

## Foreword: The Future of Immigration Enforcement, a Tribute to David A. Martin

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Our immigration law is a complex and politically-charged subject. Through it, we determine who may enter the country and under what conditions, who may stay, and who must leave. We use it to define the group of people eligible to become U.S. citizens. We allow families who have been separated to be reunited. We enhance our global competitiveness through the admission of people with skills, talents, and entrepreneurial ambitions. Immigration law also enables us to provide humanitarian relief to the persecuted by setting forth a framework for obtaining refugee status. In short, immigration law is an important mechanism for shaping our country's future.

In the last several years, it has been the enforcement aspects of immigration law that have proven the most divisive and volatile. The subject of enforcement raises numerous questions regarding how government officials should ensure compliance with the law. Should they attempt to remove every violator from the country? Raid workplaces or homes searching for violators? Construct a fence on the border? Exercise their discretion to look the other way if an unlawfully-present alien is otherwise law-abiding? What kinds of due process protections should be in place? This symposium, jointly sponsored by the University of Virginia Immigration Law Program and the *Journal of Law & Politics*, aims to critically assess the possible directions for immigration enforcement in the coming decades. It is fitting that we have chosen to publish this symposium in honor of Professor David A. Martin, who is one of the world's leading immigration scholars and a crafter of many of the United States' most successful immigration enforcement mechanisms.

Immigration enforcement issues have dominated the political landscape in the last several years. For example, Secure Communities, a program begun under President George W. Bush and expanded under President Barack Obama, has been the subject of widespread criticism. The program allows Immigrations and Customs Enforcement ("ICE") to identify immigration violators among people arrested by federal, state, or local police, through a check of all fingerprints that are sent to the Federal Bureau of Investigation ("FBI") against Department of Homeland

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Security's ("DHS") immigration database. Advocacy groups claim that this practice discourages undocumented immigrants from reaching out to law enforcement to report crimes, including crimes of domestic violence, and that it is likely to lead to racial profiling and pretextual stops and arrests.<sup>1</sup>

The issue of discretion in enforcement has also been controversial. During his time at ICE, symposium panelist and former ICE Director John Morton issued a series of memoranda systematically setting forth a centralized list of ICE's priorities. Morton's purpose was to achieve consistent application nationwide as well as to provide a roadmap for determining when ICE officials should exercise prosecutorial discretion by declining to initiate removal proceedings.<sup>2</sup> These memoranda have generated significant controversy, both from the political right, because they allegedly "advertise" to potential violators how to avoid the risk of deportation, and from the left, because they show that ICE still sometimes prioritizes the removal of non-criminal aliens. In 2012, the Obama Administration exercised discretion in a different way, by launching a new program, Deferred Action for Childhood Arrivals, or "DACA." This program extends work authorization and provides a temporary form of legal status to undocumented people brought to the United States at a young age. Some constituents responded with jubilation, while others accused the President of overstepping his executive authority.<sup>3</sup>

Last summer, another enforcement issue dominated the national media. As tens of thousands of undocumented children from Central America crossed the U.S.-Mexico border, the government was faced with an enormous political and humanitarian crisis. Many of the women and children were detained in facilities in Artesia, New Mexico and Karnes County, Texas, leading to criticism that the Obama administration was acting without regard to potentially valid asylum claims.<sup>4</sup>

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<sup>1</sup> Renee Feltz & Stokely Baksh, *Immigration Crackdown Creates Insecure Communities*, PBS (Aug. 19, 2010), <http://www.pbs.org/wnet/need-to-know/security/video-immigration-crackdown-creates-insecure-communities/2964/>.

<sup>2</sup> See, e.g., Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to All Employees of Immigration & Customs Enforcement (Mar. 2, 2011) (on file at <http://www.ice.gov/news/releases/civil-immigration-enforcement-priorities-memo>); Memorandum from John Morton, Dir., Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel of Immigration & Customs Enforcement (June 17, 2011) (on file at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>).

<sup>3</sup> Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1.

<sup>4</sup> See, e.g., Esther Yu-Hsi Lee, *Lawyers Say Detention Center Designed to Quash Legitimate Asylum Claims*, THINK PROGRESS (Aug. 27, 2014), <http://thinkprogress.org/immigration/2014/08/27/3475472/lawsuit-artesia-detention-center/>.

Finally, after the symposium published here was held last fall, President Obama announced on November 20, 2014 a series of executive actions that expanded DACA-type status to, among others, qualified parents of U.S. citizens and lawful permanent residents. This action has proven to be one of the most controversial in President Obama's time as chief executive.<sup>5</sup> Several Republican members of Congress have threatened to defund the Department of Homeland Security if the President refuses to rescind his executive actions.<sup>6</sup> And on February 16, 2015, a district court in Texas issued a preliminary injunction staying the President's action pending a resolution of a legal challenge brought by twenty-six states.<sup>7</sup>

This symposium addresses the politically-charged challenge of immigration enforcement head-on in an unusual way—by convening leading figures from academia and government to assess possible directions for immigration enforcement over the coming decade. The objective is to help point the way toward a sustainable, stable, and long-term enforcement system. Participants in the symposium include several former high-level government officials from multiple administrations: Doris Meissner, who served as Commissioner of the Immigration and Naturalization Service (“INS”) under President Bill Clinton; Bo Cooper, who served as General Counsel to INS under President Clinton; Julie Myers Wood, who served as Director of ICE under President George W. Bush; and John Morton, who served as Director of ICE under President Barack Obama and authored the aforementioned “Morton memos.”

We have also included several leading legal scholars, many of whom have been active in government service and sharp critics of the existing system: Hiroshi Motomura and Ingrid Eagly of U.C.L.A. Law School; Cristina Rodríguez of the Yale Law School; Margaret Taylor of Wake Forest Law School; Stephen Legomsky of the Washington University School of Law (who served as Chief Counsel to the U.S. Citizenship and Immigration Services under President Obama); and Daniel Kanstroom of Boston College Law School (who is the founder of Boston College's

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<sup>5</sup> See, e.g., David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES, Dec. 4, 2014, at A1.

<sup>6</sup> Eric Bradner, *Graham: GOP 'Playing with Fire' on Immigration*, CNN (Jan. 12, 2015), <http://www.cnn.com/2015/01/12/politics/obama-would-veto-gop-immigration-bill/>; Jerry Markon, *Homeland Security Chief Blasts GOP Threat to Defund Department*, WASHINGTON POST (Jan. 16, 2015), <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/01/16/homeland-security-chief-blasts-gop-threat-to-defund-department/>.

<sup>7</sup> *Texas v. United States*, Civ. No. B-14-254 (D. Tex. Feb. 16, 2015), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/02/14-254-Texas-SD-immigration-ruling-2-16-15.pdf>.

Immigration and Asylum Clinic). Finally, our symposium's honoree, David Martin, is a leading example of how legal scholars can make lasting change in government, as I describe in greater detail below.

Many of our distinguished panelists have produced academic papers based on remarks they made in a panel format at the symposium in October. In each of these panels, our participants grappled with the difficult question of how to make an immigration enforcement system fair, humane, efficient, and workable, and the difficulties of doing so within the current political landscape. The first panel was entitled *Federal Interior Enforcement, With and Without Legalization*. Panelists were invited to consider how interior enforcement resources (as opposed to border control) would best be deployed to reduce and deter future violations.

The two papers published here from that panel take very different approaches to interior enforcement. In his contribution, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, Daniel Kanstroom proposes a framework for interior immigration enforcement. Kanstroom argues that the two primary goals of interior immigration enforcement are extended border control and post-entry social control. As an example of extended border patrol, Kanstroom cites the practice of placing immigrants found near the border into expedited removal proceedings. In contrast, removing a long-term lawful permanent resident for criminal activity represents post-entry social control. Kanstroom characterizes extended border control as more directly tied to the legitimate goals of immigration enforcement, and argues that the United States ought to de-emphasize post-entry social control in its enforcement strategy. He proposes a number of reforms that would achieve this shift in emphasis, including a statute of limitations on deportation and graduated sanctions in removal cases.

In contrast, David A. Martin's article, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, defends enforcement as necessary to instill confidence in the immigration system. For Professor Martin, enforcement can be successful only if it includes both border security and better interior enforcement, including improvements to the e-verify system to avoid identity fraud, an overstay removal campaign with streamlined removal for certain categories of overstays, and a commitment to state and local cooperation through Secure Communities. It is this latter commitment to the removal of criminal aliens that most sharply distinguishes Professor Martin from Professor Kanstroom: for Kanstroom, deportation of criminal aliens is a prime example of the post-entry social control approach that he

believes creeps beyond the legitimate bounds of immigration authority; for Martin, removal of criminal aliens is crucial maintaining public confidence in the immigration system. The authors share, however, a commitment to more nuance and flexibility in removal proceedings. Professor Martin expresses this commitment as an argument for restoring greater discretion to immigration judges making removal determinations.

The interior enforcement panel was followed by a keynote address by Doris Meissner entitled *The Changing Face of Immigration Enforcement*. Meissner made an observation that was picked up again in the final panel of the day—that there are “new factors” based on “new realities” that we must take into account when evaluating immigration reform. For example, the public perception is still that massive illegal immigration from Mexico continues to increase, but that perception is false. The of the economic recession suffered by the United States, decreasing fertility in Mexico, and the rise of a real Mexican middle class have all worked together to end the large-scale illegal immigration that has occurred since the early 1970s. On the other hand, there is another “new normal” developing. The child migrant crisis of the summer of 2014 has abated, but the conditions that led to it have not changed, and we may continue to see substantial migration of children from Mexico and Central America for the foreseeable future.

Meissner harnesses these new realities to critique what she calls our “dry and circular” approach to enforcement. For example, the United States’ response to the child migrants was to see them as a failure of border security. But, she points out, the children crossing the border were not attempting to evade Customs and Border Patrol; in fact, they wanted to turn themselves in so they could obtain hearings on their claims for humanitarian relief. The real enforcement “crisis,” she argues, was the underfunding of immigration courts, and their consequential inability to deal with a crisis of this magnitude. Our collective obsession with border control left us vulnerable to a situation that required courts, not fences.

The final panel of the day was entitled *Improving Enforcement: What Role for Cooperative Federalism and for Federal Procedural Reform?* Two of the papers from that panel are published here. The first, *Toward Détente in Immigration Federalism*, by Professor Cristina Rodríguez, suggests that we are approaching a new détente in immigration federalism after the battles surrounding *Arizona v. United States* and other state and local attempts to regulate immigration. Rodríguez welcomes this development, which she characterizes as beneficial because law enforcement agencies from various levels of government must police overlapping space and communities. Rather than thinking of federalism as

merely a division of labor between levels of government, Rodriguez understands it as a cooperative interaction, in which federal, state, and local governments each have an incentive to participate because they all stand to benefit from “comity rather than competition.” This shift can be achieved by creating ways for federal officials to impart their priorities, training officers in the complexities of combining immigration investigation and regular policing and acknowledging the real concerns that states and localities have about immigration’s impact.

In *What Happened to non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, Professor Margaret Taylor identifies another dysfunction in current immigration enforcement, one that has been overlooked due to the focus on federalism, border control, and illegality in the political discourse. Professor Taylor’s paper takes a closer look at how the goals of the Immigration and Nationality Act can be undermined by how the Act is actually enforced in agency adjudication. Echoing Doris Meissner’s observation that an enforcement crisis can occur in the courts rather than at the border, Taylor shows how one particular type of relief from removal—cancellation of removal for immigrants who do not have Lawful Permanent Resident status—that was intended to grant a lasting relief from removal actually operates to provide work authorization while the applicant waits for years for his or her application to be approved. The result, Taylor shows, is twofold: meritorious applicants now must wait years in limbo for their applications to be approved, and the number of frivolous applications has ballooned, since applicants know that they will get work authorization that will likely last several years while they wait to have their application ultimately denied.

Finally, all of the panelists convened at the end of the day for a final panel, a structured dialogue entitled *Building a Sustainable, Stable Immigration Enforcement System*. In this discussion, panelists expanded on Meissner’s notion of the “new normal” in immigration and speculated—correctly, as it turns out—that Congressional inaction was likely to lead to expansive executive action in the near future. An edited transcript of that conversation is provided in this symposium volume.

Several themes emerged from these presentations and discussions. In particular, panelists observed again and again that the politics of immigration are getting in the way of an effective enforcement system. Over time, the law has become increasingly complex, as Congress and agencies graft additional pieces to the governing statutes and regulations and issue executive orders. The statutes and regulations have become so

convoluted and difficult to parse that even lawyers have difficulty understanding them, least of all ordinary people trying to comply with the law. But getting rid of old provisions is often politically untenable, because simplification can easily be portrayed at election time as a lack of fortitude on the part of incumbent politicians. We find ourselves caught in a vicious circle where Congress refuses to act, the Executive steps in to make what changes he can, and the law becomes increasingly arcane and difficult.

Is there a path out of this mess? If so, the person most likely to point the way is Professor David A. Martin, to whom this symposium is dedicated. Professor Martin is the Warner-Booker Distinguished Professor of International Law and Joel B. Piassick Research Professor of Law at the University of Virginia School of Law. As the thousands of students and lawyers who have studied with him and worked under him well know, he perfectly embodies the fusing of academic rigor with government service and experience that this symposium celebrates.

Professor Martin graduated from the Yale Law School in 1975, where he was the Editor-in-Chief of the *Yale Law Journal*. He then clerked for Judge J. Skelly Wright, then of the U.S. Court of Appeals for the D.C. Circuit, and United States Supreme Court Justice Lewis F. Powell, Jr. He has served on the University of Virginia School of Law faculty for thirty-five years, combining interests in human rights, immigration, constitutional law, and international law. He has authored dozens of articles and is the author, with fellow panelist Hiroshi Motomura and others, of one of the leading casebooks on immigration law, as well as a leading casebook on asylum and refugee law. He also founded the Immigration Law Program at U.Va. Law and serves as its Director, bringing immigration-related speakers to Grounds and increasing awareness of immigration issues around the Law School.

Professor Martin's students and colleagues treasure the intelligence, wisdom, and care he brings to his teaching and research. Over the years, he has taught thousands of students—many of whom have entered into careers in immigration law. Janet Napolitano, who served as Secretary of Homeland Security in the early years of President Obama's administration, was a student in the very first class he taught, a "small section" in Property Law. Many other former students, including panelist and former ICE Director John Morton, have gone on to become highly-influential players in the immigration law field, whether in private practice, government service, or immigrant advocacy organizations.

But David Martin is more than an exemplary faculty member. What marks him as truly extraordinary is that he couples his strengths as a

teacher and scholar with sustained commitment to government service. After completing his clerkships and before joining U.Va. Law's faculty, he served as the Special Assistant to the Assistant Secretary in the State Department's human rights bureau from 1978 to 1980. Fifteen years after joining the U.Va. Law faculty, he took a leave of absence to become General Counsel to INS from 1995 to 1998, where he reported to panelist Doris Meissner, who was then Commissioner of INS. (He was succeeded in that position by panelist Bo Cooper.) He returned to government service in 2009, when he became Principal Deputy General Counsel for DHS, a position that gave him the opportunity to work with his former student and then-ICE Director, panelist John Morton, and narrowly missed the opportunity to work with his academic colleague and panelist Steven Legomsky, who became Chief Counsel for U.S. Citizenship and Immigration Services ("USCIS") several months after he left.

Professor Martin's contributions while in government service included helping to draft the Refugee Act of 1980, crafting major alterations to U.S. asylum procedures in 1995, implementing the 1996 statutory amendments to the immigration laws, implementing the Obama Administration's reforms of enforcement priorities and the detention system used in removal proceedings, developing the government's strategy in its 2010 lawsuit against Arizona's restrictive immigration enforcement law, and serving as DHS's representative to the interdepartmental task forces for evaluating the cases of all detainees at Guantanamo and reviewing overall detention policies in the battle against terrorism. Professor Martin is a rare breed—a prolific scholar whose academic work has been profoundly influential in the halls of government.

The work Professor Martin did early in his career continues to affect government today. One of his first articles, for instance, analyzed the legislative veto, a device that allowed one or both houses of Congress to disapprove administrative action without the President's review and a possible veto. Proponents of the legislative veto saw it as a streamlined mechanism for Congress to establish better accountability for the administrative state. But Professor Martin disagreed, arguing that this device allowed Congress "the luxury of being negative," and thus would have the perverse effect of thwarting agencies when they make difficult decisions, without necessarily leading to workable alternatives. In *The Legislative Veto and the Responsible Exercise of Congressional Power*, published by the *Virginia Law Review* in 1982, he argued that the

legislative veto was not only bad policy but unconstitutional as well.<sup>8</sup> The U.S. Supreme Court agreed with him. In *INS v. Chadha*, the Court invalidated the legislative veto, citing Professor Martin's work.<sup>9</sup> Professor Martin's critique of the legislative veto is one that resonates today. Had the Court sustained the legislative veto, Congress could have expanded its application so widely as to block all sorts of executive initiatives, perhaps including President Obama's recent executive actions on immigration.

Professor Martin's work on asylum law has also been widely influential and created a roadmap for effective enforcement of immigration statutes. In a series of articles and essays written during the 1980s and 1990s, he argued that asylum procedures must be streamlined enough to deter fraud and delay, and yet still ensure full protection to those who would truly be at risk if returned to their countries of origin. Because of this high-profile work, he was ultimately chosen by INS to be the lead consultant in its effort to reform the asylum system, which led to a complete system redesign in 1994 through 1995. These efforts were enormously successful, reducing asylum applications by two-thirds by deterring weak or manipulative claims (while still sustaining a high grant rate), and providing the resources so that government could reach prompt decisions.<sup>10</sup> Professor Martin's work on asylum issues is instructive for efforts to reform immigration enforcement more generally: the balance of efficiency and fairness must constantly be reassessed and managed to simultaneously provide justice to human beings and prevent abuse of the system.

More recently, Professor Martin has published articles on nearly every conceivable immigration-related subject. He has advocated for a broadening of tolerance toward dual citizenship, critiqued state laws attempting to restrict unlawful immigration, and defended the role of prosecutorial discretion in immigration enforcement. His scholarly articles are marked by heartfelt concern for the rights of immigrants and refugees, careful attention to the realities faced by those who must implement our immigration laws, and a robust pragmatism that has allowed him to be widely influential in both academia and government. Yet for all of his achievements, Professor Martin has never ceased to be a warm, humble, and kind friend, mentor, and colleague. He uses his intellectual gifts and

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<sup>8</sup> David Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982).

<sup>9</sup> *Immigration & Nationalization Serv. v. Chadha*, 462 U.S. 919, 925 n.2, 945 (1983); see also *id.* at 960 n.2 (Powell, J., concurring).

<sup>10</sup> For Professor Martin's observations on the reforms he helped implement, see David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995).

legal training to better the lives of others. As we venture further into this century and struggle to maintain a just and humane immigration system, we would do well to live by his example.