to circumvent noncitizen's rights. This has largely been the product of pervasive xenophobia that has influenced critical legal decisions in the United States. In order to create a more just system, we must first align deportation with judicial review and reverse the growth of the system itself.

The first step forward must alter the legal framework of immigration law by ending the plenary powers doctrine. This doctrine has allowed Congress and the executive branch to wield unchecked powers in excluding noncitizens from the United States. In the current legal framework, policymakers will continue to expand the scope and authority of deportation without any constitutional limits. The policies passed after 9/11 are only the most recent example of the unchecked power that the federal government has exercised. Furthermore, the plenary powers doctrine has constructed deportation as administrative law, thus excluding noncitizens from judicial review of the deportation process itself. Noncitizens are denied essential constitutional rights because of this distinction. Particularly now that deportation is tied with criminal proceedings, this distinction only serves those who wish to deny noncitizens the right to challenge their deportation.

In addition, we must reverse the policies that have been part of this long history of unchecked deportation policy. Absent judicial review, policymakers have been able to pass legislation subjecting more and more noncitizens (e.g. 'criminal aliens', 'terrorists', etc.) to unchecked

⁶ The different systems of racial profiling involved in deportation enforcement have been written about extensively. The DOJ has primarily targeted Arab and Muslim noncitizens in their pursuit of terrorist suspects, often detaining them for investigation and later deporting them if possible (See Miller). The DHS has primarily targeted Latinos suspected to be unauthorized immigrants (See Golash-Bozaa). While these are both separate issues, they are related in demonstrating the discriminatory nature in the enforcement of deportation.

deportation. These policies have been historically informed by xenophobia and do not reflect an accurate analysis of necessary deportation.

This is not to say that all deportation policies should be rescinded. Rather, we must revisit and refine the policies that guide deportation today. The Anti-Terrorism and Effective Death Penalty Act (AEDP) and the Illegal Immigration Reform and Responsibility Act (IIRRA) are still operational and allow the deportation of long-time permanent legal residents for committing a petty misdemeanor. Few would agree that this policy serves the United States' national interests. Similarly, we must re-examine the legislation passed in the wake of September 11th to objectively analyze the current relevance of policies like the PATRIOT Act and the Homeland Security Act. Furthermore, we must be cognizant of the longer history of deportation law in the United States moving forward and resist the temptation to rely on deportation as an unchecked power to deport 'threatening' noncitizens.

In the past few years, the Obama administration has taken multiple executive actions granting 'deferred action' to categories of deportable immigrants, functionally allowing these groups to reside in the United States for the near future.⁷ Yet while these actions are significant, they do not address the underlying problems with the deportation system. In June of 2012, the administration announced Deferred Action for Childhood Arrivals (DACA), an initiative that would grant deferred action to certain undocumented youth (Napolitano 2012). In total, this program has relieved over 650,000 unauthorized immigrants from deportation (USCIS 2014). In November 2014, the administration announced that it would expand eligibility for DACA as well as implement another program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), now extending the same benefit to the parents to which its title references (Johnson 2014).

Although the program has yet to be implemented, current estimates show as many as 3.7 million unauthorized immigrants nationwide are eligible. While these numbers are significant, executive actions are only temporary solutions that do not reverse past policies, or change the juridical framework surrounding immigration. Any future president can rescind these orders, easily reversing any progress made over the past few years. Moreover, current legal battles challenging the legitimacy of his most recent executive order are stalling implementation (Chishti and Hipsman 2015).

However, the legal pushback that has surrounded the Obama administration's current actions is however telling of the obstacles that any true reform will face. Moreover, Congress's inability to pass any form of immigration reform in recent years implicates deportation as well. In this light, executive action on deportation might be a necessary and proper short-term solution. The public is evenly divided over whether the recent increase of deportation is 'good' or 'bad' (Pew Research 2014). Nevertheless, gradual reform is possible and modestly scaling back both the size and power of the deportation regime can be a pragmatic push towards ultimately creating a just, and more accountable deportation system.

⁷ 'Deferred Action' is the political term used to describe the executive's branch use of 'prosecutorial discretion' in order to deprioritize low priority categories of immigrants. This legal justification of prosecutorial discretion relies on the argument that the executive branch should be allowed to focus attention on 'high priority' individuals that do not pose a threat to national interests.

Conclusion

From a broad perspective, the question of whether to offer noncitizens a more democratically accountable system of deportation relates to the long-standing tension between liberty and security. In this case, it is noncitizens' liberties that are being threatened. Deportation policy's history should demonstrate that our xenophobic fears, particularly in times of crisis, often easily lead us to compromise liberties for the sake of security. Again, a more sober analysis of deportation policy can help us find a more proper balance between liberty and security. Placing immigration under judicial review is by no means abnormal; it is simply aligning our deportation policy with the basic democratic values the United States espouses. Deportation must have its constitutional limits and be reviewable by the judiciary. Neither of these standards unduly restricts counterterrorism operations, most of which have nothing to do with deportation. However, by doing this we can create a more just system of deportation that checks arbitrary government power and guarantees noncitizens basic legal rights.

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