

ZEALOUS ADMINISTRATION: THE DEPORTATION BUREAUCRACY

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Abstract

An agency's culture shapes its lawmaking. Under certain conditions, agency culture dominates decisionmaking so strongly that it mutes the influence of those factors that administrative law scholars have traditionally focused on—including presidential will, judicial oversight, internal resistance, and public opinion. We call this undertheorized phenomenon “zealous administration.”

The immigration enforcement bureaucracy has vast discretion to remove unauthorized immigrants from the United States. Current immigration policies—such as indiscriminate deportation, family separation, and harsh detention—represent the most prominent example of zealous administration in the federal government. This Article focuses on that bureaucracy to plumb the causes and effects of zealous administration and to explore ways to limit it.

Zealous administration manifests in three principal ways. First, the agency engages in *hyper-regulation*—the exercise of authority in indiscriminate, pervasive, and performative modes. Second, the agency is *politically resilient*—it is uniquely impervious to influence from the President, pressure from other government entities, public disapproval, and internal dissent. Third, zealous administration—once it has taken root in an agency and absent some powerful intervention—will *grow over time and coopt for its mission other agencies* sharing the same regulatory space.

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The immigration enforcement bureaucracy's zealous administration complements President Trump's aggressive agenda, but it is not merely a product of it. Zealous administration in that bureaucracy has deep structural roots long predating the current administration. Neither the reigning presidential-control view of administrative lawmaking nor the alternative deliberative-democratic view can fully account for it. This Article fills the gap by drawing on classic public choice theory to construct a model of immigration enforcement as regulation. It concludes that taming zealous administration requires policymakers to focus on redirecting bureaucratic incentives, redesigning institutions, and expanding judicial review.

INTRODUCTION

The Trump administration has taken an exceptionally aggressive approach to immigration enforcement. But there is a deeper phenomenon at work driving that enforcement, which long predates the administration and will outlast it. Consider the story of Boguslaw Fornalik.

In the late 1990s, the Chicago District Office of the Immigration and Naturalization Service (INS) was trying to deport Fornalik, a Polish teenager. He sought to prevent this by filing a petition with the INS's Vermont Service Center, arguing that he qualified for an immigration benefit under the Violence Against Women Act because he had been abused by his father.¹ The Vermont Service Center granted his petition, awarding him “deferred action”—a form of prosecutorial discretion not to deport him.²

But the INS Chicago Office kept pursuing the deportation, arguing that its decision should prevail over the Vermont Service Center's. A “baffled” Seventh Circuit disagreed: “The last we checked, the INS is one unified agency of the federal government, not a mare's nest of competing and autonomous actors.”³

Yet a mare's nest of competing and autonomous actors is exactly what the immigration bureaucracy was. It contained INS agents charged with enforcement who were deportation zealots—single-mindedly focused on deporting non-citizens regardless of whether they were teenagers or had been abused by a parent.⁴ And it also contained benefit adjudicators, whose job it was to consider just

¹ Fornalik v. Perryman, 223 F.3d 523, 528 (7th Cir. 2000).

² *Id.*

³ *Id.* at 529.

⁴ For a taxonomy of bureaucratic official types, including “mission zealots,” see ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1964). We do not argue that zealous administration results merely from the predominance of mission zealots within an agency. Other institutional and legal factors are important contributors. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 68, 173 (1991) [hereinafter WILSON, *BUREAUCRACY*] (“People matter, but organization matters also, and tasks matter most of all.”); Part II *infra*.

such facts. When the two came into conflict, the agency lawyers insisted that the enforcers' decisions should control.

And the enforcers did ultimately come to dominate, thanks in part to Congress. Not long after *Fornalik*, the Homeland Security Act (HSA) split the INS into separate enforcement and service parts—United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE)—both housed in the Department of Homeland Security (DHS), a colossal agency with a counterterrorism mission.⁵ Now the enforcers and service providers were part of a larger bureaucracy with a law enforcement outlook and a national security mandate. The trend within the immigration bureaucracy prioritizing enforcement over service accelerated.

What *Fornalik* and subsequent trends reveal is that the most consequential forms of immigration regulation⁶ are the product of neither “presidential administration”⁷ nor deliberation among

⁵ See 6 U.S.C. § 111; *infra* Part I.A. Federal customs and border control functions were consolidated in a third DHS agency, Customs and Border Protection (CBP). We focus primarily on ICE in this Article because it shares far more regulatory space with USCIS, and in that space the contrast between their missions, cultures, and functions is most apparent. Nonetheless, as we discuss in Part I, *infra*, the CBP's immigration enforcement activities are carried out by a bureaucracy with virtually the same mission, incentives, and culture as ICE. CBP and ICE are, in this respect, bureaucratic identical twins, and most of the conclusions we draw about ICE are applicable to CBP as well.

⁶ Immigration enforcement may not seem like regulation at first glance, but there are many good reasons to conceive it as such. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 721 (2005) (analyzing prosecutor's offices as agencies and applying administrative law principles accordingly); Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953 (2017) [hereinafter Knowles, *Warfare*] (modeling U.S. national security activities as forms of regulation and applying administrative law principles); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 91 (2016) (“[P]olice agencies should be governed by the same administrative principles that govern other agencies.”).

⁷ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (describing increased presidential coordination of agency decisionmaking and concluding that it enhances transparency and responsiveness to the public). This presidential-control model has been highly influential in administrative law scholarship. See Lisa Schultz Bressman & Michael P.

agencies and branches.⁸ Instead, they emerge directly from the bureaucratic culture of immigration enforcement—a mission-centered culture shaped over decades by a confluence of institutional and political factors.⁹ We call this form of lawmaking *zealous administration*.

Zealous administration has three principal qualities. The first is *hyper-regulation*—the exercise of legal authority in indiscriminate, pervasive, and performative ways.¹⁰ Because agencies face resource constraints, their hyper-regulation typically involves zeroing in on only a portion of their statutory mandate while neglecting the remainder.¹¹ Indeed, ICE has engaged in hyper-regulation of immigrants and correspondingly tepid regulation of other entities it has a mandate to pursue, such as employers and traffickers.¹² Through its enforcement patterns and internal policies, ICE has

Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 47–49 (2017).

⁸ See, e.g., Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1176 (2016) (arguing for “mechanisms to promote greater coordination, learning, and deliberation among actors at all levels of the [immigration] bureaucracy”).

⁹ We share this view with a handful of other scholars who have argued that these models are a poor fit for the immigration bureaucracy and have drawn on public choice insights in doing so. See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 84–85 (2012) (discussing the limits of the presidential control model); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 689 (2016); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 199 (2014) [hereinafter Rabin, *Victims or Criminals?*] (emphasizing the importance of bureaucratic incentives).

¹⁰ The term and definition are our own. *But cf.* Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1258 (2019) (referring to ICE’s current policies as “hyper-enforcement”).

¹¹ See *infra* Part II.C.1.

¹² See Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1625–26 (2010); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1120 (2011); *infra* Part I.C.1.

developed practices that are indiscriminate:¹³ they treat all eleven million unauthorized immigrants as equally eligible for deportation.¹⁴ These practices have become pervasive to the point that ICE makes arrests and raids in formerly safe locations like schools and courts,¹⁵ conducts operations in disguise,¹⁶ uses U.S. citizens as bait to capture their undocumented relatives,¹⁷ and retaliates against those who resist its policies.¹⁸ And these rules are *performative* in that their purpose is to send a message to both immigrant communities and pro-enforcement political constituencies.¹⁹ When ICE separates families, detains immigrants in harsh conditions, and deports them to countries where they face life-threatening dangers, it aims to deter unauthorized immigration

¹³ The trend toward indiscriminate enforcement was briefly disrupted by Obama administration efforts to require ICE to exercise more discretion, but such efforts were late in coming, firmly resisted by the bureaucracy, and quickly abandoned under Trump. *See infra* Part I.C.1; Kagan, *supra* note 9, at 667. Law enforcement agencies create new primary rules of conduct when they shift enforcement patterns. *See* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 34 (2017). This is a form of administrative law creation. *Cf.* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244–45 (2017) (arguing that “many internal measures” have the “paradigmatic features of legal norms even if they lack the element of enforcement through independent courts”).

¹⁴ *See infra* Part I.C.1; Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1439–41 (2018).

¹⁵ Stephen Rex Brown, *Courthouse Arrests of Immigrants by ICE Agents Have Risen 900% in New York this Year: Immigrant Defense Project*, , Nov. 15, 2017; Ted Sherman, *AG Criticizes ICE Arrests of Immigrants as Kids Were Going to School*, NJ.COM (Jan. 26, 2018).

¹⁶ Nausicaa Renner, *As Immigrants Become More Aware of their Rights, ICE Steps Up Ruses and Surveillance*, THE INTERCEPT (July 25, 2019), <https://theintercept.com/2019/07/25/ice-surveillance-ruse-arrests-raids/>.

¹⁷ Ryan Devereau, *Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers*, THE INTERCEPT (Apr. 29, 2019), <https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/>.

¹⁸ *See* Cade, *supra* note 14, at 1442–43.

¹⁹ *See* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1478–79 (2017) (noting the performative nature of some immigration enforcement policies). Performative enforcement is rooted in moral educative theories of punishment. *See* O. C. Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1245 (2011).

and encourage “self-deportation.”²⁰ But it also aims to send a message to the public that it is doing everything possible to ensure that “breaking the law” will not be tolerated.²¹ In other words, the cruelty is the point.²²

The second major quality of zealous administration is *political resilience*—a special imperviousness to presidential influence, public opinion, and internal dissent. Hyper-regulation by immigration enforcement agencies accelerated during the Trump administration.²³ But this was not an example of “presidential administration”: it required no wrangling of the bureaucracy.²⁴ The trend toward hyper-regulation had already begun decades earlier.²⁵ ICE and its bureaucratic twin, Customs and Border Protection (CBP), had already demonstrated, during the Obama administration,

²⁰ Within DHS, this is known as “consequence delivery.” Nick Miroff, *ICE Air: Shackled Deportees, Air Freshener and Cheers. America’s One-Way Trip Out*, WASH. POST (Aug. 10, 2019) (quoting the Acting Director of ICE, who also stated that, “If migrants who cross illegally are released directly into the United States, more will come. If deportations are swift and certain, fewer will try.”). It is one strain of a broader strategy known as “attrition through enforcement,” holding that the level of unauthorized immigration will drop when all immigrants feel that their status is precarious. Amanda Frost, *Alienating Citizens*, 114 NW. U.L. REV. ONLINE 48, 60 (2019) [hereinafter Frost, *Alienating Citizens*]. But the concept of self-deportation has long percolated through the immigration enforcement bureaucracy. See K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1884–85 (2019) (discussing the long history of the concept).

²¹ See Miroff, *supra* note 20 (quoting the Acting Director of ICE, who stated that, “Our job is to enforce the law” and that, “It’s up to Congress to make the laws or change the laws.”).

²² See Adam Serwer, *The Cruelty Is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/>.

²³ See *infra* Part I.C.1.

²⁴ See *infra* Part II.C.1; Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 244 (2017) (arguing that President Trump’s “bombastic enforcement promises, when combined with seeming indifference to certain constitutional rights and administrative realities, have apparently encouraged agents at the lowest administrative levels to exercise their own power in a manner insufficiently constrained by law”).

²⁵ See *infra* Part I.C.

a significant capacity to resist presidential policies that attempted to impose limits on their discretion.²⁶

What has become more apparent during the Trump administration is the third quality of zealous administration—*mission cooptation*, which we define as the tendency of an agency conducting zealous administration to convert to its mission other agencies with different missions sharing the same regulatory space.²⁷ As we discuss below, ICE and CBP have successfully encouraged other parts of the immigration bureaucracy with a traditional service orientation to pivot toward law enforcement tasks.²⁸ But this mission cooptation long predates the Trump administration: critics of the INS had complained about it as early as the 1990s.²⁹

Zealous administration occurs outside the immigration context, too.³⁰ But we focus on that context here for three reasons. First, the stakes are very high. The immigration enforcement apparatus constitutes the largest federal law enforcement body, with a budget

²⁶ See Kagan, *supra* note 9, at 667; Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 103 (2014) (concluding from a study of the DHS's Office of Civil Rights and Civil Liberties that it is inherently difficult to induce agencies to execute both a primary mission and constraints on that mission).

²⁷ Cf. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007) (defining “legal cooptation” as “a process by which the focus on legal reform narrows the causes” and, *inter alia*, “diverts energies away from more effective and transformative alternatives”).

²⁸ See *infra* Part I.C.2. The influence of President Trump and his advisors also played a role in mission cooptation. See Nick Miroff & Josh Dawsey, *The Advisor Who Scripts Trump's Border Policy*, WASH. POST (Aug. 18, 2019) (discussing Trump advisor Stephen Miller's jawboning immigration bureaucrats).

²⁹ Demetrios Papademetriou, T. Alexander Aleinikoff & Deborah Waller Meyers, *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 NO. 14 INTERPRETER RELEASES 501, 504 (1998) (referring to complaints that the law enforcement mission had “infected” service components of the INS).

³⁰ See, e.g., Knowles, *Warfare*, *supra* note 6, at _ (discussing the political insularity of the national security state and its tendency to overregulate).

bigger than all others combined.³¹ About 13% of the U.S. population is foreign-born, a quarter of that number undocumented.³² Immigration enforcement profoundly affects millions of U.S. citizens—many of them children—with non-citizen family members.³³ Like the Environmental Protection Agency, the Federal Trade Commission, or the National Transportation Safety Board, the immigration bureaucracy’s activities ultimately affect every community in America.³⁴

Second, the U.S. immigration enforcement bureaucracy has an especially influential role in creating law.³⁵ The vast discretion granted it by Congress largely determines the fate of eleven million unauthorized immigrants.³⁶ And when that bureaucracy adjudicates and makes rules, it relies heavily on the informal end of the spectrum, which pushes lawmaking to the bottom rungs.³⁷ The metes and bounds of immigration enforcement law accrete from often-secret internal guidance memos and the day-to-day decisions of front-line and mid-level bureaucrats.³⁸ Without understanding

³¹ Doris Meissner & Julia Gelatt, *Eight Key U.S. Immigration Policy Issues: State of Play and Unanswered Questions*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/research/eight-key-us-immigration-policy-issues>.

³² See Pew Research Center, *Key Findings About U.S. Immigrants* (Nov. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants/>. The foreign-born share of the U.S. population reached its peak in 1890 at 14.8%. See *id.*

³³ Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 711–12 (2015) (observing that even U.S. citizens and those with legal status experience the instability produced by immigration enforcement policies).

³⁴ See DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 10 (2009) (“Nations define themselves through the official selection and control of foreigners seeking permanent residence on their soil.”).

³⁵ See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 7–13 (2015) [hereinafter WADHIA, *BEYOND DEPORTATION*].

³⁶ See *id.*; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 133–35 (2015).

³⁷ See Cox & Rodríguez, *supra* note 36, at 135; *infra* Part I.C.1.

³⁸ For example, the official move of ICE toward indiscriminate enforcement came about because of a memo from the Executive Associate Director of ICE, a position several levels below the cabinet level DHS Secretary. See, e.g., .S.

agency culture and bureaucratic incentives, policymakers cannot focus their efforts on the most effective mechanisms of change.³⁹

Third, the structural features of the immigration bureaucracy both provide fertile ground for the mission cooptation aspect of zealous administration and make it more visible. The enforcement arms, ICE and CBP, are located in the DHS and share its national security mission.⁴⁰ But DHS also houses USCIS, which adjudicates immigration benefits. This structure helps enable ICE to coopt USCIS for its mission and priorities even when they are in conflict with USCIS's own mission and institutional interests.⁴¹ Moreover, signs abound that immigration agencies in other departments, like Justice and State, have, with White House prodding, also have been coopted for ICE's enforcement mission.⁴²

The complex and changing structure of the immigration bureaucracy—and how it came to enable zealous administration—is the subject of Part I of this Article. In Part II, having found the presidential control and deliberation models of administrative

Immigration and Customs Enforcement, Memorandum for All ERO Employees from Matthew T. Albence, Executive Associate Director, Implementing the President's Border Security and Interior Immigration Enforcement Policies, Feb. 21, 2017). However, that official statement was preceded by a variety of actions on the ground level demonstrating a commitment to such a policy, such as the lawsuit filed by the ICE Employees' Union against Obama administration efforts to limit enforcement. *See supra* Part I.C.1.

³⁹ *See* WILSON, BUREAUCRACY, *supra* note 4; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 925 (2005) (emphasizing that “predictions about the behavior of government institutions ought to rest on plausible accounts of the interests of individual officials who direct these institutions . . .”).

⁴⁰ *See infra* Part I.A.

⁴¹ *See infra* Part I.C.2.

⁴² *See, e.g.*, Melissa del Bosque, *Immigration Officials Use Secretive Gang Databases to Deny Migrant Asylum Claims*, ProPublica, July 8, 2019, <https://www.propublica.org/article/immigration-officials-use-secretive-gang-databases-to-deny-migrant-asylum-claims> (describing coordination between the State Department and ICE agents to collect secret intelligence used in deportations); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 709–12 (2019) (describing the “symbiosis” between DHS and the DOJ's immigration agency, Executive Office for Immigration Review).

lawmaking a poor fit for immigration enforcement, we introduce a new model of internal immigration enforcement as regulation, drawing on insights from classic public choice theory.⁴³ We find, counter-intuitively, that an agency is more likely to engage in zealous administration when its mission is broadly defined: this encourages mid- and low-level bureaucrats to zero in on only that small portion of the agency's statutory mandate that enhances agency autonomy and produces the greatest reputational payoff. Zealous administration is also more likely when an agency's rulemaking and adjudication are informal, opaque, and subject to very limited judicial review.⁴⁴ Further contributing factors include a national security mandate and vast enforcement discretion.

In Part III, we offer proposals for how to limit zealous administration and, by doing so, encourage agency action that fully reflects its statutory mandate. There are no easy solutions, but we discuss several changes that could help—agency realignment, strengthened judicial review, and restrictions on the private contractors whose lobbying amplifies the power of zealous bureaucrats.

I. THE IMMIGRATION ENFORCEMENT BUREAUCRACY

This Part appraises the structural features and history of the U.S. immigration bureaucracy that have created the conditions for zealous administration. The legal scholarship on immigration enforcement has discussed this history, but it has not sufficiently emphasized the importance of agency structure and culture.⁴⁵

⁴³ See Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 24 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (“[T]he crucial unifying thread in public choice theory is the assumption that all actors in political life . . . behave rationally to maximize or optimize some objective function (wealth, status, power).”). Public choice theory first emerged, in part, from critiques of zealous, over-regulating bureaucrats at federal agencies. See *infra* Part II.A.

⁴⁴ See *infra* Part II.C.3.

⁴⁵ See, e.g., ROBERT A. KATZMANN, REGULATORY BUREAUCRACY 7 (1980) (“Organizational arrangements have much to do with determining how power is

Drilling down on these key drivers of agency behavior is a critical project for understanding immigration enforcement law because the agencies largely create the law. As in other regulatory spaces, congressional grants of broad discretion leave much immigration lawmaking to the executive.⁴⁶ Immigration law is therefore uniquely a “creature of administrative law.”⁴⁷ Congress makes significant updates to the immigration code once in a generation,⁴⁸ but, in the interim, the agency molds immigration law through its interpretations and practices, and courts have given special deference to these agency actions.⁴⁹

When the immigration enforcement bureaucracy makes law, it tends to do so informally. Its law very rarely emerges from notice-and-comment rulemaking.⁵⁰ To some extent, that law is shaped by the adjudicatory decisions of the Board of Immigration Appeals, the Attorney General, and the federal courts. The Attorney General, in particular, has recently exercised an unprecedented degree of

distributed among participants in the decisionmaking process, the manner in which information is gathered, the types of data that are collected, the kinds of policy issues that are discussed, the choices that are made, and the ways in which decisions are implemented.”). A key exception is Nina Rabin, who has discussed several of her own clients’ cases and applied public choice insights to account for the behavior of ICE and USCIS decisionmakers in those cases and others. Rabin, *Victims or Criminals?*, *supra* note 9, at _; Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, U. MICH. J.L. REFORM (forthcoming), <https://ssrn.com/abstract=3371181>. Others emphasizing the importance of bureaucratic culture are Cuellar, *supra* note 9; Kagan, *supra* note 9; and Schlanger, *supra* note 26.

⁴⁶ See *infra* Part I.

⁴⁷ See Kagan, *supra* note 9, at 670; see generally Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012) [hereinafter Family, *Administrative Law*] (discussing immigration law as a type of administrative law).

⁴⁸ See generally TICHENOR, *supra* note 34 (describing the passage of major immigration reform measures in American history).

⁴⁹ See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584–85 (2017) (“Immigration law is famously exceptional. The Supreme Court’s jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms.”); *infra* Part II.C.

⁵⁰ Family, *Administrative Law*, *supra* note 47, at 588.

influence on immigration adjudication by issuing a series of decisions changing immigration law doctrines and procedures.⁵¹ But these decisions, by limiting immigrants' procedural rights and access to immigration courts, have only heightened the importance of the discretion exercised by bureaucrats at ICE, CBP, and USCIS.⁵²

The immigration bureaucracy might at first seem an unlikely breeding ground for zealous administration. It has long been the black sheep of the American administrative state. Without a true and lasting home, it has roved from agency to agency, conflictual in its approach to its subject matter, and embattled by the public perception that it has not done a particularly good job. Part of this is a function of its mission, which requires it to perform two seemingly conflicting tasks: letting immigrants in and kicking them out.

In a sense, the two are related: vetting new immigrants requires assessing the risks of admitting them; and enforcing the grounds of deportability against resident non-citizens requires the exercise of prosecutorial discretion to not deport persons who, despite having committed a technical violation, are a low risk. On the whole, though, the tasks have manifested very different modes of operation in the United States: one, resembling the work of traditional bureaucracies organized around the adjudication of government benefits; the other, looking more like police or military work.

These strikingly different modes of operation have attracted to the bureaucracy both officials with a pro-immigrant worldview and

⁵¹ See, e.g., *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (reversing Board precedent concerning family as a cognizable social group in an asylum case); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (overturning Board precedent concerning bond for certain asylum seekers); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (modifying the standard for obtaining a continuance in an immigration court case); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (reversing Board precedent concerning domestic violence-based asylum cases); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (modifying the standard for administratively closing an immigration court case).

⁵² See Cuéllar, *supra* note 9, at 13 (“Routines and administrative practices [] play a critical role in shaping how immigration law is experienced and what consequences it creates.”).

those with a law-and-order, sometimes even xenophobic, mentality.⁵³ How the law enforcement mission and culture have come to dominate over the service culture and mission is important for understanding that bureaucracy's recent behavior.

A. The Scattered and Peripatetic Immigration Bureaucracy

Immigration policy raises difficult economic, philosophical, and legal questions.⁵⁴ It is perhaps unsurprising that the United States has struggled with how to define and situate the immigration bureaucracy in relation to the other functions of government. Is immigration primarily an economic, foreign relations, humanitarian, law enforcement, or national security issue?⁵⁵ How one answers this question impacts where the agency is located.

Currently, USCIS, ICE, and CBP all exist within the DHS, but four other cabinet level agencies are also involved in aspects of immigration regulation. The Department of Justice contains the immigration courts and Board of Immigration Appeals; the Department of Labor weighs in on employment-based immigration; the State Department adjudicates foreign visa applications; and the Department of Health and Human Services handles aspects of refugee resettlement and housing for unaccompanied immigrant children. This fragmented arrangement is perhaps a vestige of the agency's transient legacy. In the past, the immigration service was at one time or another primarily housed in the Departments of Treasury, Labor, and Justice. The changing categorization of

⁵³ See *infra* Part I.C.

⁵⁴ See, e.g., Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 235 (2006) (assuming that "emigration and immigration states both implement policies aimed at maximizing their domestic social welfare"); see generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* (2006); Michael Walzer, *The Distribution of Membership*, in PETER BROWN & HENRY SHUE—BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS (1981).

⁵⁵ Cuéllar, *supra* note 9, at 26 (describing immigration as "a regulatory domain simultaneously shaping labor markets, perceptions of security, and the scope of the national community" and affecting "a vast array of economic, political, and social interests").

immigration likely reflects the nation's shifting views over time about its costs and benefits.

1. The Department of Treasury

The federal government did not become heavily involved in immigration regulation until the late nineteenth century. When it did so, it was for the purpose of enforcing a policy of racial exclusion, fixing its trajectory over the following century and a half as an enforcement-oriented bureaucracy. After passage of the Chinese Exclusion Act of 1882, U.S. Customs Collectors at each port of entry began collecting a “head tax” from immigrants, while “Chinese Inspectors” excluded Chinese nationals.⁵⁶ Over the following decades, the federal government's role continued to expand. The 1891 Immigration Act created the Office of the Superintendent of Immigration within the Treasury Department. The Superintendent oversaw a new corps of Immigrant Inspectors, many of whom were former Customs Inspectors and “Chinese Inspectors.”⁵⁷ In 1895, Congress retitled the “Office of Immigration” as the “Bureau of Immigration” and made its head the “Commissioner-General of Immigration.”

2. The Department of Labor

In 1903, the Bureau of Immigration was transferred from the Treasury Department to the newly-created Department of Commerce and Labor—a recognition that immigrants were not just a source of revenue; they overwhelmingly were laborers. In 1906, Congress passed the Basic Naturalization Act, which also created the Federal Naturalization Service to oversee the nation's naturalization courts. Congress combined this new agency with the Bureau of Immigration, which it renamed the Bureau of Immigration and Naturalization.⁵⁸ In 1913, the Department of Commerce and Labor was divided into separate cabinet

⁵⁶ US Citizenship and Immigration Services, USCIS History Office and Library, Overview of INS History 3 (2012) [hereinafter Overview of INS History].

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 5.

departments. Afterward, the Bureau of Immigration and Naturalization split again into the Bureau of Immigration and the Bureau of Naturalization, both housed within the new Department of Labor.

3. The Department of Justice

The Bureaus of Immigration and Naturalization were reunited within the Department of Labor as the Immigration and Naturalization Service (INS) in 1933.⁵⁹ The war years saw the INS increasingly involved in law enforcement and national security work, and in 1940 President Roosevelt moved the INS from the Department of Labor to the Department of Justice.⁶⁰

The next major bureaucratic reshuffling occurred in 1983, when immigration judges and the Board of Immigration Appeals were moved out of the INS into an independent new sub-agency of the Department of Justice, the Executive Office for Immigration Review (EOIR). The move addressed a criticism that the immigration judges were biased because they worked for the same agency that prosecuted deportation and exclusion cases.

4. The Department of Homeland Security

After the September 11, 2001, terrorist attacks, Congress mobilized around a plan to improve counter-terrorism through administrative restructuring. The Homeland Security Act created DHS—an administrative behemoth that “melded the functions of twenty-two previously existing agencies, from Treasury’s Customs Service, to Agriculture’s Plum Island Animal Disease Center, to the previously independent Federal Emergency Management Agency

⁵⁹ *Id.*

⁶⁰ *Id.* Secretary Perkins later expressed disappointment with the move, saying that immigration “deals with human affairs and, I should say, is more properly located in the Federal Security Agency [a predecessor of the Department of Health and Human Services] or the Department of the Interior. It should not be a permanent function of the Department of Labor or the Department of Justice and certainly not of the FBI.” FRANCIS PERKINS, *THE ROOSEVELT I KNEW* 361 (1946).

(FEMA).”⁶¹ The new agency had “to encompass functions ranging from international child labor investigations to marine fuel leaks.”⁶² Congress’s goal in creating such a heterogeneous and far-flung agency was to unite “under a single department those elements within the government whose primary responsibility is to secure the United States homeland.”⁶³ The statutory mandate of DHS was “to prevent terrorist attacks.”⁶⁴

The HSA abolished the former INS and placed its functions under three new sub-agencies of DHS: USCIS, CBP, and ICE.⁶⁵ It left EOIR untouched within the Department of Justice, and it did not alter the role that the State Department played in adjudicating foreign visa applications, the Department of Labor in employer-based visa petitions, or the Department of Health and Human Services in refugee resettlement. Thus, the immigration bureaucracy became more scattered even as it grew and was tasked with a major new focus on national security.

The mission of CBP was to “prevent terrorists and terrorist weapons from entering the country, provide security at U.S. borders and ports of entry, apprehend illegal immigrants, stem the flow of illegal drugs, and protect American agricultural and economic interests from harmful pests and diseases.” It absorbed employees from the INS, the Border Patrol, the Customs Service, and the Department of Agriculture.⁶⁶

ICE’s mission was to enforce “criminal and civil laws governing border control, customs, trade, and immigration.”⁶⁷ It inherited the INS’s enforcement apparatus as well as functions of the former United States Customs Service. Initially, ICE was imagined as the

⁶¹ Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 676 (2006).

⁶² *Id.* at 696.

⁶³ H.R. REP. NO. 107-609, pt. 1, at 63 (2002).

⁶⁴ 6 U.S.C. § 111(b)(1)(A), (B), (F).

⁶⁵ P.L. 107-296.

⁶⁶ CHAD C. HADDAL, CONGRESSIONAL RESEARCH SERVICE, BORDER SECURITY: KEY AGENCIES AND THEIR MISSIONS 2 (2010), <https://fas.org/sgp/crs/homesecc/RS21899.pdf>.

⁶⁷ Overview of INS History, *supra* note 56, at 11.

investigative arm of DHS. Its Office of Investigations had oversight over a variety of programs, including the Air and Marine Operations Branch, the Federal Protective Service, the Federal Air Marshals, and Deportation and Removal Operations (DRO).⁶⁸ Over time, it evolved into just two sub-agencies: Enforcement and Removal Operations (formerly DRO), and Homeland Security Investigations (HSI), dedicated to investigating transnational crime and terrorism.

USCIS was charged with overseeing “lawful immigration to the United States and naturalization of new American citizens.”⁶⁹ Although the Department of State adjudicates applications for most temporary “nonimmigrant” visas, USCIS handles the majority of immigration applications, including naturalization applications, applications to immigrate based on a relationship to a United States citizen or lawful permanent resident family member or a US-based employer, applications for asylum and other humanitarian benefits, employment authorization applications, and applications to change status from one type of temporary visa to another. It processes these petitions and applications in four major USCIS Service Centers and eighty-three Field Offices in the United States, Puerto Rico, and Guam.⁷⁰ Almost all of its work involves the provision of immigration services rather than enforcement, with the one exception being the Office of Fraud Detection and National Security, which seeks to root out fraud and address criminal and national security issues raised by immigration applications.⁷¹

B. The Bipolar Immigration Bureaucracy

The United States has long been of two minds about immigration. On one hand, it has welcomed and tried to

⁶⁸ Letter of Nineteen HSI Special Agents in Charge to The Honorable Kirstjen Nielsen, Secretary, U.S. Department of Homeland Security, 1, <https://www.documentcloud.org/documents/4562896-FILE-3286.html>.

⁶⁹ Overview of INS History, *supra* note 56, at 11.

⁷⁰ WILLIAM A. KANDEL, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING, CONGRESSIONAL RESEARCH SERVICE 2 (2015).

⁷¹ *Id.* at 4.

“Americanize” or assimilate new arrivals.⁷² On the other, it has pursued tough immigration restrictions to limit the number and type of immigrants. The two philosophies of assimilation and restriction naturally entail very different modes of bureaucratic action. An assimilationist policy would seem to involve a bureaucracy that looks like other offices that primarily allocate government benefits, like the Social Security Administration. On the other hand, an office that is bent on restricting the number of immigrants would seem to look more like a law enforcement or military agency, patrolling the border and interior of the country for unauthorized migrants.

These distinct modes of bureaucratic action can be traced to the early days of immigration policy. In the early twentieth century, Congress codified visa requirements and implemented immigration quotas, requiring an agency able to engage in complex adjudication.⁷³ At the same time, the country was shifting from a relatively open border to a policed one.⁷⁴ By the end of the 1920s, the Bureau of Immigration and Naturalization engaged in two discrete functions: immigration services and enforcement, with the latter looking much like criminal enforcement. As the Great Depression took hold, the agency came to increasingly prioritize enforcement.⁷⁵ This was a function of the restrictionist character of the laws passed by Congress in the 1920s, a decline in net migration into the United States, and the protectionist politics of the Depression. Along with a massive campaign of Mexican repatriation largely carried out by local authorities,⁷⁶ the federal government substantially increased deportations, which were

⁷² See James R. Barrett, *Americanization from the Bottom Up: Immigration and the Remaking of the Working Class in the United States, 1880–1930*, 79 J. AM. HIST. 996, 997 (1992).

⁷³ Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 NO. 26 INTERPRETER RELEASES 937, 940 (1998).

⁷⁴ See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–47 (2003).

⁷⁵ *Id.*

⁷⁶ FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 151 (2006).

viewed by the Hoover administration's Labor Secretary William Doak as a means to protect jobs for United States citizens.⁷⁷

The INS during the Great Depression raided immigrant communities, arrested suspected unauthorized migrants without a warrant, and offered little due process to those in deportation proceedings.⁷⁸ Administrative reformers critiqued the arbitrary deportation procedures and argued for judicial review.⁷⁹ These measures gained some traction during the Roosevelt administration, when the agency adopted fairer procedures and methods for granting discretionary relief from removal.⁸⁰

Although Roosevelt's progressive administrators endeavored to bring due process and discretion to deportation proceedings, after the outbreak of World War II, the INS increasingly undertook national security tasks like fingerprinting every non-citizen in the country through the new Alien Registration Program, operating internment camps for "enemy aliens," and increasing its border patrol operations.⁸¹ It also ran an exploitative guest worker initiative called the Bracero program, which compensated for the War's labor shortage by importing an average of 200,000 *braceros* from Mexico each year.⁸²

The post-war period also saw a militaristic new deportation campaign, shamefully named "Operation Wetback." It used harsh tactics to apprehend and summarily deport 170,000 undocumented immigrants in its first three months of operation.⁸³ The national security initiatives of World War II like Japanese internment and alien registration, the move of the agency to the Department of Justice, the massive post-war deportation campaign of Operation

⁷⁷ SEE DANIEL KANSTROOM, DEPORTATION NATION 215 (2010).

⁷⁸ NGAI, *supra* note 74, at 87.

⁷⁹ JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE (1931); WILLIAM VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932); National Commission on Law Observance and Enforcement (Wickersham Commission).

⁸⁰ NGAI, *supra* note 74, at 95.

⁸¹ Overview of INS History, *supra* note 56, at 8.

⁸² NGAI, *supra* note 74, at 87.

⁸³ *Id.* at 156.

Wetback, and a Cold War focus on deporting persons with communist affiliations all lent the INS a decidedly enforcement focus, and a rather draconian one at that.

This shifted a bit after passage of the Immigration Act of 1965, which abolished the blatantly discriminatory national origin quotas and replaced them with a more facially egalitarian system. As a result, in the late 1960s, the culture of the INS shifted a bit, and adjudication grew in importance relative to enforcement.⁸⁴

Yet over the course of the following decades, the INS's emphasis "steadily shifted back toward enforcement."⁸⁵ Enforcement received "the lion's share of the budget and attention" and there was "a perception that enforcement personnel, including Border Patrol officers . . . stood a better chance of reaching senior positions—such as District Director, for example—than those who work[ed] as adjudicators."⁸⁶ As enforcement occupied much of the INS's energies, adjudication backlogs grew.⁸⁷ At the same time, courts struck down enforcement efforts that violated constitutional norms, leading the INS to focus more on preventing unauthorized entries and combatting fraud, false documents, and smuggling than on apprehending undocumented immigrants already in the United States.⁸⁸ The adjudication backlogs and the INS's failure to fully address undocumented immigration led those on all sides of the political spectrum to believe the INS to be dysfunctional.⁸⁹

In 1986, Congress passed the Immigration Reform and Control Act (IRCA). IRCA added significant new enforcement and service responsibilities for the INS. On the one hand, the agency was charged with a massive legalization project that ultimately led to 2.7

⁸⁴ Scully, *supra* note 73, at 941.

⁸⁵ *Id.*

⁸⁶ *Id.* In 1980, an OMB budget examiner told a study team of the House Government Operations Committee that "some of the INS's problems in handling resources result from a long-standing conflict between enforcement and service responsibilities," and complained that the agency put too much emphasis on enforcement and too little on service." Papademetriou et al., *supra* note 29.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

million undocumented persons obtaining status in the United States.⁹⁰ In terms of enforcement, the agency for the first time became responsible for bringing sanctions against employers who hired unauthorized workers. Although the agency initially pursued both initiatives, its employer sanctions efforts ultimately were seen to lack real teeth.⁹¹ For a time, the agency seemed again to be tilting a bit away from enforcement and toward service. Its immigration services also received a budgetary boost in 1990 when Congress created the “Immigration Examinations Fee Account” (IEFA) to hold immigration application fees. The account became a substantial source in the following years for funding the agency’s operations.⁹²

This shift toward services continued with the creation in 1990 of a new Asylum Corps. That year, the government issued additional regulations implementing the 1980 Refugee Act.⁹³ The regulations took responsibility for asylum cases away from the INS District Offices, which had been criticized for overwhelmingly denying asylum to thousands of Central American refugees in the 1980s who had real reason to fear persecution in their war-torn home countries. Instead, asylum claims would be handled by a professional cadre of officers trained in human rights law.

That same year, Congress appointed yet another commission to study immigration policy.⁹⁴ The U.S. Commission on Immigration Reform released its final report in 1997, and recommended a major structural overhaul of immigration. It concluded that the INS cannot

⁹⁰ Nancy Rytina, Office of Policy and Planning, Statistics Division, U.S. Immigration and Naturalization Service: IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001 3 (2002).

⁹¹ Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 803 (2008).

⁹² See 8 U.S.C. § 1356(m). The Immigration Examinations Fee Account was established by the FY1989 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, P.L. 100-459 (1988); it was amended the following fiscal year to fund all immigration adjudication activities by the FY1990 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, P.L. 101-162.

⁹³ Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (July 27, 1990)

⁹⁴ Overview of INS History, *supra* note 56, at 10.

be both a benefits agency and an enforcement agency, and perform both functions effectively. Therefore, it recommended that the INS's enforcement functions should be left in the Department of Justice, but that its benefits functions should be transferred to the Department of State. The report generated significant discussion, including a number of unsuccessful legislative efforts to restructure the agency to separate out the INS's enforcement and immigration services functions.⁹⁵

At the end of the twentieth century, the INS workforce, which numbered approximately 8,000 from World War II through the late 1970s, had increased to more than 30,000 employees in thirty-six INS districts at home and abroad.⁹⁶ It was widely viewed as ineffectual, hampered by a fundamental incompatibility between its competing missions of enforcement and immigration services. Commentators with intimate knowledge of the agency felt that enforcement predominated over service, and suggested that the agency's history and its position within the enforcement-oriented DOJ were the causes of this imbalance.⁹⁷

The internal conflict between enforcement and service was ultimately resolved by the HSA's bifurcation of the INS. By giving ICE responsibility for enforcement and USCIS responsibility for benefits adjudication, the HSA adopted the recommendation of the U.S. Commission on Immigration Reform to separate the two functions. However, the Commission had recommended that the benefits adjudication agency be placed in the State Department, which at least in part shared a service-oriented mission. In contrast, the HSA placed USCIS within an agency dedicated to national security—a mission in tension with immigration services.⁹⁸

C. *The Zealous Immigration Bureaucracy*

During the debates in the late 1990s over whether to divide the INS into separate enforcement and benefits agencies, some had

⁹⁵ *See id.*

⁹⁶ *See id.* 11-13.

⁹⁷ Papademetriou et al., *supra* note 29; Scully, *supra* note 73.

⁹⁸ Cohen et al., *supra* note 61 at 683-84.

argued that the two functions were interconnected and that dividing them could lead to insufficient scrutiny of benefit applications or enforcement devoid of compassion.⁹⁹ There appears to have been something to this critique because, in the years since their creation, ICE has increasingly engaged in hyper-regulation. Efforts during the Obama administration to rein in ICE largely failed, and since President Trump took office on a pledge to ramp up immigration enforcement, ICE has been empowered to zealously and single-mindedly pursue this mission. Parts of USCIS have resisted hyper-regulation, while other elements of USCIS have been *coopted*—pushed toward embracing it. The degree of zeal that USCIS and ICE have manifested for immigration enforcement is related to each agency’s culture as well as budgetary and other institutional incentives.

1. ICE

Freed of oversight by INS managers who sometimes were less zealous about enforcement, ICE initially showed little restraint. During the Bush administration, ICE engaged in a series of high-profile workplace raids, such as a raid in Postville, Iowa, that led to assembly-line prosecutions and removal proceedings against hundreds of Latino workers at an Iowa meat packing plant.¹⁰⁰ It administered a “Special Registration” program that required males over the age of sixteen from certain predominately Muslim countries to register, which led to the deportation of thousands of Muslim males.¹⁰¹ The agency ramped up immigration detention and began outsourcing detention management to private prison companies that were not accountable to detainees for violations of detention standards.

These private prison contractors were a powerful ally to ICE in congressional budget negotiations. Flush with government

⁹⁹ House Holds Hearing on INS Restructuring Proposals, Legislation Introduced, 75 INTERPRETER RELEASES 774, 775 (1998).

¹⁰⁰ See Sioban Albiol, R. Linus Chan & Sarah Diaz, *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. FOR SOC. JUST. 31 (2008).

¹⁰¹ See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

contracts, private companies like Geo Group and CoreCivic lobbied Congress.¹⁰² In 2004, the detention contractor, GEO Group, spent \$120,000 on federal lobbying. Over time, that amount has steadily increased. The lobbying arm of GEO Group spent \$1.56 million on lobbying in 2018, deploying only lobbyists who previously worked in government. Another detention contractor, CoreCivic, followed closely behind in its lobbying expenditures, paying \$1.23 million in 2018, and also giving \$378,000 in contributions.¹⁰³

The Obama administration attempted to impose a set of enforcement priorities on ICE. On June 17, 2011, ICE Director John Morton issued two significant memoranda on the use of prosecutorial discretion in immigration matters.¹⁰⁴ These memoranda described a set of priorities for immigration enforcement, and a set of criteria for agents to consider in assessing whether to pursue removal proceedings. The agency's lawyers were ordered to undertake a sweeping self-examination of ICE's removal docket, with a goal of administratively closing cases that fell outside agency priorities. Lawyers could cite to the Morton memo in support of requests that the agency exercise its prosecutorial discretion to not pursue removal proceedings against their clients. The agency could even dole out a quasi-benefit in these cases called "deferred action," which came, not only with a reprieve from removal, but also a work permit.¹⁰⁵

These initiatives did not square with ICE's enforcement-oriented culture, and immigrants' lawyers struggled to convince ICE officials to favorably exercise prosecutorial discretion in even the

¹⁰² Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SECURITY 145, 148 (2018).

¹⁰³ Camille Erickson, *Detention Center Contractors Will Keep Reaping Profit Even After DHS Upheaval*, OPENSECRETS.ORG. (Apr. 15, 2019).

¹⁰⁴ Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to Agency Pers., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); Memorandum from John Morton, U.S. Immigration and Customs Enf't, to Agency Pers., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

¹⁰⁵ WADHIA, BEYOND DEPORTATION, *supra* note 35, at 15–20.

most sympathetic cases.¹⁰⁶ The ICE union, which represented 7,000 ICE officers, blocked efforts by the DHS to train its members on how to prioritize deportation cases and exercise discretion under the memos.¹⁰⁷ ICE's review of approximately 300,000 pending removal cases resulted in less than 2% of them being closed. A report concluded one year after the release of the Morton memos that "the statistics show a resounding failure of the DHS to implement the policy."¹⁰⁸

Faced with recalcitrance from ICE, on June 15, 2012, the President tried another tactic to impose prosecutorial priorities. President Obama announced creation of the Deferred Action for Childhood Arrivals (DACA) program to offer categorical deferred action to undocumented youth who could meet certain requirements.¹⁰⁹ Over the following months, USCIS hired hundreds of new workers to implement the new initiative, which was expected to result in a large increase in application fees for USCIS.¹¹⁰

The program had the look of an end-run around ICE,¹¹¹ and in August 2012, a group of ICE agents and the State of Mississippi sued to try to stop implementation of DACA.¹¹² The lawsuit failed, and in November 2014, the Obama administration took an even greater leap to increase the exercise of prosecutorial discretion to limit deportations. First, the DHS Secretary, Jeh Johnson, issued a

¹⁰⁶ See generally Rabin, *Victims or Criminals?*, *supra* note 9 at 207.

¹⁰⁷ Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES (Jan. 7, 2012).

¹⁰⁸ One Year Later: Report Shows Morton Memo Hasn't Delivered on Promises of Relief, REFORM IMMIGRATION FOR AM.

¹⁰⁹ See Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 61 (2015).

¹¹⁰ Daniel Hanlon, *USCIS Ramps Up Hiring for DACA Processing*, ASIAN J. (Aug. 28, 2012), <http://asianjournal.com/immigration/uscis-ramps-up-hiring-for-daca-processing/>.

¹¹¹ See Kagan, *supra* note 9, at 666.

¹¹² *Crane v. Napolitano*, 920 F. Supp. 2d. 724, 730 (N.D. Tex. 2013).

new prosecutorial discretion memo to replace the earlier memos.¹¹³ Under the memo, ICE had three priorities for removal, and undocumented immigrants without criminal convictions who had not recently entered the United States were not a priority for removal. Second, President Obama moved to create a new categorical deferred action program for USCIS to administer—Deferred Action for Parental Accountability (DAPA), which would have granted deferred action to millions of parents of United States citizens.¹¹⁴

Texas and twenty-six states or governors of states successfully sued to enjoin DAPA.¹¹⁵ The point became moot, in any event, with the election of President Trump, who pursued a maximalist approach to immigration enforcement. In his first month in office, President Trump issued three executive orders concerning immigration. The most prominent of these was his so-called “Muslim Ban,” which initially halted refugee processing and banned travel by nationals of seven predominately Muslim countries to the United States. His order on interior enforcement, however, has arguably had a more sweeping impact. It reversed the Obama administration’s priorities for enforcement, stating explicitly that all persons in the country without status were now considered enforcement priorities.

In sharp contrast to its resistance to the Obama prosecutorial discretion directives, ICE quickly embraced the Trump administration approach. In February 2017, an internal ICE memorandum to its employees stated, “effective immediately, Enforcement and Removal Operations (ERO) officers will take

¹¹³ Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Customs and Immigration Enf’t, et al. 3–4 (Nov. 20, 2014).

¹¹⁴ Kagan, *supra* note 9, at 684.

¹¹⁵ Texas v. United States, 86 F. Supp. 3d 591, 604, 677 (S.D. Tex. 2015), *aff’d* by 809 F.3d 134 (5th Cir. 2015), *aff’d* by U.S. v. Texas, 136 S. Ct. 2271 (2016).

enforcement action against all removable [immigrants] encountered in the course of their duties.”¹¹⁶

Since this memorandum, mid- and lower-level ICE officers have pursued immigration enforcement with a level of fanaticism unseen in recent memory¹¹⁷. In April 2017, a DACA recipient was deported.¹¹⁸ That summer, a veteran ICE officer gave an interview, stating, “[t]he problem is that now there are lots of people [at the agency] who feel free to feel contempt. . . . [in the past] I’d never have someone say, ‘Why do I have to call an interpreter? Why don’t they speak English?’ Now I get it frequently.”¹¹⁹

In short order, ICE virtually ceased exercising prosecutorial discretion. From February through June of 2016, the Obama administration had closed an average of approximately 2,400 immigration court cases per month in the exercise of its prosecutorial discretion. During the same period in 2017, fewer than 100 cases were closed per month, amounting to a 96% drop in the use of prosecutorial discretion in immigration removal proceedings.¹²⁰

ICE showed no qualms about making collateral arrests of undocumented immigrants “in immigration raids targeting their

¹¹⁶ Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, PROPUBLICA (July 17, 2017), <https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty> (citing U.S. Immigration and Customs Enforcement, Memorandum for All ERO Employees from Matthew T. Albence, Executive Associate Director, Implementing the President’s Border Security and Interior Immigration Enforcement Policies (Feb. 21, 2017)).

¹¹⁷ See generally SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP* (2019).

¹¹⁸ Alan Gomez and David Agren, *First protected DREAMer is Deported under Trump*, USA Today, April 18, 2017.

¹¹⁹ Jonathan Blitzer, *A Veteran ICE Agent, Disillusioned with the Trump Era, Speaks Out*, THE NEW YORKER (July 24, 2017).

¹²⁰ TRAC, *Immigration Court Dispositions Drop 9.3 Percent Under Trump* (July 17, 2017), <https://trac.syr.edu/immigration/reports/474/>.

friends, neighbors and coworkers.”¹²¹ In July 2017, ICE arrested 650 people in a four-day operation, of which 457 were not original targets of the raid, meaning that “a full 70% of the immigrants swept up in this operation were simply in the wrong place at the wrong time.”¹²²

Over the summer of 2017, the agency began using the children of undocumented parents as “bait” to arrest their sponsors in cases where it contended that the parents had helped their undocumented children come to the United States.¹²³ ICE officers began staking out traffic court and other state courts, and arresting undocumented immigrants who showed up for their cases.¹²⁴ In January 2018, ICE agents arrested two Indonesian nationals as they dropped their children off for school in New Jersey, and detained and moved to deport an outspoken immigrant activist, allegedly in retaliation for his constitutionally-protected speech.¹²⁵ In August 2018, ICE officers arrested a man driving his pregnant wife to the hospital for her Cesarean section.¹²⁶

¹²¹ Tessa Berenson, *Immigration Raids Are Sweeping Up More People Who Weren't Targets*, TIME (Aug. 9, 2017).

¹²² *Id.*

¹²³ John Burnett, *ICE Has Arrested More than 400 in Operation Targeting Parents Who Pay Smugglers*, NPR (Aug. 18, 2017), <https://www.npr.org/2017/08/18/544523231/arrests-of-undocumented-parents-sparks-debate-between-federal-officials-and-immi>; Ryan Devereau, *Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers* (Apr. 29, 2019), <https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/>.

¹²⁴ There was a 900% surge in New York court arrests from 2016–17. Stephen Rex Brown, *Courthouse Arrests of Immigrants by ICE Agents Have Risen 900% in New York This Year: Immigrant Defense Project*, N.Y. DAILY NEWS (Nov. 15, 2017).

¹²⁵ *Ragbir v. Homan*, No. 18-1597, 2019 WL 1811537, at *4 (2d Cir. Apr. 25, 2019); Ted Sherman, *AG Criticizes ICE Arrests of Immigrants as Kids Were Going to School*, NJ.COM (Jan. 26, 2018), https://www.nj.com/news/2018/01/ag_criticizes_ice_arrests_of_immigrants_as_kids_we.html.

¹²⁶ *ICE Detains Man Driving Wife to Hospital to Deliver Baby*, BBC (Aug. 20, 2018), <https://www.bbc.com/news/world-us-canada-45251249>.

Just as the enforcement focus of the former INS consistently prevailed over its adjudicatory responsibilities, these aggressive enforcement tactics by ICE ERO overwhelmed the investigative functions of ICE HSI. Over time, ERO siphoned the HSI budget to pay to house its growing population of immigrant detainees.¹²⁷ As ICE's enforcement efforts garnered publicity, the agency became synonymous with immigration enforcement, even though half of the agency was supposed to be dedicated to tasks like protecting immigrant trafficking victims. Some local law enforcement authorities decided over time to limit their cooperation with ICE's immigration enforcement.¹²⁸ However, HSI relies on cooperation with state and local law enforcement agencies for its work, and ICE's reputation in some jurisdictions made its work difficult. These issues led a group of nineteen HSI Special Agents in Charge to write a letter to DHS Secretary Kirstjen Nielsen in June 2018 requesting that HSI be separated from ICE and made its own agency.¹²⁹

Enforcement prevailed over service at the former INS, but after the INS was dissolved, ICE became even more zealous about deportation than the INS had been. The agency was populated by mission zealots who pursued "indiscriminate deportation" policies that were indiscriminate and intended to have a general deterrent effect on undocumented immigration, rather than focusing on traditional priorities for removal like non-citizens with criminal convictions or serious immigration law violations. During the Obama administration, mid- and lower-level ICE officers effectively resisted policies intended to redirect their efforts around traditional removal priorities. After the Trump administration eliminated the Obama enforcement priorities, ICE's deportation

¹²⁷ Letter of Nineteen HSI Special Agents in Charge to The Honorable Kirstjen Nielsen, Secretary, U.S. Department of Homeland Security, 3–4, <https://www.documentcloud.org/documents/4562896-FILE-3286.html>. The letter noted that the following amounts were "reprogrammed" from HSI to support ERO detention priorities: 5M in FY11, 10M in FY13, and 34.5M in FY16.

¹²⁸ Villazor & Gulasekaram, *supra* note 10 at 1236-37.

¹²⁹ Jason Buch, ICE *Criminal Investigators Ask to Be Distanced from Detentions, Deportations in Letter to Kirstjen Nielsen*, TEXAS OBSERVER (June 27, 2018).

zealots were enabled to pursue their vision of indiscriminate deportation as a general deterrent to unauthorized migration.

2. USCIS

The new home of USCIS within DHS has impacted its operations. Even without an intimate knowledge of Capitol Hill budget wrangling, it is easy to imagine how a service-oriented agency stranded in a colossal law enforcement- and national-security-oriented agency might wither. The one advantage that USCIS had going into this new environment was the IEFA that Congress had created as a partial funding source for the INS. The IEFA was allocated in its entirety to USCIS, and over the following years, it became the agency's primary funding source.¹³⁰ The IEFA reduced USCIS's reliance on congressional appropriations and its vulnerability to intra-agency budget battles.

Therefore, from a budgetary perspective, at least, USCIS has been somewhat insulated from the pressures that might exist within DHS to frame its operations and mission in terms of national security. Its fee-based funding has offered it some autonomy to continue to grant immigration status to unauthorized migrants, and it has mostly continued to do so, granting the majority of applications for many immigration benefits, such as U visas for crime victims, T visas for trafficking survivors, and DACA applications.

Recently, however, DHS has moved to shift part of the IEFA to ICE. Although the Immigration and Nationality Act mandates that the funds be used to fund "providing immigration adjudication and naturalization services,"¹³¹ DHS has proposed to shift the IEFA funds based on a dubious argument that "ICE investigations of potential immigration fraud perpetrated by individuals and entities who have sought immigration benefits before USCIS and efforts to enforce applicable immigration law and regulations with regard to

¹³⁰ WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERVICE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 5 (2015).

¹³¹ 8 U.S.C. § 1356(n).

such individuals and entities constitute direct support of immigration adjudication and naturalization services.”¹³²

The siphoning of the IEFA is part of a general tilt toward enforcement. In 2018, USCIS eliminated the phrase “nation of immigrants” from its mission statement and ceased referring to applicants and petitioners as “customers.”¹³³ The shift is not merely semantic; recent years have seen stricter rules, greater processing delays due to increased scrutiny of applications, and more active collaboration and information sharing with ICE.

For example, in May 2017, USCIS adopted a new measure subjecting foreign students and exchange visitors who inadvertently commit even *de minimis* status violations to deportation proceedings.¹³⁴ In October of that year, USCIS rescinded its longstanding guidance that directed personnel to give deference to prior determinations when adjudicating nonimmigrant, employment-based extension petitions involving the same position and the same employer.¹³⁵ These changes have made it harder for USCIS officers to grant benefits. In June 2018, USCIS made one of its biggest policy changes, issuing a new guidance allowing it to refer persons to removal proceedings upon denying applications.¹³⁶

¹³² Department of Homeland Security, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280, 62288 (Nov. 14, 2019).

¹³³ Dara Lind, *America's Immigration Agency Removes 'Nation of Immigrants' from Its Mission Statement*, VOX (Feb. 22, 2018), <https://www.vox.com/2018/2/22/17041862/uscis-removes-nation-of-immigrants-from-missionstatement>.

¹³⁴ USCIS, Memorandum, Accrual of Unlawful Presence and F, J, and M Nonimmigrants (May 10, 2018), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf.

¹³⁵ USCIS Policy Memorandum, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf>.

¹³⁶ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Updated Guidance for the Referral of Cases and Issuance of Notices to

USCIS always referred some applicants for removal proceedings, such as asylum, green card, or naturalization applicants. However, a firewall previously existed between USCIS and ICE with respect to humanitarian relief such as: T visas for trafficking survivors; U visas for crime victims; Special Immigrant Juvenile Status (SIJS) for abused, abandoned, and neglected children; and self-petitions by abused spouses and children of United States citizens and lawful permanent residents under the Violence Against Women Act (VAWA). The referral of such applicants for removal proceedings is a major change.

There is evidence of increasing information sharing between USCIS and ICE. USCIS officers have begun turning over applicants for immigration benefits to ICE at their interviews when the officer finds that the person has a prior removal order, criminal conviction, or illegal reentry.¹³⁷ In July 2019, USCIS Director Ken Cuccinelli “asked agency personnel to volunteer to perform work for ICE at ICE field offices throughout the country.”¹³⁸

The new information sharing and collaboration between USCIS and ICE contrasts with the agency’s reduced transparency toward immigrants. In October 2018, USCIS announced the phase-out of self-scheduled “InfoPass” appointments, which allowed applicants and attorneys to easily schedule in-person meetings with USCIS to discuss processing delays and other case problems.¹³⁹ In January

Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

¹³⁷ Meagan Flynn, “*Citizenship Service Conspired with ICE to ‘Trap’ Immigrants at Visa Interviews, ACLU Says*,” WASH. POST (Aug. 15, 2018).

¹³⁸ Letter of the Congressional Hispanic Caucus to the Honorable Ken Cuccinelli, July 31, 2019, <https://congressionalhispaniccaucus-castro.house.gov/sites/congressionalhispaniccaucus.house.gov/files/7.31.19%20Cuccinelli%20Letter.pdf>.

¹³⁹ USCIS Webpage, “USCIS to Expand Information Services Modernization Program to Key Locations” (Oct. 30, 2018), <https://www.uscis.gov/news/news-releases/uscis-expand-information-services-modernization-program-keylocations>.

2019, USCIS eliminated the use of USCIS service center e-mail boxes for case-specific questions.¹⁴⁰

The agency's greater scrutiny of applications has led to increased delays. The overall average case processing time surged by 46% from FY 2016–18 and 91% since FY 2014. "USCIS processed 94[%] of its form types—from green cards for family members to visas for human trafficking victims to petitions for immigrant workers—more slowly in FY 2018 than in FY 2014." Processing times for citizenship applications approximately doubled from 2016 to 2019, from 5.6 months to 10.1 months.¹⁴¹ These increased processing times occurred even as case volume appeared to markedly decrease: USCIS's "net backlog" exceeded 2.3 million delayed cases at the end of FY 2017—more than a 100% increase over the span of one year—despite only a 4% rise in case receipts during that period.¹⁴²

Despite USCIS's tilt to enforcement, it continues to have a different culture than ICE, and this assures that there will be pockets of resistance to ICE's cooption of the agency. Just as ICE officers resisted President Obama's efforts to broaden the exercise of prosecutorial discretion, USCIS asylum officers have resisted some Trump Administration policies. The union representing USCIS asylum officers filed an amicus brief in one case arguing that the Trump administration's "Migrant Protection Protocol" (MPP), requiring asylum seekers to wait in Mexico while their cases are adjudicated, is illegal and "contrary to America's longstanding

¹⁴⁰ USCIS Webpage, "Update on Case Assistance by Service Centers" (Dec. 21, 2018), <https://www.uscis.gov/news/alerts/update-case-assistance-service-centers>.

¹⁴¹ COLORADO STATE ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *CITIZENSHIP DELAYED; CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS* 9 (2019).

¹⁴² AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *AILA POLICY BRIEF: USCIS PROCESSING DELAYS HAVE REACHED CRISIS LEVELS UNDER THE TRUMP ADMINISTRATION* (2019), <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>.

tradition of providing safe haven to people fleeing persecution.”¹⁴³ As USCIS’s asylum officers have resisted Trump administration immigration enforcement policies, the administration has endeavored to circumvent them, by delegating some of the “credible fear” interviews typically conducted by asylum officers to CBP agents instead.¹⁴⁴

USCIS is one element of the scattered immigration bureaucracy, which as a whole has been ideologically riven between assimilation and restriction—structurally divided between service and enforcement. Over time, its arc has been toward prioritizing enforcement over service—a focus that has been dictated by agency structure, congressional grants of vast discretion, and nativist politics—all of which have empowered deportation zealots within the agency.¹⁴⁵ There have been periods when the emphasis has shifted somewhat, such as the development of discretionary relief from removal during the Roosevelt era, the period following passage of the 1965 immigration act, the late 1980s through early 1990s when the INS processed millions of amnesty applications and developed an independent and professional asylum corps, and the Obama administration’s DACA program.

But the location of the INS within the Department of Justice and USCIS within DHS has mostly assured that immigration services will be subordinated to enforcement priorities. Deportation zealots have thrived within this structure, finding themselves empowered during the Obama years to resist the administration’s enforcement priorities, and within the Trump administration to pursue an indiscriminate deportation policy. USCIS, meanwhile, has been coopted, forced to bend its service-based mission to enforcement needs, although its fee-based funding structure and more

¹⁴³ See Brief of Amicus Curiae Local 1924 in Support of Plaintiffs-Appellees’ Answering Brief and Affirmance of the District Court’s Decision, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716, (9th Cir. June 26, 2019).

¹⁴⁴ See Molly O’Toole, *Border Patrol Will Screen Asylum Requests in New Push to Restrict Claims*, *Memos Show*, L.A. TIMES (May 9, 2019).

¹⁴⁵ We discuss the interaction of these factors in Part II.

heterogeneous culture allows it to maintain pockets of resistance such as the Asylum Office.

II. A PUBLIC CHOICE MODEL OF IMMIGRATION ENFORCEMENT

This Part introduces a comprehensive model of immigration enforcement as regulation. In constructing our model, we draw on key insights from public choice theory, which, in our view, best explains the behavior of the immigration enforcement bureaucracy. In narrowing our theoretical lens, we sideline other approaches taken by legal scholars in their descriptive and prescriptive accounts of agency behavior in the immigration space and elsewhere. We do not argue that presidential control has not been a strong contributor to hyper-regulation. Nor do we suggest that technical expertise,¹⁴⁶ behavioral biases,¹⁴⁷ and deliberation and dialogue among agencies and with the White House¹⁴⁸ have no role to play in shaping immigration enforcement policy. But we do conclude that agency mission, culture, budget, and institutional design are the dominant drivers.¹⁴⁹ And these factors are the primary focus of traditional public choice theory.

We begin by describing the key regulatory players in immigration enforcement—the President, Congress, the Courts, the public, immigration reform advocates, state, local, and foreign governments, the immigrants themselves, and the agencies and their bureaucrats. Next, we examine the power dynamics among them. In general, the pro-regulatory forces are strong and anti-regulatory forces are weak. Although each player exercises some degree of influence, the President and the bureaucrats wield by far the most. When the President and the bureaucrats clash, the bureaucrats often

¹⁴⁶ See, e.g., Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2037 (2017).

¹⁴⁷ See, e.g., Daniel Kahneman & Jonathan Renshon, *Hawkish Biases*, in *AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11 79* (A. Trevor Thrall & Jane K. Cramer eds., 2009).

¹⁴⁸ See generally, e.g., Landau, *supra* note 8.

¹⁴⁹ Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007) (“The academic literature on immigration law and policy has largely neglected [] institutional design. . .”).

prevail within their own sphere of influence. When the Presidents and the bureaucrats join forces, such as during the Trump administration, zealous administration further expands.

The conclusions of our model explain ICE's unmistakable trend, irrespective of presidential imperatives, toward hyper-regulation: ICE's enforcement pattern has become indiscriminate—treating all undocumented immigrants as equally worthy of deportation—and favors pervasive and performative tactics intended to encourage “self-deportation” and deter prospective immigrants from entering the country.¹⁵⁰ USCIS, for its part, has become coopted for ICE's enforcement mission and enforcement patterns, although pockets of resistance to hyper-regulation exist within USCIS, just as ICE resisted President Obama's efforts to pursue a more restrained philosophy of immigration enforcement.¹⁵¹

Five major factors have contributed to the trend toward zealous administration. They include: (1) Congress's decision to house the immigration enforcement arms in the DHS; (2) a resulting bureaucratic culture at ICE, supported by its employees' union, that pushes it toward hyper-regulation; (3) the pro-regulatory politics of crime and national security; (4) the private contractors, who increasingly perform enforcement functions, are driven by financial incentives, and use their profits to lobby for pro-enforcement policies; and (5) the weakness of immigration courts and limits on Article III judicial review, both of which would otherwise serve as limits on hyper-regulation.

A. Public Choice Insights and Regulation

Public Choice Theory emerged in the 1960s and 1970s and inspired much of the Reagan Administration's administrative reforms.¹⁵² Many of its most enduring insights focus on bureaucrats' incentives. William Niskanen, in an influential 1971 study,

¹⁵⁰ TRAC, *ICE Focus Shifts Away from Detaining Serious Criminals*, <https://trac.syr.edu/immigration/reports/564/>.

¹⁵¹ See *supra* notes 104–15 and accompanying text.

¹⁵² See FARBER & O'CONNELL, *supra* note 43, at 2–8 (tracing the development of economic public choice theory from its inception to present day).

hypothesized that bureaucrats seek to maximize their own utility by increasing their agencies' budgets.¹⁵³ Larger budgets begat increases in "salary, perquisites of the office, public reputation, power, patronage, [and the] output of the bureau."¹⁵⁴ Other theorists fleshed out Niskanen's sketch of the rational bureaucrat.¹⁵⁵ Zeal for their agency's mission was believed to have special influence.¹⁵⁶ Justice Stephen Breyer made his own contribution, observing that bureaucrats tend to overregulate concerning rare, high-profile risks.¹⁵⁷ The common theme was that bureaucrats' incentives drove them to overregulate.¹⁵⁸

¹⁵³ See WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 39 (1971) ("It is *impossible* for any one bureaucrat to act in the public interest, because of the limits on his information and the conflicting interests of others, regardless of his personal motives." (emphasis in original)); see also William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–94 (1968) (discussing how bureaucrats maximize utility). The figure of the empire-building bureaucrat has had lasting influence in the public imagination as well. Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523, 1525 (2006) (observing that popular fantasy author J.K. Rowling, in *Harry Potter and the Half-Blood Prince*, "depict[s] a Ministry of Magic run by self-interested bureaucrats bent on increasing and protecting their power, often to the detriment of the public at large").

¹⁵⁴ NISKANEN, BUREAUCRACY, *supra* note 156, at 38.

¹⁵⁵ See Farber & O'Connell, *supra* note 43, at 4–5 (describing the modern transformation of Niskanen's model to focus on a broader range of players and structures).

¹⁵⁶ See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081–82 (1986) (arguing that traditional social cost and benefit is often distorted within agencies by bureaucrats' bias for their own missions).

¹⁵⁷ See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 9–11 (1993) (describing quality-of-life regulators' tendency to overregulate high-profile, low probability risks); Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 142–43 (2016).

¹⁵⁸ Although Niskanen focused on the inefficiency produced by bureaucratic incentives, this became conflated, in the minds of reformers, with the assumption that these bureaucrats were, at the same time, overregulating. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006) (calling for a reform of the Office of Management and Budget's review).

Indeed, the field was dominated by an anti-regulatory predisposition.¹⁵⁹ In the 1970s and 1980s, it was popular to refer to “agency capture,” not as governance of the regulator by the regulated,¹⁶⁰ but as prestige-seeking bureaucrats and public interest groups collaborating to over-regulate the hapless private sector at the public’s expense.¹⁶¹

These conservative anti-regulatory public choice theorists developed their critiques with financial and quality-of-life regulation in mind.¹⁶² Their models did not always fare well under scrutiny, and had poor success at predicting actual agency behavior in those areas.¹⁶³ The result¹⁶⁴ is what is typically meant today when an agency is said to be “captured.”¹⁶⁵ Moreover, as James Q. Wilson observed of the FBI, domestic agencies do not always behave as

¹⁵⁹ See *id.* at 1261–62 (“OMB’s advocates were frank that its primary function was to create a ‘rebuttable presumption against regulation’ in order to curb agencies’ supposed instincts to overregulate.”).

¹⁶⁰ See Bagley & Revesz, *supra* note 161, at 1284.

¹⁶¹ See *id.* at 1264–65 (discussing Reagan’s supporters’ promotion of centralized review of agency decisionmaking in order to promote “coordinated and cost-effective regulatory state” and to curb excessive regulation); DeMuth & Ginsburg, *White House Review*, *supra* note 150, at 1081–82 (arguing that requiring cost-benefit analysis would “force regulators to confront problems of . . . overzealous pursuit of agency goals, which experience has shown to be common in regulatory programs”); Elena Kagan, *supra* note 7, at 2279 (“Proponents of [Reagan’s executive review process] stressed the need . . . to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees.”).

¹⁶² See Bagley & Revesz, *supra* note 161, at 1289 (criticizing agencies for failing to prioritize health and safety in rulemaking).

¹⁶³ *Id.*

¹⁶⁴ See Bagley & Revesz, *supra* note 161, at 1282–1304 (arguing that the public choice assumptions about bureaucratic incentives often do not hold up when the behavior of quality-of-life regulators is examined).

¹⁶⁵ See Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010) (defining capture as a “shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public”); REVESZ & LIVERMORE, *supra* note 154, at 1340 (listing sources and their definitions of regulatory capture).

empire-building, budget-maximizers—in fact, they actively avoid regulating in some instances.¹⁶⁶

However, there is plenty of evidence that the 1970s fable of the empire-building, overregulating bureaucrat urged on by a small group of pro-regulatory private firms is generally accurate with respect to immigration enforcement. As we have noted, ICE and CBP—with the approval and urging of the White House, their unions, and private contractors—have continued to escalate their hyper-regulation.¹⁶⁷

B. The Players

Immigration enforcement is a complex regulatory game in which an unusually large number of entities, both public and private, exert influence.¹⁶⁸ Public choice models of U.S. government regulatory activities typically include the following players—the regulating agencies; the regulated entities; the President; the Congress; the courts; and the American public. Often models will also include public interest organizations and any other institutions seeking to influence the products of the regulatory process.¹⁶⁹

Immigration enforcement is unique because the players are so widely distributed, both horizontally and vertically. Horizontal distribution is the number of players across the same level of government, while vertical distribution is the number of players at multiple levels of government.¹⁷⁰ For example, environmental regulation is a *two*-level game because the federal enforcement regime relies upon, at least in part, the policy choices of state

¹⁶⁶ JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 169–70 (1978). See also Levinson, *supra* note 39, at 932–34 (discussing empire-building in the context of non-elected government officials).

¹⁶⁷ See *supra* Part I.C.

¹⁶⁸ See TICHENOR, *supra* note 34, at 1–36 (discussing the range of institutions and political interests with influence on the immigration policymaking process).

¹⁶⁹ See FARBER & O’CONNELL, *supra* note 43, at 5–6 (discussing the broadening of recent public choice models); Mashaw, *supra* note 43, at 19–20 (describing various public choice models).

¹⁷⁰ See generally Jens Newig & Oliver Fritsch, *Environmental Governance: Participatory, Multi-level—and Effective?*, 19 ENV. POL. & GOV. 197 (2009).

government.¹⁷¹ Defense policy is also a two-level game because the U.S. government faces both domestic and international political pressure.¹⁷²

With respect to immigration enforcement, U.S. executive branch entities—the President, the DOJ, ICE, and CBP—do most of the heavy lifting in law creation. At the federal level, they share regulatory power with the other components of the immigration bureaucracy, Congress, and the federal courts. But they must also contend with the policies of foreign, state, and local governments.¹⁷³ Foreign governments seek to affect the outputs of the U.S. immigration enforcement system with respect to their own citizens, in the way that Iran successfully pressured the Carter and Reagan administrations to terminate its citizens' visas during the resolution of the 1979 Hostage Crisis.¹⁷⁴ State and local governments also affect immigration enforcement law and policy in a number of ways.¹⁷⁵ The federal enforcement regime depends in part on their cooperation—they are expected to share information about, arrest, and detain enforcement targets, for example. But they may also seek to magnify or disrupt federal policy by enacting their own complementary or competing enforcement regimes or by refusing to

¹⁷¹ See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288–89 (4th Cir. 2001) (speaking of the Surface Mining Conservation and Recovery Act (“SMCRA”) as a statute embodying “a ‘cooperative federalism,’ in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities”).

¹⁷² See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 434 (1988) (discussing the political complexities of international negotiations world players face in balancing domestic and international interests).

¹⁷³ See TICHENOR, *supra* note 34, at 889; (“Immigration control represents an area of government action that intersects domestic and foreign policy.”); Cuéllar, *supra* note 9, at 85 (observing that “the United States, like many other nation-states, responds to external pressures from the international system as well as domestic institutions, interests, and public priorities”).

¹⁷⁴ See *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 115–16 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980).

¹⁷⁵ See generally David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 986–89 (2016) (discussing the role of states and local municipalities in shaping immigration law and policy).

cooperate.¹⁷⁶ Immigration enforcement is therefore a *four*-level regulatory game, in which the U.S. government must respond to international, national, state, and local politics.

Private entities also influence immigration enforcement law and policy. On the side of indiscriminate enforcement are the unions representing ICE and CBP bureaucrats and the private contractors who supply the agencies with equipment and operate facilities where immigrants are detained.¹⁷⁷ Opposing indiscriminate enforcement are public interest organizations and attorneys who represent and advocate for the rights of immigrants, private corporations seeking to maintain or expand the labor pool, and certain pockets of USCIS, such as the USCIS Asylum Officers.¹⁷⁸

The immigrants themselves are also, of course, significant players in the immigration regulatory game.¹⁷⁹ But their role is often discounted because their power is weak compared to regulated entities in other regulatory spaces. Unlike broadcasters lobbying the FCC or manufacturers lobbying the EPA, for example, most recent immigrants possess few resources and little clout to influence policy in the commonly-understood manner.¹⁸⁰ Nonetheless, their incentives and behavior can have a profound effect on the success of immigration enforcement policy.¹⁸¹

¹⁷⁶ See *infra* Part II.C.4.

¹⁷⁷ See Ted Hesson, *15 Companies That Profit From Border Security*, ABC NEWS (Apr. 15, 2013), https://abcnews.go.com/ABC_Univision/Politics/15-companies-profit-border-security/story?id=18957304; *supra* notes 100–04 and accompanying text.

¹⁷⁸ See *supra* Part I.C.4.

¹⁷⁹ See, e.g., Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 3–4 (2017) [hereinafter Frost, *Cooperative Enforcement*].

¹⁸⁰ In general, the longer a particular immigrant community has existed in the United States, the more pressure its members and representatives can exert on immigration enforcement policy. See TICHENOR, *supra* note 34, at 803 (“Government decisions to permit the admission and relatively easy naturalization of new immigrants have had the effect of introducing new groups with a decided interest to mobilize on behalf of admission policies enabling their families and fellow ethnics to enter the country.”).

¹⁸¹ See Frost, *Cooperative Enforcement*, *supra* note 184, at 3–4.

C. *The Parties' Power Dynamics and Incentives*

These parties come with varying capacities to influence policy and different levels of interest in doing so. In general, among the parties with a high level of interest in the outcome, the parties favoring greater enforcement, have more influence than those favoring restraint, resulting in a process that encourages both political resilience and hyper-regulation.¹⁸² And the constraints the parties have imposed on one another have led to hyper-regulation—indiscriminate, pervasive, and performative—dominating policy. But the dynamics leading to these results are complex and not simply the product of the push-and-pull of raw institutional power. The current immigration enforcement regime emerged from the interaction of the parties over time, and functions in ways that were not necessarily intended by the parties.

1. The President and Congress

Among the three branches of the federal government, the President wields the most power over immigration enforcement. This might seem surprising at first. The Constitution explicitly vests Congress—and not the President—with the power to regulate immigration.¹⁸³ From the sheer prolixity of the immigration code, it might appear that Congress has robustly exercised that power, tightly circumscribing executive discretion over immigration enforcement.¹⁸⁴

But this is only true with respect to some aspects of *ex ante* control over immigration.¹⁸⁵ By periodically expanding the ways in which immigrants are eligible for removal and stripping them of their procedural rights, Congress has left the executive branch with vast discretion over *ex-post* enforcement, which has an immense

¹⁸² Other parties may have a high capacity to influence the outcome but lack the incentive to exert pressure for a particular policy. *See infra* Part II.C.4.

¹⁸³ Cox & Rodriguez, *supra* note 36, at 414.

¹⁸⁴ *See* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 55–56 (2012).

¹⁸⁵ *See* Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1789–90 (2010).

impact in determining the composition of the immigrant population.¹⁸⁶ Congress has also further empowered the President by continuing to shower budgetary resources on immigration enforcement.¹⁸⁷

Moreover, the courts have often hewed to a “plenary power doctrine” under which they defer to congressional and executive authority over immigration, particularly in matters concerning the admission or removal of non-citizens.¹⁸⁸ Although the plenary power doctrine is often expressed in ways that conflate the political branches’ authority, long stretches of congressional silence on the substance of immigration law have enabled the President and the bureaucracy to benefit the most from it and other forms of immigration exceptionalism, which we discuss below.¹⁸⁹

Congress could, of course, intervene at any moment to reshape the immigration code, requiring the executive branch to revamp the immigration enforcement regime. But history suggests that significant substantive congressional action on immigration requires an unusual convergence of events: when immigration is a highly salient political issue; when political incentives enable cross-party or strange-bedfellow coalitions to form;¹⁹⁰ and when the President, responsive to the national political environment, senses that the decision to sign reform legislation would be popular.¹⁹¹

¹⁸⁶ See Cox & Rodriguez, *supra* note 36, at 133–35.

¹⁸⁷ See *id.* at 133.

¹⁸⁸ Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 96, 101 (2017) (arguing that “[n]owhere is the administrative exercise of policymaking authority more evident than in the immigration context”).

¹⁸⁹ See *id.* (“The power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation’s administrative agencies.”)

¹⁹⁰ See TICHENOR, *supra* note 34, at 233 (“[T]he dynamics of U.S. immigration policy have long been influenced by the making and remaking of distinctive political coalitions on this issue that cut across familiar partisan and ideological lines.”).

¹⁹¹ See generally *id.* (describing the influences shaping immigration legislation in American history).

Nonetheless, Congress has imposed significant constraints on presidential authority over immigration enforcement in another way—through institutional design. Legal scholarship emphasizing presidential control over agency action often overlooks how Congress’s institutional design decisions may limit presidential authority by creating and shaping agency culture in advance.¹⁹²

Congress’s 2003 decision to split the INS into three parts and house them in the new DHS, with the support of the George W. Bush administration, has had a lasting and profound impact on immigration law. It was the twenty-first century’s only significant legislative act regarding immigration. The HSA embedded the lion’s share of the immigration bureaucracy within the National Security State.¹⁹³

In his seminal work on bureaucracies, James Q. Wilson observed that “the formative years of a policy-making agency are of crucial importance in determining its behavior. As with people, so with organizations: Childhood experiences affect adult conduct.”¹⁹⁴ ICE and CBP were born with national security missions and “grew up” during years when antiterrorism responsibilities brought prestige, power, and money, and indiscriminate immigration enforcement became the norm.¹⁹⁵ USCIS’s service mission, by contrast, never fit well in this new bureaucratic realm, leaving it with second-class status and depriving it of influence. The Obama administration’s late efforts to use the USCIS to counter-balance the

¹⁹² Cf. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 429–30 (2015) [hereinafter Nou, *Intra-Agency*] (concluding that “fixed legislative and executive design choices” impose costs that may discourage agencies from making procedural changes). *But cf.* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 215 (2015) (describing presidential efforts to circumvent fixed institutional limits by using agency authorities in combination).

¹⁹³ See 6 U.S.C. §§ 275, 291, 521 (2019); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 483–84 (2007).

¹⁹⁴ See WILSON, BUREAUCRACY, *supra* note 4, at 68.

¹⁹⁵ See WADHIA, *supra* note 35, at 36 (“In the decade after 9/11, agency officials and policymakers were loath to use ‘prosecutorial discretion’ or related tools to focus resources on high priorities and instead preferred to enforce the immigration law at all costs.”).

enforcement agencies' influence were, therefore, severely constrained by Congress's institutional design decisions from a decade earlier.¹⁹⁶ Thus, the USCIS was vulnerable to being co-opted for the national security mission in the Trump administration.¹⁹⁷

2. The President and the Bureaucrats

In general, public choice theory predicts that a president's policy will gain traction at an agency only to the extent it aligns with the agency's goals and, more importantly, its bureaucrats' core tasks.¹⁹⁸ An agency's goals are defined by Congress via statute, by the President via executive orders or similar commands, and by its high-level bureaucrats via guidance or rulemaking. Core tasks are what front-line bureaucrats do on a daily basis.¹⁹⁹ In determining how an agency will respond to external pressure, an agency's core tasks are more important than its assigned goals or bureaucrats' individual preferences because agency culture is formed in large part by those tasks—agency culture is “a persistent, patterned way of thinking about the central tasks of and human relationships within an organization.”²⁰⁰ It is “passed on from one generation to the next” and “changes slowly, if at all.”²⁰¹

The clarity and breadth of an agency's goals will affect the degree to which mid- and lower-level bureaucrats' incentives influence how core tasks are defined. This is because an agency's leaders must spend their time dealing with external forces and do not typically have the time or energy to redefine the agency's goals or its bureaucrats' core tasks.²⁰²

When an agency has a narrow set of clearly-delimited goals, bureaucrats are more likely to adopt core tasks related to those goals,

¹⁹⁶ See *supra* Part I.C.

¹⁹⁷ See Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era* (Forthcoming 2020), SSRN: <https://ssrn.com/abstract=3371181>.

¹⁹⁸ See WILSON, BUREAUCRACY, *supra* note 4, at 91.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ *Id.*

²⁰² See *id.* at 32.

and the agency's political leadership is therefore more likely to be able to influence the definition of core tasks. But at an agency with conflicting or vague goals, the bureaucrats' incentives will play the prominent role in determining the agency's set of core tasks, and the bureaucrats will embrace policies that enable them to more easily perform those tasks while shirking responsibility for carrying out policies that require taking on new tasks.²⁰³

The old INS was a classic example of an agency with vague and conflicting goals.²⁰⁴ But even the post-2003 agencies, ICE and USCIS, have broad mission statements that reveal the inherent tension between immigration enforcement as ensuring a fair process and immigration enforcement as protecting national security and preventing terrorism.²⁰⁵ The latter focus has come to dominate because a national security mandate has a uniquely transformative effect on an agency. It carries a special vagueness that invites mission creep and the devolution of rules into standards.²⁰⁶ In other words, a national security mandate lays the groundwork for

²⁰³ See *id.* at 222 (“Changes consistent with existing task definitions will be accepted; those that require a redefinition of tasks will be resisted.”); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T'L. L. REV. 1, 17–30 (2009) (observing that agencies will “systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives); cf. Nou, *Intra-Agency*, *supra* note 188, at 429–30 (discussing barriers to agencies implementing procedural and organizational changes).

²⁰⁴ See WILSON, BUREAUCRACY, *supra* note 4, at 158 (observing, in 1991, that the INS had “been conspicuous for its weak sense of mission and low morale” chiefly because “it [had] vague and competing goals”); *supra* Part I.A.

²⁰⁵ See *supra* notes 65–71 and accompanying text.

²⁰⁶ See Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 61, 71 (2014) (discussing mission creep at the FBI after it received a national security mandate from the President); Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2144 (2016) (observing that national security bureaucracies take vague grants of authority as “invitations to develop broad and malleable standards” and “strip rules of their ordinary meaning, causing their *sub rosa* transformation into standards”).

bureaucratic incentives to determine an agency's core tasks, rather than Congress, the President, or even the agency's leadership.

In the absence of narrow and clearly-defined goals, James Q. Wilson concluded, a handful of factors are most likely to influence how front-line bureaucrats determine the agency's core tasks: (1) "the impetus given to the organization by its founders"; (2) "the array of interests in which the agency is embedded"; (3) the problems front-line bureaucrats "encounter daily in their work"; and (4) peer expectations.²⁰⁷

As we discussed in Part I, the impetus for the creation and early development of ICE and USCIS was to tether immigration enforcement to the rest of the national security state in the years after 9/11.²⁰⁸ ICE was born as a counterterrorism agency in the aftermath of the 9/11 attacks, imbuing it from the start with a strong national security mandate and mission. Both agencies are embedded within a parent agency and an enormous national security state with the same mandate and mission.²⁰⁹

Indiscriminate immigration enforcement is also attractive for a number of strategic and political reasons. When bureaucrats seek to handle the problems they encounter daily, they will settle on tasks that increase agency autonomy. Bureaucrats will also seek prestige and greater authority, but not at the expense of autonomy. This accounts for why agencies sometimes lobby to defeat reforms that would expand their authority if it overlaps with other agencies'; why agencies will seek to carve out a niche by performing tasks not performed by other agencies and corner the market on those tasks; and why agencies are generally wary of joint or cooperative activities.²¹⁰

²⁰⁷ WILSON, BUREAUCRACY, *supra* note 4, at 27; *see also* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 193 (2018) (noting the importance of peer expectations in driving bureaucratic behavior, especially in national security settings).

²⁰⁸ *See supra* Part I.B.

²⁰⁹ *See supra* Part II.B.

²¹⁰ WILSON, BUREAUCRACY, *supra* note 4, at 193–95.

Wilson's observations about autonomy account for why ICE's bureaucrats have settled on a certain set of core tasks and why they heavily resisted efforts by the Obama administration to alter those tasks. On a daily basis, the major problem ICE bureaucrats face is that the agency has the resources to deport just a small percentage of unauthorized immigrants.²¹¹ Moreover, a small subgroup of those unauthorized immigrants actually engage in criminal activity or represent national security threats.²¹²

Despite efforts to shift enforcement priorities during the Obama administration, ICE bureaucrats have settled on, and rarely depart from, a set of core tasks aimed at the goal of indiscriminate deportation—removing the greatest number of unauthorized immigrants, period.²¹³ This means drawing on the latest surveillance technology to attempt to monitor the enormous pool of unauthorized immigrants.²¹⁴ It also means arresting, detaining, and deporting as many as possible when opportunities present themselves—regardless of whether the target is a U.S. military veteran or is apprehended at a school or courthouse.²¹⁵ The turn toward indiscriminate and pervasive enforcement is also performative because it is believed to advance the ultimate goal by deterring future unauthorized immigration and encouraging “self-deportation.”²¹⁶

ICE could have responded to its central problem in a different way. It could have prioritized certain unauthorized immigrants for deportation—those with violent criminal histories, for example—or shifted the lion's share of its resources to disrupting cross-border criminal gangs and human-trafficking networks. The latter is, in

²¹¹ See Cuéllar, *supra* note 9, at 13.

²¹² See Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019).

²¹³ See *supra* Part I.C.3; cf. Nou, *Intra-Agency*, *supra* note 188, at 473 (“The career incentives and training of civil servants usually orient them towards perpetuating the stability of their institutions, rather than embracing administrative innovations.”).

²¹⁴ See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 4 (2014).

²¹⁵ See *supra* Part II.C.3.

²¹⁶ See *id.*

fact, the core mission of HSI, the lesser-known subdivision of ICE that has consistently found its budget commandeered by ERO and its activities drowned out by the agency's overall emphasis on indiscriminate immigration enforcement.²¹⁷

Part of the reason that HSI's work has been subordinated within ICE to that of ERO is that it operates on turf already occupied by other law enforcement agencies, such as the FBI and DEA, and requires cooperation with them.²¹⁸ Rolling up human trafficking and drug smuggling networks might seem a more prestigious law enforcement activity than deporting millions of non-criminal immigrants, but indiscriminate enforcement dovetails with a strain of populist anti-immigrant sentiment that has always undergirded American politics.²¹⁹ Transnational criminal enforcement does not offer the same cathartic release for the portion of the United States population that feels alienated by demographic change.²²⁰

Indiscriminate deportation, in contrast, offers an efficient and dependable way of boosting ICE's autonomy and prestige. The FBI, for example, has neither the legal jurisdiction nor the inclination to deport non-criminal immigrants—that is an enforcement activity

²¹⁷ *See id.*

²¹⁸ *See* Andrew Grossman, *FBI Agents Say Rivals Encroach on Their Turf*, WALL ST. J. (Aug. 26, 2014) (describing turf wars between the FBI and HSI and conflicts between their respective cultures).

²¹⁹ *See* ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* 432–33 (2006); Rubenstein & Gulasekaram, *supra* note 49, at 584–85 (noting the recent political salience of nativism).

²²⁰ Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271, 310 (2013) (Agencies “tend to choose the goals that are more easily measured so they can demonstrate progress, . . . [and t]his often means taking an approach that focuses on short-term concerns with tangible outputs, as opposed to long-term effects that might be harder to predict and quantify”); *Cf.* Cuéllar, *supra* note 9, at 71 (“In a political environment of rising concern about immigration and strong affective responses to the perceived erosion of sovereignty, the marginally simpler policy argument of fortifying the border is likely to have greater resonance among unsophisticated but concerned voters than the more complex idea of shaping the demand for migration through multiple regulatory strategies.”).

falling squarely within ICE's domain.²²¹ In addition, identifying whether an immigrant is authorized or unauthorized requires far fewer resources than undertaking an additional quasi-adjudicatory process to determine, based on numerous factors, whether a particular unauthorized immigrant is a high or low priority for removal.²²² Under an indiscriminate deportation policy, an ICE agent can simply issue a charging document or removal order and move on to the next target.²²³

Moreover, the same incentives also encourage performative and pervasive enforcement methods that constitute hyper-regulation. Displays of raw power address directly the fears of anti-immigrant constituencies, just as they do in the ordinary criminal justice context.²²⁴ Family separation and conducting raids at schools may bring notoriety to ICE, but such tactics also inspire the agency's supporters in Congress and among the public—for a segment of the United States population, the ICE agent who departs every undocumented immigrant he encounters is a hero.

The bureaucrats at ICE and USCIS are not automatons, of course. Each individual brings to her role previous experiences and values,²²⁵ and every bureaucracy is populated by a range of types.

²²¹ The FBI is not above using deportation as leverage over, for example, informants. *See, e.g.,* Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 710 (2010).

²²² *See* Rabin, *Victims or Criminals?*, *supra* note 9, at 238 (observing that an ICE agent's decision to deport is considered "an agency win and a job well done" while exercising prosecutorial discretion and dismissing a case "would require a messier and unfamiliar adjudication of conflicting factors, and could place the agent and/or the agency under fire."); Nou, *Intra-Agency*, *supra* note 188, at _ (noting that resource constraints drive agency decisions about which procedures to adopt).

²²³ *See supra* notes _ _ and accompanying text; *see also* Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1630 (2018).

²²⁴ *See* Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 27–28 (2007) (observing that law enforcement "policy professionals have realized that it is more feasible to address the effects of crime, such as fear and outrage, rather than crime itself" and as a result, "policy has become about risk and resource management and expressive penal measures").

²²⁵ *See* Ingber, *supra* note 212, at 164–65.

There are bureaucrats who work to advance an agency’s core tasks, shirk them, or sabotage them.²²⁶ There are bureaucrats who resist the agency’s current policies or a change in policy through a variety of means—enlisting the help of internal “offices of goodness” such as inspectors general,²²⁷ seeking outside allies such as congressional staffers, leaking damaging information, going public, quitting, slowing down procedures, or internal advocacy.²²⁸

Moreover, an agency’s culture is rarely monolithic. As Joseph Landau has observed, the immigration enforcement bureaucracy has, on occasion in the past, actually developed pro-immigrant norms.²²⁹ Sub-agencies can have distinct sub-cultures, as with HSI and ERO. Many HSI officers have become so frustrated by the dominance of ERO within ICE that they asked in June 2018 to be spun off.²³⁰

One might also think that immigration enforcement agencies would be fertile ground for shirkers, saboteurs, and resisters because so much of immigration enforcement law and policy is made by mid-level and frontline bureaucrats exercising vast discretion.²³¹ Indeed, the low priority ICE gives to investigating employer infractions could be seen as a form of shirking.²³²

Nonetheless, the sub-units of DHS that qualify as “offices of goodness”²³³—designed to identify and address unlawful activity and abuses of power by ICE and CBP—are quite weak. Inspector

²²⁶ See JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* 21 (1997).

²²⁷ Schlanger, *supra* note 26, at 54–55 (defining “offices of goodness” and subsidiary agencies created by Congress or the President to instill in the parent agency “particular [v]alues that are important to the [creator] but less than central to the [parent]”).

²²⁸ Ingber, *supra* note 212, at 164–65; Jennifer Nou, *Bureaucratic Resistance from Below*, 36 *YALE J. ON REG.: NOTICE & COMMENT* (Nov. 16, 2016), <https://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/>.

²²⁹ See generally Landau, *supra* note 8.

²³⁰ Letter of Nineteen HSI Agents, *supra* note 68.

²³¹ See *supra* notes __ and accompanying text.

²³² See Rabin, *Victims or Criminals?*, *supra* note 9, at 241.

²³³ See generally Schlanger, *supra* note 26.

General reports criticizing agency policies have been ignored,²³⁴ and DHS's Office of Civil Rights and Civil Liberties has been largely ineffective at inducing ICE or CBP to change its policies.²³⁵ Complaints of civil and human rights violations by ICE agents often go unanswered, much less addressed.²³⁶

In addition, the profile of a typical ICE bureaucrat helps account for why the level of shirking, sabotage, and resistance at the agency is probably low. First, peer expectations—another factor James Q. Wilson noted influences how bureaucrats settle on core tasks—are especially important in law enforcement and military organizations.²³⁷ Because ICE is a law enforcement body with quasi-military characteristics, its bureaucrats are more likely to be influenced by their peers' expectations than bureaucrats at other types of agencies.²³⁸ Second, agency workforces are largely self-selecting, and ICE is no exception.²³⁹ Its agents are more likely than bureaucrats at the EPA, for example, to be politically conservative, to prioritize strict enforcement of immigration laws, and to resist political pressure from the White House to change policy.²⁴⁰ Third, because ICE is a young agency and turnover is high, its bureaucrats are less likely to question the focus on current core tasks than holdovers clinging to different priorities from earlier eras.²⁴¹ And

²³⁴ Yuki Noguchi, *'No Meaningful Oversight': ICE Contractor Overlooked Problems At Detention Centers*, NPR (July 17, 2019), <https://www.npr.org/2019/07/17/741181529/no-meaningful-oversight-ice-contractor-overlooked-problems-at-detention-centers>.

²³⁵ See Schlanger, *supra* note 26, at 103.

²³⁶ See, e.g., Susan Ferriss, *et. al.*, *Homeland Security's Civil Rights Unit Lacks Power To Protect Migrant Kids*, NPR (Aug. 2, 2019), <https://www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lacks-power-to-protect-migrant-kids>.

²³⁷ WILSON, BUREAUCRACY, *supra* note 4, at 34-38; Rabin, *Victims or Criminals?*, *supra* note 9, at 201.

²³⁸ WILSON, BUREAUCRACY, *supra* note 4, at 43; Stephen Lee & Sameer M. Ashar, *Daca, Government Lawyers, and the Public Interest*, 87 *FORDHAM L. REV.* 1879, 1893-94 (2019).

²³⁹ See Michael Kagan, *supra* note 9, at 687-89.

²⁴⁰ See *id.*

²⁴¹ See Rebecca Kaplan, *Homeland Security Has a Serious Employee Retention Problem*, CBS NEWS (Sept. 22, 2014),

finally, by settling on that small set of core tasks aimed at indiscriminate deportation and zero tolerance, ICE has sidelined the work of certain professionals at the agency, such as lawyers, whose training involves drawing subtle distinctions and whose outside obligations might compel them to constrain the agency's exercise of discretion.²⁴² These factors together reinforce the strong sense of mission at ICE surrounding its core tasks.

USCIS, by contrast, is a far less cohesive agency with a weaker sense of mission. It has among its ranks a far greater number of bureaucrats with experience serving immigrants rather than deporting them.²⁴³ USCIS bureaucrats are also much more likely to have represented immigrants as lawyers or advocates.²⁴⁴ Some came to the roles during the Obama administration or even the old INS era, when the enforcement and service missions enjoyed something closer to equal weight. Finally, because the agency is funded by application fees rather than congressional appropriation, its leaders can exercise more independence from pro-enforcement political interests.²⁴⁵

As a result, what an USCIS bureaucrat sees as her core tasks will vary greatly, depending on the geographical jurisdiction of the office and the individual's previous experience and values.²⁴⁶ Because USCIS's primary role is adjudicatory, rather than investigative,

<https://www.cbsnews.com/news/homeland-security-has-a-serious-employee-retention-problem/>.

²⁴² WILSON, BUREAUCRACY, *supra* note 4, at 60 (defining “professionals” as “those who receive incentives from organized groups of fellow professionals outside the agency); 53–54 (observing that professionals at an agency who lack a well-defined role will be motivated by, among other things, professional standards); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1995) (arguing that agency lawyers should be responsive to politics); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1055–56 (2011) (contending that limited judicial review and vast discretion “tend[] to empower politics at the expense of expertise and, especially, law”).

²⁴³ *See supra* Part I.C.4.

²⁴⁴ *See supra* Part I.C.4.

²⁴⁵ *See* Michael Kagan, *supra* note 9, at 662.

²⁴⁶ *See supra* Part I.C.

professionals such as lawyers are more likely to draw on their training and professional values to influence the decisionmaking process. These may be reasons why President Obama housed his new DACA program within USCIS. Faced with open resistance by ICE to exercising favorable prosecutorial discretion in removal cases, President Obama created a categorical prosecutorial discretion program that could be implemented by USCIS instead of ICE.²⁴⁷

Under these circumstances, USCIS represents a potential source of resistance to ICE's indiscriminate deportation policy. The Asylum Office, in particular, has resisted President Trump's efforts to have asylum seekers wait outside the United States while their cases are adjudicated.²⁴⁸

As a whole, however, USCIS's weak sense of mission has left it vulnerable to influence from the White House and the bureaucratic context in which it is embedded.²⁴⁹ Despite potential shifts in White House policy, the bureaucratic context tends to support ICE's core tasks and undermine resistance to them. Like ICE, USCIS is located within the DHS, a parent agency with a national security mandate and mission.²⁵⁰ And also like ICE, DHS as a whole engaged in a post-9/11 scramble with other law enforcement, defense, and intelligence agencies to maintain its autonomy by carving out its own operational niches. ICE's small set of core tasks are a better fit with its parent agency's national security mission than USCIS's more varied and immigrant-friendly set. In this bureaucratic landscape, ICE became zealous and USCIS vulnerable to cooptation by its more singularly-focused counterpart.

²⁴⁷ See Michael Kagan, *supra* note 9, at 666.

²⁴⁸ See Part I.C.4, *supra*.

²⁴⁹ See WILSON, BUREAUCRACY, *supra* note 4, at 82 (noting the importance of the bureaucratic context in driving bureaucrats' incentives).

²⁵⁰ See *supra* Part II.B.

3. The Courts and the Bureaucrats

Compared to bureaucrats, courts have limited power to impact deportation and exclusion.²⁵¹ Some of the limitations were self-imposed by federal courts over time. Other limitations were imposed by Congress on the federal courts and immigration courts, or by the President on the immigration courts.

Ostensibly, immigration judges preside over removal cases. However, their authority and discretion is severely constrained. First, the majority of removal cases do not even go before immigration judges. Instead, Congress has created several species of truncated removal processes that sidestep immigration courts, allowing removal based on an official's mere say-so.²⁵² In FY2017, approximately 76% of all removal orders were issued through two of these fast-track processes: "reinstatement of removal" or "expedited removal."²⁵³ Recently, the Trump administration announced a vast new expansion of expedited removal,²⁵⁴ and, if the courts allow this expansion to take effect, the number of cases reaching immigration courts will represent an even smaller percentage of the total. Moreover, Congress has attempted to eliminate or drastically curtail judicial review of these types of

²⁵¹ See Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 814 (2015) (observing that the involvement of multiple agencies in immigration adjudication further limits the effectiveness of judicial review).

²⁵² Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 598–611 (2009); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE. & L. 1, 6–7, 22–25 (2014).

²⁵³ Department of Homeland Security, Office of Immigration Statistics, Katherine Wittsman, *Immigration Enforcement Actions: 2017 12* (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

²⁵⁴ Department of Homeland Security, *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409 (July 23, 2019).

cases, making it unlikely that a court will ever get involved in the majority of removals.²⁵⁵

Second, in the minority of cases that do go before immigration courts, Congress has acted to limit the power of Immigration Judges (IJs) to grant relief from removal. Before 1996, IJs had considerable discretion to waive grounds of removability based on positive discretionary factors, such as length of residency in the United States, hardship, or family ties.²⁵⁶ That year, Congress passed a series of immigration reforms that both broadened the grounds for removal, and also limited the discretion of judges to stop removal. In doing so, it transferred authority from the system's "adjudicators" to its "enforcers."²⁵⁷

Next, IJs also lack decisional independence and resources.²⁵⁸ The immigration court backlog has now reached over a million cases, in large part due to an overemphasis on enforcement at the expense of adjudication.²⁵⁹ IJs need smaller caseloads, more training, and more clerks.²⁶⁰ Rather than respond to the backlog with more resources, the administration has imposed quotas that require IJs to decide 700 removal cases per year—or approximately two per day.²⁶¹ At the same time, the Attorney General has exercised his ability to certify cases to himself from the Board of Immigration

²⁵⁵ See 8 U.S.C. § 1252(a)(2)(A) (preventing federal courts from reviewing expedited removal orders or the decision to apply expedited removal to a non-citizen); 8 U.S.C. § 1252(e) (barring challenges to the system of expedited removal except in a certain narrow form and venue); 8 U.S.C. § 1252(g) (barring courts from reviewing decisions by the government "to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter"); 8 U.S.C. § 1252(a)(2)(B) (barring federal courts from reviewing discretionary agency decisions).

²⁵⁶ Cade, *supra* note 14, at 677.

²⁵⁷ *Id.* at 679.

²⁵⁸ Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 576 (2011) [hereinafter Family, *Beyond Decisional Independence*].

²⁵⁹ American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* [hereinafter "ABA Report"] 3 (2019).

²⁶⁰ Family, *Beyond Decisional Independence*, *supra* note 263 at 576.

²⁶¹ ABA Report, *supra* note 264, at 11.

Appeals to limit the ability of IJs to terminate, close, or continue cases, pushing IJs to issue removal orders instead.²⁶² This political control of IJs is another way in which the courts are subverted to the enforcement bureaucracy.²⁶³

Immigration courts operate outside the procedural norms that govern most other courts, limiting the ability of judges to constrain prosecutorial excess. First, the exclusionary rule does not apply in removal proceedings except in truly “egregious” cases.²⁶⁴ As a result, it is difficult to contest removal proceedings even when they are based on searches and seizures that would violate the Fourth Amendment in the criminal context.²⁶⁵ There is extremely limited discovery in removal proceedings, so it is difficult to determine whether ICE has instituted removal proceedings based on discriminatory or otherwise unlawful grounds.²⁶⁶ There is no right to appointed counsel, so even if there were discovery, many non-citizens in removal lack advocates to help them challenge executive overreach.²⁶⁷ Non-citizens in removal proceedings are often held in detention, which is extremely difficult to challenge, and being detained exacerbates the difficulty of immigration court litigation in all ways.²⁶⁸ For pro se individuals, the “complexity, harshness, and

²⁶² See *Matter of Castro-Tum*, 27 I&N Dec. 271, 290, 292–93 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 464–65 (A.G. 2018).

²⁶³ Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 3 (2018).

²⁶⁴ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). See generally Stella Burch Elias, “*Good Reason to Believe*”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (2008).

²⁶⁵ David Gray et al., *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 27–31 (2012).

²⁶⁶ Geoffrey Heeren, *Shattering the One-way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014).

²⁶⁷ Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2401 (2013).

²⁶⁸ Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 619–26 (2010) (describing the various doctrinal and logistical difficulties with challenging immigration detention in federal court).

opacity of immigration law” make effective litigation near impossible.²⁶⁹

Given the limitations of immigration courts, some might seek to challenge executive overreach in federal court instead. However, a variety of legislatively- and judicially-constructed doctrines limit non-citizens’ ability to collaterally challenge unlawful action in the removal context.²⁷⁰ Most notably, the plenary power doctrine insulates much governmental action concerning deportation and exclusion from review.²⁷¹ As if that were not enough, a variety of jurisdiction-stripping statutory provisions limit federal court review.²⁷² Doctrines like administrative exhaustion, qualified immunity, and abstention offer yet more roadblocks.²⁷³

To be sure, the courts have occasionally intervened to block especially egregious constitutional violations.²⁷⁴ Non-citizens have often done best when indirectly asserting rights, such as by invoking the rights of citizens impacted by immigration decisions, applying a

²⁶⁹ Family, *Beyond Decisional Independence*, *supra* note 254, at 567.

²⁷⁰ Peter Margulies, *Noncitizens’ Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FLA. INT’L U. L. REV. 319, 321–22 (2011).

²⁷¹ See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059–60 (1994); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

²⁷² See 8 U.S.C. § 1252(a)(2)(B) (preventing federal courts from reviewing discretionary agency decisions); 8 U.S.C. § 1252(a)(2)(C) (barring review of final removal orders against many non-citizens with criminal convictions); 8 U.S.C. § 1252(f) (limiting courts from enjoining removal proceedings except with respect to an individual non-citizen); 8 U.S.C. § 1252(g) (barring courts from reviewing decisions by the government “to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”). See also *Reno v. Am. -Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (interpreting 8 U.S.C. § 1252(g) to foreclose review of a challenge to a pattern of discriminatory enforcement).

²⁷³ Margulies, *supra* note 275, at 321–22.

²⁷⁴ See, e.g., *Ragbir v. Homan*, 923 F.3d 53, 57 (2d Cir. 2019) (holding that courts have jurisdiction to consider whether the First Amendment prohibits ICE from targeting immigrants in retaliation for exercising their right to free speech).

“procedural surrogate” for a constitutional right, such as a traditional discovery rule, or relying on a “phantom norm”—a regulatory or statutory right that substitutes for a constitutional one.²⁷⁵ Nevertheless, the powerful combination of statutory, doctrinal, and practical limitations prevent judges, in most respects, from serving as a meaningful check on presidential action or the immigration enforcement bureaucracy. Although immigration litigation is abundant, most removals proceed untouched by judicial review.

In most agencies, the prospect of judicial review forces regulators to engage in more robust deliberation and create a thorough record.²⁷⁶ But when regulated entities—the immigrants—have few due process rights and the regulators—ICE and USCIS—face little prospect of meaningful judicial review, the lawyers have less influence and the bureaucrats are empowered.²⁷⁷ Agency culture and politics, therefore, play a greater role in decisionmaking.

4. The Other Players

The immigration enforcement regulatory game has many other players. None has the same powerful combination of influence and interest in the outcome that matches the bureaucrats’. Still, these other players do exert influence and have the potential to exert even more.

The most important pro-regulatory players are the private contractors, the employee unions, and the American public. As in other areas of the national security regulatory space, the bureaucrats at ICE are simpatico with the private contractors who supply their equipment and even perform some of their activities, such as surveillance and detention.²⁷⁸ A robust revolving door between the

²⁷⁵ See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010).

²⁷⁶ See, e.g., Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 886–87 (2014).

²⁷⁷ See *supra* note 238 and accompanying text.

²⁷⁸ See Knowles, *Warfare*, *supra* note 6, at 2005 (describing the influence of military contractors on policymaking); Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 NYU REV. L. SOC. CHANGE 255, 265–80 (2019); *supra* notes __ and accompanying text.

agency and the contractors reinforces the shared sense of mission.²⁷⁹ The contractors want to sell the government technology that makes indiscriminate enforcement policies easier to perform, and the bureaucrats want to buy it. Some of the contractors have been supplying the military and local law enforcement and are looking to expand the market for their products.²⁸⁰ The employee unions reinforce ICE's pro-regulatory sense of mission through aggressive lobbying and public advocacy. They are quick to condemn any criticism of the agency's policies.²⁸¹ Like any other union, they pursue their members' interests with Congress, the White House, and the public.

At first, it would seem that the American public would be an anti-regulatory player in the immigration enforcement game. Polls show that strong majorities support immigration generally and a path to citizenship for unauthorized immigrants—positions at odds with ICE's mission and policies.²⁸² And elections do sometimes turn on immigration issues,²⁸³ but voters supporting hyper-regulation and ICE and CBP tend to prioritize immigration far more than voters with a more nuanced view.²⁸⁴ A key insight of public choice theory is that a highly-mobilized minority can exert more influence than an under-mobilized majority.²⁸⁵ A substantial constituency exists for ICE's current policies, and the agency gains in prestige with that subset of the American public convinced that unauthorized

²⁷⁹ See Kaplan, *supra* note 246.

²⁸⁰ See Hesson, *supra* note 182;

²⁸¹ See *supra* Part I.C.1.

²⁸² See, e.g., National Immigration Forum, *Polling Update: American Attitudes on Immigration Steady, but Showing More Partisan Divides*, (Apr. 17, 2019), <https://immigrationforum.org/article/american-attitudes-on-immigration-steady-but-showing-more-partisan-divides/>.

²⁸³ Villazor & Gulasekaram, *supra* note 10, at 1271–72 (noting that immigration “has significantly shaped the past four presidential contests, and has played a leading, if not decisive, role in several midterm elections for federal lawmakers”).

²⁸⁴ Kristen Bialik, *State of the Union 2019: How Americans See Major National Issues*, PEW RES. CENTER (Feb. 4, 2019), <https://www.pewresearch.org/fact-tank/2019/02/04/state-of-the-union-2019-how-americans-see-major-national-issues/>.

²⁸⁵ See Farber & O'Connell, *supra* note 43, at 2–8.

immigration presents a danger serious enough to merit very aggressive measures.²⁸⁶

Still, signs abound of growing resistance to ICE's policies among the public. Family separation and horrific detention conditions have brought attention to internal enforcement policies as well.²⁸⁷ A broad-based coalition has helped move ICE's policies to the center of political debates.²⁸⁸ Immigrants' lawyers have fought those policies in a variety of legal contexts, further raising the profile of enforcement issues.²⁸⁹ As a result, significant numbers of pro-immigrant voters have been mobilized by ICE's indiscriminate enforcement policy and have influenced state and local governments to resist. A host of cities around the country—from San Francisco to Chicago—have adopted policies limiting cooperation with ICE enforcement.²⁹⁰

Such pockets of federalist resistance have made it harder for ICE to carry out its policies in some places, but to what degree is uncertain. Neither this type of resistance nor public outrage and increasing congressional oversight have, so far, influenced ICE to change its policies. In fact, ICE's response has largely been to push back against its critics and try to outmaneuver them by, for example, engaging in retaliatory deportation and surveillance of immigration activists.²⁹¹

Other players in the immigration enforcement regulatory game possess the potential to significantly influence the process, but lack sufficient incentives to do so. U.S. companies benefit from hyper-regulation because, as a result, they enjoy special leverage over their

²⁸⁶ See Rubenstein and Gulasekaram, *supra* note 49, at 633 (observing that “political polarization can push immigration policy to the extremes”).

²⁸⁷ See, e.g., Lisa Riordan Seville, Hannah Rapplepe & Andrew W. Lehren, 22 *Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>.

²⁸⁸ See, e.g., Molly O'Toole & Noah Bierman, *Trump Will Pitch Immigration Plan Already Facing Stiff Opposition in Congress*, L.A. TIMES (May 15, 2019).

²⁸⁹ See Ashar, *supra* note 19, at 1505.

²⁹⁰ See generally Villazor & Gulasekaram, *supra* note 10.

²⁹¹ See Cade, *supra* note 14, at 1439–41; *supra* Part I.C.1.

employees who are unauthorized immigrants.²⁹² They will tolerate the occasional raid, so long as their punishment is a slap on the wrist.²⁹³ Foreign governments sometimes protest the treatment of their citizens by the U.S. immigration bureaucracy, but such protests rarely, if ever, escalate to meaningful pressure.²⁹⁴ Several factors account for this. Geopolitical power imbalances prevent many nations from being able to influence U.S. policies that emerge from mission-centered bureaucracies, especially regarding internal enforcement.²⁹⁵ Some nations remain indifferent to the fate of emigres, whom they may view as undesirable.²⁹⁶ Other nations play a double game, condemning abuses while continuing to cooperate with the U.S. enforcement bureaucracy; their law enforcement agencies and militaries typically have pro-regulatory bureaucratic orientations similar to ICE's.²⁹⁷

The last, and oft-forgotten, players in the regulatory game are the immigrants themselves, for whom ICE's policies are not a game

²⁹² See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 211–14 (2007); Michael Grabbell & Howard Berkes, *They Got Hurt at Work—Then They Got Deported*, NPR (Aug. 16, 2017), <https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported>.

²⁹³ See Cuéllar, *supra* note 9, at 18 (“A generally functionalist account of immigration law could pivot on the idea that perhaps the most relevant concentrated interests—employers—are perfectly happy to keep in place a system that lets them squeeze value from undocumented labor or workers with temporary H-1b visas, while maintaining (given the problems with employer sanctions) a relatively low risk of sanctions by federal authorities.”).

²⁹⁴ Cf. Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1382 (2007) (describing Mexico's lobbying to alter provisions of draft legislation and limited success).

²⁹⁵ See Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 39 (2005).

²⁹⁶ Congressional Research Service, *Immigration: “Recalcitrant” Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, (Feb. 1, 2019), <https://fas.org/sgp/crs/homesec/IF11025.pdf>.

²⁹⁷ See, e.g., Nick Miroff & Kevin Sieff, *Trump Administration to Send DHS Agents, Investigators to Guatemala-Mexico Border*, WASH. POST (May 31, 2019).

at all, but life-transforming and often life-threatening.²⁹⁸ Most immigrants, even authorized ones, lack the power to push back against ICE's policies because their legal status is too precarious.²⁹⁹ Even those with legal representation face the strong headwinds of vast enforcement discretion and little due process protection.³⁰⁰ Because the number of unauthorized immigrants far exceeds the number ICE can deport, the best resistance strategy for the deportable immigrant is to go into hiding—to avoid public places and avoid cooperating with any type of law enforcement.³⁰¹ This is why immigrant communities turn into ghost towns when rumors of ICE raids spread.³⁰² The indiscriminate enforcement policy, therefore, damages the social fabric of these communities and makes it harder for police to solve crimes.³⁰³

III. TAMING ZEALOUS ADMINISTRATION

ICE's hyper-regulation is the product of its culture and the institutional context in which it operates. It is a mission-driven national security agency filled with committed adherents focused on a small set of core tasks, bolstered by nativist politics and the lobbying of private detention and surveillance industry profiteers—unchecked in most cases by meaningful judicial review. These conditions have made its functioning a paradigmatic example of zealous administration.

In some contexts, the benefits of zealous administration may outweigh the costs. Suppose Congress gives an agency a well-defined mission delimiting a small set of core tasks, the performance

²⁹⁸ See Frost, *Cooperative Enforcement*, *supra* note 184, at 3–4.

²⁹⁹ See Frost, *Alienating Citizens*, *supra* note 20, at 60 (describing the Trump Administration's "goal of restricting immigration into the United States and destabilizing the position of all immigrants, whether undocumented or legally present, under its policy of attrition through enforcement").

³⁰⁰ See *id.*

³⁰¹ See Cindy Carcamo, Giulia McDonnell Nieto Del Rio & Molly Hennessy-Fiske, *ICE raids keep some hiding inside, afraid to be out in public*, L.A. TIMES (July 14, 2019).

³⁰² Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 627–28 (2015).

³⁰³ See *id.*

of those tasks does not allow much discretion, and the bureaucratic context provides few opportunities for mission cooptation of other agencies. Zealous administration by such an agency could be tolerated, even encouraged.

But ICE is not such an agency—nor are CBP and the other four units of the immigration bureaucracy. Hyper-regulation by such a massive apparatus endowed with broad discretion to set crucial national policy not only imposes heavy social costs, but it also runs contrary to key rule-of-law values and general principles of administrative law. Zealous administration is rarely stable, but tends to grow over time. Escalating hyper-regulation creates instability in the law, producing damaging uncertainty and unpredictability.³⁰⁴ It also makes the rules that are created difficult to understand and often impossible to follow.³⁰⁵ In addition, this laser-like focus on a narrow band of Congress’s statutory mandate while neglecting other aspects raises serious questions about whether ICE is a faithful agent of the legislative principal or a “rogue agency.”³⁰⁶ ICE’s political resilience makes it far less responsive and accountable to the President and the public—qualities generally believed to be important in an administrative agency.³⁰⁷ And mission cooptation spreads all of these problems to other agencies.

Zealous administration tends to be durable: without some major intervention, future presidents will have little success reining it in. Moreover, there is little reason to believe it will not spread to other areas of regulation. The immigration enforcement bureaucracy’s present may be the federal bureaucracy’s future.

³⁰⁴ See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1927 (2018).

³⁰⁵ See *id.*

³⁰⁶ Lee & Ashar, *supra* note 243, at 1894–95.

³⁰⁷ See Elena Kagan, *supra* note 7, at 2331–32 (describing presidential control of agencies as a form of political accountability); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) (“Increasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”).

A key question, therefore, should be how to reconstitute ICE and similar agencies to contain the phenomenon of zealous administration. There is a growing movement to abolish ICE,³⁰⁸ but there has been little discussion about what would happen after.³⁰⁹ The United States is unlikely to be a country of open borders in the foreseeable future, and, as long as that is the case, there will be a need for some governmental organization to perform the function of immigration enforcement.

Controlling zealous administration requires confronting its structural causes and trying to change them. Some, like the agency's culture and the valence of particular political memes, like nativism, are very difficult to address. Other solutions, like creating a meaningful check on agency power, limiting the force-multiplying influence of private contractors, and reducing an agency's ability to coopt other agencies, are more viable. There are probably multiple ways to achieve these ends. The proposal set out in this Part presents a menu of options, each of which might help, particularly if combined with others.

A. Structural Changes

ICE is not an agency with a singular mission. It includes two separate sub-agencies: ERO and HSI. ERO implements the indiscriminate deportation policy that has received much public attention; the much less visible HSI, in contrast, is charged with protecting immigrants from trafficking and transnational crimes. As ERO's work has come to dominate the budget and reputation of ICE, HSI's work has become secondary. This is due in part to its placement within a national security agency created in the wake of a terrorist act committed by foreign nationals. DHS's national

³⁰⁸ Sean McElwee, *It's Time to Abolish ICE*, THE NATION (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/> [<https://perma.cc/PP9Y-MKPA>]; Ella Nilsen, *The List of Democrats Calling to Abolish ICE Keeps Growing*, VOX (June 30, 2018), <https://www.vox.com/policy-and-politics/2018/6/29/17518176/democratsto-abolish-ice-movement-gillibrand-de-blasio-ocasio-cortez> [<https://perma.cc/6VJK-U9VU>].

³⁰⁹ See Peter L. Markowitz, *Abolish ICE...And Then What?*, YALE L.J. FORUM (forthcoming 2019), <https://ssrn.com/abstract=3420771>.

security mission aligns much more with that of ERO than HSI; therefore, ERO dominates ICE policies and coopts the other domestic immigration sub-agency, USCIS. One means of addressing this issue would be to relocate ICE, or at least USCIS. Bureaucratic reshuffling of this magnitude would come with a substantial cost, and that cost would need to be weighed carefully against the gains from containing a zealous governmental agency.

There are a number of options for structural reform. In the 1980s and 1990s, several analysts urged the creation of a new cabinet-level immigration agency that combined the immigration-related functions performed by a slew of other agencies: Labor, State, Health and Human Services, and Justice.³¹⁰ A new Department of Immigration would presumably house some version of ICE as well as USCIS, along with other sub-agencies dedicated to border enforcement, refugee resettlement, humanitarian relief, and immigrant labor. It should be constituted with a mission embracing economic and humanitarian goals for regulating immigration, in addition to national security and law enforcement.³¹¹ A broad mission that places appropriate emphasis on the range of immigration goals might reduce the ability of a zealous immigration enforcement sub-agency to infect its counterparts.

³¹⁰ See Gene McNary, *No Authority, No Accountability: Don't Abolish the INS, Make it an Independent Agency*, 74 INTERPRETER RELEASES 1281 (Aug. 25, 1997); Morris, *supra* note 86, at 141–42; Demetrios Papademetriou, et al., *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 INTERPRETER RELEASES 501, 509 (1998).

³¹¹ Historically, policymakers have identified a range of goals and tasks for immigration regulators. For example, the 1990s' Commission on Immigration Reform stated, "Properly-regulated immigration and immigrant policy serves the national interest by ensuring the entry of those who will contribute most to our society and helping lawful newcomers adjust to life in the United States. It must give due consideration to shifting economic realities. A well-regulated system sets priorities for admission; facilitates nuclear family reunification; gives employers access to a global labor market while protecting U.S. workers; helps to generate jobs and economic growth; and fulfills our commitment to resettle refugees as one of several elements of humanitarian protection of the persecuted." US Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* 24 (1997), <https://www.hsdl.org/?view&did=437705>.

On the other hand, despite the fact that the old INS was charged with a diverse set of tasks, enforcement usually dominated.³¹² Avoiding a similar fate for a new immigration agency would require careful attention to its structure, funding, and leadership. If immigration enforcement were too big a part of the agency's budget or staff, or if the agency's overall leaders were drawn too regularly from the enforcement sub-agency, enforcement might come to predominate over service, just as it did for the INS. In any event, political influence and private contractors may push the agency in that direction. One option for limiting this influence might be to create a politically independent office charged with making immigration policy, as the Federal Reserve does with fiscal policy.

Alternatively, ICE might be contained by transferring it to a broader law enforcement agency, like the FBI. One risk of housing immigration enforcement within a criminal law agency would be to validate the sense that immigration violations, which are mostly civil, are crimes. However, for better or worse, immigration and criminal law increasingly intersect,³¹³ and placing immigration enforcement within a criminal law enforcement agency could lead to a more rational prioritization of immigration cases because the agency's leadership would need to assess how to allocate resources for addressing illegal entries and visa overstays alongside drug trafficking, terrorism, cybercrime, and violent crimes. Separating ICE from USCIS might also limit the extent to which USCIS's operations are coopted for immigration enforcement.

Another option might be to move USCIS to a different parent agency. In the late 1990s, the U.S. Commission on Immigration Reform urged that the service functions of the INS be moved to the

³¹² Morris, *supra* note 86, at 131.

³¹³ See Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1351 (2010); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU. L. REV. 1457, 1467 (2014); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

State Department.³¹⁴ The Commission noted that the State Department already had a substantial docket of immigration adjudication because it was (and remains) responsible for issuing visas abroad.³¹⁵ Moreover, the Commission wrote that moving immigration services from the Department of Justice to State “sends the right message, that legal immigration and naturalization are not principally law enforcement problems; they are opportunities for the nation as long as the services are properly regulated.”³¹⁶ The report generated significant discussion, including a number of unsuccessful legislative efforts to restructure the agency to separate out the INS’s enforcement and immigration services functions.³¹⁷

B. Strengthening Judicial Review

There is a lack of judicial review of immigration enforcement at multiple levels: first, the internal review process for immigration enforcement action is weak and often nonexistent; and second, the federal courts are constrained from fully reviewing and supplementing that weak process.³¹⁸ Bolstering both of these forms of judicial review could serve as one of the most effective checks on zealous immigration enforcement.

There is a debate within literature relating to public choice theory as to whether strengthening judicial review will address problems of agency capture.³¹⁹ When it comes to zealous

³¹⁴ U.S. COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 151 (1997).

³¹⁵ *Id.* at 162.

³¹⁶ *Id.*

³¹⁷ H.R. 3904 (1998) (dividing the INS responsibilities into an enforcement arm housed within DOJ and a benefits agency housed within State); H.R. 2588 (1997) (removing enforcement from the INS and placing it into a new sub-agency of DOJ).

³¹⁸ Part II.C.3, *supra*.

³¹⁹ Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 33–34 (1991) (arguing, contrary to numerous other prominent legal scholars cited in the article, that public choice theory does not justify more stringent judicial review because courts are as subject to capture by special interests as legislatures and agencies); Thomas Merrill, *Does Public Choice Theory Justify Judicial Activism after All?*, 21 HARV. J.L. & PUB. POL’Y 219, 229–30 (1997) (arguing that public choice provides a justification for

administration, though, agency capture is only a small part of the problem; it is the agency's own culture and other internal dynamics that drive it to zealotry. Judicial review is likely to be one of the best counterweights to these dynamics; a variety of commentators have noted the capacity of judicial review to encourage thoughtful and rational decisionmaking, and to counter bias.³²⁰ This literature seems particularly apt to the phenomenon of zealous administration, which involves the culture-driven exertion of raw power in regulation, rather than deliberation. Greater judicial oversight of ICE could lead to a more rational immigration enforcement regime in which the agency would be required to create a thorough record and generate robust contemporaneous reasoning in support of its rules and policies. At a minimum, it would better assure that the agency complied with procedural and substantive requirements before removing a person from the United States.

There have been numerous proposals for improving the quality of immigration courts—for example, increasing their independence and adopting procedural mechanisms already used by other administrative courts, such as rules of discovery.³²¹ For purposes of

probing judicial review “within a narrow range of controversies where each of the contending positions is represented by a group with significant (but not necessarily equal) organization strength, and only when the outcomes reached in these circumstances will not be trumped by a legislated solution”).

³²⁰ William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 438 (2013); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW U. L. REV. 1165, 1206 (2003); Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490 (2002); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 (1989) (“Judicial review serves as a powerful *ex ante* deterrent to lawless or irrational agency behavior.”).

³²¹ See, e.g., ABA REPORT, *supra* note 264; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 25 (2009); LENNI B. BENSON & RUSSELL R. WHEELER, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION (2012), <https://www.acus.gov/report/immigration-removal-adjudication-report>; Stephen H. Legomsky, *Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (recommending converting immigration

countering ICE's zealous administration, the best reform would probably be to increase the immigration courts' independence, perhaps by making them an Article I court like the Tax Court.³²² As long as the IJs operate simply as employees who report directly to the Attorney General, they will be especially susceptible to mission cooptation.

Giving immigration courts the power to contain over-zealous ICE enforcement will require authorizing them to issue orders that compel and even sanction ICE officers and attorneys—authority that, for the most part, they currently lack.³²³ It also ideally would involve restoring much of the power that immigration courts once had to grant discretionary relief from removal. Currently, immigration courts are constrained in many cases by rigid and arcane laws from preventing deportations of persons who have a lengthy history in the country, extensive family, and otherwise have highly-sympathetic cases.³²⁴ President Obama attempted to prevent such deportations by setting out priorities for removal and mandating that ICE exercise prosecutorial discretion.³²⁵ ICE resisted that effort and now pursues an indiscriminate deportation policy endorsed by the current administration.³²⁶ As Professor Nina Rabin has noted, ICE is a poor administrator of equity.³²⁷ It would be far better to vest equitable power in the courts by granting them greater authority to grant discretionary relief from removal.

Of equal importance is the strengthening of federal judicial review over immigration enforcement. In 1996, Congress imposed

judges into ALJ and replacing appellate review by a new, Article III Immigration court).

³²² See ABA REPORT, *supra* note 264, at 6–8.

³²³ For example, immigration courts lack the power to enforce subpoenas. 8 C.F.R. §§ 1003.35(b)(6), 1287.4(d) (requiring an IJ to refer a case to a United States attorney for enforcement). If an immigration court orders an individual released who ICE contended was subject to mandatory detention, ICE can automatically stay the court's order. 8 C.F.R. § 1003.19(i)(2).

³²⁴ Cade, *supra* note 14, at 677, 679.

³²⁵ Part I.C.1, *supra*.

³²⁶ *Id.*

³²⁷ Rabin, *Victims or Criminals?*, *supra* note 9, at 245.

a series of bars to federal court review of immigration cases.³²⁸ Despite these roadblocks, the federal courts have continued to exert influence on immigration courts, especially during a period after the administrative review at the Board of Immigration Appeals was “streamlined,” meaning that the Board effectively abdicated its responsibility to review a large number of immigration court cases.³²⁹ As a result, there is an influential body of immigration law arising from federal court decisions, which has a significant precedential effect on the Immigration Courts.³³⁰

However, federal courts rarely, if ever, review removal orders entered outside immigration court, and these make up the vast majority of all removals.³³¹ Review of expedited removal orders to the federal courts are severely limited by statute,³³² and the circuit courts have split on whether the Suspension Clause requires that collateral review be left open via habeas corpus.³³³ The lack of meaningful judicial oversight of expedited removal enables hyper-regulation, and improvements are needed. For starters, the federal courts should be able to review legal issues concerning expedited removal, such as whether immigration officers and judges are applying the correct legal standard for assessing whether an asylum seeker in expedited removal has a credible fear of persecution.³³⁴

In addition, a person in expedited removal should be able to challenge whether she properly falls under the expedited removal statute. Under that statute, persons are subject to expedited removal if they have been in the United States for less than two years, and the Trump administration has now implemented expedited removal

³²⁸ Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1444 (1997).

³²⁹ Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1117 (2018).

³³⁰ *Id.* at 1128.

³³¹ See note 258, *supra*.

³³² 8 U.S.C. § 1252(e).

³³³ Compare *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 445 (3d Cir. 2016) (non-citizen in expedited removal may not invoke the suspension clause) with *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1115 (9th Cir. 2019) (non-citizen in expedited removal may invoke the suspension clause).

³³⁴ See *Castro*, 835 F.3d at 428 n.8; *Thuraissigiam*, 917 F.3d at 1102.

to the full extent authorized by the statute.³³⁵ It is easy to imagine persons who have been in the United States for less than two years being improperly subjected to expedited removal. At present, the only means to challenge an erroneous finding is by filing a habeas petition in federal court—a process that will be out of the reach for most of the predominately *pro se* immigrants in expedited removal.³³⁶ A better process ought to exist for them to easily seek review of an officer's finding in a factual hearing before an Immigration Judge.

C. *Limiting the Power of Private Actors*

Private actors play an important role in various aspects of immigration enforcement.³³⁷ Some of these, such as interpreters for immigration hearings, do little to influence policy. However, a growing coterie of companies specializing in surveillance and detention contribute to zealous administration because it aligns with their economic self-interest.³³⁸ Not only do they lobby for spending on immigration enforcement, but their operations are opaque and they are difficult to hold accountable when they violate the law.³³⁹ Reducing the influence of these contractors and limiting their lobbying power might help contain zealous immigration enforcement.

One solution might be to more broadly regulate the lobbying and political activities of governmental contractors. Federal contractors are already banned from spending federal appropriations to lobby

³³⁵ 8 U.S.C. § 1225(b)(1)(A)(iii)(II); Department of Homeland Security, Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019).

³³⁶ 8 U.S.C. § 1252(e)(2). Filing federal court litigation to challenge an expedited removal order will be extraordinarily difficult for most non-citizens.

³³⁷ Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 4–18 (2017).

³³⁸ *Id.* at 38–39; Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOC. 426, 427 (2013); Lamdan, *supra* note 283 at 270-80; Rubenstein & Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 226 (2019).

³³⁹ Chacón, *Privatized Immigration Enforcement*, *supra* note 342, at 39–41; Rubenstein & Gulasekaram, *supra* note 343, at 226.

for certain purposes, such as the extension of a federal contract.³⁴⁰ A broader ban, such as one limiting campaign contributions, might raise First Amendment concerns because the Supreme Court has found that strict scrutiny applies to restrictions on corporate speech.³⁴¹ However, the rent-seeking behavior of corporations negatively impacts the nation's economic welfare because it leads to inefficiency in governmental spending.³⁴² Controlling this economic distortion could be considered a compelling governmental interest, and a properly drawn restriction might also satisfy the narrow tailoring requirement of strict scrutiny.³⁴³

Another option is to reduce privatization in the immigration enforcement arena. The easiest target would be immigration detention, which accounts for a very large and increasing share of the growing immigration detention industry.³⁴⁴ The Obama administration had announced it would end private detention contracts (a decision reversed by the Trump administration), so there is a precedent for doing so.³⁴⁵

CONCLUSION

The President's ability to manipulate the executive branch bureaucracy has been a central theme of administrative law scholarship in recent years.³⁴⁶ Recognizing the crucial role the immigration bureaucracy plays in American governance, scholars have begun to explore the President's relationship to that bureaucracy.³⁴⁷ Given the special constitutional prerogatives the

³⁴⁰ 31 U.S.C. 1352(a).

³⁴¹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). *But see* *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (upholding a state ban on campaign contributions by state contractors).

³⁴¹ See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 198, 226–53 (2012).

³⁴² See *id.* at 226–32.

³⁴³ *Id.* at 198, 226–53.

³⁴⁴ Rubenstein & Gulasekaram, *supra* note 343, at 225.

³⁴⁵ Franco Ordoñez, *Did Companies' Donations Buy a Trump Change in Private Prison Policy?*, MIAMI HERALD (Mar. 3, 2017).

³⁴⁶ See *supra* note 7.

³⁴⁷ See generally Cox & Rodriguez, *supra* note 36.

President enjoys in immigration law, the relative weakness of judicial review, and congressional paralysis, one would think that the immigration bureaucracy would be fertile ground for presidential administration.

A closer look reveals that immigration regulation is actually a place where presidential administration founders, along with other theories of agency behavior developed with other regulators in mind. Instead, the incentives of the immigration enforcement bureaucrats play a crucial, if not the dominant, role in developing immigration law and policy. The result is zealous administration. And public choice theory—which places bureaucratic incentives at the center of analysis—therefore holds real promise for accurately mapping how the immigration bureaucracy functions and analyzing how it may best be reformed.

This Article offered a comprehensive public choice model of the internal immigration enforcement agencies. This model should be complicated by future assessments. But it also may point the way to re-examining accounts about other areas of regulation—accounts that may overstate the ability of the White House to change law and policy in the teeth of bureaucratic incentives. It may be that zealous administration—in some form—is not so rare after all.