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### Administrator-in-Chief: The President and Executive Action in Immigration Law

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# ADMINISTRATOR-IN-CHIEF: THE PRESIDENT AND EXECUTIVE ACTION IN IMMIGRATION LAW

MING H. CHEN\*

*This Article provides a framework for understanding the role of the President as the Administrator-in-Chief of the executive branch. Recent presidents, in the face of heated controversy and political division, have relied on executive action to advance their immigration policies. Which of these policies are legitimate, and which are vulnerable to challenge, will determine their legacy. This Article posits that the extent to which the President enhances the procedural legitimacy of agency actions strengthens the legacy of the policies when confronted regarding their substance. This emphasis on shoring up administrative procedure is a form of expertise that should be counted alongside traditional normative criteria such as political accountability, democratic participation, and efficiency. Institutional analysis of three of President Obama's immigration policies serve as case studies of a presidential attempt to strengthen the procedural legitimacy of substantively contentious policies: deferred action for long-term undocumented immigrants; immigration detention for immigrants with criminal histories; and priority docketing of recently-arrived immigrants seeking asylum. Interviews with Department of Homeland Security officials and other policymakers shed light on the internal dynamics of agency policies. This Article concludes with prescriptions for safeguarding the conditions under which executive*

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*action in immigration can be defended and rethinking the conditions under which it cannot.*

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## INTRODUCTION

In the face of political division, presidents increasingly rely on executive action to advance their signature policies.<sup>1</sup> While he was neither the first nor the most prolific, President Barack Obama is remembered for issuing prominent executive policies, including several on immigration.<sup>2</sup> Similarly, President Trump vigorously issued executive actions of his own in the opening days of his administration—many to counter his predecessor's policies on immigration.<sup>3</sup> The legitimacy of these presidential policies is a subject of sharp contention. Based on institutional analysis of the Obama administration's key executive actions in immigration policy, this Article posits that presidential policymaking is most effective when the president is primarily acting as Administrator-in-Chief, rather than as chief policymaker.<sup>4</sup>

Behind the contemporary controversies over executive action in immigration law is an enduring institutional concern. The administrative presidency, defined as the President's systemic administration of government through the apparatus of the regulatory state, animates much of modern law and policymaking.<sup>5</sup> President Obama's administration of his signature policies was no different. Yet the administrative presidency is

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1. President Obama issued fourteen executive orders in his first month in office and a total of 276 executive orders in eight years. BARACK OBAMA EXECUTIVE ORDERS DISPOSITION TABLES, <https://www.archives.gov/federal-register/executive-orders/obama.html> (last visited Apr. 14, 2017). By way of comparison, President George W. Bush issued 291 executive orders in eight years, President Clinton issued 364 executive orders in eight years, and President Reagan issued 381 executive orders. EXECUTIVE ORDERS DISPOSITION TABLES INDEX, <https://www.archives.gov/federal-register/executive-orders/disposition.html>. (last visited Apr. 14, 2017).

2. Most notably, the Supreme Court proved unable to decide a twenty-seven state challenge to President Obama's immigration program that would provide temporary repose from deportation for undocumented immigrants, leaving in limbo one-half of the program (Deferred Action for Parents of Americans, or DAPA) while the other half proceeds into its fifth year (Deferred Action for Childhood Arrivals, or DACA). *Texas v. United States*, 136 S. Ct. 2271, 2272 (2016) (per curiam). The 2012 DACA program remains in place.

3. Within his first month in office, President Trump signed twelve executive orders including three executive orders on immigration. WHITE HOUSE PRESIDENTIAL ACTIONS: EXECUTIVE ORDERS, <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>. (last visited Feb. 19, 2017).

4. While President Trump's executive orders similarly provide salient examples, many of them were too recent to have been implemented by the time this Article went to press.

5. The focus of the President's relationship to the regulatory state here is on executive agencies rather than independent agencies. Independent agencies merit separate analysis, with a distinct set of case studies.

a concept misunderstood and even lost within much of constitutional and administrative law.<sup>6</sup> Constitutional and administrative law scholars largely emphasize structural concerns, such as the separation of powers and control of agencies by the political branches; however valuable, these studies exclude the more granular details of public administration from their purview.<sup>7</sup> The dynamics occurring inside agencies become a black box, largely unknown and poorly understood. Despite the traditional discomfort with a strong administrative state, most accept the modern regulatory state as a matter of pragmatism or resignation to modern conditions despite their ambivalence about its legitimacy.<sup>8</sup> Rather than confronting their discomfort with the complicated nature of administrative action, skeptics reassure themselves by borrowing the normative justifications of other branches: the democratic engagement of Congress, the political accountability of the President, or the independence of courts. However, there are some signs that the foundations of the administrative state are under attack.<sup>9</sup>

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6. Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1137, 1138 (2014) [hereinafter Farber & O'Connell, *The Lost World of Administrative Law*] (discussing how rulemaking is not a clear three part procedure); see also JERRY MASHAW, CREATING THE AMERICAN CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 5 (2012) [hereinafter MASHAW, CREATING THE AMERICAN CONSTITUTION] (discussing the lack of concrete authority concerning administrative rulemaking); Gillian Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 85 GEO. WASH. L. REV. 1517, 1519 (2015).

7. David Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CON. L. & PUB POL'Y 81 (2013); David Rubenstein, *Black Box Immigration Federalism*, 114 MICH. L. REV. 983 (2016) (disputing the priority of the law in action and nonbinding federal laws such as DACA over the INA due to structural logic).

8. *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia J., dissenting) ("I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."). See also Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (explaining how issues with administrative actions are inevitable).

9. In the past year alone, Speaker of the House Paul Ryan formed a working group on executive overreach and the House passed a bill to restrict funds or nullify executive actions that purportedly violate the separation of powers. Lewis K. Uhler & Peter J. Ferrara, *Ryan's Executive Overreach Working Group: It's Time for Congress to 'Man Up' and Do Its Duty*, DAILY CALLER (July 26, 2016); H.R. 76 Separation of Powers Restoration Act of 2017 (clarifying the nature of judicial review of agency interpretations of statutory and regulatory provisions). Justice Thomas repeatedly dissented from administrative law decisions due to his desire to rethink the foundations of the administrative state. See, e.g., Justice Thomas opinion in *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas J. concurring) *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas J. concurring) ("Because this doctrine

This Article joins a budding scholarship that seeks to understand the legitimacy of executive action by studying agencies from the inside out.<sup>10</sup> Bringing together research on presidential control of agencies and the legitimacy of executive action, it coins a new name for the president's role in promoting the procedures by which his agencies administer federal policy: the Administrator-in-Chief. The chief administrator is animated by concerns for procedural soundness and administrative effectiveness. This position undertakes supervisory actions that promote coherent federal policy, seeks to centralize agency discretion to promote consistent decisions within the agency, and attempts to coordinate actions across his administration. The normative theory of the Administrator-in-Chief is that the President is most justified when bolstering administrative procedure, with the effect of enhancing perceptions of legitimacy by the agency officials who implement them, and increasing their policy effectiveness.

Among the many notions of legitimacy—legal, moral, and sociological—this Article focuses on a sociological conception.<sup>11</sup> Empirical studies of sociological legitimacy demonstrate that individuals cooperate with rules based on their belief that the procedures used to enact the rules are trustworthy and fair—in other words, procedurally legitimate—even when

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effects a transfer of the judicial power to an executive agency, it raises constitutional concerns.”). The Trump Administration’s presidential campaign and initial orders featured vigorous rebukes of executive action and a pledge to “deconstruct” the administrative state. Presidential Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017); Philip Rucker and Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb 23, 2017).

10. See Lisa Bressman & Michael Vandenberg, *Inside the Administrative State: A Critical Look at Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (discussing EPA administrative actions); Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1840–41 (2015) (surveying different agency actions including those at the IRS, the NSA, and the VA); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (discussing Office of Management and Budget (OMB) administrative actions). Also relevant is the internal separation of powers literature. See, e.g., Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals*, 91 N.Y.U. L. REV. 227 (2016) (arguing that separation of powers includes fragmentation of internal administrative heads); see also Farber & O’Connell, *The Lost World of Administrative Law*, *supra* note 6 (discussing how separation of powers is mismatched); Sidney Shapiro & Ronald Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2010) (discussing how the executive administration is more controlled by both internal factors as well as external separation of powers forces).

11. See Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); see also *infra* Part I.A.

the rules disfavor their self-interest and substantive preferences.<sup>12</sup> This insight into individual behavior can be extended to institutions as well. In prior research, I show that state and local policymakers cooperate with nonbinding federal policies they accept as procedurally legitimate, and they decline to cooperate with nonbinding federal policies they regard as illegitimate.<sup>13</sup> This Article builds on those studies by examining the conditions under which presidential policies on immigration elicit cooperation from the federal agencies involved in their implementation. It uses immigration policies from the Obama administration as its policy arena: deferred action for long-time immigrant residents, immigration detention for criminal aliens, and priority docketing of recently-arrived asylum seekers. The case studies contribute to existing administrative law scholarship by arguing that the success of these policies rests on the President acting as a good and fair administrator of his agencies.<sup>14</sup> This argument about the importance of administrative expertise counters scholarly justifications of executive action based primarily on democratic engagement and political accountability.<sup>15</sup> Rather, it augments those based on substantive expertise. Without discounting the importance of political accountability, this Article suggests that perfecting procedure is an important component of the expertise that legitimates agency action. Focusing on values of sound procedure and administrative expertise in immigration law—an area marked by moral controversy and policy complexity—is an approach that can be used to strengthen the institutions involved in immigration policy. To be clear, the claim that procedural

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12. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 5 (2006); TOM TYLER, *WHY PEOPLE COOPERATE* 15, 18–19 (2011).

13. Ming H. Chen, *Beyond Legality: Understanding the Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87 (2016) [hereinafter Chen, *Beyond Legality*] (showing pattern of state drivers' licenses being extended to DACA recipients); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2015) [hereinafter Chen, *Trust in Immigration Enforcement*] (showing pattern of local noncooperation with immigration detainees).

14. *Infra* Part II.B.

15. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–38 (2001) (political accountability argument); Peter L. Strauss, *Overseer or 'The Decider'? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (political control argument); Richard Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (interest representation and democratic engagement model). See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–485 (2003) [hereinafter Bressman, *Beyond Accountability*] (summarizing legitimacy accounts, critiquing accountability); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND L. REV. 2, 443 (2014) (summarizing legitimacy accounts in administrative law scholarship).



legitimacy can strengthen institutions does not suggest that it can substitute for moral legitimacy; the more modest claim is that it is necessary, even if not sufficient, for moral acceptance. The claim is also not that procedural legitimacy is compulsory; in many cases, the recommended practices go beyond what is legally required.

This Article advances the theory of the President as an Administrator-in-Chief through narrative description, normative analysis, and policy prescription.

Descriptively, this Article builds on administrative theory recovering the internal sphere of agency action by specifying the role of the President as Administrator-in-Chief.<sup>16</sup> Acting as an administrator means supervising the administration of policies internal to the agencies. Examples of these tasks include issuing executive actions undertaken to promote the coherence of policy during complicated and sometimes competing administrative realities, centralizing discretion to produce consistent decisions within agencies, and coordinating agency initiatives across the executive branch. These three C's—coherency, consistency, and coordination—are the internal tasks of administration and they are inextricably related to the success and effectiveness of policies, especially where the policies rely on cooperation for their implementation and where moral consensus may be lacking.

By placing the administrative presidency in context, this Article provides an insider's perspective on executive policymaking. After disaggregating the concepts of the President's internal administration and presidential policy, the theories of good administration can be operationalized in terms of the conditions of administration and connected to in-depth studies of particular policies. This Article traces the policymaking process for three of President Obama's immigration policies. The first case study is President Obama's deferred action program, executed by the U.S. Department of Homeland Security (DHS) and the U.S. Citizenship and Immigration Services' (USCIS's) use of regulatory guidance. The second case study is President Obama's reboot of DHS Immigration and Customs Enforcement's (ICE's) use of immigration detainees to transfer "criminal aliens" into civil detention.<sup>17</sup> The third case study is the President and

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16. The vocabulary of internal/external draws upon the work of Bruce Wyman and early scholars of administrative law. It differs from modern scholarship on separation of powers insofar as my use of internal and external focuses on the function of presidential and administrative power, not the source of legal constraint. See BRUCE WYMAN, *THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 4, 14 (1903).

17. The term "criminal alien" comes from congressional statutes, such as the Criminal

DHS Secretary Johnson's memo announcing vigorous border control measures for recently-arrived migrants from Central America in addition to a DOJ memo establishing priority dockets for adjudicating these cases in immigration court.<sup>18</sup>

The immigration case studies were chosen for their theoretical merits and empirical significance as examples of executive policymaking. DHS's literal focus on security and its ambitious, wide-ranging mission that includes immigration makes it an exemplar of modern administration.<sup>19</sup> Against the backdrop of history, the proliferation of agencies dedicated to health and safety, environment, civil rights, and nationality security is sometimes characterized as a security state.<sup>20</sup> Putting the case studies together illustrates the key features of presidential influence on administrative agencies. Yet the features relating the President to agencies are distinctive across the case studies in instructive ways. The range of policies selected varies along political orientation from extending or opposing immigrants' rights to promoting or deferring enforcement, involving states, Congress, and the general public. They also vary in policymaking form: agency policy statement, enforcement actions, and agency adjudication. This range and complexity of immigration policies

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Alien Program, targeting immigrants with criminal histories. See U.S. ICE, *Criminal Alien Program: Overview* (Mar. 29, 2017, 4:30pm) [hereinafter *Criminal Alien Program: Overview*], <https://www.ice.gov/criminal-alien-program>. It is a contested term due to its imprecision (referring to a variety of crimes, pre- and post-conviction circumstances, and enforcement efforts that exceed the stated purposes) and the moral valence it has acquired in a contentious political environment. Nevertheless, it is used, within quotations, because it denotes the parameters of the official government policies under examination in the Article, however problematic. See *id.*

18. Each case study combines information and analysis from a variety of print sources and in-depth interviews with U.S. Department of Homeland Security (DHS) government officials, civil servant staff, and immigration attorneys and advocates. I spoke with former and current immigration officials within the agencies most relevant for each case study. I also spoke with immigration attorneys, policy analysts, or community organizers familiar with the policies. All interviews were conducted off-the-record, with the understanding that generalized statements could be made without attribution, in accordance with University of Colorado IRB Protocol 16-0484 exemptions 2, 3. For more on the methodology, see *infra* Part II.

19. See DHS., *Our Mission* (Mar. 26, 2017, 12:15pm), <https://www.dhs.gov/our-mission>.

20. Administrative law histories describe periods of growth in the administrative state, with the modern era described as a security state. See LAWRENCE FRIEDMAN, *TOTAL JUSTICE* 45 (1985); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986).

permits variation that helps to build the theory of the Administrator-in-Chief.<sup>21</sup>

The formation of DHS—an executive agency born of a major reorganization following the terrorist attacks of September 11, 2001—provides a critical juncture in policy development and a rare opportunity to view the politics and bureaucratic control surrounding the agency's design.<sup>22</sup> Also, the agency is enormous: it melds together twenty-two preexisting agencies, employs a quarter million federal workers, and governs a variety of critical matters.<sup>23</sup> Immigration policy, a high stakes area, is an easy case for the argument that we need good administration in an era of ambitious executive policy. The tendency toward strong federal power is high and the risk of abuse equally so—the issue is predominantly governed by federal statutes, it benefits from presumptions of plenary power and preemption, it is often embroiled in sovereignty matters.<sup>24</sup> To the extent that it is exceptional as a policy arena, its extremities make recurrent institutional problems in the administrative presidency more apparent.

The chronic search for legitimacy in the administrative state is not just about legal trespass.<sup>25</sup> It is about normative trade-offs in a regulatory state that is prolific and yet rests on contested Constitutional underpinnings. Normatively, this Article argues that a president's concern for sound public administration can improve the quality, effectiveness, and acceptance of executive policy that relies on agency officials for their implementation. In contrast, procedurally illegitimate executive actions suffer, no matter how compelling the substance of those policies. Attention to sound public administration in government is important for fulfilling policy objectives

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21. Another possibility is to compare executive action across presidential administrations. While there are advantages to this method, the disadvantage is that differences in political climate and social context confuse the focus on institutional dynamics and the broad scope necessitates more sweeping generalizations.

22. The sharp break of September 11 represents a critical juncture in political development. Giovanni Capoccia, *Critical Junctures and Institutional Change*, ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES (James Mahoney & Kathleen Thelen eds., 2015).

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

24. See Gabriel Jack Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, IMMIGRATION STORIES (David A. Martin & Peter H. Schuck eds., 2005); cf. Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law* 14 GEO. IMMIGR. L.J. 257 (1999) [hereinafter Chin, *Is There a Plenary Power Doctrine?*] (commentary by Kevin Johnson et al.)

25. See JAMES O. FREEMAN, CRISIS AND LEGITIMACY 10–13 (1978).

and also safeguarding the institutions that embody them. Consequently, those seeking to understand the promises and perils of President Obama's use of executive action should first attend to public administration. Their concerns for the vulnerability of executive action in the face of lacking moral consensus in immigration policy should motivate them to focus on institutional conditions that support legitimacy, rather than becoming overly mired in the substantive particulars. However important the substantive particulars, progress will be undermined without strong institutions that can withstand controversy and change.

The theory of an Administrator-in-Chief articulates good governance and policy effectiveness as values in executive policymaking. Prescriptively, this Article adds to existing accounts of executive action with a theoretical framework built for an Administrator-in-Chief. It operationalizes that value in a typology of administrative tasks: promoting coherent policy in the face of complex and competing administrative pressures, centralizing discretion to make consistent policy within agencies and within a decentralized state, and coordinating actions to make effective policy across the executive branch. It then connects those tasks with substantive policies that cut across policy orientation and policymaking form. It prescribes constraints to balance the need for sound internal administration with the pressures beyond the agency and to build a common ground of procedural legitimacy—a common ground that is vital with controversial policies and divisive politics. Other legitimating accounts posit democratic engagement and political accountability as the main reason to permit administrative policy, often at the expense of the agency's substantive expertise.<sup>26</sup> These accounts fail to recognize sound procedure and effective public administration as a distinctive form of expertise and a criterion of administrative legitimacy.<sup>27</sup> The model of the Administrator-in-Chief contributes to the project of justifying the administrative state by identifying circumstances under which presidential involvement in the administrative state is legitimate: by forging coherent policy, by encouraging consistent decisions, and by coordinating actions. These conditions free agencies to do what they do best—execute and implement policy.

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26. Kagan, *Presidential Administration*, *supra* note 15, at 2255.

27. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) (laying out a typology for public administration that includes bureaucratic rationality, professionalism, and moral judgment as different models for agency aspiration). Rather than presuming moral judgment as the paragon of justice, by way of judicial or legislative or corporate analogy, this enlarged focus permits a wider range of organizational goals. Consistency, coherence, rationality, for example, motivate public agencies as a type of organization and legal institution. See *id.*

There are scholarly and policy implications for research that brings together legitimacy theory, administrative procedure, and immigration policy. Attention to the legitimatizing conditions of presidential policymaking will be useful to immigration scholars and reformers during a time when significant immigration policy unfolds in the executive branch and during time when moral consensus is lacking about important national policies. This Article facilitates an ongoing evaluation of executive policies in immigration during times when moral consensus about the substance of those policies is lacking. President Obama, in the face of congressional resistance to legislative reform, advanced signature immigration policies using executive action.<sup>28</sup> Which of those actions is legitimate, and which are vulnerable to challenge, is critically important for the legacy of those policies. Taking an in-depth look at President Obama's immigration policies uncovers lessons of consequence during moments of political and policy transition. Immigration is always a value-laden and controversial policy arena, and it concerns core national debates about the very rules that constitute the nation.<sup>29</sup> It has played a particularly prominent role during the presidential transition.<sup>30</sup>

A portrait of the internal dynamics in a vast, complex modern bureaucracy will be useful to scholars working on general theories of the administrative state and policy reformers seeking to improve it. Given the modern propensity toward executive expansion, this Article illustrates necessary constraints in an otherwise broad grant of executive authority. Immigration policy provides a salient example of the risks inherent in executive policymaking given the high stakes, divisive politics, and long tradition of deference to the executive branch.<sup>31</sup>

Evaluators of President Obama's immigration policies should take heed of the new brand of administrative law scholarship that peers inside agencies.<sup>32</sup> This Article contributes to that line of scholarship. Focusing

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28. *Criminal Alien Program: Overview*, *supra* note 17, and accompanying text.

29. Catherine Kim, *Presidential Legitimacy Through the Anti-Discrimination Lens*, 91 CHI-KENT L. REV. 1, 207–208 (2015) (discussing congressional reaction to the attempted implementation of the Obama Administration's DACA and DAPA programs).

30. For examples of President Trump's focus on the immigration issue, see Julie Hirschfeld Davis et al., *Trump, in Optimistic Address, Asks Congress to End 'Trivial Fights'*, N.Y. TIMES (Feb. 28, 2017) [https://www.nytimes.com/2017/02/28/us/politics/trump-address-congress.html?\\_r=0](https://www.nytimes.com/2017/02/28/us/politics/trump-address-congress.html?_r=0).

31. The plenary power doctrine is credited as the source for extraordinary deference to the political branches in immigration laws and the source of much scholarly commentary. See e.g. Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There A Plenary Power Doctrine?*, 14 GEO. IMMIG. L.J. 307, 307 (2000).

32. An exemplar of this body of scholarship is Bressman & Vandenberg, *supra* note 10.

exclusively on Congress or the substantive policy dimension of executive action that has dominated public debate distracts us from understanding the institutional dynamics animating executive policies. The failure to distinguish the President's administrative and policymaking functions, and the false assumption that agency action seeks to surreptitiously circumvent democratic processes, leads to misunderstandings about agencies' work. It breeds suspicion of agencies' motives regarding policymaking. The suspicion imposes unfair demands on agency operations. It also obscures opportunities for understanding how best to reign in administrative excess when necessary and appropriate. More broadly, the conflation of internal administration and external administration of law exacerbates chronic concerns about the legitimacy of both presidential power and administrative action.<sup>33</sup> Ironically, it also contributes to political division that sometimes drives presidents to resort to executive action.

Part I describes the President's complex task of administering a vast regulatory state. It disaggregates the multiple functions of the executive into internal administration and policymaking. In keeping with scholarship on presidential administration, it describes core functions of internal administration. Extending this scholarship, it then relates the internal administration to the external policymaking aspect of presidential action and discusses the conditions required to maintain legitimacy amid political division. Part II applies the internal administration and external policymaking analysis to three case studies of enforcement discretion in immigration law under President Obama's administration. Part III examines the implications of reframing the President as Administrator-in-Chief. It prescribes specific steps that can be taken to integrate presidential policy into the administrative state in a legitimate manner.

## I. THE PRESIDENT AND EXECUTIVE ACTION

### *A. Legitimacy of Executive Action*

Underlying the concept of an Administrator-in-Chief is the systemic administration of government through presidential oversight of the

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33. See, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 1, 44 (2014) (discussing general patterns of action and reaction between congressional and agency actions, such as the phenomenon whereby "Aggrieved officials cease to follow ordinary norms of cooperation and constraint. . . this dynamic is perfectly predictable once we attend to the tools and incentives of the actors within each branch . . ."); William Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive Branch Action*, 2014 UTAH L. REV. 773 (2014) (describing the polarization that leads Congressional dysfunction and presidential exercises of power).

regulatory state. The legitimacy of those executive actions, more specifically the President's intervention in the administration of public policy, is a central concern to administrative law scholars.<sup>34</sup> Much of this legitimacy scholarship is concerned with normative theories of legitimacy. Legal theorists posit that legitimacy can be disaggregated into substantive and procedural components, and empirical scholars advance this insight by showing that fair procedures can elicit voluntary cooperation from individual and institutional actors and thereby increase its effectiveness.<sup>35</sup>

The focus in this Article is primarily on the President's pursuit of procedural legitimacy as a justification for his administrative policies. Its claim is that presidential attention to administration coupled with agency expertise lends credibility to presidential policies. Thus, the President can positively impact his policy effectiveness by promoting practices of good government in agencies rather than trying to substitute his policymaking judgments for those of the agency. The President's role, as Administrator-in-Chief, constitutes a distinctive form of administrative expertise that, in turn, normatively justifies the administrative policies.

This argument about administrative expertise mediates between two poles in the normative scholarship about the role of law and politics in the presidential control of agencies. Those who worry that administrative agencies lack the political accountability and democratic responsiveness of other branches of government rely on the ability of agencies to borrow democratic authority from their nationally-elected president or emulate the legislative process by relying on APA rulemaking procedures to legitimize agency action.<sup>36</sup> Those who worry that agencies' vulnerability to political

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34. For a sample of the administrative scholarship on legitimacy, see generally Sydney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012) (discussing how to legitimize executive administrative actions in a constitutional liberal democracy); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside Out*, 37 HARV. ENVTL. L. REV. 313 (2013) (discussing judicial review as a mechanism to legitimize administrative action); William H. Simon, *The Organizational Premises of Administrative Law*, 78 L. & CONTEMP. PROBS. 101 (2015) (discussing the background-looking conception of legitimacy). The jurisprudential scholarship on legitimacy is sufficiently vast that it deserves separate treatment.

35. See Fallon, *supra* note 11 (three strands of moral, procedural, and legal legitimacy); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (substantive and political); see also *supra* notes 12–13.

36. The seminal example of the political accountability justification can be found in Kagan, *Presidential Administration*, *supra* note 15 (using examples from the Clinton administration to show presidential administration bolsters agency accountability and

influence will compromise their substantive expertise lean on structural constraints to safeguard the agencies' ability to make independent judgments and enact rational policy—internal constraints such as the separation of power within agencies, or external constraints such as judicial review or legislative control of agency regulations.<sup>37</sup> Those who worry that agencies will flounder in their execution of presidential priorities, whether due to supervisory lapses or agency dysfunction, treat agencies as if they were businesses. Agency competence is measured by their fidelity as agents of a principal, efficiency, or other proxies for performance; these reforms target tighter control.<sup>38</sup>

Agencies do aspire to cultivate democratic attributes (like Congress), independence (like courts), and efficiency (like private organizations). But their institutional posture as policy implementers is distinct from these other branches.<sup>39</sup> Given the futility of analogizing agencies to Congress, courts, and private organizations, those who believe in the importance of the administrative state should look inside the executive branch and more specifically at presidential engagement with agencies.<sup>40</sup> After all, execution of policy is where the President's influence on agency action is strongest. Presidential policymaking, or quasi-legislative actions, are a virtual necessity in some circumstances.<sup>41</sup> Yet it sits uncomfortably with our traditional

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effectiveness, and claiming that presidential control is implied in congressional delegations to agencies).

37. For the relationship between judicial review and internal procedure, see Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

38. Public choice theory typifies this approach to agency behavior. Studies of the OMB and Office of Information and Regulatory Affairs (OIRA) are often premised on these managerial assumptions as well. See generally RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Dan Farber & Anne Joseph O'Connell eds., 2010) [hereinafter RESEARCH HANDBOOK].

39. See generally HAROLD BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* (2006) (calling usual separation of powers framework ill-suited to the blended functions within agencies).

40. Whether the President is limited to overseeing the agencies or welcome to decide the agency's substantive stances is a matter of considerable debate, as is the propriety of an agency taking actions responsive to the President's priorities. Peter Strauss provides an overview of struggle for control of agencies in his essay. Strauss, *supra* note 15 (sparking a debate among administrative law scholars about the limited role of president as overseer in most circumstances); see also Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017) (addressing further issues in the overseer–decider debate).

41. Adam Cox and Cristina Rodriguez emphasize this point because, in their account,



understanding of the three branches of government and the traditional primacy of Congress over lawmaking.

In the abstract, the inattention to internal administration and administrative effectiveness can be remedied by resorting to generic forms of executive oversight. White House regulatory review, such as by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), serves to oversee some administrative aspects of regulation.<sup>42</sup> The theory behind executive oversight is that while OIRA is a generalist in substantive policy, it is expert in public administration and can improve the quality and effectiveness of agency policy through the assertion of this type of administrative expertise. However, OIRA uses blunt tools and limited measures of agency performance, asserting efficiency and cost-savings as the primary manifestations of administrative competence without adequately considering values such as fairness, reputation, legal and policy acumen, operational success, and commitment to organizational mission.<sup>43</sup>

Additionally, OIRA's tools of regulatory control presume neutrality, which is inconsistent with the moral controversy that characterizes much

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Congress has de facto delegated policymaking to the executive branch through its inactions and inconsistencies. Consequently, they maintain the primacy of the political branches in immigration law should focus on the President. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 119 YALE L.J. 458, 530–32 (2009) [hereinafter Cox & Rodríguez, *Redux I*]. This renewed focus enhances the rule of law, transparency, and organizational effectiveness. While I largely agree with Cox and Rodríguez, my argument focuses on prudential matters rather than power. Although not in the context of immigration, similar approaches are taken by Justice Scalia in *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). See also Vermeule, *Our Schmittian Administrative Law*, *supra* note 8 (discussing how statutes, judicial decisions and institutional practice either explicitly or implicitly exempt the executive from legal constraints).

42. See Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); see also OMB, EXEC. OFFICE OF THE PRESIDENT, M-16-11, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, IMPROVING ADMINISTRATIVE FUNCTIONS THROUGH SHARED SERVICES (2016) (providing OMB guidance aimed at making executive agencies more effective and efficient through uniform management of “common business activities,” i.e., financial management, HR, acquisitions, IT).

43. See e.g. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002) (claiming that OIRA is overstaffed by civil servants who possess economic training and are privy to deregulatory agendas); RICHARD REVEZS & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (Oxford University Press 2008) (taking issue with the manner in which cost-benefit analysis is conducted).

agency action—indeed, the controversy is often why the policy has been delegated to agencies.<sup>44</sup> Looking inside the executive branch, and specifically inside agencies, draws attention to values of good governance and procedural fairness as normative ideals for presidential administration.<sup>45</sup> This attention to procedural fairness that builds trust in institutions is vital to the longevity of policy.<sup>46</sup> Focusing more on the internal character of public administration has another virtue: it fosters clearer understandings of how agencies operate, and provides valuable glimpses inside specific agencies. For this Article, the immigration-related agencies at DHS and DOJ furnish concrete examples of the importance of attending to procedural fairness and expert administration in a complex and controversial area of policy.

### *B. Functions of the President as Administrator-in-Chief*

Executive action can take many forms and has many sources. In its strongest form, executive action can be legally binding presidential directives or sub-delegations to agencies.<sup>47</sup>

Typically, agencies implement statutory mandates, delegated by Congress under Article I.<sup>48</sup> These are strong forms of policymaking in the sense that they are conventionally law-like: legally binding and judicially

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44. David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: a political science approach*, 20 CARDOZO L. REV. 947, 949 (1999) (discussing reasons why Congress chooses to delegate to Agencies, including reasons of 'legislative efficiency').

45. Jerry Mashaw uses "bureaucratic rationality" to describe good governance. See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 27. Daniel Carpenter uses "reputation." See Daniel Carpenter, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010); see Metzger, *The Constitutional Duty to Supervise*, *supra* note 10 (using "supervision").

46. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12; TYLER, WHY PEOPLE COOPERATE, *supra* note 12.

47. Executive orders issue from the President, are binding on agencies, and are recorded in the Federal Register. 44 U.S.C. § 1505 (2012). Executive actions are broader. The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. *Id.* Furthermore, executive orders must comply with preparation, presentation, and publication requirements established by an executive order issued by President Kennedy. See Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) (codified at 1 C.F.R. § 19). President Obama did not use an executive order in the immigration case studies; rather, he relied on the DHS Secretary to release agency guidance to enact the programs. Remarks by President Obama on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

48. U.S. CONST. art I.

enforced. These executive actions constitute the primary subject of modern administrative law. Scholars who study the legal sources of presidential power conclude that presidents are powerful—sometimes too powerful—and prone to overreaching and entangling of substance and procedure.<sup>49</sup> They are the scholars most often concerned about the legitimacy of presidential involvement in policymaking and most tempted to resort to congressional oversight.<sup>50</sup>

The President can also exercise softer policymaking power under Article II by supervising executive agencies.<sup>51</sup> This form of presidential influence involves oversight of administrative procedure and attention to administrative realities.<sup>52</sup> First, presidential influence is bound up in operational details such as planning, overseeing, and allocating resources that make coherent policy possible within a complicated bureaucracy. Second, presidential influence requires shaping agency decisionmaking to produce consistent results within agencies. Third, presidential influence requires coordinating within and across agencies to promote consistency across a decentralized executive branch. Many of these soft powers are nonreviewable as they rely on the “power to persuade” others to achieve their primary goals, rather than legal control over intra-agency discretion,

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49. See generally EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (1940) (discussing the trend of consolidating power within executive departments of all governments, inevitably concentrating it within an administration). The administrative law literature on presidential control of agencies resonates with this conception of the President's invocation of strong power. See generally Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2488 (2011) (describing three views of presidential directive authority over regulatory decisions entrusted by statute to agency heads and adopting directive authority as interpretive principle); Nina Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455, 2458 (2011) [hereinafter Mendelson, *Another Word*] (suggesting that the President has directive authority regardless of whether Congress delegates specific powers to an agency). But cf. Kevin Stack, *The Reviewability of the President's Statutory Powers*, 62 *VAND. L. REV.* 1171, 1121 (2009) (stating that, when asserting statutory authority, both the President and agency heads can only exercise powers specifically delegated by that statute).

50. See Corwin, *supra* note 49.

51. In addition to vast public administration scholarship, see Metzger, *The Constitutional Duty to Supervise*, *supra* note 10. This emphasis on supervision is similar to Peter Strauss' description of “oversight” vs. “decision-making.” Strauss, *supra* note 15. Note: Agencies include executive and independent forms, and the latter particularly raise concerns about the unitary executive. The focus in this Article is on executive agencies that are assumed to be within the supervisory chain of the president.

52. A non-comprehensive list includes Metzger, *The Constitutional Duty to Supervise*, *supra* note 10; see also Pasachoff, *supra* note 10; Jennifer Nou, *Intra-Agency Coordination*, 129 *HARV. L. REV.* 421 (2015) (setting forth similar typologies).

interagency decisions, and state policies.<sup>53</sup> Consequently, some scholars misunderstand practices of supervision and soft power as evading the rule of law or at least lacking the procedures used to guard against executive overreach. These are the scholars most committed to the separation of powers, whether achieved by internal or external mechanisms of control.

The Administrator-in-Chief theory emphasizes the softer exercises of power captured in the internal administration of law.<sup>54</sup> One leading administrative law casebook defines public administration as “the body of general rules and principles governing administrative agencies”<sup>55</sup> and another calls it the “relations of [public] officers with each other.”<sup>56</sup> This internal administrative law governs how agencies do their work. It concerns the part of administration that occurs inside the administrative agencies and the executive branch more broadly.<sup>57</sup> It enables the running of a public organization. Much of it is ministerial and technical. It relies more on prudence than power. Still, it involves discretionary judgment with significant policy implications. The policymaking face of agencies is more familiar, by way of analogy to legislatures and courts, and emphasizes agency actions that advance substantive policy outcomes.<sup>58</sup> If the procedures of agency administration are underemphasized in the scholarly imagination, the substance of agency policy is overemphasized.

The administrative face of presidential policy is obscured in doctrinal analysis and abstract theory on presidential control of agencies.<sup>59</sup> Doctrinal articles discussing the constitutional lines of power under Article II’s take-care or faithful-execution clauses and how they interact with Article I’s vesting of legislative power in Congress are important for establishing the

53. For an example of agency utilization of ‘soft power’ to avoid notice-and-comment, see Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 16 (2009). Other examples include non-compulsory gestures to induce cooperation, including creating incentives, appealing to the moral authority of his office, and rewarding desirable behaviors.

54. See WILLIAM FOX, UNDERSTANDING ADMINISTRATIVE LAW 84 (3rd ed. 1997); Woodrow Wilson, *The Study of Administration: An Essay*, 2 POL. SCI. Q. 197, 212 (1887) (“Public administration is detailed and systemic execution of law.”).

55. See PETER L. STRAUSS, ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 11 (11th ed. 2011).

56. See WYMAN, *supra* note 16, at 14; see also ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW 5 (Unpublished Manuscript) (on file with author).

57. See WYMAN, *supra* note 16, at 14.

58. Seifter, *States, Agencies, and Legitimacy*, *supra* note 15 at 448–49 (discussing different models of agency legitimacy such as the transmission belt vs. policymaker analogies).

59. See Shapiro et al., *supra* note 34; Bruce Ackerman in *The New Separation of Powers*, 113 HARV. L. REV. 633, 696 (2000).

outer bounds of presidential power. However, they can lose sight of the purpose of those parameters in their emphasis on powers rather than prudence. That's where Tom Tyler's empirical insights on cooperation come back into focus: power matters because it secures a threshold of legal legitimacy upon which cooperation can be built.<sup>60</sup> General theories of legitimacy miss the nuance inherent in empirical studies, especially studies of immigration policy where the procedures are consequential and complex. That is where the substantive case studies come in.

To make the point more concrete: a defining feature of President Obama's administration of immigration law is his institutionalization of enforcement priorities for agencies.<sup>61</sup> These priorities bind together substance and procedure to address major issues in the field by providing temporary relief from deportation to long-term immigrants residing without documentation, propagating more aggressive techniques for deporting immigrants with criminal histories, and responding to unexpected and uncontrolled flows of migration.<sup>62</sup> There are general lessons for presidential administration in these particulars. The subsections that follow highlight the three C's as features of being Administrator-in-Chief: prioritizing enforcement to produce *coherent* policy, overseeing the discretion of agency staff to produce consistent policy, and coordinating across agencies. Sustained examples of each will be provided in Part II.

### 1. Promoting Coherent Policy

Most important among the three tasks of an administrator-in-chief is creating coherent policy in the face of complex administrative realities and conflicting pressures. This involves agenda setting through the allocation of resources, selection of personnel, and establishment of priorities. Faced with systemic and individual resistance to change, the President instigates agency action and galvanizes bureaucratic expertise.<sup>63</sup>

Ideally, the President sets priorities for the agency in ways that integrate his policies into the agency's operations. The President, with the assistance of White House staff, selects and supervises an agency head to help him

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60. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12; TYLER, WHY PEOPLE COOPERATE, *supra* note 12.

61. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187–88 (2015) [hereinafter Cox & Rodríguez, *Redux* 2].

62. Cox and Rodríguez point to DAPA as a program that institutionalizes discretion through the adoption of specific procedures and channels of supervision. *Id.*

63. See Kagan, *Presidential Administration*, *supra* note 15, at 2281–99 (2001); Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461 (2010).

implement his priorities.<sup>64</sup> The President is the principal; his appointees are his agents.<sup>65</sup> The President's selection of agency personnel who share his policy priorities can lead regulatory agencies to implement the presidential agenda through agency rulemaking and adjudicatory powers, typically operating by suggestion, rather than assertion.<sup>66</sup> However, sometimes the agency leadership clashes with the President.<sup>67</sup> The White House offices can serve as an intermediary by shaping agency policymaking. Executive Order 12866 directs OIRA to coordinate agency planning and to review the costs and benefits of an agency's proposed regulations.<sup>68</sup> Presidential policies are channeled through the White House to the agency's leadership, who implement policy through agency staff.

While presidential pressure on an executive agency is real, an agency does more than mindlessly follow the President. The President's process of obtaining accession from the agency is a means to an end. It is not an assured outcome. As Harold Bruff states:

Specific directives, such as those by Presidents Clinton, Bush, and Obama, can overcome the ossification of rulemaking and galvanize agency action on particular topics. They are a way for presidents to cut through the complex web of relationships with public and private entities that any agency inhabits and give it a direction to follow.<sup>69</sup>

Elena Kagan has also recognized the many resources a president has to influence the scope and content of administrative action, "even absent any assertion of directive authority," so long as Congress has not prohibited the

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64. WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW, CHAPTER 38, PART II* (3rd ed. 2016.)

65. *Id.*

66. U.S. CONST. art. II, § 2 (Appointments Clause).

67. Sometimes when there is a clash between the President and Agency leadership, whether or not the President can fire the agency head is heavily litigated. See, e.g., Marcy Gordon, *Trump Administration Wants Freer Hand to Fire Head of Agency*, ABC NEWS (Mar. 17, 2017), <http://abcnews.go.com/Business/wireStory/trump-admin-fire-head-consumer-agency-46212643>.

68. See Pasachoff, *supra* note 10 (describing the "M" and "B" sides of OMB as management tools that implicate policy and noting the interaction between OMB budgeting and congressional apportionment). Cass Sunstein and Lisa Heinzerling disagree about the extent to which OIRA focuses on cost-benefit analysis and interagency planning and coordination concerns. Compare Cass Sunstein, *Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1842 (2013), with Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 340-42 (2012).

69. See Bruff, *supra* note 63, at 487.

specific interpretive exercise and so long as the agency acts in a manner that respects institutional integrity.<sup>70</sup>

Political accountability is typically the normative justification for this task. For example, a president's directives ensure that the agency policies are imbued with the support of a national constituency.<sup>71</sup> However, presidential intervention that promotes coherence can provide complementary benefits such as predictability, regularity, transparency, and effectiveness.<sup>72</sup>

## 2. *Centralizing Discretion for Consistent Decisions Within Agencies*

The President can oversee the quality and consistency of agency decisionmaking by mobilizing the department secretary, who in turn guides exercises of agency discretion by a smaller number of agency officials. Typically, those agency heads serve in the agency's headquarters, although matters could be channeled to officials in agency components and their field offices.<sup>73</sup>

Generally, the President will work with his appointed agency heads and their politically-appointed delegates to ensure that discretion is exercised by the civil servant staff in a manner consistent with the organic statute governing the agency and presidential priorities.<sup>74</sup> These priorities will be counterbalanced against the agency's sense of its congressional mandate

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70. See Kagan, *Presidential Administration*, *supra* note 15, at 2298 (noting that this interpretive principle flows from Article II and is a better understanding of congressional intent than the unitary executive approach); see also Mendelson, *Another Word*, *supra* note 49, at 2458 (concurring that the president can act without express statutory authority, e.g., when a statute delegates to a secretary or an administrator on the basis of statutory interpretation rather than constitutional interpretation).

71. See Kagan, *Presidential Administration*, *supra* note 15, at 2372 (Discussing the Supreme Court's reasoning in the *Hampton* case, in that it suggests that presidential action can enable political accountability and that this accountability—if lent to administrative action through presidential directive - can ease concerns relating to the exercise of broad grants of discretion).

72. *Id.* at 2252.

73. For examples from scholarly literature that include the processing of disability claims in the Social Security Administration, see MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 27, (describing adjudication of asylum claims in the immigration courts of the DOJ); JAYA RAMJI-NOGALES, ET AL., *REFUGEE ROULETTE* (2007), or permitting for wetlands in the U.S. Army Corps of Engineers, see Dave Owen, *Regional Federalism Administration*, 63 *UCLA L. REV.* 58 (2016).

74. See Kagan, *Presidential Administration*, *supra* note 15, at 2289 (discussing the premise that the simple delegation of rulemaking authority to a specified agency head would not prevent the President from making a final decision).

and professional norms.<sup>75</sup> The political leadership may also oversee and determine benchmarks for agency performance or specify standards and uniform definitions that an agency might further elaborate through the promulgation of more detailed regulations.<sup>76</sup> These forms of supervision operate in the interstices, or some would say the minutiae, of agency actions. Yet they implicate agency decisionmaking and policymaking in profound ways.<sup>77</sup>

Another task for the President is influencing decisionmaking among states and private actors in a decentralized state.<sup>78</sup> Federal law cannot compel these actors.<sup>79</sup> The President's task is distinct from controlling agency discretion—where the President and his appointees can compel compliance as a matter of right—especially in executive agencies with at-will removal and hierarchical means of control.<sup>80</sup> Rather, the President and his administration rely on powers of persuasion to shape decisions across a vast network.<sup>81</sup>

Normatively, the justification for this type of presidential intervention is supervisory and flows from the President's role as chief executive.<sup>82</sup> The President is uniquely able to coordinate actions across the executive branch. Coordination within agencies is critical as a matter of public administration and the rule of law. Where the President and agency leadership differ in an executive agency, the agency officials yield to the President so long as the President's policies remain permissible under

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75. Norms of professionalism will vary according to the agency. At the FDA, scientific integrity may function as a norm. In a law enforcement organization such as the FBI, the law itself may function as a professional norm.

76. See Kagan, *Presidential Administration*, *supra* note 15, at 2297 (noting that often significant White House participation in formulating the content of the presidential directives to agencies occurs, as well as in overseeing their execution).

77. The seminal study is Jerry Mashaw's *Bureaucratic Justice*, which examines agency discretion in the Social Security Administration. See MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 27.

78. Metzger, *The Constitutional Duty to Supervise*, *supra* note 10.

79. *Id.*

80. It also differs from a unitary executive theory of government, which typically pertains to the president's control over independent agencies and preemption, which requires federal primacy over states in instances of conflicting statutory interpretations. For an overview of disagreements in unitary executive theory, see Lessig & Sunstein, *supra* note 35.

81. For examples, see text accompanying *supra* note 53.

82. U.S. CONST. art. II, § 1. ("The executive power shall be vested in a President of the United States of America.").



legislative, judicial, executive, and professional norms.<sup>83</sup> The unifying influences of the President can come into conflict with the value of agency expertise or good governance.<sup>84</sup> The pressure for uniformity can conflict with the agency's need for independence from political or private influence.<sup>85</sup> It can also come into tension with the value of dissent from agency leaders and civil servants who can check presidential power, providing an internal separation of powers and promoting competing norms of professionalism or substantive policy when an agency is overly swayed by the President.<sup>86</sup>

### 3. Coordinating Agency Action Across the Executive Branch

Implicit in this description of the relationship between the President and his agencies is that successful executive action depends on coordination across the executive branch. The nature and extent of the administrative state forces agencies to act in a regulatory space shared by other regulators.<sup>87</sup> Also contributing to this regulatory overlap is the vast scope of the administrative state, its unclear and sometimes redundant functions, and its fragmentation across multiple agencies. Sometimes a transcendent authority, such as the President, is required to work out the differences.

The President possesses the power to coordinate agency activities and to mediate conflicts within this shared space.<sup>88</sup> Within a department such as

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83. The example of Immigration and Customs Enforcement (ICE) taming detainer practices through the imposition of enforcement discretion—first the Morton memos, then the replacement of Secure Communities with the Priorities Enforcement Program (PEP)—illustrates the operational chain of command. *See infra* Part II.B.2.

84. Ronald J. Krotoszynski, *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN L. REV. 735 (2002); Bressman, *Beyond Accountability*, *supra* note 15 at 462 (promoting good governance as key concern for arbitrariness, rather than majoritarianism or accountability).

85. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611–14 (2010).

86. The concept of internal dissent and regulatory resistance appears in social science studies of agencies and legal scholarship on administrative constitutionalism. *See, e.g.*, MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000); Ming H. Chen, *Where You Stand Depends on Where You Sit: Immigrant Incorporation in Federal Workplace Agencies*, 33 BERKLEY J. EMP. & LAB. L. 227 (2012) [hereinafter Chen, *Where You Stand*]; Gillian Metzger, *Administrative Constitutionalism*, 91 TEXAS L. REV. 1897 (2012); Sophia Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace*, 96 VA. L. REV. 799 (2010).

87. *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012)

88. U.S. CONST. art. II, § 1.

DHS, the Secretary may prod his assistants and deputies within the office to secure agreement between agency components such as ICE, Customs and Border Patrol (CBP), and USCIS. The President or his surrogates may also mediate conflicts among divisions within a single agency, such as the Office of General Counsel, which is charged with legal advice and the policy branches.<sup>89</sup>

The President may coordinate actions *across* the executive branch, such as when he reconciles the prosecution of immigration enforcement claims brought by DHS attorneys against immigrants in removal proceedings that take place within the immigration courts that are housed in the DOJ's Executive Office for Immigration Review (EOIR).<sup>90</sup> Interagency working groups focused on cross-cutting issues help agencies share information, reach understandings, and work out differences.<sup>91</sup> Bilateral negotiations between agency leadership mediate these conflicts across the executive branch.<sup>92</sup>

Like the discussion of centralized decisionmaking, the justification for presidential coordination is primarily good governance. Coordination enhances the consistency and effectiveness of government, rendering

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89. This internal fragmentation offers a form of separated powers analogous to constitutional self-checking. Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (discussing how the executive is not "unitary" and proposing mechanisms that can create checks and balances within the executive); see Metzger, *The Interdependent Relationship*, *supra* note 37, at 426–35 (describing "internal separation of powers mechanisms"); see also Michaels, *Of Constitutional Custodians and Regulatory Rivals*, *supra* note 10; Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036 (2011) (stating agencies are a "they, not an it"); Dan Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CAL. L. REV. (forthcoming 2017). Jennifer Nou discusses similar issues that flow from agency heads coordinating interagency action. See Nou, *Intra-Agency Coordination*, *supra* note 52.

90. DOJ, *Organization Chart: EOIR* (Mar. 29, 2017), <https://www.justice.gov/eoir/organization-chart>.

91. Interagency working groups on national origin have been important to the protection of vulnerable workers and survivors of domestic violence. Visas such as the U-visa, which permits immigrants to normalize their immigration status in exchange for helping law enforcement to investigate other illegal activities, came out of these types of working groups. See generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1175 (2012) (noting that the President requests that agencies coordinate with each other).

92. For example, there is a Memorandum of Understanding ("MOU") between the Department of Labor and ICE over the non-prosecution of immigrants who have reported labor abuses at the hands of their employers on the occasions when the employer calls in a tip. See also Farber & O'Connell, *Agencies as Adversaries*, *supra* note 89 (offering a typology of conflicting arrangements and corresponding mechanisms for dispute resolution).

different actors as partners in policymaking and avoiding chaos that flows from a lack of coordination. In routine matters, the chaos is unnecessary and undesirable.<sup>93</sup> Executive branch policies may undermine one another with insufficient coordination. The President serves as a broker between his agencies when co-equals come into conflict or when it comes time to seek funding from Congress. Procedural values of regularity and transparency, linked to procedural legitimacy, flow from interagency coordination.<sup>94</sup>

### *C. Relating Administration to Policymaking*

The defining question in this Article is under what circumstances is presidential policymaking, through his influence on agencies, normatively justifiable. Parts I.A and I.B posited that the answer depends on whether executive intervention concerns public administration of agencies defined by the three C's—coherence, consistency, and coordination. The manner in which conflicts are managed between an agency and the public is important when agency actions affect the general public through the generation of public policy.

Objections to presidential management of agencies are often motivated by concerns about the secondary effects of internal administration beyond the agency. The imposition of secondary effects on third parties can lead to executive policies impacting Congress, states, and private parties. While not inherently problematic, critics call it executive lawmaking, implying that presidential management operates unilaterally and circumvents Congress's legislative power or otherwise violates the rule of law and other professional norms.

Internal administration and external policymaking can be closely related and sometimes overlap. However, these two facets of presidential

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93. The overcrowding of the immigration courts following the post-DHS separation of investigation and adjudication is an example. *See* Part II.B.3.

94. As will be discussed more in Part III.C, there is the risk that over-friendly agencies with overlapping jurisdiction will be less likely to counter one another or could propel forward bad policy without adequate deliberation or experimentation. In these circumstances, friction is meant to preserve checks and balances. For example, the fair adjudication of asylum claims necessarily requires an outcome whittled from the sharpened perspectives of a border patrol agent charged with border security, an asylum officer trained to detect credible fears of persecution, and an impartial immigration judge who balances the need for enforcement with humanitarian considerations. The agencies, in this case ICE (within the DHS) and the Executive Office of Immigration Review (EOIR) (within the DOJ), can productively engage in bilateral negotiations that produce a MOU regarding the treatment of their shared subjects. *See* Part II.B.3.

administration are not the same and should not be conflated. As the following subsections demonstrate, after disaggregating public administration and public policy, the two parts can be rejoined in a variety of configurations that bear on the legitimacy of executive policy.

### *1. Constraining Spillovers from Presidential Policies*

Sometimes presidential attempts to achieve policy coherence are strategic, using agency procedures to accomplish substantive goals. Sometimes executive policy is the unintended effect of public administration. That is, the President's Article II supervisory duties—promoting a coherent policy agenda, controlling agency discretion, and coordinating across the executive branch—can “spillover” into this setting and shape public policies affecting third parties. Often this occurs through indirect and decentralized means. The appropriate constraints depend on which type of policy spillover is in play and whether executive action is the first or last resort.<sup>95</sup>

When policy spillover is deliberate, external checks play an important part. Usually, agencies engage in policy through the exercise of delegated power from Congress or the President. So long as these delegations are intelligible and the agency promulgates rules in a manner consistent with administrative procedure, the resulting rules have the force of law.<sup>96</sup> Courts set limits on agency action by policing the bounds of executive authority.<sup>97</sup>

Policy spillover can be inadvertent, when it is inextricable from administrative choices. For example, presidents can indirectly influence policy beyond the agency by making decisions to defer or forbear from taking action under statutory mandate.<sup>98</sup> Generally, judicial review of these enforcement decisions is deferential.<sup>99</sup> Requirements for the agencies implementing these decisions are similarly loose.<sup>100</sup> The Obama

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95. In the context of agency rulemaking, for example, case law has developed tests for judging substantial impact on regulated entities or revealing encoded substantive values. *See, e.g., American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987).

96. *See, e.g., Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

97. Some classic examples of separation of powers cases include *INS v. Chadha*, 462 U.S. 919 (1983) (prohibiting legislative veto) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

98. *See generally* Dan Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016); David Barron and Tod Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

99. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

100. Consider APA exceptions to notice-and-comment procedures for internal deliberations and rules of agency organization practice and procedure. *See* 5 U.S.C. § 553.

Administration's DOJ pronouncement that it would forgo enforcement of federal marijuana laws in states that have legalized marijuana furnishes an example.<sup>101</sup> The immigration actions to forbear from deporting undocumented immigrants who have long resided in the United States, an example studied in Part II, furnish another. Internal constraint is important to counter these policy spillovers.

Policy resulting from indirect pathways of influence, such as the President's enlistment of actors who are not legally bound to obey under their congressional mandate or directive authority, are harder to constrain.<sup>102</sup> The President can direct an agency to issue informal policies in pursuit of its legal mandate, such as when an agency aims to provide guidance about its anticipated interpretation of a statute or enforcement approach.<sup>103</sup> The President can plug implementation gaps and smooth coordinative hiccups that interfere with a coherent and functioning policy.<sup>104</sup> Modest policy innovations can accumulate over time to create national policy.<sup>105</sup> Or the President can advance schemes of cooperative federalism that elicit voluntary cooperation from states.<sup>106</sup> In an era of decentralized governance, the President can endeavor to cabin the discretion of those with attenuated relationships.<sup>107</sup>

Although it is not usually normatively desirable, the President sometimes

101. See generally Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle* (U. Denver, Legal Research Paper No. 16-19, 2016); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

102. There is a lively debate over whether presidential control over the agency is limited if a statute delegates authority to an agency as opposed to the President. For an overview of the debate, see Strauss, *supra* note 15.

103. See 5 U.S.C. § 553(b)(A) (notice-and-comment procedures are not required "for interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice"). These informal forms of administrative law, quintessentially internal, can nevertheless have weighty effects on the external world. See William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001); Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency*, 47 U. MICH. J.L. REFORM 1 (2013).

104. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015).

105. Heather Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2013-2014).

106. States' enactment of policies that extend driver's licenses to immigrants with deferred action status is one example. Chen, *Beyond Legality*, *supra* note 13. State and local resistance to immigration detainee requests is another. See Chen, *Trust in Immigration Enforcement*, *supra* note 13; see also Part II.B.2.

107. Metzger, *The Constitutional Duty to Supervise*, *supra* note 10, at 1848 (isolating decentralization as a quality of new governance).

engages in, or insists upon, unilateral policymaking across the executive branch under special circumstances, such as when a rapid response is required, when a uniform response is required, or when a matter uniquely concerns the president as a figurehead for the nation state.<sup>108</sup> The President might be able to invoke inherent or emergency powers to take action without the assent of Congress.<sup>109</sup> This type of institutional leapfrogging raises special concerns, some of which may not be avoidable in the first instance. Even in these cases, the President can normalize policymaking by coordinating catch-up opportunities for institutional realignment in agencies. For example, a president can encourage Congress to follow up his executive action with legislative action to enact the same policy or he can encourage an agency to codify customary practice or informal agreement in the form of a regulation.<sup>110</sup> While this requires additional steps and takes longer than moving forward unilaterally, inviting more process re-inserts the procedural checks that imbue administrative action with legitimacy and induce cooperation.

At the end of the day, in normal circumstances, presidential influence over attenuated policies depends on persuasion rather than control. It may not always succeed. Bolstering the chances of success requires that the lever of executive influence be regarded as trustworthy and procedurally legitimate. When legitimacy is lacking, persuasion is elusive—even when the substantive goals of a policy might be otherwise unobjectionable.

## 2. *Permitting Internal Dissent Within Agencies*

Executive action is vulnerable to abuse, especially in the midst of political division that makes its use all the more likely. This is especially true in the area of immigration law or national security where external constraint gives way to executive power due to the primacy of the President

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108. A distinction can be drawn between unilateral presidential action and the unitary executive theory. For an overview of unitary executive theory and a description of the debate surrounding it, see Lessig & Sunstein, *supra* note 35.

109. Pozen, *supra* note 33.

110. Following passage of the Immigration Reform and Control Act (IRCA) in 1986, which legalized a broad segment of the undocumented population, Presidents Ronald Reagan and George H.W. Bush used their executive authority to protect a group that Congress left out of the legislation—the spouses and children of individuals who were in the process of legalizing—from deportation. For more information about the Family Fairness Act, see American Immigration Council, *Reagan-Bush Family Fairness: A Chronological History* (Dec. 9, 2014), <http://www.immigrationpolicy.org/just-facts/reagan-bush-family-fairness-chronological-history>.

in both areas. Constraints on executive power are integral to safeguarding its legality and establishing its legitimacy.<sup>111</sup>

Emerging scholarship calls attention to the need for internal constraints that separate power within an agency and permit checking and balancing within the executive branch.<sup>112</sup> These constraints can be legal or political. Scholarship on internal legal constraints focuses on allocations of power within the agency, the role of agency heads in coordinating agency operations, and bureaucratic controls.<sup>113</sup> Of all of the political constraints, executive oversight, such as OIRA regulatory review, receives the most attention as a means for policing regulatory excess.<sup>114</sup> Even without executive oversight (or with voluntary submission to such oversight), agencies can engage in self-regulation by issuing explanations and justifications for their regulatory actions in the preambles to their guidance

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111. Chen, *Beyond Legality*, *supra* note 13.

112. See Michaels, *Of Constitutional Custodians and Regulatory Rivals*, *supra* note 10; Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); see also Farber & O'Connell, *Agencies as Adversaries*, *supra* note 89. Additional literature discusses political control of agencies and the relationship between civil servants and political leadership in several contexts. See Adam Shinar, *Dissenting from Within*, 40 FLA. ST. U. L. REV. 601 (2013); Alex Hemmer, *Civil Servant Suits*, 124 YALE L.J. 758, 773–74 (2014). Less relevant to executive agencies, yet important to the broader area of inquiry is the norm against interference with independent commissions.

113. See Magill & Vermeule, *supra* note 89; Nou, *Intra-Agency Coordination*, *supra* note 52; Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 214 (2015); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2014). Katyal, *supra* note 89 (State Department dissent cable as channel for elevating agency staff concerns against political leadership); MASHAW, CREATING THE AMERICAN CONSTITUTION, *supra* note 6; see also MASHAW, BUREAUCRATIC JUSTICE, *supra* note 27 (on professionalism and organizational logics); Chen, *Where You Stand*, *supra* note 86; Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009); see also Deacon, *supra* note 98 (exercises of discretion).

114. The voluminous literature on OIRA regulatory review involving cost-benefit analysis is an example of executive oversight. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 830 (2003); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081–82 (1986); John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 995–97 (2006); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064–69 (1986); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012). For purposes of this Article, the intervention of a White House office such as OIRA is classified as “internal” to the executive branch, rather than external to the agency itself.

or regulations.<sup>115</sup> While not legally binding, the articulation and deliberation of these justifications can by itself improve the quality of decisionmaking and the effectiveness of governance. This call to look inside agencies for constraints seeks to bolster the legitimacy of executive action by grounding it in sound public administration.

### 3. *Avoiding Excessive Coordination Across Agencies*

The forces brought to bear on the President from outside the executive branch—that is, from Congress, courts, states, foreign governments and private organizations engaged in non-administrative activism—comprise external controls on agency action.<sup>116</sup> Administrative law scholarship is particularly preoccupied with control from the outside-in.<sup>117</sup> These constraints separate rulemaking powers so that legislative functions reside in Congress, executive functions in the presidency (extending to his appointed officers in agencies), and judicial functions in the courts. Violations of the legislative–executive divide are managed through Congress’s limits on delegation of authority to agencies, prohibition of legislative vetoes of agency actions, or restrictions on the President’s ability to appoint and remove agency personnel.<sup>118</sup> Congress checks presidential power, either through substantive legislation, procedural laws such as the APA, or processes of oversight and appropriations.<sup>119</sup>

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115. Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016).

116. This definition comes from Aziz Z. Huq & Jon Michaels, *The Cycles of Separation of Powers Jurisprudence*, 126 YALE L.J. 346 (2016) (describing thick political surround); cf. Metzger, *The Interdependent Relationship*, *supra* note 37, 428–29 (describing external constraints on agencies as courts, Congress, and the President).

117. Rubenstein, *Immigration Structuralism*, *supra* note 7; Rubenstein, *Black Box Immigration Federalism*, *supra* note 7.

118. See *Whitman v. Am. Trucking Ass’n Inc.*, 531 U.S. 457 (2001) (describing nondelegation doctrine and case law). Congress can use organic statutes to determine the jurisdiction of the agency as well. See *INS. v. Chadha*, 462 U.S. 919 (1983) (prohibiting legislative veto). The major removal cases concern removal of agency officials for-cause in independent agencies. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654 (1988); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010). The President’s appointment and removal powers for executive agencies is typically broader than for independent agencies, with officers serving at the pleasure of the President.

119. The APA procedures aim to restrain agencies’ ability to act without accountability to Congress and the public. APA compliance with § 553 notice-and-comment rulemaking procedures, for example, provides the agency with the best information, provides private interests an opportunity to be heard, and ensures public knowledge of agency intentions.



Judicial review by courts serves to reinforce the structural constraints on executive action.<sup>120</sup> Courts also ensure respect for substantive constraints such as Due Process that balance the need for regulation against the amount of process required to respect individual rights.<sup>121</sup> Similarly, states can ensure the rights of private parties when federalism and policy spillover intrude on a private parties' constitutional rights.

While external constraints are undoubtedly necessary to constrain a powerful president, these constraints can be more formal than functional.<sup>122</sup> Also, exceptions to political and legal review made for matters of internal administration exist.<sup>123</sup> Consequently, it is difficult to justify presidential administration based on the institutions that surround it without also expecting more from the White House and the agencies themselves.<sup>124</sup> These voluntary steps to temper executive overreach from the inside-out are based on an administrator's concern for fairness and procedural legitimacy. Attention to procedure that is undertaken for non-instrumental

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5 U.S.C. § 553(b)(1)–(3) (2012). These procedures bolster expertise and reason-giving, as well as transparency, in agency rulemaking. *Id.*

120. Courts review a range of agency actions adopted under the APA and organic statutes empowering agencies to implement statutes. Typically, statutory interpretation is laid out by the agency and then reviewed by courts using different degrees of deference for statutory interpretation, factfinding, and policy judgments. *See, e.g., Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

121. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

122. The merit of the external constraints is that they maintain formalist conceptions of separated powers that use inter-branch competition to check excesses of power. Some say that they provide political accountability or promote reason-giving and expertise in agencies through the borrowed power of Congress and courts. However, on structural constraints, despite the nondelegation doctrine, delegation of legislative authority to agencies is typically broad and does not constrain very much agency action. *Am. Trucking Ass'n Inc.*, 531 U.S. 457 (noting that nondelegation case law has only struck down delegations on two occasions). Challenges to legislative vetoes or restrictions on the President's ability to appoint and remove agency personnel do not constrain very much agency action either. *Chadha*, 462 U.S. at 919 (prohibiting legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that once an agency officer is confirmed by the Senate, Congress's ability to remove the official is limited to impeachment).

123. 5 U.S.C. § 553(a)(2) (creating an exception for "a matter relating to agency management"); 5 U.S.C. § 553(b)(3)(A) (creating an exception for "rules of agency organization, procedure, or practice"); 5 U.S.C. § 553(b)(3)(A) (creating an exception for "interpretive rules, general statements of policy").

124. See Part III for examples of the kinds of executive oversight and agency self-regulation that might help.

reasons can foster the legitimacy of administrative action even more effectively than controls from the outside.

## II. CASE STUDIES OF THE ADMINISTRATOR-IN-CHIEF FROM IMMIGRATION LAW

Three case studies follow. They each show President Obama acting as the Administrator-in-Chief in the area of immigration law. Each case study traces the process development for a specific policy and highlights the three basic tasks of internal administration described as conditions for legitimate presidential intervention into agency policy. Though all three conditions appear in each case study, a defining feature is highlighted within each case study to permit in-depth analysis. The cases vary in terms of policy orientation and policymaking form. The purpose of including cross-case variation is to sketch the parameters of the theory that the President stands on his firmest ground when exercising the three C's, regardless of the policy orientation or policymaking form.<sup>125</sup> The in-case analysis supports the insight that a president can succeed or fail in his administrative functions, even within the context of a single policy.<sup>126</sup>

Each case study combines information and analysis from a variety of print sources, including journalistic reports, community advocacy, academic scholarship, government sources, and in-depth interviews with government officials and immigration advocates. Although no single official can speak for the *mélange* of motivations behind an agency's policy and the small size of the sample does not serve the purpose of representativeness, these selective interviews provide insight into the internal perspectives of key decisionmakers within the agency.<sup>127</sup> My own observations and insights from administrative theories of institutional design, presidential control, and bureaucratic discretion also inform the analysis.<sup>128</sup>

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125. Although a case study comparison cannot generate the same type of testable hypothesis as a quantitative study or formal design, case study comparisons permit causal inferences and can be especially valuable for process tracing and the development of conceptual typologies. ALEXANDER GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (2005).

126. For example, President Obama was more successful with DACA than DAPA, less successful with Secure Communities than its successor PEP. For more discussion within case analyses, see *id.*

127. Jennifer Hochschild, *Conducting Intensive Interviews and Elite Interviews*, Workshop on Interdisciplinary Standards for Systematic Qualitative Research (2009).

128. For each case study, I spoke with two or three former or current immigration officials within DHS or its sub-agencies. I also spoke with immigration attorneys familiar

The case studies begin with a preliminary section describing the statutory framework and organizational infrastructure of the immigration bureaucracy for context.

### *A. Mapping the Immigration Bureaucracy*

The immigration-related agencies of the regulatory state are mostly housed in DHS. It is a young agency, and a sprawling one. Following September 11, 2001, twenty-two agencies were consolidated into DHS under President George W. Bush, making President Obama the first Democratic President to govern it.<sup>129</sup>

Among the key features of institutional reform was a functional division of service to immigrants in USCIS from the enforcement of immigration laws by Border Patrol and ICE. The adjudicative functions were isolated from DHS and instead placed in the DOJ Executive Office of Immigration Review, which houses the immigration courts and Bureau of Immigration Appeals. Faced with intensifying demands for immigration enforcement, the scope and size of these immigration-related agencies has grown on every measure—staff, number of deportations, range of operations, statutory grounds for deportation—albeit unevenly.<sup>130</sup> The agency missions sometimes complement, but sometimes compete for jurisdiction.

The resulting structure of the immigration bureaucracy is often described as unwieldy, inefficient, and ineffective. Criticism of the structure of the DHS has a history. Its predecessor, the Immigration and Naturalization Service (INS), suffered longstanding institutional design problems.<sup>131</sup> Insufficient funding, institutional fragmentation, lack of clarity about mission or internally contradictory missions, and poor workplace

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with the policies. All interviews were conducted off-the-record unless specific permission was granted for attribution. IRB clearance for these interviews was granted in connection with Protocol 16-0484 exemptions 2, 3 at University of Colorado.

129. See Homeland Security Act of 2002, 6 U.S.C. §§ 101–103, §201(f)(2)(g), §402(3) (2012) (Granting the President the Authority to Transfer Agencies to be under DHS auspices; transferring ICE responsibility to DHS). The major statute governing immigration law is the Immigration and Naturalization Act (INA). INA § 103 grants broad authority to the Secretary of Homeland Security (formerly the Attorney General when INS was part of the DOJ), who “shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens.” 8 U.S.C. § 1103(a)(1).

130. See Stephanie Francis Ward, *As Funding for Immigration Enforcement Increases, So Will Court Backlog*, ABA JOURNAL (Mar. 6, 2017), [http://www.abajournal.com/news/article/as\\_funding\\_for\\_immigration\\_enforcement\\_increases\\_so\\_will\\_court\\_backlog](http://www.abajournal.com/news/article/as_funding_for_immigration_enforcement_increases_so_will_court_backlog).

131. See generally KITTY CALAVITA, *INSIDE THE STATE* (1992); MILTON MORRIS, *IMMIGRATION—THE BELEAGUERED BUREAUCRACY* (1985).

culture, especially for line officers, were the result.<sup>132</sup> Many of the institutional problems remain after the DHS reorganization following 9/11. Judge Mariano-Florentino Cuéllar, who prepared a presidential transition report for President Obama before joining the bench, discusses organizational fragmentation between (1) DHS and DOJ and (2) within the three branches of the DHS.<sup>133</sup> Efforts to overcome the intra-agency and inter-agency fragmentation are ongoing.<sup>134</sup>

DHS confronts additional challenges, beyond institutional design. Agency culture impacts the capacity and motivation of the agency to deliver on its mission, and DHS's reputation for low morale is legion.<sup>135</sup> The agency is additionally constrained by the high-profile nature of the immigration and the political sensitivities surrounding it. Entrenchment makes it politically costly to back down on immigration enforcement. Shifts can and do occur. For example, President Obama shifted enforcement efforts away from the worksite raids used during the Bush administration toward "criminal aliens."<sup>136</sup> President Trump has shifted toward terrorism and national security threats.<sup>137</sup> As Judge Cuéllar noted, limited presidential control over the bureaucracy is a consequence of these institutional and cultural constraints.<sup>138</sup>

Apart from structure and culture, the President's limited powers over the immigration bureaucracy are partly explained by the lack of resources available that the President commands relative to the scope of the agency's mandate. Although the President can make recommendations to the agency, Congress passes the budget.<sup>139</sup> For many years, Congress's budget

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132. *Id.* at 87–94.

133. MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* (2013).

134. *See, e.g.*, DHS, *DHS UNITY OF EFFORT INITIATIVE 2014*, <https://www.dhs.gov/news/2016/11/16/statement-secretary-johnson-inspector-generals-report-dhs-management>.

135. Numerous interviews spoke to agency morale. *See, e.g.*, interviews with DHS General Counsel officials (May 30, 2016; May 31, 2016, 6; June 5, 2016). *See also* Jerry Markon, *Homeland Security Ranks Dead Last in Morale—Again—But Jeh Johnson's Morale Is High*, WASH. POST (Sep. 29, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/09/29/dhs-disappointed-by-latest-low-morale-scores-vows-to-keep-trying/> (reporting survey of government morale that shows DHS at lowest government-wide).

136. CUÉLLAR, *supra* note 133, at 53.

137. Exec. Order No. 13, 769 82 Fed. Reg. 8977 (2017)

138. CUÉLLAR, *supra* note 133, at 57.

139. *See* Pasachoff, *supra* note 10 (describing use of budget to control policy, including OMB prioritization of existing resources); Mark Jia, *Immigration Law—Office of Legal Counsel Issues Opinion Endorsing President Obama's Executive Order on Deferred Action for Parental*

could not keep pace with the scale of immigration enforcement. The government had the capacity to remove less than 4% of the 11.3 million undocumented immigrants living inside the United States, even at the historically high level of 400,000 removals each year.<sup>140</sup> The congressional purse strings on the spending of the budget also influence the ability of the agency to allocate the resources that it receives toward its various programs.<sup>141</sup> Congress's detention bed mandate calling for 34,000 beds in 250 facilities across the country, per day, is commonly linked to DHS's enforcement metrics.<sup>142</sup>

In the face of resource limitations, President Obama's deferred action policies tackled the undocumented immigrant population from two sides. First, through a variety of executive actions, the President announced enforcement priorities, beginning in 2011 with the ICE Director John Morton's memo increasing the priority of criminal history<sup>143</sup> and continuing in 2014 with the DHS Secretary Jeh Johnson's comparable memo adding recently-arrived immigrants.<sup>144</sup> Second, on the de-prioritization side, President Obama used executive action to grant deferred action and work permits to undocumented immigrants who are long-term residents. The 2012 Deferred Action for Childhood Arrivals (DACA) program is the most notable deferred action program that provides relief for those who arrived many years ago at a young age.<sup>145</sup> These

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*Accountability—The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 128 HARV. L. REV. 2320, 2323 (2015).

140. The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., at 1 (Nov. 19, 2014) (acknowledging DHS statistics on enforcement capabilities given current resources).

141. Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>.

142. *Id.*

143. ICE Director John Morton Memo on Civil Immigration Enforcement Priorities (Mar. 2, 2011) [hereinafter Morton memo], [https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities\\_app-detn-reml-aliens.pdf](https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf)

144. DHS Secretary Jeh Johnson Memo on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) [hereinafter Johnson Priorities Memo], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

145. Consideration of Deferred Action for Childhood Arrivals (2012) [hereinafter DAPA Memo], <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>. The 2014 DAPA memo was never put into effect, following a

interlocking priorities set in motion our three case studies of the President acting as Administrator-in-Chief: deferred action for long-time undocumented residents, detainees to transfer “criminal aliens” into removal proceedings, and border control against recent arrivals.

*B. Case Studies of the President as Administrator-in-Chief in Immigration Law*

President Obama’s administration relied on a strategy of prioritized enforcement to manage the clash of broad legislative mandates and limited resources. Building on selective practices of discretion, his DHS Secretaries issued memos outlining positive and negative priorities for the agency.<sup>146</sup> The articulation of these priorities serves administrative functions and carries implications for immigration policy beyond the agency.

Importantly, these policies and programs resulted from nonbinding agency actions, not executive orders as they were often characterized in public discussion.<sup>147</sup> The policies were issued through nonbinding policy statements and memoranda that can be collectively categorized as guidance,<sup>148</sup> though they are sometimes layered atop existing regulations.<sup>149</sup>

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nationwide injunction left in effect by a 4-4 Supreme Court decision in *Texas v. United States*, 136 S. Ct. 2771 (2016).

146. Morton memo 2011, *supra* note 143; Johnson Priorities Memo 2014, *supra* note 144.

147. The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. *Id.* Furthermore, executive orders must comply with preparation, presentation, and publication requirements. 44 U.S.C. §1505 (2012). The distinction between an executive order and an executive action, a broader term encompassing agency guidance memos, is described in VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION (2014).

148. For example, the 2012 DACA program and the 2014 DAPA program relief on DHS agency guidance. *See, e.g.*, Janet Napolitano, DHS Sec’y, Memorandum Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/publication/memorandum-deferred-action-process-young-people-who-are-low-enforcement-priorities>; Jeh Johnson, DHS Sec’y, Memorandum Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

149. The immigration detainer program that replaced Secure Communities in 2014 was announced through guidance; however, the underlying use of detainers had been promulgated by agency regulations years ago. *See* Memorandum from Jeh Johnson, DHS Sec’y, to Thomas S. Winkowski, Acting Dir., U.S. Citizenship & Immigr. Serv. (USCIS), on Secure Communities (Nov. 20, 2014) [hereinafter Johnson Secure Communities Memo],

Although President Obama invested considerable energy in crafting, implementing, and defending them, they were not claimed to be binding presidential directives or executive orders.<sup>150</sup> Rather, President Obama's policies relied on partnerships with other agencies, Congress, and states.<sup>151</sup>

The three case studies of immigration policy during the Obama administration illustrate the dimensions and dynamics of a president acting as an administrator-in-chief. The case studies were chosen for their theoretical import and also their ongoing contemporary interest. The first case study, USCIS's administration of DACA, concerns a policy of immigrant inclusion and temporary deportation relief with a strong operational dimension driven by the need for resource allocation. The second and third case studies concern exclusionary enforcement measures to advance policies of crime control and border control. The ICE policies on immigration detainees evince a strong internal operational dimension by drawing up discretionary criteria for detainees to pair presidential priorities with congressional objectives, while also bolstering agency effectiveness in increasing detention and removal. The border crackdown for recent arrivals lacks as strong an operational core given that the policy was forged in the midst of a migration crisis that the existing infrastructure proved ill-equipped to address.<sup>152</sup>

### 1. Using Guidance to Provide Administrative Relief to Undocumented Immigrants

The most well-known example of executive administration in immigration is President Obama's attempt to provide temporary relief from deportation to long undocumented immigrants through deferred action. In the thirty years since Congress's last legalization, the population of long-

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[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communitie\\_s.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communitie_s.pdf).

150. See generally, Jorge Ramos & Brett LoGuirato, *Obama Defends His Record on Immigration to Jorge Ramos*, FUSION (Dec. 9, 2014, 9:59 PM), <http://fusion.net/video/32969/watch-obama-spars-with-jorge-ramos-on-immigration/>; Alicia Montgomery, *President Obama Defends His Record on Race*, NPR (July 1, 2016) <http://www.npr.org/sections/codeswitch/2016/06/28/483873682/president-obama-defends-his-record-on-race>; David A. Martin, *A lawful Step for the Immigration System*, WASH. POST (June 24, 2012) [https://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/24/gJQAgT0O0V\\_story.html?utm\\_term=.1c6417010ed2](https://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/24/gJQAgT0O0V_story.html?utm_term=.1c6417010ed2).

151. See Sheryl Gay Stolberg, *Gentle White House Nudges Test the Power of Persuasion*, N.Y. TIMES (Feb. 23, 2010), <http://www.nytimes.com/2010/02/24/health/policy/24persuade.html>.

152. These very different programs are studied in two prior articles. See generally Chen, *Beyond Legality*, *supra* note 13; Chen, *Trust in Immigration Enforcement*, *supra* note 13.

time undocumented immigrants grew to 11.3 million.<sup>153</sup> President Obama lacked the resources and will to deport them all. After several failed efforts for legislative reform and under pressure from community groups, the President announced his decision to allocate more resources to the benefits-granting component of DHS, USCIS, through the creation of DACA in 2012 and Deferred Action for Parents of Americans (DAPA) in 2014.<sup>154</sup> The story of deferred action is one of a president engaging in the agenda-setting and resource allocations functions of public administration, with some success. It is also the story of an operational policy on a morally contentious issue being undone by procedural deficiencies in the face of substantive controversy.

In 2012 and 2014 respectively, the President prompted his DHS Secretaries—first, Janet Napolitano and then Jeh Johnson—to work with USCIS to promulgate agency guidance consistent with his reprioritization goals. The priority memos packaged together numerous policies in an effort to rationalize and modernize the chaotic enforcement from prior administrations. The 2012 DACA memo lowered the priority of young people who migrated without documents as children, were younger than age thirty-one before June 15, 2012, and have resided continuously in the U.S. since their entry.<sup>155</sup> The 2014 DAPA memo lowers the priority of undocumented immigrants with U.S. citizen and legal permanent resident children based on similar equities of long-term and continuous residence.<sup>156</sup>

The deferred action programs drew directly upon longstanding practices of exercising prosecutorial discretion in individual removal cases.<sup>157</sup> The programs were consequential on many measures. DACA provided beneficiaries with increased educational and economic opportunities, and it

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153. See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CENT. (Nov. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>.

154. See *supra* notes 128–29.

155. *Consideration of Deferred Action for Childhood Arrivals*, USCIS Guidance (last visited Feb. 18, 2017), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#guidelines>.

156. See Johnson Priorities Memo, *supra* note 144; USCIS, *Executive Actions on Immigration*, <https://www.uscis.gov/immigrationaction> (last updated April 15, 2015). The 2014 memo encompassed DAPA and also an expansion of DACA (higher age cap and three-year, rather than two-year deferral), though the paper consolidates discussion of DACA 2014 and DAPA 2014. *Id.*

157. Immigration advocates initiated numerous FOIA requests before obtaining information about the practice of prosecutorial discretion prior to Obama's 2012 announcement of the DACA program. See SHOBA WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 1–2* (2015).



touched off a wave of state legislation to further incorporate these immigrants into society, including becoming eligible for driver's licenses, in-state tuition, and even health care.<sup>158</sup> DACA 2014 and DAPA would have taken a similar path; however, it was blocked from implementation by a federal district court injunction left in place by an evenly-divided Supreme Court.<sup>159</sup>

Certain components of the DACA memo were substantive, such as announcing values and priorities for enforcement; other components were operational. The memo codified existing criteria without changing their substance or altering removal priorities. It systematized the process for considering deferrals by producing application forms and compliance manuals, and it created service centers to process the applications.<sup>160</sup> While it facilitated the award of certain benefits such as the Employment Authorization Document (EAD) that granted permission to work, it did not create new benefits; EADs were previously codified by a regulation under the Reagan Administration.<sup>161</sup> DACA functioned as the missing link for recipients to obtain identity cards from states and other entities willing to provide them, though it did not compel those benefits.<sup>162</sup> Like its successor program, it did not create a new legal status.<sup>163</sup>

Though there is certainly substantive policy involved in deprioritizing enforcement against a category of individuals, agency officials also understood the point of the guidance was to deal with internal, bureaucratic, and pragmatic problems with creating a coherent enforcement strategy with insufficient resources. As between ICE and USCIS, resource allocations shifted away from enforcement and toward the provision of administrative relief. In interviews, numerous government officials described the need to reprioritize DHS resources among its

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158. National UnDACAmented Research Project reports consistently show increased education, job placement, and income for DACA recipients. See generally NATIONAL UNDACAMENTED RESEARCH PROJECT, <http://dacastudy.com/> (last visited Feb. 18, 2017).

159. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex., 2015) (granting Plaintiffs' motion for a preliminary injunction).

160. See Cox & Rodríguez, *Redux 1*, *supra* note 41.

161. 8 C.F.R. § 274(a.2) (2012).

162. *Id.* This account is challenged in the *Texas v. United States* litigation, wherein states asserted that they were compelled to provide driver's licenses to DACA beneficiaries at a cost to the state. 787 F.3d 733, 745 (5th Cir. 2015).

163. The issue of creating a new status through the lawful presence designation is taken up in DAPA, which the Supreme Court scrutinized during oral argument in *United States v. Texas*. See Transcript of Oral Argument at 34, *United States v. Texas*, 136 S. Ct. 2271 (2015).

component agencies.<sup>164</sup> USCIS was primarily responsible for administering DACA.<sup>165</sup> Compared to other DHS agencies, it was small in size and had a limited budget.<sup>166</sup> Some senior officials called it the “runt of the litter.”<sup>167</sup>

The resource shift forged inter-departmental conflict, placing USCIS and ICE at odds with one another in their exercises of discretion.<sup>168</sup> Professor Michael Kagan describes the conflict between line officers at ICE and the political leadership at DHS, positing that the struggle over immigration policy exists, “on one side, the President and his appointed agency heads, who have sought to use prosecutorial discretion to shield many unauthorized immigrants from deportation” and, on the other side, “frontline immigration enforcement officers and their union representatives who do not agree with the President’s agenda.”<sup>169</sup> Kagan’s article and subsequent writings present rich descriptions of the intransigence of ICE officers in the face of the DHS priorities memos that made long-time undocumented residents an unlikely target for removal.<sup>170</sup> Similar descriptions appear in other accounts of the inner workings of ICE.<sup>171</sup> ICE and USCIS’s battle came to the fore in the ICE officers’ vote of no confidence for their political leadership and the filing of *Crane v. Johnson*.<sup>172</sup>

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164. Interviews with USCIS and DHS General Counsel officials (May 30, 2016; May, 31, 2016; June 5, 2016).

165. USCIS is the benefits granting agency within the DHS.

166. Since a 1989 appropriations bill created the Immigration Examination Fees Account, USCIS is funded by user fees rather than congressional appropriations. WILLIAM KANDEL, CONG. RESEARCH SERV., R44038, USCIS FUNDING AND ACCOUNTABILITY TO CONGRESS (Feb. 19, 2015).

167. Interviews with USCIS officials (May 31, 2016).

168. Interview with DHS officials (July 5, 2016).

169. See Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 667 (2016).

170. *Id.* at 684–89 (focusing on front line resistance); see also Michael Kagan, U.S. v. Texas—Some Observations as the Briefing Begins, YALE J. ON REG. L. & REG. PRAC.: NOTICE AND COMMENT BLOG (Mar. 9, 2016), <http://www.yalejreg.com/blog/u-s-v-texas-some-observations-as-the-briefing-begins> (describing the U.S. government’s defense of DACA and DAPA as an attempt to control the “idiosyncratic Behavior of DHS Agents”).

171. See Hiroshi Motomura, *President’s Dilemma, Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 23–24 (2015) (discussing “who” the within executive branch gets to exercise discretion); Ahilan Arulantham, *The President’s Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014), <http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html>; see also Cox & Rodríguez, *Redux 1*, *supra* note 41, at 530–32; Cox & Rodríguez, *Redux 2*, *supra* note 61, at 187–88; Hemmer, *supra* note 112, at 772–74 (2014).

172. 920 F. Supp. 2d 724 (N.D. Tex. 2013). The *Crane* lawsuit challenged the 2012 DACA program by the State of Mississippi and several ICE officers on the grounds that the

Although the legal challenge was ultimately dismissed for lack of standing and subject matter jurisdiction, it unveiled internal dissent toward President Obama's immigration policies along political and career staff lines.<sup>173</sup>

Within USCIS, increased resource allocations enabled greater efficiency, consistency, and predictability in the granting of individualized claims for relief. President Obama's allocation of greater resources for USCIS allowed it to increase hiring for processing DACA applications and rationalize the individualized exercises of discretion. This hiring authority also presented opportunities to diversify the overall composition of the staff. USCIS is the benefits-granting agency within DHS, which might give the impression that it consists of a pro-immigrant staff. However, many of the long-time civil servants in USCIS began as trial attorneys in the INS legacy agency, where they were tasked with enforcement rather than services.<sup>174</sup> Others came to USCIS for reasons unrelated to the agency mission, such as higher prestige or salaries.<sup>175</sup> In contrast, newly-hired USCIS attorneys came into the agency for the express purpose of furthering the agency's DACA mandate.<sup>176</sup> The net effect was to broaden the ideological composition of the office to include those who embraced the President's strategy of following institutional enforcement priorities rather than pursuing every policy with equal force.<sup>177</sup>

Still USCIS's organizational culture of following rules literally could not easily be overcome. In this respect, the USCIS shared the law enforcement

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exercise of prosecutorial discretion interfered with officers' oaths of office to execute and defend the law. Amended Complaint, 920 F. Supp. 2d at 724 (N.D. Tex. 2013) (No. 3:12-cv-03247-O). Crane, representing the government employee union, apparently resented that their discretion to depart from headquarters' priorities was being taken away in the DACA memo that "established a system that mandates that the nation's most fundamental immigration laws are not enforced." See Andrew Becker, *Tension Over Obama Policies Within Immigration and Customs Enforcement*, WASH. POST (Aug. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606561.html>; Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html>.

173. See Becker, *supra* note 172.

174. Interviews with officials in the USCIS office (May 5, 2016). DHS officials relayed to me that the service-side of the reformulated USCIS attracted some attorneys not because of mission but because of better opportunities for professional advancement and salary. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* DHS officials relayed to me that the service-side of the reformulated USCIS attracted some attorneys not because of mission but because of better opportunities for professional advancement and salary. *Id.*

mindset of its sister agencies.<sup>178</sup> As one former INS official told me, in the years preceding DACA and DAPA, USCIS attorneys routinely issued Notices to Appear upon denial of immigration benefits, even for non-threatening situations like missing a one-year filing deadline for asylum.<sup>179</sup> The effect was to transform immigration benefits cases into enforcement cases without evaluating the case from the perspective of the agency's enforcement strategy.<sup>180</sup> Interviews with government officials in USCIS referred to changing the mindset of non-discretion as part of the considerable "spade work" that needed to be undertaken before DACA.<sup>181</sup> Articulating the affirmative criteria for deferred action as programmatic criteria encouraged individual line officers to consider agency-wide factors in their determinations about individual applications for relief.<sup>182</sup>

Still President Obama's attempt to expand DACA with the issuance of DAPA in 2014 tested the extent to which hearts and minds had been changed. President Obama appointed as DHS Secretary, Jeh Johnson, a well-respected lawyer without strong policy priors on immigration enforcement.<sup>183</sup> President Obama charged Secretary Johnson with extending administrative relief. Secretary Johnson spent the bulk of his early months in office on a memo outlining avenues of administrative relief. He exchanged multitudes of drafts with the White House and consulted with varied interest groups, from business to immigration to labor, in closed-door meetings.<sup>184</sup> The result was a policy modeled on DACA, with a few significant expansions. DAPA was broader in scope and scale than DACA, rendering twice as many undocumented immigrants eligible for temporary relief and using criteria that exceeded prior legislative proposals for a DREAM Act. DAPA was more controversial in its inclusion of adults who, though possessing positive equities, were less sympathetic than the DACA youth who were not culpable for the decision to migrate without documentation. DAPA, unlike DACA, named lawful presence and more

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178. See Thomas W. Donovan, *The American Immigration System*, 17 INT'L J. REFUGEE L. 574, 574 (2005) (noting USCIS is tasked with conferring benefits to the immigrant community and other missions might be incompatible).

179. Interview with former INS official (Aug. 2016).

180. *Id.*

181. *Id.*

182. *Id.*

183. See Ann Palmer et al., *How Obama Got Here*, POLITICO (Nov. 20, 2016), <http://www.politico.com/story/2014/11/how-obama-got-here-113077>.

184. By one count, the White House collaboration with the DHS administration produced more than 60 drafts in 8 months by this point. *Id.*; see also Interview with immigration attorney (June 6, 2016).

strongly supported the award of associated benefits.<sup>185</sup> This last expansion proved the most consequential, exacerbating procedural deficiencies in DACA in the face of heightening division.<sup>186</sup>

As when DACA was first introduced, the introduction of DAPA was resisted by ICE agents and in field offices.<sup>187</sup> The agents subtly resisted training. Secretary Johnson's reminders of their duty to follow the new priorities were rebuked and complained about in the national media.<sup>188</sup> While these intra-agency tensions were scarcely mentioned by the government in its defense of DAPA during *Texas v. United States*,<sup>189</sup> Washington insiders and veterans of immigration policy report that these internal forces were strong and had been long festering.<sup>190</sup>

In addition, the use of incremental fixes to pursue ambitious policy changes rendered the policies vulnerable to challenge from outside the agency. By 2014, partisan rancor among elected officials reached a boiling point. Congressional resistance to President Obama's 2012 executive action exacerbated stalemate on continued immigration reform. To the frustration of community activists, the President played into the political maneuvering by delaying taking further executive action until the 2014 midterm elections.<sup>191</sup> The delay proved unfortunate because by the time

185. DAPA

Memo,

[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf); see also Josh Blackmun, *DACA Unlike DAPA Does Not Confer "Lawful Presence"*, Josh Blackman's Blog ("The phrase 'lawful presence' appears nowhere in the memorandum. In contrast, the November 2014 memorandum establishing DAPA expressly noted that it conferred 'lawful presence.'"), <http://joshblackman.com/blog/2017/03/14/daca-unlike-dapa-does-not-confer-lawful-presence/>.

186. Anil Kalhan, *DAPA, "Lawful Presence" and the Illusion of a Problem*, YALE J. ON REG.: NOTICE & COMMENT BLOG (2016) (explaining how lawful presence became concern in litigation over DAPA), <http://yalejreg.com/nc/dapa-lawful-presence-and-the-illusion-of-a-problem-by-anil-kalhan/>.

187. Preston, *supra* note 172.188. *Id.*

189. 787 F.3d 733, 745 (5th Cir. 2015).

190. Interviews with USCIS officials (May 30, 2016; May 31, 2016). The fragmentation of the service and enforcement functions within the INS, the conflicts of political leadership and civil servants, and confusion of shifting agency culture are not unique to President Obama's immigration agencies. *Id.*

191. Interview with immigration attorney (June 6, 2016). Though President Obama continued to promise immigration reform, President Obama did not want to jeopardize the political chances of congressmen running in close races by angering voters who were not enamored with the President's prior use of executive action. The concern became particularly acute following the unexpected loss of House Majority Leader Eric Cantor, who had supported a piecemeal approach toward immigration reform. It was widely interpreted

Congress and President Obama were ready to act, the window of opportunity was closing.<sup>192</sup> On November 20, 2014, President Obama introduced DAPA in a televised speech, proclaiming that he would do “everything in his power” to rectify the broken immigration law despite his continuing preference for Congress to take action.<sup>193</sup> There was no denying the political overtone. President Obama claimed credit for enacting the substantive policy, even as he disclaimed his desire to use administrative means. The response was political all-around: supporters lauded the actions as “bold, courageous, and generous”<sup>194</sup> and opponents derided it as executive overreach—an attempt by President Obama to circumvent Congress in a way that runs afoul of separation of power values and administrative procedures for rulemaking under the APA.<sup>195</sup> Constant comparisons between executive and legislative action underscored the view that President Obama had engaged in policymaking and even impermissible lawmaking.

The opponents’ framing won. Almost immediately after the issuance of DAPA in 2014, Speaker of the House John Boehner threatened to sue the President for executive overreach, and the House of Representatives made repeated attempts to cut funding for DACA implementation through proposed appropriations bills.<sup>196</sup> Texas led twenty-seven states in filing a

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as a sign that Congress would not be able to secure comprehensive immigration reform and resulted in even more pressure for the President to act. *Id.*

192. News had broken that a rush of Central Americans were fleeing violence by crossing the southwestern border in record numbers. Compounding the pressure, the media reported that some of the Central American asylum-seekers had heard of DHS Secretary Janet Napolitano’s 2012 memorandum and mistakenly believed they would be able to remain in the U.S. notwithstanding their recent arrival. See Stephen Dinan, *Surge in Illegal Immigrants Blamed on U.S. Policy, Not on Spiking Violence in Central America*, WASH. TIMES (June 11, 2014), <http://www.washingtontimes.com/news/2014/jun/11/surge-illegals-blamed-us-policy/>; see also *supra* Part II.B.3.

193. See Memorandum from Jeh Johnson, DHS Sec’y, to Thomas Winkowski, Acting Dir., USCIS, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

194. Statement from Rep. Gutierrez (D-Ill.) who was a key supporter of the DREAM Act and liaison to the White House. IMMIGRATION BATTLE. Dir. Shari Robertson and Michael Camerini, (Frontline & Independent Lens 2015.).

195. *Id.*

196. The Department of Homeland Security Appropriations Act (2015) funded DHS but restricted funds for DACA implementation. See H.R. 240, 114th Cong. (2015–2016) (the Department of Homeland Security Appropriations Act which funded DHS but restricted funds for DACA implementation became law); H.R. 38, 114th Cong. (2015–2016)

lawsuit in federal court for a preliminary injunction to bar implementation against the DAPA program.<sup>197</sup> Their challenge, *Texas v. United States*, succeeded in the federal district court and the Fifth Circuit.<sup>198</sup> As the case proceeded through the federal courts, constitutional issues about the President's power gave way to technical questions about administrative law and the procedural validity of the USCIS guidance.<sup>199</sup> Yet the political overtones never relented. The district court decision used thinly-veiled political rhetoric, alongside its technical legal analysis, to attack the motives of the President and the operation of the program and the presiding judge became embroiled in scrutiny over his own political motivations.<sup>200</sup> The Fifth Circuit, consisting of two Republican-appointees and one Democratic appointee, split along partisan lines when affirming the district court opinion.<sup>201</sup> The refusal of Congress to fill a vacancy in the U.S. Supreme Court in the face of uncertainty about the coming presidential election led to a 4-4 impasse that left in place the lower court decisions, without resolving the underlying controversy.<sup>202</sup> The election of a new president who can unilaterally withdraw DACA and DAPA—with a stroke of the same pen that created them—further underscores the limits of executive action.

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Rep. Ted Yoho (R-Fla.) introduced a bill titled “Preventing Executive Overreach on Immigration Act” but it was not passed. *Id.*

197. *Texas v. United States*, 86 F. Supp. 591 (S.D. Tex. 2015).

198. *Id.* The Fifth Circuit affirmed the district court's initial injunction and merits decisions in subsequent 2-1 decisions. *Texas v. United States*, 86 F. Supp. at 677–78 (S.D. Tex. 2015), *aff'd*, 787 F.3d 733, (5th Cir 2015), *aff'd*, 136 S. Ct. 2271 (2016) (the U.S. Supreme Court came to a 4-4 impasse in June 2016, issuing a one-sentence decision that deferred to the Fifth Circuit's injunction on the program without offering justifications).

199. In particular, the *Texas v. United States* litigation focused on the appropriateness of the Obama administration's decision to proceed without notice-and-comment rulemaking while constructing a large-scale program with significant practical consequences for states and employers, and potentially binding legal consequences. An amicus brief filed by a group of prominent administrative law professors considered the DACA memo to fall into three exemptions for notice-and-comment rulemaking: internal subject matter, guidance, and grant or benefit. Brief United States, et al. as Amici Curiae Supporting Petitioners (*United States v. Texas*, 136 S. Ct. at 2271 (2016) (No. 15-674)).

200. Kalhan, *DAPA, “Lawful Presence” and the Illusion of a Problem*, *supra* note 186; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015).

201. See *Texas v. United States*, 787 F.3d at 743 (Judges Smith and Elrod wrote the majority opinion). Judge King filed a passionate dissent. *Id.* (King, J., dissenting).

202. See *United States v. Texas*, 136 S. Ct. at 2271 (2016) (per curiam), *rehearing denied*, 137 S. Ct. 285 (2016).

In sum, the Obama administration converted a substantive policy change into an operational imperative. The intermingling of administrative procedure and substantive policy in DACA was risky, though it survived political and legal attacks due to the popular support it enjoyed. However, brewing partisan division engulfed the subsequent expansion of deferred action in DAPA. This political ferment led to the undoing of the program in a coordinated campaign involving the courts, Congress, and the states. In the view of the President, the executive action and USCIS guidance strove to set a coherent policy for the agency through operational changes to resource allocation for enforcement. Perhaps because of their successes with DACA, the Obama administration took risks with DAPA, expanding the substantive reach of their executive power without shoring up administrative procedure. Opponents in Congress and Republican-led states vehemently disagreed with this administrative exercise and pushed back. They emphasized the costs of policy spillover effects from the guidance, especially costs borne by the states, over the benefits of a well-functioning administration of immigration policy. While policy spillovers are sometimes inevitable and not always problematic, in the case of DAPA the conflation of operational needs with substantive effects sowed confusion and acrimony. The acrimonious politics surrounding deferred action in 2014 eroded what had, for a brief moment, been a victory for public administration and that later became undone as presidential policymaking.<sup>203</sup>

## 2. *Centralizing Discretion over Detention for “Criminal Aliens”*

Presidential administration consists of more than operational intervention to advance coherent policy. It also entails the President’s assertion of control over discretion to ensure consistent decisions—the second task from the typology of internal administration. Two types of discretion must be controlled for immigration detention: decisionmaking within agencies to act on high priority flags by issuing detainer requests and the independent judgment of states and localities who can choose whether to cooperate with these detainer requests.<sup>204</sup> President Obama inherited

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203. At the time of writing this Article, the Trump Administration has not indicated whether it will end DACA. Maya Rhodan, *DREAMers Face Uncertain Future After Confirmation Hearings*, TIME MAGAZINE (Jan. 12, 2017).

204. Cf. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 694–97 (2015) (arguing that DACA was a “shift toward more systemic and categorical implantation of enforcement discretion,” and allowing for such prosecutorial discretion was an attempt to establish more equitable enforcement in terms of deportation); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PENN. L. REV. 1753, 1795–97 (2016) (analyzing the



impressive machinery that could flag incarcerated persons with immigration issues, which a vigorous ICE agency used to seek transfers of these individuals to civil immigration detention.<sup>205</sup> He cultivated a network of local law enforcement partners willing to cooperate with federal immigration enforcement.<sup>206</sup> Both exercises of discretion served the President's overarching goal of targeting "felons, not families" through his enforcement priorities. As with deferred action, President Obama attempted to recalibrate enforcement criteria. Within the category of "criminal aliens," he pushed ICE to focus on immigrants with serious criminal offenses, rather than pursuing full enforcement against more minor offenses.<sup>207</sup> In theory, this system of priorities ameliorated the severity of ICE's enforcement strategy. However, the execution of these priorities was clumsy and procedurally defective. The missteps fomented distrust among community stakeholders that led to the rescission of the program and doomed its replacement.<sup>208</sup>

The Criminal Alien Program (CAP) was an enforcement policy that prioritized the removal of noncitizens who have committed crimes.<sup>209</sup>

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different elements of DAPA to determine "whether [those] elements of DAPA truly reflect an exercise of enforcement discretion."). *See also* Dan Cadman & Mark H. Metcalf, *Disabling Detainers: How the Obama Administration has Trashed a Key Immigration Enforcement Tool*, CENTER FOR IMMIGRATION STUDIES, at 2 (Jan. 2015) ("Actions by state and local authorities that frustrate federal authority by claiming compliance is discretionary appear to be unconstitutional on their face.").

205. *See ICE's Criminal Alien Program (CAP): Dismantling the Biggest Jail to Deportation Pipeline*, IMMIGRATION LEGAL RESOURCE CENTER, at 1 (2016) (noting that ICE utilizes CAP to locate incarcerated persons who could potentially be deported and, based on this information, will transfer these persons to immigration detention).

206. *See Fiscal Year 2016 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, at 9 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>, (noting that since the implementation of the Priority Enforcement Program, state and local authorities have become more cooperative with federal immigration authorities).

207. *See* John Morton, *Memorandum: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, ICE, at 2 (Mar. 2, 2011) (identifying the priorities of apprehension based on the seriousness of the crime committed), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

208. The motivations for DHS's use of detainers was the subject of disagreement in my interviews. Agency insiders blamed Congress and attributed the program's failings to organizational dysfunction; agency outsiders blamed DHS for its lack of transparency and a substantive purpose that threatened constitutional norms of due process.

209. *See* ICE, CAP DESCRIPTION, <https://www.ice.gov/criminal-alien-program> (last visited on Feb. 21, 2017).

CAP, created by Congress during the appropriations process, mandated DHS's strong enforcement against this diverse category of immigrants that includes legal permanent residents with serious criminal convictions and immigrants whose only criminal offense is immigration-related.<sup>210</sup> DHS required efficient and strong enforcement to meet specific numerical benchmarks for detention and removal with allocated resources.<sup>211</sup> Operating through jails was a faster, cheaper, and safer way to meet benchmarks than through the indiscriminate use of field operations to find and capture those with qualifying convictions.<sup>212</sup> The use of immigration detainers to funnel incarcerated noncitizens into the civil immigration detention system was a longstanding practice, and it was codified in ICE regulations.<sup>213</sup> The criminal-to-civil transfers became far more prevalent once the Secure Communities program installed an information database in 2008 to identify incarcerated individuals who may also have violated immigration laws.<sup>214</sup> Detention and removal rates skyrocketed.<sup>215</sup>

Secure Communities relied on interrelated exercises of discretion. First, information sharing across agencies enabled federal immigration officials in ICE to screen the fingerprints of every individual arrested to check the prints against immigration records.<sup>216</sup> Once ICE learned that local law enforcement had a noncitizen in custody who was subject to removal, immigration authorities could request that local authorities provide advance notification of that noncitizen's scheduled release and detain, or "hold," the person until immigration authorities could take custody.<sup>217</sup> The second stage of coordination occurred when the local law enforcement responded to ICE's request, either agreeing to hold the noncitizen for transfer to ICE or releasing the person once the criminal sentence has been

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210. *Id.*

211. Although the funding for interior enforcement is high, it is dwarfed by border control and counter-terrorism. Interview with ICE official (June 13, 2016).

212. *Id.*

213. See generally Christopher Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008) (discussing histories of immigration detainers); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1475–78 (2015) (describing detainers within the context of federal-state crossover).

214. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1850 (2011) (discussing local-federal partnerships and devolution of immigration enforcement).

215. *Id.* at 1851.

216. *Secure Communities*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT, <https://www.ice.gov/secure-comunities.com> (last visited Apr. 14, 2017).

217. *Id.*

served.<sup>218</sup> Over the course of the Secure Communities program's life, each stage of decisionmaking between federal and local law enforcement underwent a roller coaster of expansions and contractions.<sup>219</sup> Eventually, acknowledging a loss of public confidence and ongoing challenges to the latest incarnation of the program, DHS Secretary Jeh Johnson replaced it with the Priorities Enforcement Program (PEP) in 2014.<sup>220</sup> PEP put several limits on federal immigration detainer requests. Rather than having states hold immigrants for transfer to ICE, in most cases, ICE requested that jails notify them of scheduled releases if there was probable cause to believe that the immigrant is deportable.<sup>221</sup> Criteria for triggering these notifications tilted toward more serious crimes.<sup>222</sup> In short, PEP aimed to control agency discretion in an effort to elicit local cooperation.<sup>223</sup>

Ensuring consistent decisions across both stages of discretion involved many obstacles. When President Obama took office in 2008, he inherited an ICE that vigorously pursued its enforcement mission and whose organizational culture was impervious to exercising discretion under any circumstance. More than one ICE official relayed in interviews the anecdote that ICE officers presented with a choice between deporting the proverbial undocumented grandmother and the undocumented murderer would go after both.<sup>224</sup> Many critics complained that this zero tolerance mindset created a chaotic, inconsistent, and unjust system of removal.<sup>225</sup> Changing the mindset in order to cure the organizational dysfunction was not easy.<sup>226</sup> In response, ICE Director John Morton in 2010 issued a memo listing criteria that shifted the benchmarks toward quality, not

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218. *Id.*

219. Among the important changes was a FOIA lawsuit that resulted in ICE clarifying that, at stage one, the detainer request was optional not mandatory. *NDLON v. ICE*, 827 F. Supp. 2d 242 (S.D.N.Y. 2011). The legal challenges to the use of immigration detainers, the Constitutional safeguards, and a roller coaster of policymaking continues. *Id.*

220. *See supra* note 149.

221. *Id.*

222. *Id.*

223. *See Written Testimony of ICE Director Sarah Saldana for a Senate Committee on the Judiciary Hearing Titled "Oversight of the Administration's Criminal Alien Removal Policies,"* DHS (Dec. 2, 2015), <https://www.dhs.gov/news/2015/12/02/written-testimony-ice-director-senate-committee-judiciary-hearing-titled-oversight>, (noting that PEP was designed to be flexible in favor of local authorities so as not to damage their trust and that "it is critically important that we bring back non-compliant jurisdictions as partners.").

224. Interview with ICE official (June 13, 2016); interview with DHS official (June 10, 2016).

225. *Id.*

226. *Id.*

quantity.<sup>227</sup> Still, as an ICE official explained to me, many ICE officers did not want discretion even once granted it, and many did not exercise it even after the Morton memo ordered it.<sup>228</sup> This made it difficult to implement the new enforcement priorities.

DHS leadership chipped away at the zero tolerance enforcement mindset by appealing to the hierarchical culture of ICE.<sup>229</sup> Respect for the chain of command meant that DHS headquarters called on ICE principals to bring their inferior officers and employees in line.<sup>230</sup> Talk of professionalization and modernization of ICE appealed to the ICE principals, even if it took more effort to persuade line officers.<sup>231</sup> DHS portrayed enforcement priorities as a “smart strategy” tantamount to the special missions used by elite units in DHS and by DOJ prosecutors.<sup>232</sup> Still designing guidelines for discretion was not easy given the overbreadth of statutory grounds for entering jail and then being flagged for removability.<sup>233</sup> ICE Director Morton issued a second memo with more detailed criteria in 2011.<sup>234</sup> More priorities memos followed and a Task Force was created to identify low-level crimes that should not be treated as serious for purposes of removal.<sup>235</sup> Insiders recalled “countless efforts” to alter agency practices, so many in fact that management became concerned

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227. Morton memo, *supra* note 143; Johnson Priorities Memo, *supra* note 144.

228. Interview with ICE official (Jun 13, 2016).

229. Interview with ICE official (June 13, 2016); interview with DHS official (July 5, 2016); interview with DHS official (June 23, 2016).

230. *Id.*

231. *Id.*

232. *Id.*

233. One ICE official relayed that the computer databases had difficulty disaggregating the crimes associated with priority triggers and, in particular, sorting federal re-entry crimes from violent crimes. Interview with ICE official (June 13, 2016); interview with immigration attorney (May 19, 2016).

234. See generally John Morton, *Memorandum: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, ICE (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

235. The Task Force reported that the program failed to target serious criminals and resulted in removal for low level offenses, such as traffic stops, civil immigration, and criminal reentry offenses. For example, driving without a license was tantamount to a status crime until more states allowed driver's licenses to undocumented immigrants. Yet existing criteria treated it as a serious misdemeanor for purpose of applying immigration enforcement priorities. The task force successfully persuaded ICE to change its policy. See DHS, HOMELAND SECURITY ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS (Sept. 2011), [big.assets.huffingtonpost.com/TaskForce.pdf](http://big.assets.huffingtonpost.com/TaskForce.pdf).

about “change fatigue.”<sup>236</sup> Looking back, principals across DHS acknowledge the gradual shift in ICE toward a culture of prioritized discretion, describing the change as “going through a difficult transition” and then “turning a corner” even if discretion could still be better controlled.<sup>237</sup>

The decentralized decisionmaking of local law enforcement in response to ICE requests posed a different set of challenges outside the agency. If the procedural deficiency ICE aimed to cure by centralizing intra-agency discretion was organizational dysfunction, the procedural deficiency ICE aimed to cure by communicating those discretionary criteria to localities was the lack of transparency.<sup>238</sup> From its inception, ICE has operated Secure Communities in a secretive manner. This lack of transparency eventually undermined the program and contributed to its rescission.<sup>239</sup> There was significant confusion about the program’s terms for participation—a congressional investigation and a FOIA lawsuit were required to clarify that local cooperation with ICE hold requests was voluntary.<sup>240</sup> The obfuscation shrouded the program in community mistrust.<sup>241</sup> DHS Secretary Napolitano attempted to ameliorate tension by establishing a Task Force comprised of respected stakeholders to improve local-federal relations.<sup>242</sup> However, Secure Communities had become a

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236. Interview with ICE official (June 13, 2016); interview with DHS official (June 13, 2016).

237. Interview with DHS official (June 13, 2016). See Motomura, *The President’s Dilemma*, *supra* note 171 (describing how the exercise of discretion was inconsistent at first after the Morton Memos were issued, that field officers originally refused to attend training sessions).

238. Chen, *Trust in Immigration Enforcement*, *supra* note 13.

239. Some DHS officials contested the characterization of their operation as “secretive,” instead saying that it suffered from disorganization that led to a perception of obfuscation. Interview with ICE officer (June 13, 2016).

240. See Letter from Janet Napolitano, DHS Sec’y, to Zoe Lofgren, Chairwoman, Subcommittee on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law (Sept. 7, 2010) (on file with the U.S. Department of Homeland Security) (responding to ICE’s inconsistent responses to local efforts to “opt-out”); *Nat’l Day Laborer Org. Network v. ICE*, 827 F. Supp. 2d 242, 258–59 (S.D.N.Y. 2011) (discussing FOIA litigation resulting in revelation that ICE knew program was not voluntary despite contrary claims); see also Christopher Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 205–09 (2012) (discussing the convoluted history of immigration detainees through a critical analysis of the government documents, forms, and regulations used to sustain them.).

241. Interview with immigration attorney (June 5, 2016); interview with DHS official (June 10, 2016); interview with DHS official (June 23, 2016).

242. See DHS ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES FINDINGS

lightning rod for all the problems with immigration enforcement. Although some meaningful changes resulted, the process did not dispel mistrust between local law enforcement, ICE, and citizen and noncitizen community members.

Additionally, legal uncertainty about the procedures used to hold immigrants beyond their scheduled release without a new warrant led to litigation in some counties.<sup>243</sup> In at least one lawsuit, the court questioned the detainment practices used to effectuate civil detention and stated that counties could be held legally liable for cooperating with ICE.<sup>244</sup> Once it became clear that counties could no longer shift responsibility to the origination of the request with the federal government, the system of federal-to-local transfers fell apart in some places.<sup>245</sup> Concerned about county liability for warrantless holds in violation of due process, a wave of counties withdrew their cooperation.<sup>246</sup> The federal government could not order non-cooperating jurisdictions to comply given that their participation was voluntary.<sup>247</sup> Nor could the federal government persuade counties to cooperate, given the broken trust operating through a decentralized system of discretion. Secretary Johnson cited the lawsuits and loss of legitimacy as a reason for rescinding Secure Communities.<sup>248</sup>

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AND RECOMMENDATIONS (2011), <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.

243. In a series of lawsuits, counties argued that immigration detainers violated constitutional prohibitions against seizure without the government furnishing independent probable cause of removability and a warrant for arrest. Several courts ruled that counties could be subject to jurisdictional liability for honoring ICE's detainer requests, once ICE had clarified detainers were optional and not mandatory. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (finding that a county could be civilly liable for unlawfully detaining immigrant for ICE because it was not *required* to comply).

244. *See Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*9, \*11, \*12 (D. Or. Apr. 11, 2014).

245. *See generally National Map of Local Entanglement*, IMMIGRANT LEGAL RESOURCE CENTER, (Dec. 19, 2016) (providing a map of the counties and a description of their policies), <https://www.ilrc.org/local-enforcement-map>.

246. *Id.*

247. *See* MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R43457, STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT 15 (2015) ("Nothing in the INA purports to require that states and localities honor immigration detainers.").

248. *See supra* note 149 ("the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such

Although PEP addressed some of the substantive and procedural shortcomings and tried to rebuild community trust, lingering doubt plagued the chances for reform. The unfortunate killing of an innocent bystander by a noncitizen who had been released from jail in San Francisco—rather than transferred to ICE for an outstanding warrant—exacerbated the tension.<sup>249</sup> Congress initiated hearings into the propriety of San Francisco and other sanctuary cities failing to cooperate with ICE, and they proposed Kate’s Law as a measure to punish the choice.<sup>250</sup> Congress’s crackdown on sanctuary cities accelerated in the presence of political division and controversy over the scope and scale of immigration enforcement and as the parameters of cooperation with ICE detainees continue to be litigated.<sup>251</sup>

What lessons flow from this story of policy dissolution? Foremost, the rise and fall of Secure Communities and its replacement by PEP is a story about the difficulties of centralizing decisionmaking *across* fragmented criminal-civil immigration structures and *within* the agency. The President, through DHS, relied on vertical hierarchy to centralize ICE discretion and later the agency culture around the issuance of detainees. But he could not compel local decisionmaking the same way. Once DHS devolved discretion over cooperation with detainees to local law enforcement in jails, a choice DHS continued to defend post-PEP, recapturing that discretion

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cooperation. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainees issued under the current Secure Communities program.”), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf)

249. See Lee Romney et al., *Fatal Shooting of S.F. Woman Reveals Disconnect Between ICE, Local Police*, L.A. TIMES (July 6, 2015), <http://www.latimes.com/local/crime/la-me-sf-shooting-20150707-story.html> (describing how the killing of Kathryn Steinle precipitated a national debate about sanctuary cities).

250. Congress has introduced several spending bills, called Kate’s Laws, to defund localities who chose not to cooperate. See Cristina Marcos, *GOP Pushes to Defund Sanctuary Cities in Spending Bills*, THE HILL (Mar. 25, 2016), <http://thehill.com/policy/finance/274336-gop-lawmakers-push-defunding-sanctuary-cities-in-spending-bills>. (following the presidential election of Donald Trump, Congress renewed its efforts to cut funding for sanctuary cities based on 8 U.S.C. § 1373); cf. Office of the Hon. John Culberson, *Attorney General Lynch Confirms New Sanctuary Cities Policy During Hearing with Chairman Culberson* (Feb. 24, 2016), <http://culberson.house.gov/news/documentsingle.aspx?DocumentID=398414>.

251. For a summary of the challenges to immigration detainees, see Chris Lasch, *The Faulty Arguments Behind Immigration Detainers*, AM. IMMIGRATION COUNCIL AND IMMIGRATION POLICY CENTER PERSPECTIVES SERIES 2, 5–8 (2013); Laurence Benenson, *The Trouble with Immigration Detainers*, NATIONAL IMMIGRATION FORUM (May 24, 2016), <http://immigrationforum.org/blog/the-trouble-with-immigration-detainers/>.

proved challenging.<sup>252</sup> The resulting national enforcement strategy was heavily contingent on a myriad of decentralized decisions.<sup>253</sup> The future of PEP, which remains reliant on discretion and continues to fall short of the President's priority of more targeted enforcement for "criminal aliens," remained uncertain at the close of the Obama administration and start of the Trump administration.<sup>254</sup>

### 3. *Coordinating Response to Central American Asylum-Seekers at the Border*

Control of the borders requires coordination within and across the vast immigration bureaucracy of immigration authorities. Given the scale and complexity of the task, it is prone to administrative obstacles. Congress's mandate and budget for border control has traditionally been robust, calling for strong enforcement and enabling vigorous efforts to control the U.S.–Mexico southern border.<sup>255</sup> The heavy emphasis of immigration policy on border control involves coordination among multiple units of DHS and the DOJ, especially where asylum seekers are involved.<sup>256</sup> Depending on the circumstances of the immigrant, the State Department, U.S. Refugee Admissions Program, and the Department of Health and Human Services (HHS) might also be involved.<sup>257</sup>

Within DHS, Border Patrol must work with USCIS and ICE to balance enforcement efforts with equitable exceptions for humanitarian concerns in border control. This requires deft intra-agency coordination. Once initial determinations about enforcement have been made, DHS's process for pursuing removal of immigrants requires adjudication in immigration

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252. See Juliet Stumpf, *D(E)Volving Discretion: The Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015). On the continuing need for some version of PEP; David Martin, *Resolute Enforcement*, 30 J.L. & POL. 411, 454-58 (2015) (explaining the effectiveness of immigration detainers and the promise of shared governance in immigration enforcement).

253. *Id.*

254. The Trump Executive Order Enhancing Public Safety in the Interior of the United States (Jan. 27, 2017) ends PEP and reinstates Secure Communities. <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

255. See, e.g., Johnson Priorities Memo, *supra* note 144; Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); DHS Secretary Kelley Implementation Memos for Trump Executive Orders on Border Security (Feb. 21, 2017) and National Interest (Feb. 21, 2017).

256. USCIS, *Obtaining Asylum in the United States*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last visited Mar. 30, 2017).

257. For example, Central American minors are privy to special processes involving these agencies. USCIS, *Central American Minors*, <https://www.uscis.gov/CAM> (last visited Mar. 30, 2017).



courts operated by the DOJ within the EOIR—itsself divided into a fact-finding body, review board, and litigating body.<sup>258</sup> As a whole, coordinating the many institutional actors throughout the stages of immigrant apprehension, processing, and removal is daunting. The case study of border control that follows is a story of a fragmented agency struggling to manage an unanticipated crisis in a highly sensitive area, without a clear operational plan for navigating a complex bureaucracy. It is also a story about the deleterious effects of that failure for the agencies, immigrants, and presidential policy.

After several years of leveling border apprehensions from Mexico, Central American migration into the United States rose in 2014 and in 2016.<sup>259</sup> This surge, motivated by migrants fleeing violence in their home countries and raising claims of political asylum, posed a crisis of bureaucratic, political, and humanitarian dimensions. The treatment of this migration as a crisis overwhelmed the capacity of the bureaucracy to respond in a measured way.<sup>260</sup>

Within DHS, stopping a border surge required clearing several bureaucratic hurdles. The Border Patrol, which is part of a single agency that combined Customs and Border Patrol during the creation of DHS, served as the front line in border apprehensions.<sup>261</sup> In the course of the initial investigation of unlawful entry, a Border Patrol officer would ask if the migrant feared returning to his home country.<sup>262</sup> If so, a USCIS officer would then conduct an interview to determine whether the person had a credible fear of persecution if returned.<sup>263</sup> If not, ICE would transfer the migrant to a detention center while waiting for expedited proceedings in immigration court.<sup>264</sup> If a USCIS officer determined the individual did possess a credible fear of returning to his home country, ICE would release the migrant to the community with a Notice to Appear in immigration

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258. The EOIR website provides a self-help guide describing this process, available here <https://www.justice.gov/eoir/self-help-materials> (last visited Mar. 30, 2017).

259. See Josh Siegel, *Central Americans Are Crossing the Border Illegally at 2014 'Crisis' Levels*, DAILY SIGNAL (May 5, 2016), <http://dailysignal.com/2016/05/05/central-americans-are-crossing-the-border-illegally-at-2014-crisis-levels/>.

260. See generally Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. (2017).

261. A migrant who makes it past border checkpoints without inspection may be apprehended by ICE and enter the defensive asylum adjudication process. USCIS, *Obtaining Asylum in the United States*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last visited Mar. 30, 2017).

262. *Id.*

263. *Id.*

264. *Id.*

court for further proceedings in immigration court.<sup>265</sup> If the migrant was an unaccompanied child, the Office for Refugee Resettlement (ORR) in HHS would then take custody.<sup>266</sup> The immigration court that adjudicates removal and considers appeals is housed at DOJ, within the EOIR.<sup>267</sup> The court reports to the Attorney General rather than the DHS Secretary.<sup>268</sup> Every stage requires coordination to hue to the President's priorities.

The structural barriers in the immigration bureaucracy are visually represented on a flow chart of the many entities involved.<sup>269</sup> The separations between components on the chart are physical as well. Whereas DHS leadership meets in a single headquarters office on Nebraska Avenue, the component offices CBP, ICE, and USCIS are scattered throughout the D.C. metro area. There is regular chatter of consolidating the physical spaces to facilitate communication, but there is little progress toward the endeavor.<sup>270</sup> Of course, it is not uncommon for complex organizations to contain silos—indeed, separations between politically-appointed staff and career staff provide a deliberate check on executive policymaking—but the degree and direction of divisions in DHS and DOJ are notable. Beyond the political versus career staff distinction, there are deep fissures between the “front office” (a mix of political appointees and career staff whom report to the DHS Secretary) and the “components.”<sup>271</sup> The field offices historically have operated with significant independence from headquarters.<sup>272</sup> Long-time officials recalled disastrous incidents where field offices interfaced directly with the State Department and foreign entities in a manner that departed from top-down national priorities.<sup>273</sup> Departmental efforts to coordinate enforcement between headquarters and field offices are necessary and difficult given the history of antagonism. Coordination across components are also necessary and difficult given that

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265. *Id.*

266. See *The U.S. Refugee Resettlement Program—An Overview*, HHS, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/resource/the-us-refugee-resettlement-program-an-overview> (last visited on Feb. 21, 2017).

267. U.S. DOJ EOIR Organization Chart, <https://www.justice.gov/eoir/organization-chart> (last visited Mar. 30, 2017).

268. *Id.*

269. CRS Insights: Unaccompanied Alien Children: A Processing Flow Chart (July 2014), <https://fas.org/sgp/crs/homsec/IN10107.pdf>.

270. Interview with DHS General Counsel official (Nov. 4, 2016).

271. *Id.*

272. *Id.*

273. Interview with former INS official (July 5, 2016).

the components were historically separate organizations prior to being consolidated into DHS.<sup>274</sup>

The different personnel, missions, and cultures within each agency further complicated the task of processing those apprehended at the border.<sup>275</sup> Border Patrol and ICE primarily focused on enforcement and expulsion of migrants, USCIS and ORR primarily focused on providing immigrant services and protecting asylum-seekers.<sup>276</sup> Whereas Border Patrol was known for its toughness—it was charged with flagging for further screening migrants seeking asylum with a fear of return.<sup>277</sup> As with the structural barriers, these cultural barriers are palpable. Agency officials strongly identified with their components, and they described the selection of agency leaders to be a process driven by insiders with a “history” so as to reinforce the separate identity of the component agency.<sup>278</sup> Intra-departmental coordination across these cultures is hard. The hard separation of DHS and DOJ following the 2002 reorganization of the immigration bureaucracy intended to increase fairness by separating the functions of enforcement and adjudication into different agencies. However, the downside was that the separate agencies now needed to coordinate on immigration and enforcement across cases and sometimes within a single case.<sup>279</sup> When the departments need to coordinate, their interagency interactions are consequently sporadic and ad hoc rather than systemized.<sup>280</sup>

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274. For more context and an analogous call for greater coordination among immigration agencies, see Mark Noferi, *Concentric Coordination*, 42 ADMIN. & REG. L. NEWS 13–15 (Winter 2017).

275. Interview with DHS official (June 10, 2016); interview with immigration attorney (July 18, 2016).

276. The USCIS Frequently Asked Questions about Credible Fear is available here: <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening>. The parallel site for asylum-seeking children is the ORR, which is available here <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5>.

277. Several DHS insiders described Customs and Border Patrol (CBP) agents as “cowboys,” “paramilitary,” and “intolerant of leniency” under any circumstances. Interviews with DHS and USCIS officials (May 31, 2016; June 10, 2016).

278. Interviews with DHS official (May 3, 2016; May 31, 2016; June 10, 2016).

279. Shah, *supra* note 113, at 814–15 (initial determinations in asylum cases were transferred from DOJ’s INS to DHS, although subsequent hearings and appeals are in DOJ’s EOIR). Notice that this flow reverses the usual course of immigration cases beginning with initiation of action in DHS and then receiving initial determinations in the immigration courts of the DOJ.

280. *Id.*

An episode recalled by government insiders vividly illustrates the problems resulting from the lack of intra-agency coordination. In 2014, President Obama's DHS opened family detention centers to hold migrants and to deter future crossings.<sup>281</sup> Reports surfaced of Border Patrol holding units and ICE detention facilities being unfit for the care of children and families.<sup>282</sup> ICE agents fumbled to change diapers and mix formula.<sup>283</sup> The Obama administration desperately sought medical care and struggled to obtain licenses for childcare and schooling of migrant children detained while waiting for proceedings.<sup>284</sup> A DHS insider accounts that even figuring out who should pay for showers in the temporary border facilities proved perplexing.<sup>285</sup> The use of family detention became a public relations disaster and created the impression of a situation out of control.<sup>286</sup> Arresting and holding children and families, particularly those fleeing chaos and violence in Central America, seemed incongruous with President Obama's promise to focus on "[f]elons, not families" during prior announcements.<sup>287</sup> Independent revelations of Border Patrol's excessive use of force and subpar holding cells, plus a federal court order denying ICE family detention facilities child care licenses, exacerbated the crisis.<sup>288</sup>

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281. See Seung Min Kim, *House Dems Urge Obama to End Immigrant Family Detention*, POLITICO (May 27, 2015), <http://www.politico.com/story/2015/05/immigrant-family-detention-house-democrats-obama-118317> (DHS spokesperson Marsha Catron is quoted saying that family detention is a safe, "effective and humane" way to maintain family unity).

282. Jorge Rivas, *These Unsealed Photos Offer Rare Peak Inside Border Patrol's Notorious 'Ice Box' Detention Cells*, FUSION (June 29, 2016), <http://fusion.net/story/319856/judge-border-patrol-unseal-pictures-documents/> (describing a recently-initiated lawsuit challenging conditions of CBP holding cells dubbed "ice boxes").

283. *Border Patrol Changing Diapers, Heating Baby Formula for Surge of Children*, WASH. TIMES (June 13, 2014), <http://www.washingtontimes.com/news/2014/jun/13/border-patrol-change-diapers-heat-baby-formula/>.

284. A Texas court subsequently issued an order denying childcare licenses in family detention, leading to release of hundreds of detained immigrants in Texas. *Grassroots Leadership, Inc. v. Tex. Dept. of Family & Protec. Serv.*, No. D-1-GN-15-004336 1, 7-8 (Travis City Civ. Dist. Ct. 2016).

285. Interview with DHS official (June 10, 2016).

286. See *Stop Detaining Families*, NATIONAL IMMIGRANT JUSTICE CENTER, <http://www.immigrantjustice.org/stop-detaining-families> (July 26, 2016) (detailing the negative impact family detention has on mothers and children).

287. See Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), [http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?\\_r=0](http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0) (describing the disconnect between President Obama's compassionate announcements regarding protecting immigrant families and the reality of the horrible conditions they face in detention).

288. See *CBP Use of Force Review: Cases and Policies*, POLICE EXECUTIVE RESEARCH

DHS Secretary Johnson attempted to take control of the crisis by pursuing a proactive strategy of deterrence. Standing in front of the family detention center in Dilley, Texas shortly after issuing his 2014 memo categorizing recent migrants as a category one priority, Secretary Johnson said, “we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released. . . . I believe this is an effective deterrent.”<sup>289</sup> These statements conveyed that enforcement actions against recent migrants were hierarchical orders “coming from the top.”<sup>290</sup> Yet the public statements could not overcome the challenges of moving DHS’s complex machinery to respond to a genuine crisis.<sup>291</sup>

A second episode in the migration crisis highlights the need for interagency coordination and the dangers of the DOJ and DHS working in isolation when developing an effective response to crisis. After the border surge briefly calmed, Central American migration once again surged in 2015.<sup>292</sup> This time, in Operation Border Guardian, DHS shifted its

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FORUM (Feb. 2013), <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf> (concluding that Border Patrol agents were often using unjustified excessive force); Rivas, *supra* note 282 (showing photos obtained in ACLU litigation); *see also Grassroots Leadership*, No. D-1-GN-15-004336 at 7–8.

289. *See* Press Release, DHS, Statement by Jeh Johnson on Southwest Border Scrutiny, (Mar. 9, 2016); *see also* Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>. The November 2014 DHS enforcement priorities memo contained stark language categorizing recent migration as a category one priority for removals, on par with national security risks or danger to the community. *See* November 2014 Secure Communities Memo, *supra* note 220. Secretary Johnson rationalized the seemingly harsh treatment as necessary to promote the safety of the migrants and the integrity of the border. *Id.*

290. Numerous interviews described Operation Border Guardian and its policy of deterrence as coming from the top. *See e.g.* interview with immigration attorney (May 30, 2016; June 6, 2016); Interview with DHS official (June 10, 2016).

291. Family detention additionally exposed the administration to congressional hearings and litigation over possible violations of international and U.S. law, including a prior settlement with the federal government. *See Flores v. Johnson*, CV 85-4544 DMG, 2015 WL 13049844, at \*2, \*17 (C.D. Cal. July 24, 2015), *rehearing denied*, *Flores v. Lynch*, No. CV-85-04544 DMG, 2015 WL 9915880 (C.D. Cal. Aug. 21, 2015). Federal judge Dolly Gee entered a court order declaring the DHS “no-release policy” for children awaiting determinations of their eligibility to remain in the U.S. violated the terms of an earlier settlement. The District Court order applied the settlement terms to minors and accompanying adults. A DHS advisory committee subsequently recommended ending family detention.

292. Siegel, *supra* note 259.

enforcement strategy from deterring through the use of family detention toward priority docketing.<sup>293</sup> DHS accomplished this by identifying the claims of recently arrived migrants for prompt EOIR adjudication, in the hopes that priority docketing would permit a fast track for the removal of immigrants determined to be ineligible for asylum.<sup>294</sup> In theory, the priority dockets ameliorated the need for prolonged family detention. Prioritizing the claims of recent migrants in immigration court lessened the time until an initial master calendar hearing to twenty-one days compared to a preexisting system that could involve long delays for even the initial hearings.<sup>295</sup> The recent migrants faced court and could theoretically receive a determination on their asylum claim within weeks.<sup>296</sup> However, their actual removal times varied in the face of ongoing backlogs for later stages of removal and there was little evidence that lessening backlogs deterred future crossings.<sup>297</sup>

Insiders and outsiders to Operation Border Guardian said that it “came from the top.”<sup>298</sup> Some meant that the policy came from the White House without agency consultation. Others meant that it came from their politically-appointed agency leadership. For the DOJ, this meant the Attorney General’s memorandum to the immigration courts. For DHS, this meant Secretary Johnson’s directives to the components. Nobody reported collaboration between the DOJ and DHS. Though it is difficult to corroborate second-hand reports of high-level conversations, the shared belief is that the policy was imposed swiftly and that the White House approached operations in both agencies in an ad hoc manner that contributed to its subsequent challenges.

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293. Some immigration attorneys postulate that the shift in strategy is also prompted by Judge Dolly Gee’s order enforcing the *Flores* settlement, though ICE disputes this contention. Interview with immigration attorney (June 6, 2016).

294. Liz Robbins, *Immigration Crisis Shifts From Border to Courts*, N.Y. TIMES (Aug. 23, 2015), <https://www.nytimes.com/2015/08/24/nyregion/border-crisis-shifts-as-undocumented-childrens-cases-overwhelm-courts.html>.

295. *Id.*

296. The ACLU, American Immigration Lawyers’ Association, and other advocacy groups have filed charges that immigrants have insufficient opportunity to obtain legal counsel and exhaust their legal remedies before being ordered removed. *See, e.g., R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015); *Castro v. DHS*, 163 F. Supp. 3d 157 (E.D. Pa. 2016).

297. *See, e.g., R.I.L.-R*, 80 F. Supp. 3d 164; *Castro*, 163 F. Supp. 3d 157.

298. Interview with immigration attorney (May 30, 2016; June 6, 2016); Interview with DHS official (June 10, 2016).

Agency insiders recounted that the problems with priority docketing were partly substantial and partly procedural.<sup>299</sup> DHS and EOIR desired a more efficient and effective process of adjudication. The concerns for massive backlog and long delay were linked to the policy of deterrence insofar as some officials believed a reputation for processing delay was itself a pull factor for migration.<sup>300</sup> Against these operational goals, the results were mixed. In some cases, priority docketing led to faster removals.<sup>301</sup> However, while DHS's prioritization of EOIR docketing led to faster scheduling of master calendar hearings, in some cases EOIR granted multiple continuances that nevertheless led to delay.<sup>302</sup> These delays were exacerbated by the backlog of cases that accumulated, even after an infusion of resources to hire more immigration judges and to improve staffing in immigration courts. In other cases, rapid processing led to subsequent appeals to the Board of Immigration Appeals and federal courts that delayed the eventual removal of immigrants.<sup>303</sup> Again, the accumulation of these cases at higher levels of review clogged the removal process. In total, the experiment with rapid processing through the priority dockets taxed the already overwhelmed immigration courts (staffed by DOJ and EOIR's immigration judges) and the ICE attorneys who prosecuted the claims on behalf of DHS.<sup>304</sup> ORR, housed within HHS, has special responsibilities toward immigrant children and also strained to keep up.<sup>305</sup>

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299. Interview with DHS official (Nov. 4, 2016); Interview with U.S. DOJ EOIR official (Nov. 9, 2016).

300. Interview with former INS official (July 5, 2016). Doris Meissner, *Upfront Hearings a Must to Stem the Tide of Border-Crossing Children*, DALLAS NEWS (June 2014), <http://www.dallasnews.com/opinion/commentary/2014/06/22/upfront-hearings-a-must-to-stem-tide-of-border-crossing-children> (noting the theory of delay as a pull factor) (Meissner is a former INS Commissioner, now at Migration Policy Institute).

301. See generally Emily R. Summers, *Prioritizing Failure: Using the "Rocket Docket" Phenomenon to Describe Adult Detention*, 102 IOWA L. REV. 851, 851 (2017).

302. *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGRATION (Sept. 21, 2015), <http://trac.syr.edu/immigration/reports/405/>.

303. See generally *Reducing the Immigration Court Backlog and Delays*, HUMAN RIGHTS FIRST 2 (July 2016), <http://www.humanrightsfirst.org/sites/default/files/HRF-Background-Immigration-Courts.pdf>.

304. See TRAC, *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGRATION REPORT (Sept. 21, 2015), <http://trac.syr.edu/immigration/reports/405/>; Susan Carroll & David McCumber, *Flow of Border Immigrants Overwhelming Agencies*, HOUSTON CHRONICLE (June 1, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Flow-of-border-immigrants-overwhelming-agencies-5520037.php>.

305. Because unaccompanied children are considered especially vulnerable, DHS is

The fragmentation of the immigration deportation system across the executive branch undermined itself in the pursuit of President Obama's priority of pursuing recently-arrived migrants.

Agency officials, especially in the "offices of goodness" that hear complaints about agency processes and asylum officers involved in credible fear determinations, emphasized that the operational goal of efficiency was counterbalanced with the goal of abiding by fair procedures and humanitarian obligations.<sup>306</sup> Against this goal, some would say the operation was successful and point to the high numbers of removals and apprehensions.<sup>307</sup> Others point to similar numbers and say the high numbers meant the heightened enforcement was not deterring future crossings.<sup>308</sup> Setting aside debates over the causes of migration and rates of apprehension, other immigration advocates felt the process used to detain and deport lacked procedural legitimacy.<sup>309</sup> Under the priority docket, immigrants often stood for court without an opportunity to consult with counsel or consider their options to appeal.<sup>310</sup> Once an immigration judge

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supposed to turn the children over to the ORR after processing. Typically, ORR houses children in state-licensed shelters or facilities while their cases are pending. *ACF About Unaccompanied Children's Services*, <https://www.acf.hhs.gov/orr/programs/ucs/about> (last visited Jan.17, 2017).

306. See Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 55-65 (2014); see also Interview with DHS official (6/10/2016).

307. DHS Secretary Jeh Johnson points to March 2016 CBP statistics showing that Operation Border Guardian resulted in repatriation of 28,000 individuals to Central America and 128,000 to Mexico and highlights recent raids to send a message to potential migrants that they will be sent home and should not cross illegally. See Statement by Jeh Johnson, *supra* note 289.

308. Those finding fault with the narrative of immigration control point out that refugees fleeing home country violence will not be deterred by heightened U.S. immigration enforcement. An article reporting on the same CBP data makes the point that the numbers of families fleeing Guatemala, Honduras, and El Salvador to enter the U.S. illegally have increased and features families saying that detentions, raids, and other policy disincentives would not affect their resolve to try to migrate when they felt they had no other options. See Meredith Hoffman, *Deportation Raids Aren't Deterring Central American Families from Coming to the U.S.*, VICE NEWS (May 19, 2016) (quoting an asylum-seeker who was unaware of family detention before migrating and said "it was a surprise to spend time in detention, but at least no one was threatening to kill us there"). The article draws parallels to a political science report showing that even individuals who were aware of such penalties were undiscouraged from coming if their migration was motivated by home country violence. See Jonathan Hiskey, et al., *Violence and Migration in Central America*, INSIGHTS (2014).

309. Interview with DHS official (June 10, 2016; Nov. 4, 2016).

310. David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823,



determined that the migrant was not eligible to remain and entered a removal order, deportation was swift. ICE aggressively sought and deported these recent migrants.<sup>311</sup> Multiple lawsuits challenging the priority dockets were filed claiming that the expedited procedures deny the immigrant a chance to obtain counsel and to prepare their case for a full and fair hearing before an immigration judge.<sup>312</sup> The claims of Due Process violations used in the course of obtaining those removals and skepticism about the regularity of adjudicatory processes leading to the deportations or their fidelity to humanitarian obligations owed to refugees threaten the legitimacy of the enforcement operation.

In sum, Operation Border Guardian pulled apart the federal government in its quest to adjudicate and deport recently-arrived immigrants efficiently, while also respecting humanitarian obligations to protect immigrants eligible for asylum-based relief from removal from the harms of persecution upon return to their persecutors. On the substantive goal of strong enforcement, the crisis created an opportunity for DHS to flex muscles on immigration enforcement and to communicate a commitment to Congress that it was serious about securing the border. Congress had long set detention and deportation quotas for DHS,<sup>313</sup> and some government insiders claimed that the raids were specifically fueled by the agency's need to meet numerical quotas once lowered priority for long-time undocumented residents drove down apprehension numbers.<sup>314</sup> Others felt the raids were conceived to demonstrate DHS's faithfulness to its statutory charge, particularly given that Republicans in Congress increased funding for this express purpose and called for even more border

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1825 (2016).

311. *Id.* at 1824.

312. *E.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016); *Castro v. DHS*, 835 F.3d 422 (3d Cir. 2016).

313. See Ted Robbins, *Little Known Immigration Mandate Keeps Detention Beds Full*, NPR: MORNING EDITION (Nov. 19, 2013), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>; see also Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST (March 27, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html?sid=ST2010032700037\\_](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html?sid=ST2010032700037_)

314. Interview with immigration attorney (May 30, 2016). See *Aggressive Immigration Enforcement Quotas Also Used to Detain Mothers and their Children*, CENTER FOR CONSTITUTIONAL RIGHTS (June 17, 2016), <http://ccrjustice.org/home/press-center/press-releases/new-report-aggressive-immigration-enforcement-quotas-also-used>; Lauren Gambino, *Huge Family Detention Centre to Open in Texas for Undocumented Migrants*, THE GUARDIAN (Sept. 6, 2014), <https://www.theguardian.com/world/2014/sep/06/family-detention-centre-texas-undocumented-migrants>.

security.<sup>315</sup> Those hoping for Congress to enact comprehensive immigration reform maintained that strong enforcement against those who had not yet developed ties and equities in the United States preserved the viability of relief for long-term residents.<sup>316</sup> Showing seriousness about enforcement served as a bargaining chip for legislation involving legalization—what one insider called “enforcing your way toward comprehensive immigration reform.”<sup>317</sup>

However, the poorly-coordinated response strained the executive branch’s institutional capacity, failed to deter future migration, and compromised the agency’s humanitarian responsibilities toward a migration crisis.<sup>318</sup> The significant coordination challenges inherent in developing a response to a complex problem was undoubtedly exacerbated by enduring structural problems in the DHS and the unanticipated outbreak of a migration crisis. The resulting policy subordinated internal administrative needs to external policy demands. It did not allow for a reconciliation of organizational, humanitarian, and legal objections inherent within DHS’s conflicting agency mission. And ultimately, the procedural failures undermined its substantive goals of efficient and well-functioning agency adjudication that could eliminate a putative pull factor for unlawful border crossings.

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The three examples from the immigration context illustrate a typology of strategies to manage agency implementation of presidential policy. While multiple types of intervention were present in each case study, one served as a defining feature for each case: promoting a coherent system of enforcement priorities in deferred action, ensuring consistent decisions over the issuance of immigration detainers for detention of “criminal aliens,” and coordinating interagency actions for removal of Central American

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315. Interview with DHS official (June 5, 2016); interview with DHS official (June 10, 2016). Congress’s support for the border crackdown was divided. Democrats criticized President Obama for his unpopular policy and instead favored legislation to help Central American governments deal with root causes of the mass migration. See Rafael Bernal, *Dems Guard Against Migrant Surge*, THE HILL (July 3, 2016), <http://thehill.com/latino/286342-dems-guard-against-migrant-surge> (describing a bill presented by Senate Democrats that would focus on helping Central American government deal with root causes of migration to the United States).

316. Interview with immigration attorney (June 6, 2016; June 30, 2016; July 18, 2016).

317. Interview with DHS official (June 10, 2016). For discussion of the Enforcement First Strategy, see *The Fallacy of “Enforcement First”: Immigration Enforcement Without Immigration Reform has been Failing for Decades*, AM. IMMIGR. COUNS. (May 9, 2013), <http://www.immigrationpolicy.org/just-facts/fallacy-enforcement-first>.

318. *Supra* notes 250–291; 298–305.

asylum-seekers.<sup>319</sup> However, the reception of the agency and their willingness to cooperate with the President's priorities differed.<sup>320</sup>

In the case study of deferred action, President Obama somewhat succeeded in promoting a coherent system of enforcement priorities amid the reality of insufficient resources and conflicting directives.<sup>321</sup> However, he and his appointed leadership struggled to transform the culture in DHS to align with the new priorities.<sup>322</sup> Then USCIS relied on policymaking tools, such as agency guidance, that were vulnerable to legal and political challenge in the decision not to engage in notice-and-comment rulemaking.<sup>323</sup> These procedural deficiencies created a shaky foundation for DACA and toppled DAPA in the face of legal challenge and moral dissent.<sup>324</sup>

Both the President's policy of detaining "criminal aliens" and fast tracking removal for recently-arrived Central American immigrants showed the President's inability to integrate his policies with the operational needs of a complicated bureaucracy. The DHS's policies governing the use of detainers to transfer immigrants with criminal histories into civil detention was an effective policy for boosting enforcement metrics imposed by Congress and an improvement over decentralized decisionmaking at the local level.<sup>325</sup> However, it swept too broadly within the category of "criminal aliens" and lost legitimacy following a series of procedural missteps from which it never recovered.<sup>326</sup> Some of this cost could have been avoided. ICE could have fine-tuned operations to avoid overbreadth in the issuance of detainers and could have been more transparent about modifications to preexisting regulations on detainers by joining the use of biometric data to the practice of issuing detainer requests. ICE could have invited participation from those outside the agency when creating protocols for local law enforcement to respond to those detainer requests, instead of waiting on protracted FOIA litigation and congressional hearings before disclosing the voluntary nature of the requests. Centralizing decisions to

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319. *Supra* Part II.B.

320. *Id.*

321. *See Cox & Rodríguez, Redux 2, supra* note 61, at 178–79; *see also supra* notes 155–156.

322. *Supra* notes 164–185

323. *Supra* notes 199–202.

324. As this Article goes to press, the vitality of the DACA and DAPA program in a new administration with differing policy goals and continuing political division is uncertain. Jens Manuel Krogstad, *Unauthorized Immigrants Covered by DACA Face Uncertain Future*, PEW RESEARCH CENTER (Jan. 5, 2017).

325. *Supra* notes 211–215.

326. *Supra* Part notes 220, 239–242.

cooperate within a decentralized implementation structure requires the President and political leadership to be even more persuasive with those not bound to follow, as a practical matter, if seeking effective agency operation. Curing these pragmatic and procedural defects for the sake of efficacy would not salvage the programs if they proved unconstitutional on other grounds, of course. Procedural legitimacy operates above the threshold of due process to improve processes presumed legal. The President and his agencies must do at least as much as due process requires and may benefit from doing more to restore trust in the immigration system.<sup>327</sup>

The DHS's uncoordinated intra- and interagency response to the border surge revealed problems within and across the immigration bureaucracy. Despite ICE's and CBP's aggressive efforts to align agency enforcement procedures with the President's prioritization of recently-arrived immigrants, the dysfunction within DHS and the fragmentation of the DHS with DOJ immigration courts failed to produce the mass-scale deportations the Obama administration undertook.<sup>328</sup> They also failed to deter migrants seeking asylum from coming to the United States, even allowing for exogenous causes for this migration such as civil unrest and violence within Central America.<sup>329</sup> The sloppy response raised the furor of critics and supporters of tighter border control due to concerns about the due process rights of the recently-arrived immigrants denied access to counsel, adequate detention conditions, and fair and efficient adjudication.<sup>330</sup> The agency needed leadership at a higher level to overcome these coordination challenges and needed systematic, rather than sporadic, mechanisms to be effective.<sup>331</sup>

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327. As this Article goes to press, there is growing concern in courts that aspects of federal detainer practice and laws seeking to curb funding for localities that choose not to comply with federal requests for cooperation in law enforcement violate the Constitution. H.B.C., *States and Cities Use Litigation To Fight Donald Trump's Immigration Orders*, *The Economist* (Feb. 2, 2017). While the substantive merits of these claims is not the primary focus of this Article, perception that agency practices violate due process or other Constitutional commands endanger procedural legitimacy. Chen, *Trust in Immigration Enforcement*, *supra* note 13.

328. *Supra* notes 281–303.

329. *Supra* notes 306–307.

330. *Supra* notes 308–311.

331. As this Article goes to press, these concerns about constitutional due process violations in asylum adjudication are gaining ground in courts. *Supra* notes 296, 312. While the merits of the legal claims are not the primary focus of this Article, findings that agency practices violate due process pose a mandatory threshold beneath the prudential procedures for the president and his agencies that are the focus of this Article.

### III. PRESCRIPTIONS FOR THE ADMINISTRATOR-IN-CHIEF

This Article began by calling for greater attention to, and acceptance of, the President's role as Administrator-in-Chief: improving the administration of law through fair procedures and good governance that can boost the legitimacy of executive policy. Fulfilling this role involves supporting agencies by promoting coherent policy amid administrative realities, centralizing discretion to produce consistent decisions within agencies, and coordinating agency action across the executive branch. Part II described the Obama administration's attempt to effectuate this administrative approach in the context of three case studies related to immigration: coherent enforcement priorities for DACA and DAPA, centralized discretion over immigrant detention for "criminal aliens," and coordinated deportation for recently-arrived Central American immigrants. The evaluation of each is mixed, with the procedural deficiencies undermining and sometimes undoing programs on grounds of legitimacy. This Part suggests prudential ways to enhance the legitimacy of executive agencies by improving procedures and reforming procedural deficiencies that make them vulnerable in the face of contention.

To a great and rising extent, presidential success requires the Chief Executive to partner with regulatory agencies to perform the work of government. There is too much to do, and so much expertise is required to do it. The ability of a president to influence his agencies is critical for the sake of good governance, agency expertise, and deliberation.<sup>332</sup> The worry, of course, is that the President will too forcefully control agencies or embroil the agencies themselves in political fights, in violation of legal and professional norms.<sup>333</sup> To be sure, executive power cannot operate without constraint. Understanding the levels of presidential influence and the external effects they may have on policymakers and the public improves our ability to strike a balance that values public administration as a source and solution.

The remainder of this section proposes a new approach toward presidential involvement in administrative action that emphasizes more executive oversight with increased agency collaboration on operations. This approach builds on the normative evaluation that executive action is on its firmest ground when the President is acting as the Administrator-in-Chief, supervising and supporting agency operations, rather than merely a policymaker seeking to assert substantive policy without following proper

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332. Shapiro et al., *supra* note 34, at 486–91 (2012) (endorsing inside-out values of expertise and deliberation over outside-in values as source of agency legitimation).

333. Thomas O. McGarity, *Presidential Control of Regulatory Decisionmaking*, 36 AM. U. L. REV. 443, 44–44 (1987).

procedure and without enlisting the cooperation of government officials in the administrative state, states and localities, or private individuals. It offers concrete steps that can be taken to improve the quality of administrative processes and to guard against abuses of agency discretion. Improving the quality of administrative procedures has the salutary benefit of boosting the policies' perceived legitimacy and thereby raising acceptance of them in the face of ongoing controversy.<sup>334</sup> While this is not a one-size-fits-all solution, the suggestions can positively impact regulatory policymaking within and beyond the sphere of immigration law.

### *A. Toward a Framework for the Administrator-in-Chief*

Shifting to a framework that values the President's role in the internal administration of agencies, and away from the traditional assumption that presidential influence necessarily embroils agencies in substantive policymaking of a questionable nature, requires a significant reworking of existing parameters for presidential administration. This section prescribes steps to improve executive oversight, disclosure of agency procedures, and fidelity to professional norms.

#### *1. Prescriptions for Promoting Coherence*

The President possesses a national perspective that justifies his oversight over executive agencies. One of the most important aspects of his role as Administrator-in-Chief is to impart a coherent policy to agencies.<sup>335</sup> Some justify the President's leadership on agency policy as the product of a political mandate for which he will ultimately be held accountable.<sup>336</sup> Perhaps. Presidential addresses from the Rose Garden can be potent symbols. They lend political accountability and moral legitimacy to agency actions. My point is slightly different. The President can boost the clarity and transparency of his policy agenda, and those of his agencies, in these moments for the sake of enhancing operational expertise.

There are several ways to encourage expertise. First, the President can

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334. For more research on the links between procedural legitimacy and acceptance of outcomes, see TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 12; TYLER, WHY PEOPLE COOPERATE *supra* note 12. A rich empirical literature has followed, including some studies in the immigration context. See Chen, *Trust In Immigration Enforcement*, *supra* note 13; Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574 (2013); Emily Ryo, *Less Enforcement, More Compliance, Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015).

335. *Supra* Part I.B.1, Part II.B.1; *infra* Part III.B.1.

336. *Id.* See generally Kagan, *Presidential Administration*, *supra* note 15, at 2281–99 (2001).

engage the resources of the Executive Office of the President's Domestic Policy Council and OIRA's regulatory planning process when approaching the agencies that will carry out this policy agenda.<sup>337</sup> These White House offices add to the political mandate a unifying vision and administrative competence that can improve the agency's effectiveness.<sup>338</sup> Whereas the President offers to agencies moral authority, the White House offices and OIRA offer expertise in the process of policymaking.<sup>339</sup> The shared effort permits agencies to focus on cultivating the substantive expertise and operational savvy to translate policy agendas into a workable plan. Second, the President can choose to be less engaged and more deferential to agency experience on operational details. Either way, the key point is for the President to maintain discipline in his policymaking by encouraging operational expertise in the course of policy implementation.

The deferred action case studies demonstrate a strong supervisory orientation to executive oversight aimed at promoting a coherent immigration policy.<sup>340</sup> President Obama through the Domestic Policy

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337. Executive oversight is currently channeled through OIRA's regulatory planning and centralized regulatory review processes, pursuant to Executive Order 12866. E.O. 12866 contains a review and a planning process. Exec. Order No. 12,866 Section 4 (planning mechanism); Section 6 (centralized regulatory review). Most scholarship on executive oversight focuses on the cost-benefit analysis within regulatory review. Because regulatory planning most directly contributes to the crystallization of coherent policy, this Article suggests the planning function should be exercised more broadly and more rigorously. At present, the Regulatory Plan agencies submit identifies regulatory priorities and contains additional detail about the most important significant regulatory actions that agencies expect to take in the coming year." OIRA, EXEC. OFFICE OF THE PRESIDENT, "Current Regulatory Plan and Unified Agenda of Regulatory and Deregulatory Actions," (2016), <https://www.reginfo.gov/public/do/eAgendaMain>. This can be applied to both rulemaking and to the fashioning of policies that undergird agency adjudication, such as priority docketing. For a similar suggestion, see Shah, *supra* note 113, at 814 (2015).

338. See Sunstein, *supra* note at 68, at 1849; Harold Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 557 (1988-89) (discussing the goals of review in OIRA "based upon a recognition that, like any other outside review, executive oversight can make regulation more reasoned . . ."); Domestic Policy Council, *A Strong American & A Strong Middle Class*, <https://obamawhitehouse.archives.gov/administration/eop/dpc>.

339. See text accompanying *supra* notes 42-45.

340. See discussion *supra* Part II.B.1. The irony is that DACA aimed to curb low-level discretion by channeling decision-making to higher-level enforcement priorities that were themselves premised on discretion. The *Texas v. United States* litigation about the categorical nature of discretionary relief captured this irony. See *supra* Part II.B.1; *United States v. Texas*, 136 S. Ct. 2771 (2016) (No. 15-674). A similar irony pertains to the priorities contained in the Morton memo and the Johnson memo rescinding Secure Communities and replacing it with the PEP program. *Supra* Part II.B.2; Morton memo 2011, *supra* note 143; Johnson

Council sought to involve the DHS Secretary in the preparation of the memos in 2012 and 2014.<sup>341</sup> The White House and DHS engaged in intensive consultation to set forth criteria for exercising enforcement discretion and to develop procedures to see that the presidential priorities would be followed by the agency staff.<sup>342</sup> This type of agenda-setting and operational intervention is necessary to craft policy that works.

Thus, the deferred action policies approximated many of the good guidance values even without notice-and-comment procedures. However, in the spirit of promoting the substantive value of coherence and the procedural value of transparency, USCIS should have more clearly explained *why* it was undertaking these policies and why it was not undergoing rulemaking. The agency could have strengthened its guidance on deferred action by explaining managerial concerns, such as the need to allocate scarce resources, to ensure consistency in case processing, and to align case-processing criteria with presidential priorities. Or the agency could have gone a step farther by enacting its policies through notice-and-comment rulemaking that would have met these goals and additionally broadened the reach of consultation and routinized the channels of participation. While engaging in notice-and-comment would have taken longer, the case studies demonstrate that more procedure could have protected the programs from internal and external challenge that themselves delayed implementation of the programs.

To an even greater extent, the President and his principals in the DHS and DOJ would have benefitted from formulating a more coherent plan for their prioritization of recently-arrived migrants from Central America.<sup>343</sup> Hasty resort to family detention and priority docketing in immigration courts failed to articulate a coherent vision for enforcement that balanced the goals of deterring unauthorized migration with humanitarian protections for asylum seekers. The resulting disarray at the border and within the detention centers and courtrooms involved in responding to a migration crisis compromised the success of enforcement outcomes and the perceived legitimacy of the program, which is hamstrung by public outcry and legal challenge.

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Priorities Memo, *supra* note 144. Cox and Rodriguez describe this feature of the Obama Administration's immigration policies as institutionalizing enforcement discretion. *See* Cox & Rodríguez, *Redux 2*, *supra* note 61, at 187–89.

341. *See* Palmer et al., *supra* note 184.

342. *See id.*

343. *Supra* Part II.B.3.



## 2. Prescriptions for Centralizing Discretion and Fostering Consistency Within Agencies

In order to align presidential priorities with agency policies, presidents need to clearly articulate their priorities to agencies and also to oversee the Secretary's implementation of those priorities within the agency. Frequently, the President by necessity or by choice delegates to agency heads oversight of exercises of discretion by career staff and line officers. Still both the implementation of DACA in USCIS and the shifting strategies for involving local law enforcement in ICE's detention efforts illustrate that setting macro-level enforcement priorities to systematize micro-level exercises of enforcement discretion leads to more consistent results.

Below the level of the President, agency heads can reinforce presidential priorities through the articulation of operational criteria to guide intra-agency exercises of discretion. They may set these out in policy statements or by affirmatively reporting on the considerations behind their decisions in the course of enforcement. As one of several criteria, agencies should disclose administrative needs that bear upon their regulatory actions. These voluntary disclosures would bolster the transparency and, thus, the procedural legitimacy of agency action.<sup>344</sup> While more complicated in the enforcement context that is necessarily encased in low-level exercises of discretion, similar measures to buff policy implementation remain advisable.<sup>345</sup> Exposing administrative realities might take the sheen off presidential policies announced from the Rose Garden, but it makes for smoother implementation and increased effectiveness.

As detailed in the second case study, the President and ICE Director's

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344. Increased voluntary disclosure is an idea common to many ACUS recommendations. See AMERICAN CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2014-3, GUIDANCE IN THE RULEMAKING PROCESS *reprinted and codified as* 79 Fed. Reg. 35,992 (June 25, 2014); OMB, EXEC. OFFICE OF PRESIDENT, PROPOSED BULLETIN FOR GOOD GUIDANCE PRACTICES, [https://www.whitehouse.gov/sites/default/files/omb/inforeg/good\\_guid/good\\_guidance\\_preamble.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/good_guid/good_guidance_preamble.pdf). Some commentators expressly call for disclosure of political reasons for agency action in rulemaking or in arbitrary and capricious review. Nina Mendelson, *Disclosing Political Oversight of Agency Decisionmaking*, 108 MICH. L. REV. 1127, 1128-30 (2010); Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009). The suggestion is similar in spirit, offered as a best practice rather than a doctrinal reform.

345. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1103-04 (discussing a potential enforcement-coordination role within OIRA). Cox and Rodriguez applaud the institutionalization of discretion in deferred action and immigration enforcement specifically.

macro-level priorities for detention progressively narrowed the scope of lower-level exercises of discretion.<sup>346</sup> While skepticism over the use of immigration detainers remains, PEP—the program that replaced Secure Communities—avoids some of the more troubling features that prompted legal challenge and popular resistance.<sup>347</sup> The change was driven by operational practices.<sup>348</sup> Successful implementation of the priorities required agency-specific knowledge of the intricacies of transferring noncitizens from jail to detention and embeddedness in agency culture.<sup>349</sup> Interviews with policymakers revealed that ICE prided itself on being led by those who had long been part of the agency, rather than by someone from outside.<sup>350</sup> In one of the few instances where an ICE Director came from the outside, he confronted initial resistance to change from the career staff.<sup>351</sup> The failures to align presidential priorities with enforcement criteria up-and-down the agency hierarchy contributed to inconsistent results and perceived illegitimacy.

The process of transforming ICE's detainer practices was bumpy. Early in the Obama Administration, ICE Director John Morton issued a series of internal memoranda articulating principles of enforcement discretion to change its agency culture of nondiscretionary enforcement and to more effectively implement prior regulations and broad statutory mandates to focus on "criminal aliens."<sup>352</sup> The Morton memos in 2010 and 2011 should have done more to explain why the agency leadership felt centralized discretion in enforcement was needed; how it served agency needs, presidential priorities, and congressional mandates; and what specific criteria could be applied to its requests that county jails detain immigrants. Part of this explanation should have been public administration. For example, the agency could have used a statement of basis and purpose to describe safety risks to officers effectuating removals in the field, or identified data disaggregation problems that impeded the targeting of serious criminals. While explanation may not absolve all internal dissent, nor should it as a normative matter, the consistent

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346. *Supra* Part II.B.2.

347. David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & POL. 411 (2015).

348. *Supra* Part II.B.2.

349. *Supra* Part II.B.2.

350. *Supra* Part II.B.2. Interview with DHS Gen. Counsel Office (June 23, 2016) and ICE Director (June 13, 2016).

351. *Supra* Part II.B.2. Interview with DHS Gen. Counsel Office (May 31, 2016; July 5, 2016) and ICE Director (June 13, 2016).

352. Morton memo, *supra* note 143.

application of operational procedures incentivizes intra-agency accountability through ICE's chain of command.<sup>353</sup> This, in turn, permitted disagreements to be worked out with a supervisor rather than in individual cases in a manner that can undermine agency performance.<sup>354</sup>

An improved approach toward intra-agency and federal-state interactions on detainers parallels some of the increased procedure recommended for deferred action. Within the agency, instilling ICE with macro-level priorities and a more professional culture reigned in abuses of discretion at the micro-level.<sup>355</sup> As between ICE and local jails, nonbinding federal detainer policies reliant on voluntary cooperation takes a softer touch. While the federal government can try to entice cooperation within this framework of discretionary decisions, it cannot force states and localities to cooperate. States are free to choose, and they are unlikely to choose cooperation without being persuaded of the legitimacy of the federal programs.

### *3. Prescriptions to Promote Interagency Coordination*

Presidents should encourage more interagency consultation and coordination across the executive branch. The OIRA regulatory planning process might assist these bilateral discussions by excavating agency plans for policymaking and adjudication. Agency heads also need to be given a motivation for engaging one another across agencies; otherwise, their default is to operate in silos. Agencies also need to be given mechanisms and incentives to engage one another. The top-down chain of command within a single agency does not pertain to bilateral discussions across agencies that require different tools of policymaking. Interagency working groups and the formulation of Memorandums of Understanding might help

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353. The function of internal dissent as a check on executive authority is briefly taken up in the next section that considers the objections to the desirability of centralized and coordinated decision-making (*infra* Part III.B). Distinguishing between dissent premised on disagreements within a permissible realm of discretion and infidelity to organizational objectives and leadership is difficult and important, and it should be examined in future research.

354. Interview with DHS Gen. Counsel Office (June 23, 2016) and ICE Director (June 13, 2016).

355. As briefly reported in the DACA case study, the President and DHS Secretary set macro-level priorities for USCIS that agency officials could implement when processing individual applications for DACA. Beyond promoting a coherent vision, policy leaders worked to instill a more professional culture of agency decisionmaking that aligned the granting of deferred action with the policy of protecting DREAMers from deportation. *Supra* Part II.B.1.

to serve this purpose in other rulemaking contexts.<sup>356</sup> Rulemaking mechanisms exist to incorporate multiple actors in policy regarding matters of shared concern, especially in the early stages of policymaking. However, a coordinating body needs to provide incentives for agencies to work together outside of their usual mechanisms and strong relationships between the agencies need to exist for successful cooperation. When *ex ante* coordination of agencies is not possible, the President and the agencies should minimize institutional leapfrogging and instead move incrementally and cyclically to give each other opportunities for catch up, realignment, and buy-in.

This suggestion for interagency coordination extends to both agency rulemaking and agency adjudication. Immigration adjudication, especially for asylum seekers, illustrates how interagency consultation can fall apart when the investigative and adjudicative functions are divided across two agencies.<sup>357</sup> The immigration courts receive attention from the President when their priorities intersect with presidential priorities.<sup>358</sup> The hasty institution of priority docketing to reduce long delays attempted to ameliorate doubts about the fairness of asylum adjudication processing and family detention and to serve the President's intended goal of deterring a surge in unauthorized migration from Central America.<sup>359</sup> However, by all accounts, the effort was haphazard and clumsily implemented.

In stark contrast to the principles of administrative regularity prescribed in this Article, DHS's shifting practices of family detention, EOIR's rapid agency adjudication, and ICE's targeted raids subsequent to removal orders caught many of the immigration attorneys and agency officials involved in the complex process of adjudication by surprise.<sup>360</sup> Even though a DHS enforcement priorities memo presaged the operation, the orders appeared to "come from the top" given the lack of public engagement during the formation of the enforcement priority and the shifting strategies of implementation.<sup>361</sup> DHS conveyed piecemeal rationales to the public in

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356. Interagency workings groups, joint rulemaking, and other multi-member coordinative devices are discussed in Freeman & Rossi, *supra* note 91, at 1175; Renan, *supra* note 113, at 214.

357. *Supra* Part II.B.3; Homeland Security Act of 2002, 6 U.S.C. § 115(a)–(b) (2012) (separating the investigation function across multiple federal agencies).

358. *Supra* Part II.B.3. Interview with DOJ EOIR immigration attorney (Nov. 9, 2016).

359. *Id.*

360. *Supra* Part II.B.3; Dan Hernandez, *Fear Overrides Everything: Immigrants Desperate for Reassurance after ICE Raids*, GUARDIAN (Jan. 6, 2016), <https://www.theguardian.com/us-news/2016/jan/06/ice-raids-immigrant-families-deportation-fear>.

361. Interviews with immigration attorneys and community organizers (May 30, 2016; June 6, 2016; June 10, 2016).

the aftermath of its raids through Secretary Johnson's press statements.<sup>362</sup> But after-the-fact justifications do little to guide implementation. The agencies were unprepared for the volume of new cases and strained to fulfill their new goals.<sup>363</sup> Lawsuits continue to challenge the due process of the procedures that resulted from DHS and DOJ's flawed interagency adjudication.<sup>364</sup>

Coordination is a critical task for an administrator-in-chief in a complex bureaucracy. DHS might point to the crisis nature of its response and expediency as reasons to grant greater leniency to Operation Border Guardian than the other executive actions. However, going forward, the DOJ should make more accessible the interagency coordinating memos between EOIR and DHS that reshape immigration court proceedings in order to improve the orderly adjudication of high stakes cases.

While these simple changes would not be enough to foster full consensus over the moral and legal dimensions of apprehending asylum-seekers through the use of family detention and priority docketing, more coherence in the program's stated goal of deterrence, better intra- and interagency coordination, and more consistent outcomes across agency adjudications could avoid some of the institutional harms. Fundamentally, the goal of this Article is not to elevate procedural criteria of legitimacy over substantive criteria of legitimacy or to say that one substitutes for the other. It is to highlight an underappreciated dimension of administrative behaviors that legitimate executive action and to suggest that, as a prudential matter, paying attention to procedure can either improve the best conceived substantive policies or ameliorate the worst of them.

### *B. Countering Objections*

The suggestions for the President and agencies emphasize voluntary measures to improve the perceived legitimacy of regulatory actions undertaken for reasons of good governance and effective administration. The suggestion for the President is to use regulatory planning more broadly and more stringently when engaging with agencies (to promote coherence), and to rely more heavily on Regulatory Policy Officers to integrate policy imperatives with operational considerations (to promote consistency). Agencies should voluntarily and affirmatively disclose the motivations and

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362. See text accompanying *supra* note 284 for DHS Secretary Johnson's description of the raids.

363. Interviews with immigration attorneys and community organizers (May 20, 2016; June 6, 2016; June 10, 2016).

364. See, e.g., *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015); *Castro v. DHS*, 163 F. Supp. 3d 157 (E.D. Pa. 2016).

justifications for their policies, enhancing their ability to align policies with presidential priorities and to reconcile competing political, legal, and professional pressures (coherence and consistency). Finally, the President's offices should develop mechanisms to facilitate interagency coordination in more systematized ways (coordination). While not a comprehensive formula for administrative success, the recommendations illustrate how the theory of President as Administrator-in-Chief could enhance presidential policymaking through agencies.

Whatever their virtues, there are objections. This section addresses concerns that the proposed reforms are unnecessary, unworkable, or undesirable.

The most obvious concern about a call for more procedure is that demanding more procedure will result in unnecessary delay. For example, USCIS officials involved in the implementation of DACA and the defense of DAPA might claim the additional procedures would not improve the quality of the policy and would run afoul of the virtues of presidential and agency enforcement discretion.<sup>365</sup> ICE officials might argue that opening up the procedures to public scrutiny risks the release of dangerous criminal aliens while waiting for the voluntary compliance of jails in sanctuary city jurisdictions.<sup>366</sup> Border Patrol might argue that cumbersome delay in asylum adjudication processes invite continued and high-levels of unauthorized migration.<sup>367</sup>

In defense of their concerns for too much procedure, the law traditionally shields the President from requirements to justify his actions, particularly in areas entrusted to enforcement discretion or in matters of

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365. *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519, 524 (1978), and *SEC v. Chenery Corp.*, 332 U.S.194, 202–03 (1947), together protect the discretion of the agency to choose its forms of rulemaking and resist the imposition of more procedure by courts.

366. Under the Trump Administration, the DHS and DOJ have both taken this position. Leah Barkoukis, *DHS Issues First Report Calling Out Sanctuary Cities That Refused to Cooperate with Federal Authorities*, TOWNHALL (Mar. 20, 2017), <https://townhall.com/tipsheet/leahbarkoukis/2017/03/20/dhs-declined-detainer-outcome-report-n2301714>; Sari Horwitz & Maria Sacchetti, *Attorney General Jeff Sessions Repeats Trump Threat that Sanctuary Cities Could Lose Justice Department Grants*, WASH. POST (Mar. 27, 2017), [https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-repeats-trump-threat-that-sanctuary-cities-could-lose-justice-department-grants/2017/03/27/1fa38e2a-1315-11e7-9e4f-09aa75d3ec57\\_story.html?utm\\_term=.cc275ff91747](https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-repeats-trump-threat-that-sanctuary-cities-could-lose-justice-department-grants/2017/03/27/1fa38e2a-1315-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.cc275ff91747).

367. Under the Trump Administration, the DOJ EOIR has taken this position. Tess Owen, *Immigration Double Down: New DOJ Immigration Memo Targets Asylum Seekers and Vulnerable Kids, Attorneys Say*, VICE (Feb. 2, 2017), <https://news.vice.com/story/new-doj-immigration-memo-targets-most-vulnerable-kids-and-asylum-seekers-attorneys-say>.

sovereignty.<sup>368</sup> The APA protects agencies from disclosing scrutiny for internal operations, internal deliberations, non-final actions, and exercises of discretion that involve complicated balancing of multiple factors, revelation of sensitive matters, or frank and open internal discussion.<sup>369</sup> Demanding more procedure could perversely incentivize agencies to avoid rulemaking altogether or suffer a loss of the relative flexibility and efficiency of guidance over notice-and-comment rulemaking, resulting in failures to act on pressing regulatory matters.<sup>370</sup> If so, concerns of ossification in the rulemaking context could be transferred into the guidance context.<sup>371</sup>

My response to the concern for unnecessary delay is that even where bolstering procedure may not make for swift action, the value of these measures resides in promoting the three C's of public administration—coherence, consistency, and coordination—that in turn enhance the procedural legitimacy of executive agency action. The difference between the relative success of DACA and the failure of DAPA demonstrates the value of added procedure in the face of contest. Moreover, the USCIS's rush to implement deferred action churned up legal challenge and public protest that generated delay and impaired implementation of the programs. The same is true for the use of immigration detainers, which had to be reconstituted from Secure Communities to the more scaled-back and deliberately-implement PEP, and continues to falter under challenges to its legitimacy. The organizational chaos and failure to swiftly and accurately

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368. See *Heckler v. Chaney*, 470 U.S. 821 (1985). The Plenary Power doctrine is another instantiation of this principle, though its normative force is eroding over time in immigration. See Chin, *Is There a Plenary Power Doctrine?*, *supra* note 24; Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 257 (1999); Legomsky, *supra* note 31.

369. See generally APA of 1946, 5 U.S.C. § 553 (2012).

370. Conor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 107–08 (2015); Keith Barnett & Chris Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (self-insulation as agency response to presidential review, not APA guidance); Michael Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014) (similar for avoiding cost-benefit); see also *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (incentive to promulgate mush and risk of agency abuse). As one example of many scholars describing the burdensome effect of increasing procedures required of agencies, see Shapiro et. al., *supra* note 34, at 464 (2012) (reporting that rulemaking takes too long and is largely in vain).

371. *Id.* See also Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); cf. Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012); Raso, *supra* note 370.

manage the migration of Central American asylum-seekers suggests that the forceful implementation of hastily-drafted policies is not succeeding.

A second objection to confining the President's focus to procedure is that separating internal procedure from substantive policy is unworkable. One reason is that the conflation of substance and procedure by the President or his agencies may be strategic. For example, community activists are quick to point out that President Obama scored political points by issuing DACA.<sup>372</sup> The blurring of substance and procedure may be the product of the inevitable difficulty of disentangling substance and procedure, even in the absence of intentional obfuscation. For example, the ramped up enforcement against asylum seekers is premised on the theory that institutional delay invites flouting of immigration law, not malevolence toward asylum seekers.

My response is that, in a number of contexts, case law and policy manages the distinction. Civil procedure cases separate agency procedures conflating means with ends.<sup>373</sup> Administrative law makes exceptions to rulemaking exemptions for procedures that "encode substantive value judgments" or affect "primary conduct."<sup>374</sup> Other legal tests recognize that even where the intention of a policy is procedural, substantive effects may be too great to warrant insulation from external review.<sup>375</sup> These objections are raised in the administrative law scholars' amicus brief, siding with the U.S. government's defense of DAPA in the *Texas v. United States* litigation. Setting aside doctrine, practice also suggests that procedure can tame substance. ICE showed less of a change of heart over the substantive goals of removing criminal aliens and more of an increased willingness to pursue enforcement priorities that targeted their efforts toward serious criminals, kept them safe from dangerous field operations, and appealed to their sense of law enforcement expertise and professional judgment.<sup>376</sup>

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372. Interviews with immigration attorneys and community organizers (May 20, 2016; June 6, 2016; June 10, 2016).

373. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (concerning the substance/procedure divide).

374. See *Air Transport Ass'n of Am. v. DOT*, 900 F.2d 369 (D.C. Cir. 1990); see also *id.* (Silberman, J. dissenting).

375. See guidance tests for substantial impact, see e.g., *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987) (rejecting substantial-impact test during review of an earlier Immigration and Naturalization Service policy statement on deferred action); *supra* note 95.

376. A different concern about workability is whether a President or agency would be willing to disclose information that they are not legally required to share under existing statutes and case law. Executive privilege alleviates the President of the obligation to disclose information about the inner workings of government. *United States v. Nixon*, 418 U.S. 683 (1974) (recognizing a qualified presidential privilege as byproduct of the president's



A final objection to concentrating presidential power on effective administration is that too much coherence, coordination, and centralizing of discretion is normatively undesirable. For example, promoting coherent presidential policy can disguise substantive disagreement or squelch the push and pull of compromise that can lead to the generation of policy alternatives.<sup>377</sup> This type of internal debate might have improved ICE's practices of immigration detention, which suffered a blind spot toward the brewing litigation over the balance of state and federal power and respect for criminal procedure. It might have softened the response to Central American asylum seekers, especially the children who went unrepresented in immigration court or were held in hastily-constructed family detention centers.

In more abstracted form, the objections raise fundamental disputes about executive power. Insisting on coherence in the executive branch sounds similar to making arguments supporting a unitary executive, or at least a strong president, in the face of national emergency.<sup>378</sup> Too much

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supremacy in executive affairs and as a function of separation of powers). FOIA exemptions similarly permit agencies to hold back inter- and intra-agency memos. Exemption 5 of the Freedom of Information Act protects "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2012). APA doctrines insulate such agency matters from the typical presumption of reviewability in court. 5 U.S.C. § 553(b)(A) (showing that requirements for notice-and-comment do not apply to "rules of agency organization, procedure, or practice). My response is to clarify that the suggestion is for voluntary and affirmative disclosure. Undertaking the suggestions would be a prudential practice; it would not be legally compelled. Looking at recent experience, presidents and their agencies do reveal more than is legally required for the purpose of promoting open government. *See* Barack H. Obama, Presidential Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 4685–86 (Jan. 26, 2009); Peter R. Orszag, OMB, EXEC. OFFICE OF THE PRESIDENT, Memorandum for the Heads of Executive Departments and Agencies on the Open Government Directive (Dec. 8, 2009); Eric H. Holder, OFFICE OF THE ATT'Y GEN., Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act (Mar. 19, 2009).

377. Public choice theory posits that political actors are self-interested and will enact deliberately ambiguous policies to secure passage of legislation or obscure electoral retribution. *See* RESEARCH HANDBOOK *supra* note 38.

378. Lawrence Lessig and Cass Sunstein explain the basic premise of the unitary executive and claim that "No one denies that in some sense the framers created a unitary executive; the question is in what sense." Lessig & Sunstein, *supra* note 35, at 8. In either its strong or weak form, the theory limits the power of Congress to divest the President of control of the executive branch. *Id.* at 8–9. For an example of the theory, see Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992). For a critique, see David Barron & Marty

centralization of discretion can detract from the expert judgment presumed in the granting of deference to agency discretion or upset the balance of career civil servants and political leadership engaged in policy implementation. Too much consistency can impede individualized determinations required for the dispensation of real rather than routinized justice.<sup>379</sup> Too much insistence on coordination across agencies, like too much coordination within agencies, can eliminate diversity of opinion and can impede the experimentation and sharing of experience that improves the quality of agency decisionmaking.<sup>380</sup>

My response to this important objection, which enduring and prolonged scholarly debate has not resolved, is that the trade-off between the virtues and vices of a good and well-administered government are somewhat unavoidable. This Article sides with the aspiration of a well-administered program for the purpose of legitimating agency actions, which are inherently vulnerable to challenge. This approach is particularly favored in the presence of complex and contested policies where the definition of the substantive good cannot be agreed upon. The case studies demonstrate the value of carefully-constructed and well-administered policies that can balance the trade-offs between flexibility and procedure. As illustrative examples, the setting of coherent priorities for immigration enforcement that can be translated into operational strategies that are implemented on the basis of experience and expertise—the strategy that underlies all three programs examined in the Article—strives for such a balance. Tipping the balance toward efficacy might be rejected by those who disagree with its substantive ends. And there will always be substantive disagreement in the face of a morally complex, value-laden subject such as immigration. However, nobody wins if the alternative course is not a transformation of those ends toward consensus goals but instead a poorly-implemented policy that compromises the institutional processes meant to stabilize the federal government amid change and controversy.

### CONCLUSION

This Article claims that the legitimacy of presidential influence over agency policy turns on the soundness of motivations for intervention and the quality of the procedures used by the President and agency to govern.

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Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (arguing that Constitution does not provide for a strong unitary executive outside the military context).

379. See generally MASHAW, BUREAUCRATIC JUSTICE, *supra* note 27.

380. See Renan, *supra* note 113, at 275 (discussing the pernicious aspects and trade-offs against the salutary aspects, yet mostly hopeful on coordination.).

This is especially true for morally controversial policies. In making this claim, this Article states that presidential actions should be analytically disaggregated into their procedural and substantive policymaking dimensions rather than judging the policies by substance alone. The administrative dimension of presidential action is frequently overlooked in the scholarship on presidential control and the legitimacy of the administrative state.<sup>381</sup> This perspective on good governance as a legitimating force contributes to established understandings of administrative legitimacy as a normative goal, and it does so in an empirically grounded way.

The case studies in this Article primarily concern the President's role in immigration enforcement policy. While the full spectrum of immigration policy, let alone all regulatory policy, is beyond the scope of this Article, the institutional features of DHS represented in the three specific immigration policies cover an array of policymaking devices used in immigration: policies involving internal administration with and without policymaking consequences; policies using legislative, enforcement, and adjudicative form; and policies generating legal and political challenge from inside and outside the executive branch. Similar analysis could be undertaken with regard to other executive enforcement actions, with the transferability of the lessons facilitated by similarities in the institutional arrangement between the agency and the President and the politics surrounding the substantive policies.<sup>382</sup> Longitudinal studies comparing administrative actions within a single policy area across presidential administrations, as opposed to the cross-sectional study comparing multiple policies within a single administration, would also be instructive.<sup>383</sup> Comparisons across

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381. See *supra* Part I.A.

382. An important limitation is that the study does not cover independent agencies. Further study of the internal dynamics in independent agencies would be beneficial, given their multimember leadership and the greater concerns for legitimacy vis-à-vis the President and Congress. A promising study of independent agencies concerns expressions of dissent within the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the FCC. See Sharon Jacobs, *Administrative Dissent* (manuscript on file with author).

Although the research design in this Article analyzes procedures rather than substantive policies and politics across case studies, the case analysis sheds some light on the later comparison: for example, noting differences in the politics surrounding DACA and DAPA or the distinctiveness of controlling the migration of recently-arrived asylum-seekers as opposed to long-time undocumented immigrants.

383. See, e.g., Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. U. L. REV. 91 (2015) (discussing the Clinton and Bush Administrations' education policy); Zachary Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119 (2015) (immigration and other controversies under Reagan, Bush, and Obama).

policy arenas would be difficult to undertake in systematic fashion given the institutional, political, and policy contingencies, but they would undoubtedly be valuable to the institutional analysis as well.<sup>384</sup>

Limitations notwithstanding, the lessons generated by studying the role of the Presidency and the administrative process of immigration enforcement are important to immigration law and policy.

Immigration policymakers and scholars recognize that there is a slim chance for moral consensus around national policy in immigration.<sup>385</sup> In the absence of such possibilities, the imaginative capacity of policy reformers should stretch beyond substantive policies to include the procedural means of addressing them. The shift will require meaningful engagement between the President, DHS leadership, and civil servants who implement the policies of the President. The lesson from administrative law is that executive policy is always vulnerable to challenge, let alone when there is the level of controversy surrounding immigration. The fervor surrounding immigration law only makes it more important to consider prudential measures in agency policymaking. The political leadership needs to receive input from experts who are well-versed in the intricacies of implementing immigration law and relatively more insulated from its politics. They need to move deliberately to improve the operation of the immigration bureaucracy that is a vital site of immigration policymaking.

Moreover, rising political division and abrupt realignments of the presidency, Congress, and the Supreme Court heighten the ever-present need for constraints on executive authority. Immigration policy is privy to policy excess, given the emotions that it stirs and its intertwining with convictions about what structural, demographic, and cultural change means for America. It is prone to executive abuse given the long tradition of deference to the political branches and the possibilities of evading scrutiny through multiple assertions of exceptionalism: as a policy concerning sovereignty, public safety, and otherwise irregular circumstances. Moreover, the administrative aspects of immigration policies—their origins, justifications, and consequences—are highly technical and can seem opaque to policy insiders and outsiders. Rather than reflexively fearing the role of the federal government in immigration<sup>386</sup>

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384. Several ACUS commissioned studies have this potential, including forthcoming interagency studies on guidance by Nicholas Parillo and an interagency study on agency adjudication by Michael Asimov (on file with authors).

385. Tal Kopan, *Immigration Policy in 2017? Good With That Say Veterans*, CNN (Feb. 14, 2017), <http://www.cnn.com/2017/02/13/politics/immigration-policy-reform-congress-chances/>.

386. Concerns with the Plenary Power Doctrine occupy a prominent part of

or shying away from the mess of immigration politics, contemporary politics and policymaking require that immigration policy move into the realm of administrative normalcy. The perennial issues in public policy and public administration should inform them how to advance coherent, consistent, and well-coordinated policy responses in a manner that is well-informed, effective, and fair.<sup>387</sup>

Misunderstanding the relationship between presidential administration and presidential policy in immigration is costly. The failure to distinguish the President's administrative and policymaking objectives leads to political encroachment on agency expertise and independence. And the false assumption that agencies engaged in the tasks of public administration are using internal means to circumvent external oversight breeds suspicion of agencies' motives with regard to policymaking and undermines the capacity for democratic legitimacy. This mutual suspicion leads to poor governance, divisive politics, and ultimately bad policy. More generally, the conflation of internal and external administration of law in immigration policy exacerbates chronic concerns about the legitimacy of both presidential power and administrative action.<sup>388</sup> Presidents and agencies need to work together to establish themselves as legitimate administrators and effective policymaking partners in the modern regulatory state.

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immigration scholarship. See, e.g., Chin, *Is There a Plenary Power Doctrine?*, *supra* note 24; see Johnson, *supra* note 368; Legomsky, *supra* note 31.

387. See *Online Symposium: Is Immigration Law Administrative Law?*, Introduction by Jill E. Family, YALE J. ON REG.: NOTICE & COMMENT BLOG, (Feb 8, 2016), <http://yalejreg.com/nc/online-symposium-is-immigration-law-administrative-law-introduction-by-jill-e-family/>.

388. JAMES FREEDMAN, *CRISIS AND LEGITIMACY* 9–10 (1978) (characterizing concerns about executive action as “strong and persistent,” engendering a sense of crisis that surpasses routine criticism). A more contemporary articulation of this concern can be seen in several manifestations of Congress's agenda for preventing executive overreach. See, e.g., H.R. 76 Separation of Powers Restoration Act of 2017; H.R. 26 Regulations from the Executive in Need of Scrutiny Act of 2017.

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