

Institutional Dissonance in Administrative Adjudications

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ABSTRACT

This Article explores agency institutional design choices undergirding mass adjudication schemes for public benefits that are hostile to the individuals the agencies were created to serve. Congress creates social welfare agencies to provide government services to the public. These agencies administer federal government programs aimed at ameliorating major issues facing the nation such as care for the elderly, health care, compensating veterans, and immigration. Nevertheless, across the administrative state, the agencies responsible for administering these programs are consistently unable to effectuate their adjudicatory charge while adhering to their service-oriented missions. No matter the subject matter, how universally sympathetic the plight of the claimants, nor how explicit the service mandate, agencies inevitably fail, mired in backlogs, scandals, and the tension between fulfilling a duty to run large-scale public benefits programs and simultaneously serve the individuals seeking public benefits.

Using administrative law frameworks, this Article explores the deviation of social welfare agencies responsible for administering mass-adjudication schemes of public benefits away from their service-oriented missions. It excavates the divide between administrative design theorization and agency implementation of regulatory charges through examining two federal agencies as case studies, the Veterans Benefits Administration and the United States Citizenship and Immigration Services. It asserts that congressional institutional design and delegation decisions, coupled with the internal administrative law rules and doctrines that amplify presidential and agency leadership power, have created a bureaucracy that is irreconcilably antagonistic to service mandates in mass adjudication systems for public benefits.

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I. INTRODUCTION

Social welfare agencies provide necessary government services to the public. Congress creates these agencies to administer federal programs aimed at ameliorating major issues facing the nation such as elder care, health care, compensating veterans, and immigration.¹ Across the bureaucratic state, however, the agencies responsible for administering large-scale public benefits programs consistently demonstrate an inability to effectuate their adjudicatory charge while adhering to their service-oriented missions. In order to receive public benefits, individuals from disadvantaged portions of the population must navigate agencies' mass-adjudication schemes.² To determine eligibility for benefits, agencies create labyrinthine procedures and institute policies that foster institutional cultures generally viewed as hostile to the claimants.³ As a result, the federal government often deprives or places unnecessary obstacles on obtaining what can be life sustaining public benefits to the individuals the agencies were created to serve.⁴

1. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 479 (2010) (stating Congress's authority to create independent agencies).

2. See Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1816–17 (2023) (explaining “high volume” administrative courts typically involve disadvantaged groups). “It is not just anyone who files a disability claim or needs to defend a deportation case. The ‘high volume’ administrative courts are social-security courts, immigration courts, Medicare courts, and veterans-affairs courts. These are courts where poor people of color file legal claims.” *Id.*

3. See Amanda Frost, *Can the Government Deport Immigrants Using Information It Encouraged Them to Provide*, 2 ADMIN. L. REV. ACCORD 97, 99 (2017) (identifying myriad of statutes making agencies hostile to claimants).

4. See *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch J., dissenting) (providing examples of burdensome access for federal agency benefits). In the denial of *certiorari* in *Buffington*, Justice Gorsuch argued how the expanse of administrative power reduces access to duly earned federal benefits:

Today, administrative law doesn't confine itself to the regulation of large and sophisticated entities. Our administrative state “touches almost every aspect of daily life.” And often it is ordinary

Perhaps the clearest example of federal social welfare agencies' perpetual struggle to adhere to their service-oriented missions is the Veterans Benefits Administration (VBA). The VBA, under the Department of Veterans Affairs (VA), administers non-medical veterans' benefits.⁵ Because of the unique sacrifices individuals who come before the VBA have made, Congress mandated not merely a service-oriented mission, but also an affirmatively proveteran system.⁶ The VBA adjudicates over one million benefit claims annually for veterans and their families, distributing approximately \$135 billion in benefits.⁷

With a clear pro-claimant mandate, one might think that the VBA would be free from the dissonance of fighting against the veteran claimants it was created to serve; however, the VBA consistently struggles to accomplish its statutory service-oriented mission with its mass-adjudication system for administering benefits.⁸ Politicians, activists, and veterans alike condemn the VBA's administration of the benefit systems for large backlogs, inaccurate adjudication of claims, and untimely delivery of life sustaining benefits. Veterans describe the mentality of the mass-adjudication system as "delay, deny, and hope that I die."⁹

While the VBA's mission is uniquely pro-claimant, it is far from exceptional in how it, and other agencies responsible for administering public benefits, inevitably get mired in backlogs, scandals, and tension between fulfilling their duty to run these systems and their service-mission objectives. As Justice Neil Gorsuch posed: "[H]ow is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist,

individuals who are unexpectedly caught in the whipsaw of all the rule changes [deference to agency interpretation] invites. Mr. Buffington's case illustrates the impact on disabled veterans So many other individuals who interact with the federal government have found themselves facing similar fates—including retirees who depend on federal social security benefits, immigrants hoping to win lawful admission to this country, and those who seek federal health care benefits promised by law.

Id.

5. See *Office of Rural Health*, U.S. DEP'T. OF VETERANS AFFS., [https://www.ruralhealth.va.gov/aboutus/structure.asp#:~:text=The%20Veterans%20Benefits%20Administration%20\(VBA,Insurance](https://www.ruralhealth.va.gov/aboutus/structure.asp#:~:text=The%20Veterans%20Benefits%20Administration%20(VBA,Insurance) [https://perma.cc/E4KE-BZBB] (describing VBA's role within VA).

6. See *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985) (highlighting "high degree of informality and solicitude" within claimants' processes); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (describing system as "uniquely pro-claimant").

7. See U.S. DEP'T OF VETERANS AFFS., 2020 ACTION PLAN (2020), <https://www.performance.gov/cx/dashboard/actionplans/2020/2020-hisp-action-plan-va-vba.pdf> [https://perma.cc/397T-RX7K]; *VA History Summary*, U.S. DEP'T OF VETERANS AFFS., <https://department.va.gov/history/history-overview/#:~:text=In%201811-%2C%20the%20federal%20government,for%20their%20widows%20and%20dependents> [https://perma.cc/X3-BM-GGNN] (providing data on VBA distributed \$135 billion in benefits).

8. See *Mathis v. Shulkin*, 582 U.S. 941, 941–42 (2017) (noting full review of VA decision denying veteran benefits required requesting medical examiner's credentials).

9. See Susan Thompson, *Navigating the Department of Veterans Affairs with Invisible Wounds: How to Overcome the Stigma of "Delay, Deny, & Hope You Die"*, USC SCH. OF SOC. WORK CTR. FOR INNOVATION & RSCH. ON VETERANS & MIL. FAM (Apr. 2012), https://cir.usc.edu/wp-content/uploads/2013/10/2012-04-CIR-Policy-Brief_Navigating-the-Department-of-Veterans-Affairs_S.Thompson.pdf [https://perma.cc/VYR9-UTZ-M] (distinguishing between VA bureaucratic system failures and favorable movements in care and treatment).

and much to impair, the interests of those the law says the agency is supposed to serve?”¹⁰ Understanding why social welfare agencies’ adjudicative schemes consistently contravene congressionally mandated service-oriented missions and objectives first requires unpacking the continual power struggle over the control of agencies.¹¹

The Constitution grants legislative powers to Congress, but the execution of those laws is the duty of the President.¹² The degree of executive branch power is determined by key congressional choices. In particular, congressional institutional design decisions and broad delegations of authority can impart substantial discretionary and managerial control to presidents and agency leadership.¹³ Justifications for congressional bestowal of control, flexibility, and judicial deference to the executive branch include subject-matter expertise and permitting flexibility to accomplish expedient responses to societal needs. In the current administrative state, the President and agency leadership have tremendous power to shape how the laws are interpreted, administered, and prioritized.¹⁴ While nimbleness may be a sought-after feature in the administrative state, it leads to tremendous executive power to determine which laws take primacy, including those laws that prescribe the agencies’ service missions.¹⁵

Presidents and agency leadership can steer agencies to accomplish policy objectives that may conflict with the service missions the agencies were created to

10. *Mathis*, 582 U.S. at 942 (Gorsuch J., dissenting) (questioning VA presumption standard in administrative proceedings).

11. See Cox & Kaufman, *supra* note 2, at 1816–17 (emphasizing Supreme Court’s attempt in restricting regulation and promoting presidential adjudication); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001) (demonstrating complexity in administrative control division and necessity for comprehensive evaluations).

12. See U.S. CONST. art I, § 1 (enumerating Congress’s legislative powers); *id.* art. II, § 1, cls. 1, 3 (confering executive power to President).

13. See Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1854 (2019) (utilizing post-master rulemaking power example to display binding administrative rules needed to effectuate executive function).

14. See U.S. CONST. art. II, §§ 1, 3 (vesting president with executive power to take care laws faithfully executed); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 238 (2020) (holding president may remove Consumer Financial Protection Bureau director at will); see also Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 644 (2020) [hereinafter *Executive (Agency) Administration*]; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1849–58 (2015) (discussing growth of supervision capacity).

15. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T L. REV. 1, 10 (2009) (suggesting agencies may have different goals than Congress); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 875–76, 886 (2007).

execute.¹⁶ Presidential control is at its apex when it comes to immigration agencies.¹⁷ Therefore, a prime example is the United States Citizenship and Immigration Service (USCIS). Congress created USCIS with the mission of administering the immigration benefits system, separate and distinct from the immigration enforcement aims of its sister agencies within the Department of Homeland Security (DHS).¹⁸ USCIS's distinct service-oriented mission was necessary to ensure that the goals and values of providing quality and efficient adjudications were not subsumed by immigration enforcement prerogatives, as had occurred under prior agency structures.¹⁹ USCIS has consistently and increasingly struggled with rising backlogs and responding in a service-oriented manner to customers.²⁰ Congress has repeatedly shown concern over the backlogs of immigration applications and mismanagement.²¹ USCIS has increasingly performed, substituted, and prioritized enforcement tasks to the detriment of the mass-adjudication system under its charge. Under the shadow of its sister agencies under the DHS, USCIS has ascended to a prominent role in the

16. See Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 380 (2019) (discussing nature and extent of presidential power over agencies); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1057–58 (2011) (discussing design differences between presidentially and congressionally created agencies); Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 559, 563 (2016) (noting agencies develop core mission to prioritize among assignments); Kagan, *supra* note 11, at 2254 (reflecting on shifts in agency control).

17. See Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 959–60 (2021), *citing* ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 105, 127–29 (2020) (discussing executive control over agencies); Shoba Sivaprasad Wadhia, *Darksided Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 384 (2020) (noting influence of Attorney General Sessions' encouragement of discretionary denials of asylum as administration policy); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 352 (2017) (studying presidential supervision of agencies in immigration context); Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1183–84 (2016) (studying power of immigration officers not only power of president); Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1084–85 (2015) (discussing presidential actions on immigration without congressional authority).

18. See Homeland Security Act, 6 U.S.C. § 291(b) (2002); Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 119–20 (1996).

19. See 6 U.S.C. § 291(b) (2002); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1111–12 (2011) (rejecting immigration system pursuing multiple goals that threaten undermining one another); *see also* Sutherland, *supra* note 18, at 119–20 (portraying previous agency's faults though refugee point of view).

20. See U.S. CITIZENSHIP & IMMIGR. SERVS., *IMPACT OF THE HOMELAND SECURITY ACT ON IMMIGRATION FUNCTIONS TRANSFERRED TO THE DEPARTMENT OF HOMELAND SECURITY* 7 (2020), https://www.uscis.gov/sites/default/files/document/reports/ihsaiftdhs_fy23.pdf [<https://perma.cc/L5BK-3GSN>] [hereinafter *IMPACT OF THE HOMELAND SECURITY ACT*] (highlighting 2.5 million cases backlogged in 2019 with plans to reduce in 2020); U.S. CITIZENSHIP & IMMIGR. SERVS., *ANNUAL REPORT 2023* iv (2023), https://www.dhs.gov/sites/default/files/2023-07/2023%20Annual%20Report%20to%20Congress_0.pdf [<https://perma.cc/5EC5-9WSS>] (suggesting backlogs continued and worsened following COVID pandemic).

21. See Homeland Security Act, 6 U.S.C. § 271(a)(5) (2002) (codifying ability to implement new programs to eliminate backlog).

deportation system, including initiating removal proceedings at a higher rate than any other agency.²²

Under the Trump Administration, USCIS's hostility towards its service mission reached new levels. Fueled by anti-immigrant policy aims, the Trump Administration systematically implemented comprehensive enforcement policies that ultimately pushed the agency to the brink of collapse.²³ As enforcement functions displaced service mission-oriented functions, the agency faced a backlog of applications in excess of 2.5 million, leaving individuals waiting years for decisions on applications for citizenship and lawful permanent resident status.²⁴ In June 2020, the agency feared it would have to furlough roughly two-thirds of its workforce due to insufficient funding.²⁵

Nonetheless, crediting President Trump with USCIS's dereliction would be a mistake. Rather, the Trump Administration's onslaught of executive actions serves as a vibrant illustration of the implications of fundamental features of the administrative state. During his first campaign, President Trump guaranteed: "We are going to deport many people, many, many people. . . . We're going to do that vigorously, we're going to go with the laws that are existing."²⁶ He fulfilled his promise, but it was not the existing immigration laws that gave him the greatest purchase. The administrative doctrine and laws that are foundational to the current balance of power over the administrative state are what provided President Trump the framework necessary to carry out his anti-immigrant policies.²⁷

The current functioning of the administrative state enables the executive branch to interpret and prioritize laws such that those directing service missions are subsumed by other policy objectives. Executive branch power is amplified by the vast array of flexibility and deference in internal administrative law tools through which the executive branch internally governs itself.²⁸ Because these tools allow dramatically varying degrees of transparency and oversight across and within agencies, the executive branch has ample space to use agencies to further policy objectives through

22. See OFF. IMMIGR. STAT., MIKE GUO & RYAN BAUGH, IMMIGRATION ENFORCEMENT ACTIONS: 2018 8 (2019), https://cis.org/sites/default/files/2020-10/enforcement_actions_2018.pdf [<https://perma.cc/2CQ7-C7EH>] (showing in 2017 and 2018 USCIS issued more Notices to Appear than ICE or CBP).

23. See Sarah Pierce & Doris Meissner, *USCIS Budget Implosion Owes to Far More than the Pandemic*, MIGRATION POL'Y INST. (June 2020), <https://www.migrationpolicy.org/news/uscis-severe-budget-shortfall> (last visited Oct. 21, 2024) (highlighting administrations' toll on USCIS).

24. See IMPACT OF THE HOMELAND SECURITY ACT, *supra* note 20, at 7 (explaining backlog due to unanticipated increase, complexity, and logistical limitations).

25. See Pierce & Meissner, *supra* note 23 (urging emergency Congressional funding).

26. Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html> [<https://perma.cc/ULZ3-AAJF>] (citing CNN interview with Anderson Cooper).

27. See Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 585 (2012) (contextualizing Trump's actions in Bush's framework).

28. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1251, 1256 (2017) (questioning why internal structures hold interpretation of law).

creating structures and guidance that attempt to steer agency officer culture and centralize decision-making.²⁹

This Article analyzes the deviation of social welfare agencies responsible for administering mass-adjudication schemes of public benefits away from their service-oriented missions. Using administrative law frameworks, this Article uses USCIS and the VBA as case studies to excavate the divide between administrative design theorization and agency implementation of regulatory charges.³⁰ It asserts that congressional institutional design and delegation decisions, coupled with the internal administrative law rules and doctrines that amplify presidential and agency leadership power, have created a bureaucracy that is irreconcilably hostile to service mandates in mass adjudication systems for public benefits.³¹

Part II first provides an overview of executive branch administrative agency mission theories, followed by congressional design and delegation choices and their implications for increased executive branch control.³² It then explores the primary executive branch stakeholders and internal administrative law features that seek to shape culture and enable centralization of decision-making that can alter the course of agencies toward or away from their service-oriented missions.³³

Part III details the immigration bureaucracy's perpetual struggle to design and structure agencies that perform the competing missions of services and enforcement.³⁴ It then analyzes USCIS's contravention of its mission mandate through administrative law theorization.³⁵ It scrutinizes the delegation decisions that inculcate the primacy of enforcement policy objectives within USCIS.³⁶ Last, this Part examines the amplification of presidential and agency leadership power over immigration enforcement policies and practices within USCIS.³⁷

Part IV turns to the administration of veterans' benefits.³⁸ It explores the nation's ever-increasing difficulties in designing a mass-adjudication system for veterans that can effectively fulfill a pro-claimant, service-oriented mission.³⁹ Then, it explores how the President and agency leadership are consistently promoting, while also

29. See Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1232 (2020) (showcasing administrative agency flexibility in rule making); JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 188, 18, 27–28 (2d ed. 2018) (explaining presidential role in administrative agency oversight); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L. J. 104, 174 (2015) [hereinafter *The President and Immigration Law Redux*] (noting critiques of Obama's use of agencies).

30. See *infra* Part III (discussing USCIS); *infra* Part IV (discussing VBA).

31. See *infra* Part V (drawing conclusion).

32. See *infra* Section II.A (discussing delegation choices); Section II.B (discussing executive control).

33. See *infra* Section II.C (discussing executive branch stakeholders); *infra* Section II.D (discussing internal administrative law).

34. See *infra* Part III (discussing history of the USCIS).

35. See *id.* (discussing USCIS's departure from its mission).

36. See *infra* Section III.B (discussing delegation of mission to USCIS).

37. See *infra* Section III.C (discussing internal administrative law).

38. See *infra* Part IV (discussing VBA).

39. See *infra* Section IV.A (discussing history of VBA).

advocating against, the proveteran service mandate, both within the workforce and outwardly toward the public.⁴⁰ Finally, it analyzes the power struggle over the VBA by examining the means through which the executive branch pushes back on the congressional duty to assist mandate.⁴¹

II. AGENCY MISSION DRIFT

The laws and doctrines that govern administrative agencies foster adjudicatory schemes for public benefits that inevitably prove hostile to the individuals that Congress created the agencies to serve. Understanding the ever-increasing contravention of their congressionally mandated service-oriented missions first requires unpacking the continual power struggle over the control of administrative agencies. Before joining the Court, Justice Elena Kagan succinctly noted the problem that seems inherent to the administrative state, “[the] perennial question of how to ensure appropriate control of agency discretion—of who could be trusted to set the direction and influence the outcomes of administration.”⁴² The Constitution vests legislative powers to Congress, but the execution of those laws is the duty of the President.⁴³ The executive branch agencies are often conceptualized in the principal-agent model, with agencies faithfully executing the will of Congress.⁴⁴ Agencies, however, are also agents of the President as the head of the executive branch, as well as agents of appointed agency leadership.⁴⁵

This Part first looks at executive branch administrative agency mission theories, followed by congressional institutional design and delegation decisions that cede agency control to the executive branch.⁴⁶ It next turns to the executive branch, describing agency stakeholders and the role of internal administrative law in facilitating centralization of decision-making and shaping adjudicator culture that further enables mission drift.⁴⁷

40. See *infra* Section IV.B (discussing administration of VBA).

41. See *infra* Section IV.C (discussing unique duty of VBA).

42. See Kagan, *supra* note 11, at 2254 (noting inherent problem of administrative state).

43. See U.S. CONST. art I, § 1 (vesting legislative powers in Congress); *id.* art. II, §§ 1, cl. 1, 3 (vesting executive power in President); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 214-15 (2020) (holding administrative agency cannot have single director not removable by President).

44. See *Seila Law LLC*, 591 U.S. at 297-98 (Kagan, J., dissenting) (noting congressional intent with respect to agency decision making and congressional goals).

45. See *Executive (Agency) Administration*, *supra* note 14; Metzger, *supra* note 14, at 1850 (explaining President’s influence).

46. See Metzger, *supra* note 14, at 1850 (examining President’s role in overseeing administrative agencies); Kagan, *supra* note 11, at 2255 (explaining rationale for congressional oversight).

47. See *infra* Section II.B (describing roles of executive agency stakeholders and use of administrative law in mission drift).

A. *Congressional Choices and Agency Mission Adherence*

Congress creates agencies to execute the laws it enacts.⁴⁸ Agency missions can involve a particular subject matter or a task that needs to be executed.⁴⁹ Some agencies are predominantly goal-oriented, including protecting the environment, worker safety, or the marketplace.⁵⁰ Others agencies are primarily task-oriented, responsible for “large-scale tasks indispensable for society,” such as the distribution of mail, collection of taxes, or mass-adjudications of benefits.⁵¹ Nevertheless, missions are rarely just one or the other—rather, goals and tasks may be interconnected and may in fact be in tension.⁵²

Performance of tasks that are complementary to an agency’s mission-related is more efficient as it utilizes the agency’s expertise, structure, and competencies, thereby requiring less effort.⁵³ Conversely, undertaking and prioritizing substitute, non-mission-related tasks detracts time and resources from those that are mission-related, resulting in ineffective performance of those secondary tasks.⁵⁴ Agencies, however, must also balance their core mission with public values that promote good governance and democratic-constitutional values such as participation, transparency, privacy, and civil and individual rights.⁵⁵

48. See U.S. CONST. art. I, § 8 (enumerating Congress’s powers); TODD GARVEY & SEAN STIFF, CONG. RSCH. SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES I, 2 (2023) (describing Congress’ view of Constitution as “as contemplating the creation of ‘departments of an executive nature’ to ‘aid’ the President in the execution of law”).

49. See JONATHAN G. S. KOPPEL, THE POLITICS OF QUASI-GOVERNMENT: HYBRID ORGANIZATIONS AND THE DYNAMICS OF BUREAUCRATIC CONTROL 72–73 (2003) (stating mission related preferences dictate organizational objectives). The mission can be gleaned in the agency’s organic statute and its preamble, or through legislative history. See Lee, *supra* note 16, at 553, 567 (displaying how one may understand agency’s mission and goals).

50. See Lee, *supra* note 16, at 560–61 (highlighting goal-oriented regulatory agencies with broad discretion to implement their goals).

51. See *id.* at 561.

52. For example, the policy making functions of an adjudication-focused agency raise concerns as an institution that both makes procedural rules and interprets relevant law in order to determine individual outcomes. Similarly, inherent conflict arises from agencies responsible for adjudication also assuming enforcement functions, though some may be necessary to ensure compliance. See Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 535 (2019) [hereinafter *Some Kind of Hearing Officer*] (discussing how agency adjudication creates conflicts promoting or hindering enforcement); see also Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1649–50 (2016) (discussing agencies’ control over administrative law judges leading to issues of unconstitutional partiality).

53. See Lee, *supra* note 16, at 564; Biber, *supra* note 15, at 8, 11 (describing difficulties agencies face in prioritizing multiple goals given by Congress that complement or substitute primary agency goals).

54. See Biber, *supra* note 15, at 11–12 (addressing root causes of inefficiencies in multi-goal agencies); Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC’s Mission*, 73 OHIO ST. L.J. 1093, 1115–16 (2012) (explaining importance of clearly defined agency missions); Magill & Vermeule, *supra* note 16, at 1075 (discussing policymaker’s concerns with inefficiency).

55. Democratic-constitutional values have been called public administrators’ “highest mission” as they are central to the identity of the country. See Karen Baehler et al., *Mission-Extrinsic Public Values as an Extension of Regime Values: Examples From the United States and the People’s Republic of China*, 46 ADMIN. & SOC’Y 199, 201 (2014) (arguing promotion of regime values at core of administrative agencies); Suzanne Piotrowski et al., *Levels of Value Integration in Federal Agencies’ Mission and Value Statements: Is Open Government a*

While Congress may create agencies with certain regulatory purposes, congressional choices also relinquish control to the President or agency leadership to determine how faithfully agencies adhere to congressional missions.⁵⁶ Congress can implement checks on executive branch power through various oversight features such as appropriations, confirmation for agency heads, oversight hearings, advisory commissions, ombudsmen offices, and reporting requirements.⁵⁷ Nonetheless, institutional design and delegation choices can serve to undermine congressional oversight by increasing executive branch discretion over prioritizing goals and interpreting the boundaries of its charge.⁵⁸

There are no mandates on how Congress chooses which agencies should be assigned tasks or how much detail Congress provides to implement those tasks.⁵⁹ Delegation decisions contemplate a variety of factors, including agency expertise, deliberation, accountability, and uniformity.⁶⁰ Congress can be detailed in delegation, including specifying the function delegated and articulating procedures or structures to be implemented.⁶¹ Delegating with specificity constrains executive branch discretionary choices and facilitates a clearer execution of the laws by agencies.⁶² Nonetheless, Congress has increasingly opted for broader delegations of authority.⁶³ As a result, the control of executive branch principals has expanded, giving the President and agency leadership a wide berth to shape the direction of agencies.⁶⁴ Broader delegation supports efficient presidential administration by providing increased flexibility, executive oversight, and policy coherence.⁶⁵ But in so doing, it weakens congressional oversight, risking “arbitrary decision-making and abuse of power.”⁶⁶

Perhaps the most significant manner in which Congress cedes power to the executive branch is implicit in the broad delegation of enforcement functions, in what

Performance Target of U.S. Federal Agencies?, 78 PUB. ADMIN. REV. 705, 705 (2018) (explaining importance of incorporating democratic-constitutional values into agencies).

56. See Biber, *supra* note 15, at 10 (discussing principal-agent relationship); Gailmard & Patty, *supra* note 15, at 875–76, 886 (addressing tensions between principal-agent relationship and legislative-bureaucratic interaction).

57. See SELIN & LEWIS, *supra* note 29, at 8, 111 (explaining Congress’ report led to merger and restructure of Department of Homeland Security); Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB’s Design for Administrative Guidance*, 36 YALE J. REG. 273, 284 (2019) (providing overview of Congress’ relationship to executive agencies).

58. See Kagan, *supra* note 11, at 2351 (noting giving power to President limits Congressional oversight).

59. See TODD GARVEY & SEAN STIFF, CONG. RSCH. SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 1 (2018) (providing guidance to Congress).

60. See generally Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (tracing theoretical underpinnings of *Chevron* doctrine).

61. See Biber, *supra* note 15, at 3 (discussing goals of Congress).

62. See Kagan, *supra* note 11, at 2255 (discussing Congress’s powers).

63. See *id.* at 2248–50 (showing presidential control over administrative agencies).

64. See *id.* (examining constitutionality of Congress’s broad powers).

65. See generally Coglianese, *supra* note 13 (discussing nondelegation doctrine).

66. See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 186 (2011) (explaining benefits of affording President maximum discretion).

Professors Cox and Rodriguez have termed “de facto delegation.”⁶⁷ Executive agencies’ enforcement duties are rooted in the President’s constitutional obligations.⁶⁸ Nevertheless, the complete and total enforcement of the laws laid out by Congress is often unattainable. Congress limits agencies’ ability to fully enforce their statutory mandates by passing wide-sweeping legislation in conjunction with allocating insufficient resources for the full-scale execution of the agencies’ charge.⁶⁹ Though Congress can dictate enforcement priorities to a certain degree through appropriations, it is generally left to the executive branch to decide how to allocate resources toward enforcement.⁷⁰

There are also no requirements regarding how Congress distributes authority across executive branch agencies. These institutional design choices serve to increase or limit presidential control over an agency’s prioritization and choice to perform tasks.⁷¹ Congress may delegate authority to an existing agency or may decide that assigning the new task to an existing agency would be ineffective due to a lack of requisite expertise or concerns that the new duties will be met by resistance.⁷² In these circumstances, Congress can create a new agency or reorganize existing agencies to accomplish different missions.⁷³ In so doing, Congress can make agencies accountable to other executive branch agencies, such as by placement under a cabinet-level agency.⁷⁴ While such placement may add beneficial layers of executive branch accountability, presidential control increases and can obfuscate external oversight.⁷⁵

Congress can also increase the power of the executive branch through the delegation of conflicting tasks to an agency, which intentionally or inadvertently creates secondary or contextual goals.⁷⁶ Though Congress can specify which goals take primacy, they generally do not indicate how much energy should go toward goals

67. See *The President and Immigration Law Redux*, *supra* note 29, at 150–52 n.140–43 (explaining congressional avenues to delegation).

68. See U.S. CONST. art. II, § 3 (setting forth duties and responsibilities of President).

69. See Zachary S. Price, *Enforcement Discretion Amid the Political Maelstrom Regulatory Reform in the Trump Administration*, 42 ADMIN. & REG. L. NEWS 17, 17 (2016-2017) (showing how gap in enforcement has encouraged prosecutorial discretion in executive furthering presidential policy aims).

70. See *The President and Immigration Law Redux*, *supra* note 29, at 150–52 n.140–43.

71. See Lee, *supra* note 16, at 559; Magill & Vermeule, *supra* note 16, at 1076; SELIN & LEWIS, *supra* note 29, at 87.

72. See SELIN & LEWIS, *supra* note 29, at 12, 89; Magill & Vermeule, *supra* note 16, at 1072, 1077.

73. See SELIN & LEWIS, *supra* note 29, at 84–88 (exploring why Congress may choose to create new agency rather than delegate to existing one).

74. See Biber, *supra* note 15, at 5–6 (explaining participation model for agency accountability); Black, *supra* note 54, at 1114, (noting premise from organizational theory that agencies displace public interest for self-interested goals); SELIN & LEWIS, *supra* note 29, at 38 (discussing costs and benefits of agency creation within existing departments).

75. See SELIN & LEWIS, *supra* note 29, at 38 (emphasizing agency creation within established departments may reduce political supervision); Magill & Vermeule, *supra* note 16, at 1057–58, 1072 (describing effect on control when agencies hierarchically closer to President).

76. See Lee, *supra* note 16, at 563 (noting subordination effect when agency tasks conflict).

outside the core mission.⁷⁷ This leaves prioritization decisions in the hands of the executive branch. Further, Congress can delegate the same authority to more than one agency.⁷⁸ In so doing, Congress may provide direction for the agencies to work together, divide responsibilities within the authority, or require consultation with other agencies.⁷⁹ But Congress can also unintentionally delegate the same authority to multiple agencies without guidance as to which agency is responsible for what aspects of the authority.⁸⁰ In these situations, Congress conveys increased discretion to the President to choose which agency should execute the task based on alignment with policy goals, irrespective of agency mission.⁸¹

Finally, Congress can delegate authority to a specific actor within the executive branch, such as an agency head or the President. When authority is specifically assigned to an agency head, Congress can choose to articulate the role of the President or not.⁸² While Congress may create certain protections and measures of independence from the President, as is done with independent agencies, in the absence of explicit direction, delegation to an agency head is generally assumed to include some degree of presidential participation as part and parcel of presidential managerial duties over the executive branch.⁸³ Nevertheless, scholars and politicians have long debated the nature of presidential involvement in these circumstances.⁸⁴ Some have argued that the President has mere oversight duties, though the President can inform agency heads of preferences.⁸⁵ Others assert that, implicitly by acting as the head of the executive branch, the President holds directive power over agency leadership when executing the delegated power.⁸⁶

77. See Biber, *supra* note 15, at 8 (addressing prioritization questions posed by agencies tasked with multiple, conflicting goals); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 129–131 (1st ed. 1991).

78. See Marisam, *supra* note 66, at 189 (emphasizing possibility of joint delegation).

79. See *id.* (explaining difference between duplicative and joint delegations).

80. See *id.* at 232–33, n.239 (outlining how President, authorized by Congress, can delegate same authority to multiple agencies); Kagan, *supra* note 11, at 2329 (arguing authorizing one agency does not prevent same authorization given to another agency).

81. See Marisam, *supra* note 66, at 232–33, n.239 (identifying significant tradeoffs from delegation to President).

82. See Kagan, *supra* note 11, at 2327–28 (articulating competing interpretations of presidential authority in case of Congress' silence).

83. See *id.* (stating President's control over executive roles creates executive official deference to President's opinions).

84. See *id.* at 2328–30 (balancing supportive conventional viewpoints against critics asserting interpretive approach).

85. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 323 (2006) (analyzing broad interpretation of President's power related to executive office delegations); Kagan, *supra* note 11, at 2250–51 (discussing how Clinton's Administration misaligns with conventional view by asserting President's directive authority); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 726–27 (2019) (highlighting contention President's role is overseer, not decider, similar to legislative and judicial branches).

86. See John Yoo, *Unitary, Executive, or Both*, 76 U. CHI. L. REV. 1935 (2009) (exploring unitary executive theory).

B. Executive Branch Control

A foundational concept of a well-functioning administrative state is that agencies will faithfully implement their congressional missions.⁸⁷ Given the vast amount of control awarded to the executive branch, the ultimate determinant of agency mission adherence is whether the executive branch actors *want* to be faithful or deviate from the agency mission. Under the general conception of the principal-agent model, Congress acts as the principal, while executive branch agencies execute congressional will as faithful agents. According to law execution theory, agencies should serve merely as “transmission belts” or “empty vessels” for the administration of laws delegated by Congress, ensuring only the performance of delegated responsibilities and compliance of laws within the agency’s purview.⁸⁸ In the current functioning administrative state, however, agencies are accountable to multiple principals within the executive branch whose objectives may diverge or contradict those of Congress.⁸⁹

As this Section describes, these actors include the President, agency leadership, and front-line officers, who often have different motivations, values, and goals that conflict with each other as well as the agency’s congressional mission.⁹⁰ Given the potential for opposition, this Section then explores the internal administrative law principles and doctrine that enable the President and agency leadership to shape and centralize decision-making power throughout the hierarchy of the executive branch to achieve policy objectives that may be contrary to the front-line culture of the agency or the mission.⁹¹

C. The Civil Service, Agency Leadership, and the President

The civil service was designed with the notion that it would be comprised of “neutrally competent nonpoliticized experts” that would follow congressional mandates as faithful agents of their principal.⁹² But the current functioning of the administrative state, where bureaucrats also serve executive branch principals, provides incentives for policy-motivated individuals to seek careers in policymaking agencies.⁹³ As such, an agency culture that is in line with the principal’s policies can foster a workforce of front-line officers that “conform to agency decisions not simply

87. See Lee, *supra* note 16, at 567 (observing statutes rarely spell out “agency’s core mission in explicit terms”). See generally Bachler et al., *supra* note 55 (discussing influence of public values on administrative missions).

88. See Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273–75 (2020) (identifying school of thought on limited executive power under Article II); Kagan, *supra* note 11, at 2253 (observing classical delegation dynamic between Congress and agencies).

89. See Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1606–07 (2023) (asserting traditionally-held principal-agent model not sole source of agency accountability).

90. See *Some Kind of Hearing Officer*, *supra* note 52, at 519–20.

91. See Magill & Vermeule, *supra* note 16, at 1040–41 (introducing concepts of how Presidents may unify agency culture).

92. See Gailmard & Patty, *supra* note 15, at 873 (discussing mindset of architects of American civil service system).

93. See *id.* (explaining how relationship between legislature and bureaucracy works in government system).

because they have to, but because they want to.”⁹⁴ When tasks are in line with the policy-motivated front-line officers’ “sense of purpose,” no additional incentives are necessary outside of pursuing the mission they signed up for.⁹⁵ Conversely, tasks outside of the mission might lead to decreased morale.⁹⁶ Nonetheless, agency culture may “drift” away from the mission.⁹⁷

An agency’s drift towards an expanded interpretation of its’ delegated authority—a “runaway agency”—is more likely to originate from a presidential push rather than the civil service.⁹⁸ The President oversees actions of the executive branch agencies as the “Administrator-in-Chief.”⁹⁹ The power of agencies to accomplish their charges stems from the Constitution’s vesting of executive powers to the President and their duty to “take [c]are that the [l]aws be faithfully executed.”¹⁰⁰

Long debated, however, is how much and what type of power the President has to direct agency action inherent to this constitutional obligation.¹⁰¹ Starting with President Clinton, presidential administration has increasingly expanded, resulting in more frequent use of agencies to achieve presidential political objectives.¹⁰² This is particularly true in areas of public policy that are highly politicized, often the subject of these social welfare agencies. Active presidential administration may lead to greater public accountability, transparency, and efficiencies throughout the administrative state.¹⁰³ On the other hand, it raises concerns of fluctuating bureaucratic implementation, threats to the impartiality of decisions, thwarted congressional objectives, and inadequate checks on abuse of power.¹⁰⁴

94. See Biber, *supra* note 15, at 23–25 (describing study regarding Forest Service recruitment and culture); Wilson, *supra* note 77, at 158.

95. See Wilson, *supra* note 77, at 371 (explaining how agency heads can use strength of agency culture to accomplish its mission, even with limited incentives available).

96. See Black, *supra* note 54, at 1116–17 (noting SEC staff not viewing FCPA part of its mission reflects adversely on staff morale).

97. See Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 717–18 (2016) [hereinafter *Binding the Enforcers*] (highlighting culture of EPA and ICE shifted from core missions under Reagan and Obama); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 349 (2019) (showing administrative bureaucrats can drift from bosses’ and agencies’ directives).

98. See Kagan, *supra* note 11, at 2350 (discussing president’s ability to disrupt congressional oversight of agency action).

99. See Chen, *supra* note 17, at 351 (coining term “Administrator-in-Chief”); Metzger, *supra* note 14, at 1857 (noting difficulty of reversing unilateral presidential administrative actions).

100. U.S. CONST. art II, § 1, cl. 1 (vesting executive power); *id.* art. II, § 3, cl. 5 (requiring president administer laws).

101. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 268–69 (2020) (Kagan, J., dissenting) (noting scholarship in debate over Take Care Clause); Kagan, *supra* note 11, at 2327–28, 2250 (commenting on presidential control of agency officials).

102. See Kagan, *supra* note 11, at 2248.

103. See *id.* at 2331–2346; *Seila Law LLC*, 591 U.S. at 281–82 (Kagan, J., dissenting) (explaining impact of presidential involvement in agencies); *Binding the Enforcers*, *supra* note 97, at 705 (recognizing processes limiting discretion reduce ability of new president to change enforcement outcomes).

104. See *Seila Law LLC*, 591 U.S. at 282–84 (Kagan, J., dissenting) (explaining impacts of agency independence); David S. Rubenstein, “Relative Checks”: *Towards Optimal Control of Administrative Power*, 51 WM. &

Agency heads can lead the charge in shifting their agency's mission.¹⁰⁵ Presidents can appoint heads whose policies and views align, even if they conflict with the agencies' core missions.¹⁰⁶ As the Supreme Court stated in *Seila Law LLC*:

The Framers deemed an energetic executive essential Accordingly, they chose not to bog the Executive down with the 'habitual feebleness and dilatoriness' that comes with a 'diversity of views and opinions.' Instead, they gave the Executive the '[d]ecision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man.'¹⁰⁷

Thus, agency heads, chosen for policy alignment and not accountable through elections, direct the front-line officers making individual decisions.¹⁰⁸

Public choice theory discusses bureaucrats' self-interest motivating their choices to advance themselves over the public good.¹⁰⁹ This can include gaining favor with the President or other external stakeholders at the expense of the public.¹¹⁰ Further, psychological theory discusses cognitive biases that can occur with agency heads which allows them to become overconfident and pursue specific goals.¹¹¹ Congress may institute certain oversight measures by defining the number and types of agency head appointments, Congress' level of involvement in the appointment process, and measures of insulation from the President.¹¹² Nonetheless, there are mechanisms through which presidents and agencies can temporarily evade congressional oversight—through recess appointments and exploiting vacancy rules as permitted by the Federal Vacancies Act.¹¹³

MARY L. REV. 2169, 2186 (2010) (describing historic and current debate surrounding agency independence and public accountability).

105. See *Seila Law LLC*, 591 U.S. at 268 (Kagan, J., dissenting) (noting for-cause removal power sufficient to ensure agencies support president's duties).

106. See *id.* at 225 (majority opinion) (identifying problem when unlucky president unable to appoint agency leadership who ideologically fits electoral platform).

107. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223–24 (2020) (justifying decision to create unitary power in presidency).

108. See Kagan, *supra* note 11, at 2260–62 (discussing control of agencies by expert, professional administrators).

109. See Black, *supra* note 54, at 1113–14 (stating how public choice theory sets foundation for critical analysis of administrative agencies).

110. See *id.* at 1113 (arguing public choice theories show intentions of bureaucrats); Biber, *supra* note 15, at 9, 11–12, 25–28 (explaining bureaucrats' inclination to prioritize easily-quantifiable tasks).

111. See Black, *supra* note 54, at 1113–14 (discussing psychological theory employed to understand why government agencies make ineffective policy decisions).

112. See SELIN & LEWIS, *supra* note 29, at 37, 84 (detailing Congress's involvement in appointment process); Magill & Vermeule, *supra* note 16, at 1039 (explaining complex constitutional procedures regarding appointment and removal of top personnel within government agencies); *Seila Law LLC*, 591 U.S. at 263 (Kagan, J., dissenting) (acknowledging "limits on the President's removal power").

113. See SELIN & LEWIS, *supra* note 29, at 95 (differentiating original intent of President's recess appointment power from actual utilization). Those filling these vacant positions, termed "actings," are, by default, the "first assistant." Even though the Act does not give a definition of the term, agencies generally define their own

Agency leadership and presidents can attempt to mold an agency's environment to reinforce a mission-driven culture or push policy objectives through institutional rhetoric, hiring qualifications, recruitment, training, performance metrics, and promotion standards.¹¹⁴ Scholarship around the principal-agent model provides that agencies favor tasks with higher principal-given incentives.¹¹⁵ As such, recruitment, hiring qualifications, performance metrics, and promotion standards can help mold agency culture.¹¹⁶ Institutional rhetoric can also build and shift agency culture. When those mechanisms fail, agency leadership and the President can use internal administrative law to more directly influence front-line officer decision-making.

1. *Controlling the Civil Service through Internal Administrative Law*

The President and agency leadership can determine how much decision-making power to afford front-line officers. Giving a high degree of discretion to front-line officers raises concerns of bias, inefficiency, and lack of oversight and accountability.¹¹⁷ In some cases, front-line officers may not be performing duties consistent with what agency leadership expects due to conflicts between different principals or poor communication with lower-level officials.¹¹⁸ In other circumstances, agency culture may be oppositional to policy objectives or the agency's core mission and may result in intentional shirking, resisting, or disobeying the President and leadership.¹¹⁹ Front-line officers may actively oppose policies of leadership and the President.¹²⁰ Resistance of this sort has been ascribed a sort of internal check on leadership and presidential power.¹²¹

rules for succession. See Anne Joseph O'Connell, *Actings*, 120 COLUM. L.REV. 613, 628–29, 636 (2020) (recognizing existence of “agency-specific succession statutes”).

114. See Biber, *supra* note 15, at 23–25 (exemplifying how Forest Service's mission ingrained in lower-level employees).

115. See Biber, *supra* note 15, at 9 (acknowledging hierarchy of agency tasks).

116. See *id.* at 23–25, 34 n.123 (suggesting clearly defined core missions enable agency to prioritize personnel recruitment and training); see also Black, *supra* note 54, at 1116 n.147 (recognizing cultural differences between SEC agency and specific legislation); Michael D. Frakes & Melissa F. Wasserman, *Are There as Many Trademark Offices as Trademark Examiners?*, 69 DUKE L.J. 1807, 1852–53 (2020) (highlighting hiring-year as key determinant for factor influencing patent-examiner behavior).

117. See *The President and Immigration Law Redux*, *supra* note 29, at 175–76 (noting criticism based on categorical discretion); Magill & Vermeule, *supra* note 16, at 1053, 1078 (highlighting President's influence on executive agencies); Metzger & Stack, *supra* note 28, at 1269 (emphasizing need for managerial and policy control).

118. See Nou, *supra* note 97, at 349 (identifying causes for disobedience in administrative agencies); Lee, *supra* note 16, at 563 (emphasizing importance of consistency between core mission and regulatory objectives).

119. See Nuo, *supra* note 97, at 360 (explaining motivations for disobeying agency directives).

120. See *id.* at 356 (noting front-line actors openly defy elected or appointed officials); Peter L. Strauss, *Eroding “Checks on Presidential Authority – Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 586 (2019) (explaining winnowing of civil service result of opposing President's policies); Joel A. Mintz, *Civil Servant Resistance at the EPA—A Response to Jennifer Nou*, 94 CHI.-KENT L. REV. 615, 616 (2019) (claiming open public protest of official policies rare but not unheard of); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 631–32 (2019) [hereinafter *Civil Servant Alarm*] (differentiating resistance from open, unlawful disobedience).

121. See Nou, *supra* note 97, at 352–53 (indicating civil servant disobedience resulted from Trump Administration's open defiance of institutional norms); Neal Kumar Katyal, *Internal Separation of Powers: Checking*

There is a vast array of internal administrative law tools that, coupled with the limitations of judicial oversight, enable agency leadership and the President to easily exert influence or control over front-line officer decision-making and therefore the agency's performance and prioritization of functions.¹²² Professors Stock and Metzger describe internal administrative law as including:

[I]nternal procedures for agency action, structures of internal agency organization and allocation of authority, specifications for how agency actors are to make evaluations or conduct analysis, guidance about the agency's understanding of what statutes and regulations mean, informal agency practices, interagency agreements and norms, and centrally generated cross-cutting requirements for agency action.¹²³

The President and agency leadership may attempt to influence or limit front-line officers' discretion by centralizing control through the numerous administrative law tools that serve to manage agency and executive branch officers.¹²⁴ Heightened centralization efforts may dictate specific standards for adjudication or even eliminate discretion in adjudication of certain issues altogether.¹²⁵ A leadership-focused approach, however, can appear overly political, raise issues of transparency and remove power from experts' authority.¹²⁶

The President can assert more control by centralizing up the executive branch hierarchy, including agency and White House leadership.¹²⁷ Since President Clinton, leaders from both parties have increasingly asserted a dominant managerial role and pushed centralization toward the White House.¹²⁸ This has been especially true to

Today's Most Dangerous Branch from Within, 115 YALE L.J. 2314, 2328–29 (2006) (arguing internal checks and balances strengthen government, using example of State Department's Dissent Channel); Magill & Vermeule, *supra* note 16, at 1037–38 (noting disagreements occur between political appointees and bureaucrats inside agencies).

122. See Magill & Vermeule, *supra* note 16, at 1039, 1042 (describing checks on administrative decisionmakers and influence on performance and functions).

123. See Metzger & Stack, *supra* note 28, at 1256 (highlighting internal procedures in administrative law).

124. See *id.* at 1251 (explaining methods of controlling agency decision-making).

125. See *The President and Immigration Law Redux*, *supra* note 29, at 141 (detailing implications of heightened centralization on agencies' functioning and decision-making); Magill & Vermeule, *supra* note 16, at 1075–76 (describing how agency policymakers limit or eliminate individualized adjudication); see also *Binding the Enforcers*, *supra* note 97, at 671 (providing example of centralized Obama-era immigration policy reducing need for individual discretion among public employees). Centralized decisionmaking promotes consistency and alignment with policy goals. See *The President and Immigration Law Redux*, *supra* note 29, at 174–75 (arguing benefits of centralized decision-making in context of Obama-era immigration policies); see also Marouf, *supra* note 85, at 741 (detailing executive interference in agency adjudications).

126. See *The President and Immigration Law Redux*, *supra* note 29, at 185, 195–96 (exploring critiques of heightened centralization).

127. See *Executive (Agency) Administration*, *supra* note 14, at 688 (detailing presidential influence on agency leadership).

128. See *Binding the Enforcers*, *supra* note 97, at 671 (noting transfer to discretionary authority); Metzger & Stack, *supra* note 28, at 1245 (introducing internal administrative law's relationship to APA); *Presidential*

accomplish politically divisive aims due to demands for follow-through on campaign promises that might be unachievable through legislation given congressional gridlock.¹²⁹ Executive branch-wide managerial internal administrative law tools including executive orders, decrees, and guidance may include policy articulations, as well as direction to agencies to change their internal structures, procedures, and interpretations.¹³⁰ Through these mechanisms, Presidents can exert control over all manner of agency actions, including adjudication and enforcement policies.¹³¹ It also includes directing inter-agency coordination and prioritization for those with shared or duplicative delegation or separated functions.¹³² Finally, presidential reliance on the Office of Management and Budget and the Office of Information and Regulatory Affairs can also be used to centralize control over agencies' internal administrative law.¹³³

The internal administrative law used in centralization are accompanied by varying degrees of transparency and oversight that further serve to amplify the power of the President and agency leadership.¹³⁴ In passing the Administrative Procedure Act (APA), Congress reinforced the wide degree of flexibility given to agencies to implement their delegated authority.¹³⁵ This deference is afforded based on the assumption that agencies hold necessary expertise to conduct reasoned decision

Administration, *supra* note 11, at 2317 (describing differences between presidential administrations of Reagan and Clinton).

129. See Kagan, *supra* note 11, at 2307–15 (detailing Clinton's use of presidential administrative control to accomplish policies unattainable due to congressional standoffs).

130. See Metzger & Stack, *supra* note 28, at 1255–56 (discussing executive control's influence on internal administration); Kagan, *supra* note 11, at 2306 (detailing President Clinton's use of executive branch to encourage coordination of multiple agencies); Walker & Turnbull, *supra* note 29, at 1235 (highlighting Trump administrations reliance on executive orders to influence agency enforcement and decision making); Proclamation No. 13,892, 84 Fed. Reg. 55,239 (Oct. 15, 2019) (articulating new standards for agency enforcement and guidance actions); Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. ON MIGRATION & HUM. SEC., no. 1, 2020, at 54 (analyzing President Trump's use of executive orders for furthering immigration policy without congressional approval).

131. See Walker & Turnbull, *supra* note 29, at 1235 (explaining President Trump's work to curtail agency guidance and enforcement mechanisms).

132. See Lee, *supra* note 16, at 582–83 (outlining potential benefits and conflicts arising from inter-agency coordination); Metzger & Stack, *supra* note 28, at 1254–55 (detailing various standards governing interagency efforts); Marisam, *supra* note 66, at 187–90 (arguing duplicative delegations distinct from joint or fragmented delegations); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 814–20 (2015) [hereinafter *Uncovering Coordinated Interagency Adjudication*] (highlighting “dire” consequences of failing interagency immigration relationships for asylum seekers); Biber, *supra* note 15, at 45–46 (explaining inter-agency monitoring).

133. See Walker & Turnbull, *supra* note 25, at 1235.

134. See Metzger & Stack, *supra* note 28, at 1251 (defining internal administrative law); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 167–68 (2019) (describing variety of types of agency guidance mechanisms); Walker & Turnbull, *supra* note 25 (exploring internal administrative law and varying degrees of judicial oversight); *The President and Immigration Law Redux*, *supra* note 29, at 174 (explaining Obama's prosecutorial discretion initiative deals with centralized versus decentralized control and secret versus public).

135. Metzger & Stack, *supra* note 28, at 1276 (discussing APA imposed floor of procedures for agency action, allowing agencies to fill in gaps); Walker & Turnbull, *supra* note 29, at 1231 (labeling APA structure “skeleton” and internal agency lawmaking “flesh”).

making and require flexibility to accomplish expedient responses to societal needs.¹³⁶ Nonetheless, it gives the executive branch significant power to easily and quietly broadly interpret and implement statutory charges.

The power given to the President and agency leadership is magnified by limited judicial review and deference.¹³⁷ APA jurisprudence and deference concerning the use of a wide variety of regulatory tools enables agencies to show favoritism toward less transparent subregulatory guidance.¹³⁸ The deference agencies receive can impact agency design and centralization of power, interpretation of delegated authority, and favoritism toward the use of less transparent subregulatory guidance.¹³⁹ This in turn may impact how an agency interprets its authority.¹⁴⁰

One of the key limitations the APA placed on an agency's use of internal administrative law concerns rulemaking requirements.¹⁴¹ Rulemaking must go through the notice and comment process, ultimately resulting in binding authority.¹⁴² The enactment of this limitation emphasized the necessity of transparency.¹⁴³ Nonetheless, policies and procedural controls with enormous implications can be accomplished through more informal and less transparent internal administrative law mechanisms.¹⁴⁴ Notice and comment is not required for "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice" as these are not technically binding.¹⁴⁵ While ostensibly nonbinding, these subregulatory guidance documents often exert a profound influence on regulated entities and are afforded deference that often renders them indistinguishable from regulations in

136. Romano, *supra* note 57, at 282–84 (articulating general deference to agency interpretation of regulations thereby lessening extent of judicial review).

137. See Metzger & Stack, *supra* note 28, at 1245 (arguing APA embraced and preserve internal administrative law); Walker & Turnbull, *supra* note 29, at 1227 (introducing various forms of administrative action enjoying judicial oversight).

138. See Romano, *supra* note 57, at 281–84 (arguing courts' deference to agencies creates tradeoff between regulatory flexibility and effectiveness).

139. See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 722–24 (2014) (offering findings of study showing effect of agencies' deference); Magill & Vermeule, *supra* note 16, at 1077 (claiming rules governing agencies determine power allocation); Kagan, *supra* note 11, at 2269 (equating most administrative law to power allocation among parties seeking agency product control).

140. See Walker, *supra* note 139, at 722–24 (finding agencies' authority interpretation influenced by deference).

141. See 5 U.S.C. § 553 (proscribing process for administrative rulemaking).

142. See *id.* (discussing note and comment process of rulemaking).

143. See Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 *CORNELL L. REV.* 69, 93–94 (2022) (describing legislative history of the APA).

144. See Metzger & Stack, *supra* note 28, at 1251 (distinguishing external from internal administrative law); Parrillo, *supra* note 134, at 168.

145. See 5 U.S.C. § 553(b)(3)(A) (2012) (noting exception when prescribed by statute); Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 4(a), 60 Stat. 237 (providing notice requirements and exceptions); see also Metzger & Stack, *supra* note 28, at 1253–54 (describing internal regulations within agencies); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *CORNELL L. REV.* 397, 400–401, 407 (2007) (describing reasons nonbinding subregulatory guidance still often has "rule-like effects.").

terms of their practical impact.¹⁴⁶ Further, the line between rulemaking and general policy statements is a blurry one. A key distinction the courts have relied on is whether the action is a “binding norm.”¹⁴⁷ But the courts have shown a lack of clarity and consistency regarding to whom the rule must be binding—agency officials or private parties.¹⁴⁸

Though much of agency less-formal rulemaking is not reviewable by the courts, when it is, there is a heightened level of deference given as the formality increases.¹⁴⁹ Though the heightened deference may lead to a preference for more formal rulemaking given its increased stability, deference is also given to agencies’ interpretations of their own regulations, done through less formal rulemaking such as subregulatory guidance. Of note, as Professor Roberta Romano demonstrated: When agencies are designed with less congressional oversight, agencies show a preference for utilizing less formal rulemaking tools, therefore creating less oversight from Congress, the courts, as well as the public.¹⁵⁰ The APA and its jurisprudence permit the executive branch a wide berth in discretionary decisions to enforce the laws and those decisions are generally not judicially reviewable.¹⁵¹ Further, enforcement policies often lack transparency to reduce rule breaking.¹⁵²

Agency adjudication and decision-making are similarly granted a large degree of deference. Moreover, for the many types of administrative adjudications that do not come within the APA’s formal hearing requirements, agencies have great flexibility in implementing structures and procedures through internal administrative law.¹⁵³ In designing these adjudication systems, agency leadership determines the appropriate procedural protections to provide.¹⁵⁴ At the same time, through guidance and

146. See Romano, *supra* note 57, at 282–83 (demonstrating leading view); Walker & Turnbull, *supra* note 29, at 1228 (signaling federal court lacking supervision of agencies).

147. See *Binding the Enforcers*, *supra* note 97, at 698 (explaining binding norms are policy statements creating enforceable law).

148. See *Binding the Enforcers*, *supra* note 97, at 704 (discussing lack of jurisprudential uniformity among court decisions relating to binding norms); see, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 196–97 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

149. See Walker & Turnbull, *supra* note 29, at 1227 (noting distinct level of deference depending on differences in formality).

150. See Romano, *supra* note 57, at 275–76 (stating agencies implementing less formal rulemaking tools when most insulated from congressional control).

151. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining agency decisions’ “general unsuitability for judicial review”); see also Lee, *supra* note 16, at 568; Price, *supra* note 69, at 20.

152. See Price, *supra* note 69, at 18.

153. See 5 U.S.C. § 554 (setting forth process governing agency adjudications); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (deferring to administrative procedures that comport with due process); Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1747 (2020) (describing agencies’ power to implement internal procedures); Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749, 1753–54 (2020) (noting exceptions to APA requirements more numerous than adherents); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 141 (2019) (stating great diversity in manner agencies adjudicate).

154. See Bremer, *Reckoning*, *supra* note 153, at 1758 (explaining agencies select their own procedures); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1353

policies, agency leadership can act to influence adjudicators' perception of the cases before them, be it favorably, unfavorably, or ambivalently.¹⁵⁵

The agency's procedural design choices include the level of adjudicator independence and degree of separation from other functions.¹⁵⁶ Measures of independence include decisions surrounding hiring, performance reviews and bonuses, and removal.¹⁵⁷ In addition, there is a range of adjudicators' ability and requirement to undertake enforcement functions.¹⁵⁸ Agencies can also choose to include structural components that separate adjudicator functions, either system-wide, during specific phases of proceedings, or at the individual officer level.¹⁵⁹ Separation of functions may be beneficial to eliminate conflict with the core mission goals and enable agencies to efficiently execute those goals.¹⁶⁰

III. THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE

The USCIS was the result of nearly a century of attempting to reconcile the inability of immigration agencies to effectively administer the nation's legal immigration system while simultaneously ensuring enforcement of removal laws. Congress decided to split the functions into separate agencies but enable coordination through placement of these divorced agencies within the same cabinet-level agency: the Department of Homeland Security (DHS).¹⁶¹ In the current structure, USCIS and its functions are statutorily separated from the enforcement agencies within DHS, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).¹⁶²

(2019) (declaring agencies have flexibility to create unique adjudicatory proceedings); Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T L. 523, 541 (2017) (describing agencies' procedural innovations).

155. See Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 751 (2020) (addressing impartiality concerns regarding adjudicator's views on applications); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 784 n.189 (1976) (weighing concerns of administrator influence for different program types); Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 737–38 (1972) (suggesting institutional pressures influence attitudes of caseworkers); CONNIE VOGELMANN, SELF-REPRESENTED PARTIES IN ADMINISTRATIVE HEARINGS 6 (ACUS 2016) (stating ethical and neutrality concerns arise when self-represented parties deal with judges and hearing officers).

156. See *Some Kind of Hearing Officer*, *supra* note 52, at 535–36 (describing bounds of agency's procedural design choices).

157. See *id.* at 582 (presenting characteristics to consider when assessing independence).

158. See *id.* at 554 (noting not all adjudicators perform enforcement functions).

159. See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMPAR. L. 3, 6–7 (2015) (describing four key variables that distinguish various types of administrative adjudications).

160. See Biber, *supra* note 15, at 34 (considering advantages and disadvantages to separating administrative functions).

161. See *Policy Manual, Chapter 1—Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 27, 2024), <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-1> [<https://perma.cc/KJW4-TNME>] (explaining purpose and background of USCIS within structure of DHS).

162. See Lee, *supra* note 19, at 1111–12 (discussing agency split in DHS between fulfillment of enforcement versus services).

President George W. Bush, who oversaw USCIS's creation, stated: "As a nation that values immigration and depends on it, we should have immigration laws that work and make us proud."¹⁶³ Congress clearly articulated this desire and statutorily distinguished the agency's mission from that of its sister enforcement-focused agencies.¹⁶⁴ Nevertheless, as the then-INS Commissioner warned: "We have long recognized the INS has to be restructured...[but] the devil's in the details."¹⁶⁵ As this Part examines, those details have indeed proven to be the devil that made USCIS's shift away from its service mandate inevitable, namely the delegation decisions and features of internal administrative law that facilitate and encourage heightened executive branch control.¹⁶⁶

Congress created USCIS with a single mission: to efficiently administer the nation's immigration benefits system.¹⁶⁷ This mission is not a small undertaking. In 2019, USCIS received over eight million applications for benefits.¹⁶⁸ As an agency with a single mission separate from enforcement, USCIS should be able to effectuate its service mission zealously.¹⁶⁹ As was the case in previous iterations of the immigration bureaucracy, however, USCIS's substitution and prioritization of immigration enforcement-focused tasks have contributed to the inability of the agency to perform its charge.¹⁷⁰

As this Part first describes, the structure of immigration agencies and USCIS's mission drift is far from extraordinary in the history of the immigration bureaucracy; rather, it is the latest model in a series of failed institutional designs borne out of the inability to reconcile the execution of the incompatible goals required by the nation's immigration laws. It then explores how institutional design choices, particularly

163. CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, ANNUAL REPORT 2004 iv (June 30, 2004).

164. See Lee, *supra* note 19, at 1111–12 (describing splitting enforcement and services functions into separate agencies response to one-agency ineffectiveness).

165. Deborah Kong, *INS Chief Defends Agency in Speech*, ASSOCIATED PRESS (June 13, 2002).

166. See Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, 53 U. MICH. J.L. REFORM 139, 143 (2019) (claiming deficiencies in immigration legal system create "outrageous and disturbing" outcomes); Lee, *supra* note 16, at 568 (noting APA gives agencies broad enforcement discretion); Price, *supra* note 69, at 20 (discussing limits of agency enforcement discretion); Walker & Turnbull, *supra* note 29, at 1231–32.

167. See Letter from Bipartisan Group of Senators, Bipartisan Letter from Senators to the Honorable L. Francis Cisna, Dir., U.S. Citizenship & Immigr. Servs. (May 13, 2019) (stating USCIS's mission). Congress created USCIS to "efficiently and effectively [administer] the American legal immigration system" by "[adjudicating] immigration matters to enable individuals to obtain work authorization, citizenship, humanitarian protection, and other important services." See *id.* (describing authority and purpose of USCIS).

168. See *Understanding Our Data*, U. S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 2, 2020), <https://www.uscis.gov/tools/reports-and-studies/understanding-our-data> [<https://perma.cc/8T93-M9Z4>] (noting USCIS process average eight million applications per year).

169. See Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 557 n.24 (2019) (noting single-mission agencies advocate more zealously than mixed-mission agencies).

170. See *id.* at 554 (describing shortcomings after fractionalization of USCIS); Chen, *supra* note 17, at 379–80 (discussing issues arising from restructuring of immigration bureaucracy); Lee, *supra* note 19, at 1111–12 (explaining INS's dissolution resulting from criticism agency could not fulfill both enforcement and service functions); Rabin, *supra* note 166, at 142 (describing how USCIS's shift to enforcement focus resulted "in delays in adjudications and baseless denials").

delegation decisions, inculcated the agency's current enforcement focus. Finally, this Part examines the means through which the current functioning of the administrative state has enabled the President and agency leadership to steer agency culture and decision-making away from its service mission.

A. Mission Implausible: Designing an Immigration Service Agency

The primary goal of the nation's immigration system is to maintain the number and type of immigrants Congress desires in the country.¹⁷¹ The structure of immigration agencies is therefore in large part driven by the delineation of responsibility over two primary functions: the *service* of administering the affirmative duties of adjudicating applications immigration status and citizenship set by Congress, and the *enforcement* of the laws that serve as barriers to unauthorized entry, means for removal, and deterrence.¹⁷²

Immigration agencies carry out the task of determining eligibility for immigration benefits such as citizenship, legal status, employment, and other related benefits as part of their "service" mission. These adjudications are categorized as a service because the government is interacting with various stakeholders—including business owners, citizens, and noncitizen applicants—to fulfill congressionally prioritized interests of filling United States labor needs, family unity goals, and humanitarian obligations.¹⁷³ Furthermore, applications generally require a fee; thus, the applicants are paying customers for the adjudication service.¹⁷⁴

Enforcement in immigration is generally conceptualized as taking action in the removal (deportation) process against individuals.¹⁷⁵ Increasingly, more stringent and punitive laws have made a vast number of individuals living in the United States subject to grounds laid out in the Immigration and Nationality Act (INA) that could lead to deportation. These include violations stemming from lack of immigration status, such as those who immigrated without authorization, who initially had status but failed to leave when that status expired, and who violated some term of their

171. See Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1214 (2014) (outlining immigration law fundamentals); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007) (suggesting current immigration law debates focus primarily on legal institutions implementing *quantity* and *type* goals).

172. See Cox & Posner, *supra* note 171, at 812 (highlighting importance of policy enforcement); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 466–47 (2015) (providing three primary goals of immigration enforcement).

173. See Press Release, AILA, Policy Changes and Processing Delays at USCIS (July 16, 2019), <https://www.aila.org/aila-files/69DE8BDE-8FE3-402D-9752-524B13E5EE7D/19071990.pdf> [<https://perma.cc/BA4C-MNTG>] (discussing Congress's intent for associations to promote immigration benefits and protection).

174. See *id.* (recognizing concern many users must pay significant amount of money for immigration services).

175. See Peter L. Markowitz, *Rethinking Immigration Enforcement*, 73 FLA. L. REV. 1033, 1042–43 (2021). But see Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1463 (2019) (describing overlooked aspects of immigration enforcement).

lawful status.¹⁷⁶ It also includes increasingly stringent provisions relating to a large range of criminal conduct, national security, and public safety.¹⁷⁷

The service and enforcement missions have been described as inherently conflictual¹⁷⁸ and “quite different, almost opposite, organizational objectives.”¹⁷⁹ Executing the laws intended to give pathways to legal status and citizenship encourages individuals to come forward to pursue these aims. These laws often provide opportunities for individuals who might otherwise be subject to removal to regularize their immigration status. Many of these laws acknowledge humanitarian concerns as well as national interests in issues like assisting law enforcement and in family unity goals and the hardship that an individual’s departure may cause to United States citizens and lawful permanent residents, and therefore the country.¹⁸⁰ Taking enforcement action against those seeking to utilize these laws frustrates the purpose of providing these avenues for status.¹⁸¹ Further, the combination of service and enforcement functions raises fundamental fairness and transparency concerns. To be sure, the line between the two is not always clear. A key differentiation, however, lies in which provisions of INS the executive branch agencies are responsible for executing—those relating to the affirmative responsibility to administer the legal immigration system or those aimed at border control (or “extended border control”) and “post entry social control.”¹⁸²

In the dueling of the two goals, throughout history, the enforcement goal always emerges victorious. As General Counsel for the previous immigration agency, the INS, explained: “We are the Anti-Naturalization Service, and we are about keeping people out. Although critics of the INS frequently characterize it as a ‘schizophrenic agency,’ torn between contradictory missions of ‘service’ and ‘enforcement,’ from the inside it seldom looked like a tough choice.”¹⁸³

The immigration bureaucracy’s inability to effectively perform the service and enforcement goals simultaneously has led to numerous reorganizations throughout

176. See 8 U.S.C. § 1227(a) (summarizing misconduct possibly leading to removal procedures).

177. See 8 U.S.C. § 1227(a)(2), (4) (highlighting criminal offenses and security related basis for deportation).

178. See Robert Charles Hill, *Restructuring the INS: Reflections on Calls for Separating Service from Enforcement*, in 24 IN DEFENSE OF THE ALIEN 1, 3 (2001) (Ctr. for Migration Stud. of N.Y. 1999) (describing calls for separation of service and enforcement).

179. See Sutherland, *supra* note 18, at 119–20 (explaining poor service from INS).

180. See Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 4 (2017) (describing how individuals subject to removal may be eligible to receive immigration status).

181. See Amanda Frost, *Can the Government Deport Immigrants Using Information It Encouraged Them to Provide?*, 2 ADMIN. L. REV. ACCORD 97, 107 (2017) (explaining challenge of immigrant self-identifying).

Likewise, any reasonable construction of laws encouraging immigrants to identify themselves to accomplish goals unrelated to immigration enforcement should include an implied restriction against using that information to deport them en masse. To do otherwise would be to interpret these federal laws to contain the seeds of their own destruction.

Id.

182. See Kanstroom, *supra* note 172, at 466.

183. See Sutherland, *supra* note 18, at 119.

history.¹⁸⁴ Prior to the current agency structure, the INS, housed for the majority of its existence in the Department of Justice, performed both functions from 1933 until it was dissolved in 2002.¹⁸⁵ Calls to separate the enforcement and services functions in the executive branch predate the creation of INS and continued through the agency's history.¹⁸⁶

Throughout INS's existence, the friction in effectuating both missions increased as Congress created legislation that altered the agency's charge and funding. The Immigration and Nationality Act of 1952 propelled the enforcement-focused regime within immigration agencies. Following its passage, INS's efforts began to coalesce around enforcement, centered on strengthening the border and interior enforcement.¹⁸⁷ INS was delegated additional service and enforcement functions in the 1980s and 1990s.¹⁸⁸ The Refugee Act of 1980 provided humanitarian avenues for immigration, including the ability to seek asylum and for refugees to obtain permanent resident status.¹⁸⁹ Adjudication functions were delegated to the Attorney General and, through regulation, many of these adjudications were then delegated to INS.¹⁹⁰ In 1986, Congress passed the Immigration Reform and Control Act (IRCA) which increased INS's duties in both service and enforcement functions.¹⁹¹ The Act authorized INS to sanction employers that hired workers without authorization, and provided a path to lawful status to 2.7 million noncitizens who were previously unauthorized.¹⁹² In 1996, Congress passed expansive immigration legislation, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), that further expanded the authority and funding of INS, particularly adding administrative deportation that does not require appearance before an immigration judge.¹⁹³

With an enlarged charge and budget, so too came growing criticism of INS. INS was performing both service and enforcement functions poorly and blurring the two

184. See generally LISA M. SEGHELLI, CONG. RSCH. SERV., RL31388, IMMIGRATION AND NATURALIZATION SERVICE: RESTRUCTURING PROPOSALS IN THE 107TH CONGRESS (2002) (describing historical organization restructuring of INS). There are other immigration functions performed by other agencies including the Department of State, the Department of Labor, and the Department of Health and Human Services. See *id.* at 6 (tabling immigration function by department).

185. See Chen & New, *supra* note 169, at 554 (describing evolution of INS).

186. See Hill, *supra* note 178, at 3 (citing reports on INS over years).

187. See OVERVIEW OF INS HISTORY, U.S. CITIZENSHIP & IMMIGR. SERVS. 9 (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/66HH-N9MX>].

188. See *id.* at 9–10 (explaining emphasis on controlling illegal immigration changed INS's responsibilities).

189. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

190. See Michael P. Brady, *Asylum Adjudication: No Place for the INS*, 20 COLUM. HUM. RTS. L. REV. 129, 132–36 (1988) (detailing the history of asylum adjudications within the DOJ).

191. See OVERVIEW OF INS HISTORY, *supra* note 187, at 10 (describing changing role of INS after IRCA); RUTH ELLEN WASSEM, CONG. RSCH. SERV., RL33319, TOWARD MORE EFFECTIVE IMMIGRATION POLICIES: SELECTED ORGANIZATIONAL ISSUES 1, 4–5 (2006) (explaining INS's expanded duties).

192. See WASSEM, *supra* note 191, at 4–5 (explaining “competing” mandates for INS to legalize unauthorized noncitizens and sanction employers).

193. See Doris Meissner, *The Changing Face of Immigration Enforcement*, 30 J.L. & POL. 495, 498 (2015) (noting creation of nonjudicial forms of removal following 1996 IIRIRA); T. Alexander Aleinikoff, *Reorganizing the U.S. Immigration Function*, in 22 IN DEFENSE OF THE ALIEN 22, 24–25 (Ctr. for Migration Stud. of N.Y. 1999) (explaining expanded functions of INS after IIRIRA).

goals to the detriment of each.¹⁹⁴ The 1990 Commission for the Study of International Migration and Cooperative Economic Development (Ascencio Commission) found the conflict in missions led to interagency resource competition and conflict. This was worsened by a lack of coordination concerning personnel practices encouraging movement between service and enforcement arms, and confusion of mission leading to inappropriate priority setting.¹⁹⁵ Readily apparent was the failure of the agency to adequately fulfill its service functions with its increased enforcement focus.¹⁹⁶ It was criticized for huge back logs in processing applications and “rudeness and inefficiency.”¹⁹⁷

After the massive legislation in 1996, calls to restructure INS hit a critical mass and many proposals were presented for how to fix the broken immigration agency. The U.S. Commission on Immigration Reform found that the INS struggled with its incompatible service and enforcement priorities and an overwhelmed mission.¹⁹⁸ The Carnegie INS Restructuring Plan described “obstruction from entrenched institutional interests.”¹⁹⁹ Then-Governor George W. Bush made restructuring INS a key point of his presidential campaign, under his responsible government policies, and called for splitting service and enforcement functions into two separate agencies.²⁰⁰ During restructuring debates, most plans proposed a split to insulate the service adjudicators from the enforcement pressures.²⁰¹ What was less clear was how to best to accomplish this goal while simultaneously allowing coordination. The Ascencio Commission called for the creation of a new agency that focused on the service component of immigration, distinct from immigration enforcement functions.²⁰² INS Commissioner Meissner attempted to avoid congressional restructuring in 1998 calling for budgetary and managerial separation of the services and enforcement arms and the creation of three commissioner positions, one dedicated to enforcement, one to service, and one for coordination of the shared responsibilities.²⁰³

194. See Sutherland, *supra* note 18, at 119–20 (listing problems with service and performance functions); SEGHELLI, *supra* note 184, at 4 (explaining performance functions previously funding better); WASSEM, *supra* note 191, at 5 (describing incompatible functions).

195. See Sutherland, *supra* note 18, at 120 (demonstrating interagency conflict).

196. See Mark Hetfield, *INS Reorganization—Separating the Cops from the Judges*, in 22 IN DEFENSE OF THE ALIEN 33, 35 (Ctr. for Migration Studies of N.Y. 1999) (hoping separation will promote “culture of service within INS,” traditionally dominated by enforcement side). “Because the [service agency] employees would be divorced from enforcement activities, they would not be inculcated with the deep suspicion of immigrants that now prevails at the INS.” Sutherland, *supra* note 18, at 135.

197. See Hetfield, *supra* note 196, at 33 (predicting agency restructuring); Sutherland, *supra* note 18, at 120 (explaining problems effect American companies and immigrants).

198. See U.S. COMM’N ON IMMIGR. REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 149 (1997).

199. See Aleinikoff, *supra* note 193, at 22, 28 (discussing benefits of breaking INS into two agencies).

200. See Hill, *supra* note 178, at 1–2 (noting calls for reforming INS in 2000 presidential election).

201. See David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, MIGRATION, POL’Y INST. INSIGHT 1–2 (Apr. 2003), https://www.migration-policy.org/sites/default/files/publications/insight_4-2003.pdf [<https://perma.cc/P7LM-44DQ>].

202. See Hill, *supra* note 178, at 3 (noting reports on potential INS reforms).

203. See *id.* at 4 (presenting various plans for reforming INS).

The U.S. Commission on Immigration Reform proposed dissolving INS altogether, parsing out the service and enforcement components within different cabinet programs.²⁰⁴ The proposal was criticized, however, due to the coordination consequences.²⁰⁵ The Carnegie INS Restructuring Plan called for the creation of a new cabinet-level agency that combined all immigration functions under the same roof, while creating separate agencies within dedicated to service and enforcement respectively.²⁰⁶ The plan, however, rejected the need to put service and enforcement in separate cabinet-level agencies.²⁰⁷ NGOs proposed separating adjudication and enforcement functions, or “police functions and judge-adjudicator functions,” while coordinating policy and support services including data-management, appointment of a high-level official in charge of both, and funding for adjudication arm.²⁰⁸

The U.S. Committee for Economic Development called for INS to remain intact but to undergo restructuring to separate the enforcement and service functions.²⁰⁹ Various restructuring bills were introduced in the House and Senate at the turn of the millennium to split service and enforcement. These efforts included different levels of separation between enforcement and service; however, included a director of the “centralized” office, one proposing a director in charge of the administrative crossover between the prongs, and the other proposing that the director to be a high-level official in the Department of Justice, as an Associate Attorney General.²¹⁰

The attacks of September 11, 2001 shook the nation and propelled a massive administrative state restructuring. Specifically, the executive branch was under attack for the failures in intelligence, interagency coordination, and communication that permitted the attack. Fortifying the homeland meant increasing communication and coordination in the executive branch, which provided justification for consolidating agencies under a new cabinet-level agency dedicated to protecting the homeland.

INS came to the center of attention surrounding the September 11 attacks because the perpetrators had entered the United States under a visa and then—in a well-publicized gaff—months after the attacks, the agency approved the benefits applications of two of the men involved.²¹¹ As such, INS was included in discussions regarding the design of a new cabinet-level agency responsible for homeland security.²¹² But

204. See U.S. COMM’N ON IMMIGR. REFORM, *supra* note 198, at 151 (recommending assigning border enforcement to Department of Justice; adjudications of applications to Department of State).

205. See *id.* at 26 (noting inability for coordination between agencies on shared issues outside their core focus).

206. See *id.* at 27.

207. See *id.* at 24.

208. See Hetfield, *supra* note 196, at 34–35 (explaining importance of split between enforcement and service functions).

209. See Hill, *supra* note 178, at 3.

210. See Martin, *supra* note 201, at 2 (comparing Senate and House bills for restricting INS).

211. See Kong, *supra* note 165 (acknowledging all nineteen September 11 hijackers entered United States through valid visas).

212. See Ron Fournier, *Bush OK Expected in Recommended Merger of INS, Customs, MRT* (Mar. 18, 2002), <https://www.mrt.com/news/article/Bush-OK-expected-in-recommended-merger-of-INS-7864859.php>; see also,

concerns over the conflicting missions remained. Congress and the White House sparred over whether INS should be subsumed intact. Congress voiced concerns that moving INS intact to the new agency would mean the country would be left with “the same old, same old INS . . . which will bring along its incompetence.”²¹³ The two main proposals were to keep the service arm under the Department of Justice while moving the enforcement functions to the newly created Department or put both functions under the new Department but in separate agencies.²¹⁴

In June 2002, President Bush proposed the creation of the Department of Homeland Security,²¹⁵ and the Homeland Security Act which effectuated its creation was signed into law on November 25, 2002.²¹⁶ The President’s first reorganization plan included establishing the Bureau of Border Security, the Bureau of Citizenship and Immigration Services, and the Director of Shared Services.²¹⁷ On January 30, 2003, President Bush modified the reorganization plan, maintaining the service agency and its mission, but splitting the enforcement agency into two bureaus under the Border and Transportation Security Directorate—one dedicated to interior enforcement and one to the border.²¹⁸ Effective March 1, 2003, the new plan renamed the enforcement branch the Bureau of Immigration and Customs Enforcement, whose mission included “enforc[ing] the full range of immigration and customs laws within the interior of the United States.”²¹⁹ The Bureau of Border Security was renamed and elevated to the Bureau of Customs and Border Protection and would be responsible for border enforcement.²²⁰ In 2005, Secretary Michael Chertoff’s Second Stage Review reorganization was the final major restructuring that produced the current structure. It eliminated the Border and Transportation Security Directorate and gave all key immigration operational components direct lines to the Secretary of Homeland Security.²²¹

SEGHETTI, *supra* note 184, at 10 (discussing goal of creating Homeland Security to consolidate roles performed across agencies).

213. See Curt Anderson, *Homeland Security Plan Examined*, BL (June 27, 2002) (quoting House Judiciary Committee Chairman James Sensenbrenner, R-Wis).

214. See *id.* (highlighting President Bush’s plan included splitting INS functions).

215. See ELIZABETH C. BORJA, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY 2001–2008 6, U.S. DEP’T HOMELAND SEC., HIST. OFF. (2008), <https://www.hsdl.org/c/view?docid=37027> [<https://perma.cc/4K97-Z6YX>].

216. See *id.* at 7.

217. See DEPARTMENT OF HOMELAND SECURITY REORGANIZATION PLAN, H.R. Doc. No. 108-16 at 5 (1st Sess. 2003).

218. See *id.* at 16.

219. See *id.*

220. See *id.*

221. See Borja, *supra* note 215, at 16 (explaining dissolution of Border and Transportation Security Directorate and subsequent direct reports to Secretary).

B. Conflicting Missions and Dueling Delegations

The strength of congressional intent in setting USCIS's mission, insulated from enforcement, is evident in the organic statute.²²² In dissolving INS and creating a split structure, congressional intent to improve the administration of the legal immigration system was clear. The Homeland Security Act included the following Sense of Congress provision:

Sense of Congress Regarding Immigration Services.— It is the sense of Congress that— (1) the quality and efficiency of immigration services rendered by the Federal Government should be improved after the transfers [of immigration functions from INS to separate bureaus] take effect; and (2) the Secretary should undertake efforts to guarantee that concerns regarding the quality and efficiency of immigration services are addressed after such effective date.²²³

The tasks most core to USCIS's service mission relate to the adjudication of applications for immigration benefits, including those based on employment, family ties, humanitarian obligations, and citizenship.²²⁴ The Homeland Security Act created "USCIS to enhance the security and efficiency of national immigration services by *focusing exclusively* on the administration of benefit applications."²²⁵

Congress gave USCIS a clear mission of service, divorced from enforcement.²²⁶ The separation from its enforcement-focused sister agencies codified a clear understanding that enforcement functions engulf service tasks when undertaken by the same agency. Congress allowed the President to restructure the separate bureaus but included an important caveat: The power may "not be used to combine, join, or consolidate functions or organizational units."²²⁷ Congressional institutional design and delegation decisions, however, fostered presidential control and continued enforcement primacy within the immigration bureaucracy.

During restructuring debates, Congress dealt with concerns about placing INS within a newly-formed DHS.²²⁸ Proponents of placing both enforcement and service

222. See 6 U.S.C. § 271(a)(3) (articulating functions of Bureau of Citizenship and Immigration Services).

223. 6 U.S.C. § 298(b).

224. See 6 U.S.C. § 271(b) (detailing adjudication of visa and naturalization petitions, asylum and refugee applications, and service centers). Congress also required reporting on these adjudications. See 6 U.S.C. § 276; see also Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services, *supra* note 173, at 2; WILLIAM A. KANDEL, CONG. RSCH. SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 1-2 (2015).

225. See *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS, <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/A6HR-34DR>].

226. See *id.* (noting USCIS specifically responsible for immigration service function).

227. See 6 U.S.C. § 291(b); see also STEPHEN VINA, CONG. RSCH. SERV., RS21450, HOMELAND SECURITY: SCOPE OF THE SECRETARY'S REORGANIZATION AUTHORITY 5 (2005).

228. See Jesse J. Holland, *Don't Break Up INS, Ridge Urges*, ASSOCIATED PRESS (June 26, 2002) (noting combining immigrant visa processing and border control in one agency could send wrong message); see also Curt Anderson, *Bush Security Plan Has Differences*, ASSOCIATED PRESS (June 10, 2002), (describing "anti-immigrant" combining of visa processing and border patrol functions in one agency). Lawmakers also expressed

functions of legacy INS within the same cabinet agency focused on the interconnect- edness of the functions and the corresponding need for coordination, as highlighted by the September 11 attacks and subsequent failings of INS.²²⁹ During debates over restructuring the INS, Professor Alexander Aleinikoff described the benefits in keep- ing both the enforcement and service goals under the same cabinet level agency as fostering the “synergy” between the two functions.²³⁰ In so doing, he emphasized the need for a structure that included coordination while maintaining accountability within the separate functions.²³¹ The ability of agencies to remain separate while coordinated and still fulfill their mission is, however, premised on the assumption that each mission would be advocated for equally.²³² Coordination may be skewed in favor of one mission over another depending on the prioritization of the coordi- nating agency.²³³

In an apparent attempt to assuage fears that the service functions of legacy INS (as well as other nonhomeland security focused agencies that similarly absorbed by the DHS) would be de-prioritized,²³⁴ Congress included “the functions of the agen- cies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected” in DHS’s statutory mission.²³⁵ Nev- ertheless, Congress was very broad in delegating the enforcement and administration of all immigration laws to the Secretary of Homeland Security.²³⁶ As the two func- tions remained under one cabinet-level agency whose mission is clearly enforce- ment-focused, the more powerful parent agency’s priorities could easily dominate.²³⁷ As critics feared, the insulation from enforcement pressures has not been successful and the enforcement missions of DHS has been prioritized and cultivated within USCIS. The placement of USCIS under DHS essentially gave USCIS the conflicting enforcement mission of its parent agency as a secondary goal that can easily be pushed to take greater priority.²³⁸ While Congress clearly laid out that USCIS’s

concerns over whether the INS’s non-homeland security duties would suffer from lack of emphasis in an agency dedicated to homeland security. See Curt Anderson, *Democrats Skeptical of Homeland Plan*, ASSOCIATED PRESS (June 20, 2002). Advocates also advanced the position that immigration services should remain within the De- partment of Justice and State Department. See *Immigration Reform and the Reorganization of Homeland De- fense: Hearing Before the Subcomm. on Immigr. of the Comm. on the Judiciary*, 107th Cong. 10 (2022) (state- ment of Bill Ong Hing, Professor, University of California Davis School of Law); Jeff Bliss, *House Panel Votes to Exclude Part of INS From Security Agency*, BL (July 10, 2002).

229. See Biber, *supra* note 15, at 33–35 (discussing separating conflicting objectives into various agencies); Fournier, *supra* note 212 (discussing bureaucratic reorganization after September 11 attack).

230. See Aleinikoff, *supra* note 193, at 22, 26–27.

231. See *id.* at 24.

232. See *id.* at 26–27.

233. See Biber, *supra* note 15, at 45–46.

234. See Anderson, *Democrats Skeptical of Homeland Plan*, *supra* note 228.

235. See 6 U.S.C. § 111 (b)(1)(E).

236. See 8 U.S.C. § 1103; 8 C.F.R. § 2.1 (outlining powers, duties, and authority of Secretary of Homeland Security).

237. See Lee, *supra* note 16, at 573.

238. See Biber, *supra* note 15, at 8 (noting difficulty of multiple goals in agencies conflicting with primary goals).

service goal should have primacy, it did not detail how the agency should balance its mission with that of DHS.²³⁹

Moreover, Congress broadly delegated DHS's enforcement authority. Congress delegated the setting of enforcement policies *and priorities* to the Secretary of Homeland Security, essentially acknowledging the gap between funding and breadth of the immigration laws.²⁴⁰ As Cox and Rodriguez explain, Congress implicitly delegates a vast amount of power to shape immigration law to the executive branch through enacting complex and wide-sweeping immigration legislation, coupled with the deference given to agencies to interpret the labyrinthine statute, and the insufficiency of agency resources to pursue total compliance.²⁴¹ The gap in resources allocated to DHS to carry out the myriad of statutory grounds for removal leaves wide latitude for Presidents to shape immigration laws, through DHS's immigration agencies, in line with their own priorities.²⁴² Additionally, Congress's increasingly draconian immigration laws have limited the discretionary relief from deportation that immigration judges can provide, thereby de facto delegating more decisionmaking power to DHS through prosecutorial discretion.

In addition, Congress expressly permitted redelegation of responsibilities within the Department, as authorized by the law.²⁴³ Within months of its creation, DHS began to delegate enforcement functions to USCIS through internal administrative law mechanisms.²⁴⁴ In March of 2003, DHS issued a final rule delegating immigration functions as "a step in the process of separating DHS enforcement and services functions from Department of Justice adjudication functions as envisioned by the Act."²⁴⁵ But the rule itself included delegation of a key prosecutorial enforcement function to USCIS: the ability to initiate removal proceedings through the issuance

239.

240. See Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1) (delegating DHS administration and enforcement authority); 6 U.S.C. § 202(3)-(5) (granting DHS authority to establish, enforce, and administer immigration policies and priorities).

241. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–511 (2015) [hereinafter *The President and Immigration Law*] (describing "de facto delegation" of powers to the President).

242. See *The President and Immigration Law Redux*, *supra* note 29, at 116 (emphasizing Presidents mold immigration policy to serve their own objectives); see also Chen, *supra* note 17, at 374–75 (highlighting executive action vulnerable to abuse concerning immigration law). "Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances." Memorandum from David Pekoske, DHS Acting Secretary, to Troy Miller, Comm'r of U.S. Customs & Border Prot.; Tae Johnson, Dir. of U.S. Immigr. & Customs Enf't; Tracey Renaud, Dir. of U.S. Citizenship & Immigr. Servs. 2 (Jan. 20, 2021) (on file with Homeland Security website) (providing reason for interim civil enforcement guidelines for immigration violations).

243. See 8 U.S.C. § 1103 (outlining of Secretary, Under Secretary, and Attorney General); 8 C.F.R. § 2.1 (highlighting delegating power of Secretary of Homeland Security).

244. See *Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-1> [<https://perma.cc/3PS5-8TR4>] (explaining authority and establishment of U.S. Citizenship and Immigration Services).

245. See 8 C.F.R. §§ 1, 2, 103, 239, 68 Fed. Reg. 10922 (March 6, 2003) (addressing transfer of INS administration from DOJ to DHS).

of Notices to Appear (NTA).²⁴⁶ Moreover, in transferring responsibility over NTA issuance from legacy INS to the new agencies, DHS amended the NTA regulations only to reflect the new agency names and officer titles.²⁴⁷ Importantly, the new regulations did not extract service-based officers that were included in the dual-missioned INS version of the regulation.²⁴⁸ Further, regulations written before the separation of missions requiring the issuance of NTAs after the denial of certain benefit applications remain unaltered.²⁴⁹

The Secretary delegated additional enforcement functions through formal delegation to USCIS in its first months of existence, including investigatory authority over “alleged civil and criminal violations of the immigration laws, including but not limited to alleged fraud with respect to applications or determinations within [USCIS],”²⁵⁰ and prosecutorial discretion actions in the form of deferred action.²⁵¹ This mechanism was again used on March 28, 2017, when DHS issued its “Delegation to the Director of U.S. Citizenship and Immigration Services to Conduct Certain Law Enforcement Activities Including, But Not Limited to, Accessing Internet and Publicly Available Social Media Content Using Fictitious Account or Identity.”²⁵² Pronounced in the context of authorizing USCIS officers to use fake social media accounts to investigate, the purpose of the delegation included the broad provision that it “reaffirms the authority of the Director of U.S. Citizenship and Immigration Services (USCIS) to conduct law enforcement activities . . . [i]n matters under the jurisdiction of USCIS, to protect the national security and public safety”²⁵³

Congressional delegation decisions were coupled with limited oversight provisions for USCIS. Reporting requirements to the President and congressional committees include annual reports that describe the number of applications received and their outcomes, regional and category breakdowns, backlog statistics and processing times, plans to eliminate the backlog, and information on fees.²⁵⁴ Further, reporting includes the amount and types of grievances against the agency, the agency’s plans to address those grievances and “improve immigration services,” and “whether

246. See 8 C.F.R. § 239 (listing DHS officers permitted to issue NTAs).

247. See *id.* The revision to the regulations changed the title to “immigration officer” which covered agents within the three agencies and beyond. See 8 C.F.R. §§ 1.2, 2.1, 239.1 (2024) (providing definitions and delegations of authority).

248. See 8 C.F.R. §§ 1.2, 2.1, 239.1. (describing immigration officers under DHS authority).

249. See *USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, USCIS 2 (Sept. 27, 2018), https://www.uscis.gov/sites/default/files/document/notices/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf [<https://perma.cc/P8BE-AATF>] (listing NTAs cases which separation of mission has updated).

250. See DEP’T OF HOMELAND SEC., 0150.1, DELEGATION TO THE BUREAU OF CITIZENSHIP & IMMIGR. SERVS. (2003) (delegating authority to investigate alleged crimes).

251. See *id.* (granting prosecutorial discretion regarding voluntary departures and deferred action).

252. See Memorandum from Lori Scialabba, DHS Acting Director, to Matthew Emirch, Assoc. Dir. of Fraud Detection & Nat’l Sec.; Inga Dawson, Chief Off. of Sec. & Integrity 1 (Mar. 28, 2017) (on file with USCIS) (setting forth authority to use fake social media accounts to enforce immigration policies).

253. DEP’T OF HOMELAND SEC., DHS Delegation No. 15002, DELEGATION TO THE DIR. OF U.S. CITIZENSHIP & IMMIGR. SERVS. TO CONDUCT CERTAIN L. ENF’T ACTIVITIES (2017) (setting forth purpose of delegation).

254. See 6 U.S.C. § 298(a) (setting forth annual report requirements).

immigration-related questions conveyed by customers to the Department . . . were answered effectively and efficiently.”²⁵⁵ Additionally, USCIS has an ombudsman who must have experience in immigration law and customer service experience.²⁵⁶ Perhaps the costliest decision for Congress in terms of oversight has been USCIS’s funding structure. USCIS is almost entirely self-funded through applicant fees that do not require congressional annual approval.²⁵⁷ As a result, USCIS can shift around resources to prioritize enforcement tasks with limited oversight.

C. Presidential Administration of USCIS

Although the Supreme Court has stated that “over no conceivable subject is the legislative power of Congress more complete” than immigration, in reality, the executive branch has tremendous power to shape how those laws are interpreted, administered, and prioritized.²⁵⁸ In immigration law, presidential administration is at its apex.²⁵⁹ The magnitude of deference given to the executive branch is particularly pronounced in immigration enforcement. The Supreme Court has called the broad discretion given to agency officials a “principal feature” of the deportation system.²⁶⁰

Immigration, as a highly politicized area with no expertise required, has frequently and increasingly enticed Presidents to flex their administrative control.²⁶¹ President Trump’s use of executive orders to control immigration accounted for a larger percentage of executive action taken than any other President.²⁶² President Biden has not turned down the dial on presidential management of the legal immigration system. Using the wealth of internal administrative law tools available, presidents and agency leadership have attempted to influence and control USCIS’s culture and enforcement-focused decision-making.²⁶³

255. See *id.* at § 298(a)(F)-(H) (noting requirements related to agency performance).

256. See 6 U.S.C. § 272 (explaining purpose and function of ombudsman).

257. See 6 U.S.C. § 296(c) (stating bureaus can collect fees from applications); WILLIAM A. KANDEL, CONGR. RSCH. SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 19 (2015) (providing history of USCIS fee funding).

258. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); Alex Sager, *Immigration Enforcement and Domination: An Indirect Argument for Much More Open Borders*, 70 POL. RSCH. Q. 42, 44 (2017) (highlighting exceptionalism of immigration power agencies exercise over people’s lives).

259. See *supra* note 17 and accompanying text (describing Presidential control over immigration agencies and policies).

260. See *Arizona v. United States*, 567 U.S. 387, 396 (2012).

261. See Kagan, *supra* note 11, at 2370–71 (discussing Presidential powers regarding immigration via Supreme Court’s *Hampton v. Mow Sun Wong* decision).

262. See Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. MIGRATION & HUM. SEC. 1, 54–55, 58 (2020) (highlighting Trump’s emphasis on immigration executive orders and percentage of immigration-focused executive orders).

263. See Exec. Order No. 14012, 86 Fed. Reg. 8277, 8277 (Feb. 5, 2021) (influencing USCIS via President Biden’s initiative encouraging immigrant participation in civic life); Press Release, Migration Pol’y Inst., Trump Completed 472 Executive Actions on Immigration During His Presidency, Many That Could Have Lasting Effects on the U.S. Immigration System (Feb. 1, 2022), <https://www.migrationpolicy.org/news/trump-472-executive-actions-immigration-during-presidency> [<https://perma.cc/XJ9X-CRNN>] (reporting Trump Administration’s extensive executive action on immigration and changes to USCIS regulations and guidance).

When USCIS was created, the workforce was not built from scratch. Rather, adjudicators from INS whose culture had been swayed to favor enforcement were transferred to the new agency.²⁶⁴ An agency's historical culture can make altering missions difficult as the workforce may feel resistant or not connect to the new mission.²⁶⁵ INS as a whole was dominated by an anti-immigration, pro-enforcement culture that hindered the ability to execute a service-oriented mission.²⁶⁶ As General Counsel for INS explained: "[W]e are the Anti-Immigration and Naturalization Service, and we are about keeping people out . . . [a]lthough critics of the INS frequently characterize it as a 'schizophrenic agency,' torn between contradictory missions of 'service' and 'enforcement,' from the inside it seldom looked like a tough choice."²⁶⁷

The service functions of INS were hampered by an agency culture within the services arm that was enforcement focused.²⁶⁸ As one news report remarked "in its zeal to catch every illegal, the INS regards everyone on the other side with suspicion. To the service, a legal immigrant is merely an illegal alien with papers."²⁶⁹ Commissioner Doris Meissner attempted during her tenure to show a sea change during a congressional oversight hearing, stating: "[w]e are putting the 'N' and 'S' back into INS. . . ."²⁷⁰ Nonetheless, attempts to change the culture within the service unit was stymied by the deeply entrenched enforcement values.²⁷¹ The enforcement culture had been cultivated and cemented through the hiring and promotion structure of the agency. Many adjudicators in the service arm had an enforcement background.²⁷² Further, those who excelled in their enforcement-focused position within the agency would be rewarded by promotion to management positions within the service unit.²⁷³ Thus, the culture within the service arm was hostile to its own aims.²⁷⁴

Caution was raised during the reorganization that efforts needed to be taken to adjust the enforcement-focused culture of INS to adhere to the new singularly service-focused mission of USCIS.²⁷⁵ Insufficient efforts, however, were made during

264. See 6 U.S.C. § 275(b) (transferring personnel from INS to USCIS); Chen, *supra* note 17, at 379–80 (explaining INS's institutional problems remain after reorganization into USCIS).

265. See Biber, *supra* note 15, at 17 (noting "historical path-dependence" and "historical inertia" among workforce may interfere with implementing agency's new missions).

266. See Hetfield, *supra* note 196, at 33–41 (describing INS' anti-immigration culture); Sutherland, *supra* note 18, at 119–20 (highlighting anti-immigration sentiment at INS); Aleinikoff, *supra* note 193, at 24 (emphasizing problematic anti-immigration culture at INS).

267. See Sutherland, *supra* note 18, 119.

268. See Lee, *supra* note 16, at 572 n.77 (discussing problematic culture at INS); Aleinikoff, *supra* note 193, at 24 (suggesting changes to address INS' issued culture).

269. See Sutherland, *supra* note 18, at 119 (highlighting attitude of INS towards opposing parties); Weston Kosova, *The INS Mess*, NEW REPUBLIC (Apr. 13, 1992), <https://newrepublic.com/article/74595/the-ins-mess> [<https://perma.cc/92QW-6W85>].

270. *Reviewing the Status of Operations at the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigr. of the Comm. on the Judiciary*, 104th Cong. 18 (1996) (Statement of Doris Meissner).

271. See Sutherland, *supra* note 18, at 119 (emphasizing enforcement values win out in INS culture).

272. See *id.* at 120–21 (explaining INS favored enforcement backgrounds when hiring).

273. See *id.* at 120 (describing promotion structure of INS).

274. See *id.* at 119 (presenting conflicting goals of INS).

275. See Hetfield, *supra* note 196, at 33 (explaining difficulty in reorganization given previous INS values).

USCIS's creation to create a mission-driven workforce.²⁷⁶ As was the case when both service and enforcement were under INS, the culture of enforcement has taken primacy over all DHS immigration agencies, including USCIS.²⁷⁷ As Professor Amanda Frost describes, USCIS has a “gotcha mentality” where adjudicators seek to deny applicants and initiate removal proceedings.²⁷⁸

One notable anomaly is the Asylum Division adjudicators within the Refugee, Asylum & International Operations (RAIO) directorate. Within USCIS, these adjudicators are dedicated to deciding humanitarian cases and have their own institutional culture that has historically been in line with its special mission.²⁷⁹ Like other USCIS adjudicators, the Asylum Division was initially comprised of those transferred from INS.²⁸⁰ Unlike the other adjudicators, however, those transferred to the Asylum Division had come from a unit within INS that had a mission-driven culture. The culture of the Asylum Division resisted the increasing enforcement tasks instituted under the Trump Administration.²⁸¹

Clarifying the INS' priorities by disentangling its enforcement from its adjudications functions may result in greater accountability within the agency, as well as the facilitation of a new culture of customer service within those parts of INS which are entrusted with serving immigrants, refugees and asylees. If, however, care is not taken to define and respect the distinction between the two functions, and to provide a means to ensure their coordination, restructuring will only create new tensions and further exacerbate the problems which have plagued the agency for so long.

Id.

276. See Chen, *supra* note 17, at 389 n.190 (highlighting conflicting values existed since creation of INS).

277. See Sutherland, *supra* note 18, at 119 (emphasizing enforcement values won out over service values in INS).

278. See Frost, *supra* note 180, at 28 (addressing mentality of immigration officials in pursuing cases).

279. See *Core Values and Guiding Principles for RAIO Employees*, U.S. CITIZENSHIP & IMMIGR. SERVS. 8 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Core_Values_and_Guiding_Principles_for_RAIO_Employees_LP_RAIO.pdf [<https://perma.cc/4WEQ-H79R>] (elucidating mission of RAIO employees); see also Katie Witt, *Why We Serve: Public Service Motivation and What the USCIS Mission Means to Its Workforce*, HOMELAND SEC. AFFS. (Mar. 2021), <https://www.hsaj.org/articles/17476> [<https://perma.cc/K5D3-QUDB>] (highlighting RAIO mission remains unchanged since inception).

280. See DEPT. OF HOMELAND SEC., *PRIVACY IMPACT ASSESSMENT FOR THE USCIS ASYLUM DIVISION 1* (2017), https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis- asylum-july2017_0.pdf [<https://perma.cc/KV5C-KDPB>] (discussing history of asylum division).

281. See Charles Tjersland, *I Became an Asylum Officer to Help People. Now I Put Them Back in Harm's Way*, WASH. POST (July 19, 2019), https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5_story.html [<https://perma.cc/HC27-Y796>] (discussing change in asylum protocol under Trump Administration). In the overhaul of agency rhetoric under the Trump administration, changes were made to the agency's directorates' mission statements. Perhaps most dramatic was the change of RAIO's mission. The prior mission stated: “We provide immigration, protection and humanitarian services for people who are: Fleeing oppression, persecution or torture; Facing urgent humanitarian situations; and, best served in our international offices, such as military members who are serving overseas and permanent residents who need replacement documents to return to the U.S.” DON PHILPOTT, *UNDERSTANDING THE DEPARTMENT OF HOMELAND SECURITY* 114-15 (2015) (discussing previous RAIO's mission). The mission was changed coldly to “We are responsible for: Conducting protection screenings; [a]djudicating asylum and refugee applications; and [a]djudicating other immigration benefits both domestically and internationally.” See *Refugee, Asylum and International Operations Directorate*, USCIS,

Agency leadership is an instrumental way of shaping agency culture. Under the Trump Administration, heads of departments included people with enforcement and anti-immigration backgrounds. Ken Cuccinelli, who performed the roles of both the head of USCIS and the second-in-command of the Department of Homeland Security, has a law enforcement background including his tenure as the Virginia Attorney General.²⁸² Joseph Edlow, the former Deputy Director for Policy immigration enforcement, has a background that includes prior work as assistant chief counsel (the prosecutor in immigration court) for ICE, as well as counsel for the Immigration and Border Security Subcommittee of the House Judiciary Committee, where he worked on criminal immigration enforcement.²⁸³ Additionally, in his first month in office, President Trump appointed USCIS Ombudsperson Julie Kirchner, a former executive director of a major national anti-immigration group.²⁸⁴ During Kirchner's tenure as Ombudsman, she failed to complete advisory work and address concerns within the office and with customers.²⁸⁵

Certain agency leadership appointments in USCIS and DHS require senate confirmation, such as the Director of USCIS and the Secretary and Deputy Director of Homeland Security.²⁸⁶ Nonetheless, violations of the Federal Vacancies Act through the improper use of "actings" and invalid changes to succession rules have been widespread within DHS and USCIS during the Trump administration.²⁸⁷ DHS amended its order of succession numerous times, including immediately preceding and amid the resignations of Secretary Kirstjen Nielsen and Acting (improperly)

<https://www.uscis.gov/about-us/organization/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate> [<https://perma.cc/VU5R-GTH8>] (detailing RAI0's responsibilities).

282. See Press Release, U.S. Citizenship and Immigr. Servs., Statement on Cuccinelli Named Director of USCIS (June 10, 2019), <https://www.uscis.gov/archive/cuccinelli-named-acting-director-of-uscis> [<https://perma.cc/VAU2-ASPS>] (providing background on Ken Cuccinelli).

283. See *Heritage Welcomes Immigration Expert Joe Edlow as Visiting Fellow*, HERITAGE FOUND. (Feb. 23, 2022), <https://www.heritage.org/press/heritage-welcomes-immigration-expert-joe-edlow-visiting-fellow> [<https://perma.cc/9XAZ-TMCZ>] (summarizing Joe Edlow's professional background).

284. See Press Release, Dep't Homeland Sec., DHS Announces New Cis Ombudsman Julie Kirchner (May 2, 2017), <https://www.dhs.gov/news/2017/05/02/dhs-announces-new-cis-ombudsman-julie-kirchner> [<https://perma.cc/7VW6-SFL8>] (announcing appointment of Julie Kirchner).

285. See Letter from Elijah E. Cummings, Chair, Senate Comm. on Oversight and Reform, to Julie Kirchner, Ombudsman, U.S. Dep't Homeland Sec. (Feb. 6, 2019), <https://oversightdemocrats.house.gov/sites/democrats.-oversight.house.gov/files/documents/2019-02-06.EEC%20to%20Kirchner%20re.%20CIS%20Ombudsman.pdf> [<https://perma.cc/FU2G-7TMQ>] (suggesting Kirchner failing to carry out functions of Ombudsman).

286. See 8 U.S.C. § 1103(c) (setting forth requirements for DHS appointment). USCIS also has four presidential appointments that do not require senate confirmation and five schedule C excepted appointments. See *Policy and Supporting Positions, Committee on Oversight and Reform, 116 Cong. 75* (Dec. 2020), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf>. USCIS's agency heads include the Director, Chief of Staff, Policy and Strategy, Chief Counsel, and Deputy Director of Operations. See *U.S. Citizenship and Immigration Services Organizational Chart*, U.S. CITIZENSHIP & IMMIGR. SERV. (Mar. 30, 2023), <https://www.uscis.gov/sites/default/files/document/charts/USCIS-Org-Chart.pdf> [<https://perma.cc/5LHR-KPAL>] (setting forth USCIS organizational chart).

287. See *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 28 (D.D.C. 2020) (noting appointment made during Trump Administration violated Federal Vacancies Act).

Secretary Kevin McAleenan.²⁸⁸ On August 14, 2020, the GAO found McAleenan was not authorized to act as Secretary, and consequentially, so too were the succession rules that put in place the current blended leadership of DHS and USCIS of Chad Wolf (Acting Secretary) and Ken Cuccinelli, both the head of USCIS (“Senior Official Performing the Duties of the Director”) and the second-in-command of DHS (“Senior Official Performing the Duties of the Deputy Secretary”).²⁸⁹

Under the Trump administration, overtly concerted efforts were made to sway the agency from service to enforcement, aligning with the President’s unforgiving immigration enforcement policy priorities.²⁹⁰ Performance measures throughout time have increasingly prioritized catching fraud and national security over customer service and efficient processing of applications. Recently, the agency has highlighted its recruitment efforts aimed at hiring people with law enforcement backgrounds.²⁹¹

Institutional rhetoric also made a dramatic and overt shift to enforcement as the Trump Administration overhauled both public facing and internal guidance. The most notable shift in rhetoric was the change in the agency’s mission statement. The old mission statement read: “USCIS secures America’s promise as a nation of immigrants by *providing accurate and useful information to our customers*, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.”²⁹² The new mission more closely reflects that of DHS, now reading: “U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits *while protecting Americans, securing the homeland*, and honoring our values.”²⁹³ In so doing, the agency removed reference to “customers” and inserted enforcement goals of “protecting Americans, securing the homeland.”²⁹⁴

Of particular importance for the mission drift of USCIS was the shift in focus on language related “system integrity” has enabled substitution and prioritization of

288. See Kate Sullivan et al., *Incoming Acting Secretary of Homeland Security ‘Not an Ideologue or Fire Breather’*, CNN (Apr. 8, 2019), <https://www.cnn.com/2019/04/07/politics/kevin-mcaleenan-acting-secretary-homeland-security/index.html> [<https://perma.cc/T68N-4PWS>] (acknowledging succession issues following resignation of Nielsen and McAleenan appointment).

289. See U.S. GOV’T ACCOUNTABILITY OFF., *LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY* 11 (2020), <https://www.gao.gov/assets/710/708830.pdf> [<https://perma.cc/DF9R-66D4>].

290. See Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 254 (2017) (discussing President Trump’s policy decisions to shift towards enforcement).

291. See *Cuccinelli Announces USCIS’ FY 2019 Accomplishments and Efforts to Implement President Trump’s Goals*, USCIS (Oct. 16, 2019), <https://www.uscis.gov/archive/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-to-implement-president-trumps-goals> [<https://perma.cc/HY2C-BJV7>] (describing USCIS’s efforts to comply with President Trump’s goals).

292. See Richard Gonzalez, *America No Longer a ‘Nation of Immigrants,’ USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> [<https://perma.cc/PN8J-WK9Z>] (quoting USCIS mission statement shift).

293. See *id.*

294. See *id.* (comparing differences between USCIS’s new and previous mission statements).

enforcement tasks.²⁹⁵ “[E]nsuring the integrity of our immigration system,”²⁹⁶ was listed as a primary goal in USCIS’s prior mission statement, alongside its service-oriented goals. The new mission statement articulates that “safeguarding” the system’s integrity is the primary goal, expressing the congressionally mandated mission to adjudicate benefits efficiently and fairly was the means through which the agency would accomplish the system integrity goal. Integrity has become a catch-all justification for policies that are anti-service and enforcement focused.²⁹⁷ A phrase capitalized on as part of the system integrity concept, that has come to influence many enforcement tasks is “enhanced vetting.”²⁹⁸ When Ken Cuccinelli assumed leadership of the agency, he explained: “I see USCIS as a vetting agency, not a benefits agency.”²⁹⁹

Internal administrative law tools enable centralizing power and managerial control to push USCIS front-line officers into more enforcement functions. As congressional action in the immigration sphere has continued to stagnate, Presidents have increasingly turned to their tools of administrative management to push their immigration in policy agendas to follow through on campaign promises.³⁰⁰ Executive action that centralizes decisions concerning both priorities for active enforcement and programs deferring enforcement are often highly publicized presidential demonstrations of policy objectives.

Attempts to influence affirmative enforcement actions and the use of prosecutorial discretion are often done through articulating enforcement priorities. Historically, enforcement priorities were articulated through ICE guidance to its officers and USCIS would correspondingly issue guidance to its workforce.³⁰¹ President Obama, facing an ICE workforce that was hostile towards perceptions of constrain

295. See Chen & New, *supra* note 169, at 581 (acknowledging change in agency priorities); Rabin, *supra* note 166, at 164 (noting USCIS shifting away from customer service approach).

296. See Gonzalez, *supra* note 292.

297. See Chen & New, *supra* note 169, at 556 (demonstrating how “integrity” used to justify shifting agency priorities). “Integrity” has been increasingly used as justification for policies limiting eligibility for benefits. See *id.* (noting Trump administration using “integrity” justification for policy change).

298. See USCIS, STRATEGIC PLAN 2019-2021 4, 11 (2019) (implementing extreme vetting into strategic plan); *Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services: Hearing on H.R. 6 Before the H. Comm. on the Judiciary*, 116th Cong. 158–59 (2019) (statement of Marketa Lindt, President, AILA) (arguing USCIS’s policies shifted from service-oriented adjudication to “extreme vetting”).

299. See Adam Shaw, *Cuccinelli Puts Hardline Stamp on Immigration Agenda, Just Two Months into USCIS Job*, FOX NEWS (Aug. 23, 2019), <https://www.foxnews.com/politics/cuccinelli-immigration-agenda-just-2-months-into-uscis-job> [https://perma.cc/X7SA-DP3J] (interviewing USCIS’ acting director about policy shift).

300. See *Presidential Administration*, *supra* note 11 (proffering idea that presidential administration filling vacuum left by Congress).

301. See JOHN MORTON, CIVIL IMMIGRATION ENFORCEMENT: PRIORITIES FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (Mar. 2, 2011) (outlining ICE enforcement priorities); JOHN MORTON, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION AND REMOVAL OF ALIENS (June 17, 2011) (providing ICE guidance to ensure agency resources focused on its enforcement priorities); PETER VINCENT, CASE-BY-CASE REVIEW OF INCOMING AND CERTAIN PENDING CASES, (Nov. 17, 2011) (noting steps USCIS must take to conform to ICE enforcement priorities); U.S. Citizenship & Immigr. Servs., Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (2011).

on their authority, centralized upward to DHS.³⁰² Secretary Jeh Johnson issued a Policy Memorandum directed at all three immigration agencies prioritizing enforcement against categories of individuals, attempting to give more specificity and thus influence individual determinations.³⁰³

President Trump's approach was to centralize toward the White House and virtually eliminate prioritization. In his first week in office, Trump issued a pair of sweeping immigration enforcement executive orders directing agencies to use "all lawful means to ensure the faithful execution" of U.S. immigration laws against all "removable [noncitizens]."³⁰⁴ DHS issued implementing guidance to USCIS, ICE, and CBP regarding enforcement actions, budgeting, and strategic planning.³⁰⁵ Without distinguishing USCIS's service mandate, Secretary Kelly instructed: "Facilitating the efficient and faithful execution of the immigration laws of the United States and prioritizing the Department's resources requires the use of all available systems and enforcement tools by Department personnel . . . Department personnel shall make full use of these [removal] authorities."³⁰⁶

On Biden's first day in office, DHS issued a policy memorandum that instructed all three Department components to complete comprehensive reviews and report on their enforcement policies and procedures.³⁰⁷ During his campaign, President Biden committed to actively manage and administer the legal immigration system.³⁰⁸ In his first month in office, he issued a set of immigration-related executive orders, including "Restoring Faith in our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans."³⁰⁹

In addition to centralizing decisions about enforcement actions, Presidents from both parties have commonly directed major executive actions aimed at providing a

302. See Press Release, The White House, FACT SHEET: Immigration Accountability Executive Action (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/AJ5E-TDZF>] (providing increased DHS authority over detention and deportation—ICE areas).

303. See JEH JOHNSON, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (Nov. 20, 2014) (outlining Obama-era immigration policy).

304. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (asserting federal government previously failed to deport those with "no right to be" in U.S.).

305. See U.S. Dep't of Homeland Sec., Implementing the President's Border Security and Immigration Enforcement Improvement Policies (Feb. 20, 2017) (implementing President Trump's Executive Order regarding enforcement of immigration laws).

306. See *id.* (implementing new policies).

307. See Pecoske, *supra* note 242 (directing review of immigration policies and practices).

308. See President Joseph R. Biden, Remarks at the National Association of Latino Elected Officials 37th Annual Conference (Aug. 6, 2020) (outlining Biden's proposed overhaul of Trump-era immigration policies).

309. See Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277 (Feb. 5, 2021) (ordering specific agencies review their actions discouraging "integration, inclusion, and citizenship" of new immigrants); see also *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUDIES, (Feb. 2, 2021), <https://cmsny.org/biden-immigration-executive-actions/> [<https://perma.cc/HJ9W-78YZ>] (summarizing Biden executive actions during first 100 days in office).

relieve for individuals who would otherwise be removable.³¹⁰ One of the largest of such efforts was President Obama's Deferred Action for Childhood Arrivals (DACA) program, which provides temporary relief from enforcement action for individuals brought to the United States as children.³¹¹ President Obama created DACA through a DHS Policy Memorandum, directed at USCIS and ICE, that granted a large prosecutorial discretion function to USCIS in determining eligibility for the program.³¹² To overcome the resistance faced in attempting to implement enforcement priorities, DACA created strict centralized decision-making standards for both USCIS and ICE to determine eligibility, leaving less discretion in the hands of the front-line officers.³¹³

Opponents of presidential centralization initiatives regarding forbearance have raised legal challenges including constitutional nonenforcement and APA procedural and substantive arguments.³¹⁴ Plaintiffs challenged implementation of DACA and attempts to expand the program by arguing that the decision not to seek removal against a large group, rather than individuals, was unconstitutional as violative of the President's duty to enforce the laws of Congress and violative of the procedural requirements of the APA regarding rulemaking.³¹⁵ The components of DACA that involved USCIS served as an inroad to judicial review. While courts generally cannot review discretionary determinations by administrative agencies about enforcement decisions, the inclusion of immigration benefits—like work authorization and temporary lawful presence adjudicated by USCIS officers—created an opening for challenging the policy.³¹⁶ The benefits portion, rather than the forbearance, led the

310. See Drew Desilver, *Executive Actions on Immigration Have Long History*, PEW (Nov. 21, 2014), <https://www.pewresearch.org/short-reads/2014/11/21/executive-actions-on-immigration-have-long-history/> [<https://perma.cc/2G2N-WTTP>] (listing major executive actions on immigration). Presidents John Kennedy, George H.W. Bush, and Barack Obama directed executive action that had the potential to benefit over one million people who otherwise would be subject to removal. See *id.* (discussing benefits of various programs and actions during different administrations).

311. See *id.* (discussing President Obama's DACA program). President Obama's attempt to expand the DACA program and offer similar temporary enforcement relief to parents of U.S. citizens or permanent residents could have benefitted roughly 3.9 million people, far surpassing other presidentially directed enforcement reprieves. See *id.* (noting DACA "offers relief to more people than any other executive action in recent history").

312. See U.S. Dep't Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (granting prosecutorial discretion to USCIS under DACA program).

313. See *id.* (listing necessary criteria before USCIS exercises prosecutorial discretion); see also Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 260 (2013) (describing backlash DACA received from conservative media, Republicans in Congress, and Supreme Court).

314. See Gilbert, *supra* note 313, at 275 (discussing nonenforcement and APA issues related to DACA); see also 5 U.S.C. § 706 (granting courts authority to "hold unlawful and set aside" specified agency action).

315. See *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (outlining plaintiffs' substantive and procedural claims under APA and constitutional claim).

316. See *id.* at 654–66 (explaining implication of DAPA benefits in judicial review of DHS decisions); 5 U.S.C. § 701(a)(2) (specifying exception to judicial review for agency discretionary action).

district court to find the court could review the program.³¹⁷ Ultimately, the court enjoined expansion to DACA because the substantive rule likely created binding rules on front-line officers sufficient to require notice and comment.³¹⁸

Under President Trump, Attorney General Jeff Sessions issued a letter to the Secretary of Homeland Security, Elaine Duke, advising that the DACA program was contrary to law in the same manner that the expansion likely was, and that she should rescind DACA.³¹⁹ The following day, Secretary Duke issued guidance to all components of DHS announcing the wind-down of the program.³²⁰ The government challenged the rescissions, which led to the Supreme Court holding that while the executive branch had the right to revoke the program, the procedures they followed violated the APA's requirements that agencies conduct "reasoned decision-making" and refrain from actions that are arbitrary and capricious.³²¹ The government again argued that the Court could not review the rescission of a non-enforcement policy.³²² Again, USCIS played a part in permitting review.³²³ Chief Justice Roberts found that DACA was more than a non-enforcement policy:

Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. Based on this directive, USCIS solicited applications from eligible [noncitizens], instituted a standardized review process, and sent formal notices indicating whether the [noncitizen] would receive the two-year forbearance. These proceedings are effectively "adjudicat[ions]." And the result of these adjudications—DHS's decision to "grant deferred action,"—is an "affirmative act of approval," the very opposite of a "refus[al] to act."³²⁴ . . . The benefits attendant to deferred action . . . [u]nlike an agency's refusal to take requested enforcement action, access to these types of benefits is an interest "courts often are called upon to protect."³²⁵

While President Trump attempted to follow the blueprint for successful rescission that the Chief Justice outlined in his decision, his administration was ultimately unable to terminate the program before the end of his term.³²⁶ On President Biden's

317. See *Texas v. United States*, 86 F. Supp. 3d 591, 654–55 (S.D. Tex. 2015) (discussing why court permitted to review DHS action).

318. See *id.* at 677–78 (granting plaintiffs' request for preliminary injunction).

319. See *DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 1 (2020) (discussing Attorney General Jeff Sessions' advice regarding DACA).

320. See *id.* (discussing Secretary of DHS's reaction to advisory letter).

321. See *id.* at 15–16 (citing *Michigan v. EPA*, 576 U.S. 743, 750 (2015)); see also 5 U.S.C. § 706(2)(a) (allowing courts to set aside agency actions if arbitrary and capricious).

322. See *Regents of Univ. of Cal.*, 591 U.S. at 18 (articulating government's argument and Court's rejection of government's argument).

323. See *id.* (explaining USCIS's affirmative actions).

324. See *id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)).

325. See *id.* (explaining why DACA not simply non-enforcement policy).

326. See Nicole Narea, *The Trump Administration Is Refusing to Fully Reinstate DACA*, VOX (July 28, 2020), <https://www.vox.com/policy-and-politics/2020/7/28/21345481/trump-daca-supreme-court-dreamers>

first day in office, he instructed the Attorney General and Secretary of Homeland Security to fortify DACA.³²⁷ While these executive actions are intended to make headlines, much of USCIS's expansion of enforcement decision centralization flies far under the radar of judicial review.³²⁸

Many agency-focused centralization efforts receive little fanfare relative to their tremendous impact. A key example for USCIS has been the agency's dramatic rise to prominence in the enforcement function of initiating removal proceedings through NTA issuance. Early in the agency's history, NTAs were not issued as a standard matter of practice throughout USCIS.³²⁹ In July 2006, USCIS issued a policy memorandum in connection with a Memorandum of Agreement with ICE, that created a procedure for referring certain cases to ICE if the application was denied due to suspected fraud or had certain public safety concerns.³³⁰ In cases with verified fraud, USCIS officers were instructed to issue the NTA themselves, rather than refer to ICE for prosecutorial decisions.³³¹ In 2011, USCIS issued new NTA Policy Memorandum that expanded the types of fraud cases where USCIS officers were required to initiate removal proceedings.³³² However, during this time USCIS adjudicators retained the ability to exercise prosecutorial discretion.³³³

In 2018, USCIS again issued a new Policy Memorandum that completely usurped ICE's role in many cases, including where a denied applicant has a criminal history.³³⁴ The new guidance also drastically limited adjudicators' discretion to refrain

[<https://perma.cc/9MTT-SYKV>] (detailing Trump administration's post-*Regents* efforts to unsuccessfully overturn DACA).

327. See Memorandum from President Joseph R. Biden to the Att'y Gen. and Sec'y of Homeland Sec., Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (Jan. 20, 2021) (instructing memorandum recipients to preserve and fortify DACA).

328. See Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 96–97 (2011) (summarizing lack of transparency in immigration removal and benefits adjudication).

329. See PENN STATE LAW & ABA COMM'N ON IMMIGRATION, TO FILE OR NOT TO FILE A NOTICE TO APPEAR: IMPROVING THE GOVERNMENT'S USE OF PROSECUTORIAL DISCRETION 33 (2013), <https://pennstate-law.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf> [<https://perma.cc/8CLJ-EWAP>].

330. See Memorandum from Michael Aytes to USCIS Dirs, Disposition of Cases Involving Removable Aliens 1, 7–8 (July 11, 2006), <https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Interoffice-Memorandum-Dispositions-of-Cases-Involving-Removable-Aliens.pdf> (explaining procedure for cases whose application denied due to suspected fraud).

331. See *id.* at 7 (providing USCIS will issue NTAs in cases where fraud verified).

332. U.S. Immigr. & Customs Enf't, Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to all ICE Employees (Mar. 2, 2011) (establishing ICE's priorities for removal and prosecutorial discretion); U.S. Citizenship & Immigr. Servs., Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (2011) (amending USCIS's policy on referring cases to ICE and issuing NTAs to conform with ICE's new articulation of priorities for enforcement).

333. The Standard Operating Procedures for one service center stated "USCIS has prosecutorial discretion when deciding whether to issue, serve or file [a] Notice to Appear. . . . USCIS is under no legal requirement to institute removal proceedings for every denied application." PENN STATE LAW & ABA COMM'N ON IMMIGR., *supra* note 329, at 33.

334. See U.S. Citizenship and Immigr. Servs., Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018) (explaining

from initiating removal proceedings. Most dramatically, USCIS officers were required to issue an NTA where a denial of a benefit left the individual without lawful status, regardless of the reason for denial.³³⁵ The policy also eliminated a prior structural protection for naturalization applicants, allowing front-line officers to issue NTAs in these cases.³³⁶ A one line reference in a DHS Policy Memorandum issued on President's Biden's first day in office, the 2018 Policy Memorandum was rescinded, reverting to the 2011 guidance.³³⁷

Further, similarly discrete internal administrative law is used to centralize decision making within DHS. For example, through USCIS's role in expedited removal proceedings, the Trump Administration called on USCIS to play an increasingly salient part in DHS policies at the border, while narrowing adjudicator discretion. Expedited removal proceedings are a process of deportation adjudications where, as Professor Jennifer Lee Koh explains, "front-line immigration officers act as investigator, judge, and jury, with the immigration courts completely uninvolved in the removability determination."³³⁸ If the CBP or ICE officer's initial interrogation of an applicant indicates the individual has a fear of persecution, an Asylum Officer determines if the individual is able to present their case to an Immigration Judge or if they can be summarily deported.³³⁹ USCIS's role is statutory due to its specialized training to perform investigations and adjudications related to international commitments.³⁴⁰ Through internal administrative law, however, DHS dictates its interpretation of the standard to remove individuals from the fast-track deportation and sets the procedural protections.

Executive policies under the Trump Administration sought to limit the discretion of Asylum Officers conducting credible fear interviews, leading to increased likelihood of USCIS determinations resulting in administrative removal.³⁴¹ DHS also added an unconscionable deterrence measure to these proceedings called the "Remain in Mexico" policy or Migrant Protection Protocols (MPP).³⁴² This policy forced individuals who arrived at the border seeking protection and passed their USCIS screening, to return to Mexico and wait months or years until their court date.³⁴³ USCIS was also required to screen for additional humanitarian protections

shifting importance of departments to enforce immigration laws) [hereinafter Updated Guidance for Referral of Cases]; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (highlighting previous structure not working).

335. See Updated Guidance for Referral of Cases, *supra* note 334 (detailing USCIS officers to issue NTAs when aliens not lawfully present, regardless of reason).

336. See *id.* (highlighting USCIS has discretion over NTA issuance despite possible naturalization).

337. See Pekoske, *supra* note 242 (acknowledging previous Memorandum rescinded and superseded).

338. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193 (2017) (explaining immigration agents' roles).

339. See *id.* at 193–94 (discussing Asylum Officer's determination protocol).

340. See *id.* at 232 (explaining USCIS's role).

341. See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 108 (D.D.C. 2018) (highlighting DHS deportation policies).

342. See *The "Migrant Protection Protocols,"* AM. IMMIGR. SERVS. (Feb. 1, 2024), <https://www.american-immigrationcouncil.org/research/migrant-protection-protocols> [<https://perma.cc/2Q3E-HDDR>] (providing background for MPP).

343. See *id.* (highlighting migrants were not given dates for adjudication).

against placement in this program, ultimately determining if the individual was subject to the enforcement policy and must await proceedings in Mexico.³⁴⁴

In addition to centralization of decision-making, presidential managerial control includes reshuffling and prioritizing resources. Within USCIS, a notable organizational component is the Fraud Detection and National Security Directorate (FDNS). Created as a program office in 2004 to coordinate with ICE, FDNS was elevated to a directorate in 2010 to “reflect[] a focus on antifraud and national security responsibilities.”³⁴⁵ USCIS has increasingly expanded the types of enforcement tasks FDNS uses to address benefits fraud, including roles in civil and criminal investigation and prosecution. Though FDNS claims to oversee strategy decisions that “distinguishes USCIS’s administrative authority, responsibility, and jurisdiction from ICE’s criminal investigative authority,”³⁴⁶ since its creation, the line has been blurry. Many of the duties undertaken by FDNS officers were formerly performed by the INS enforcement arm that is now part of ICE.³⁴⁷ In response to President Trump’s enforcement executive orders, the Secretary instructed USCIS to “increase the operational capacity” of the FDNS by increasing the staffing of officers in border enforcement related placements.³⁴⁸

President Trump also reshuffled personnel to combat opposition to increased enforcement tasks within the Asylum Office. After the issuance of a slew of stringent anti-asylum regulations that significantly heightened adjudication standards, the Director of the Asylum Division expressed criticism in his guidance to adjudicators.³⁴⁹ Shortly thereafter he was reassigned to a different division within USCIS. As one official remarked: “The administration views him as just another loophole.”³⁵⁰ In describing the impact of the reassignment, one asylum officer stated, “It’s all the more chilling because many of us saw [the Director] as a shield against this monstrous administration. He fell. What’s next.”³⁵¹

344. See *id.* (discussing discretionary nature of determining sending migrants to Mexico).

345. See DEP’T HOMELAND SEC., OFF. INSPECTOR GEN., THE EFFECTS OF USCIS ADJUDICATION PROCEDURES AND POLICIES ON FRAUD DETECTION BY IMMIGRATION SERVICES OFFICERS 3 (2012), https://www-oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_12-24_Jan12.pdf [<https://perma.cc/ZVB4-XHTQ>] (explaining impact of elevation to directorate status).

346. See DEP’T HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE 2 (2014), https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-fdns-november2016_0.pdf [<https://perma.cc/7SAZ-QXK2>] (distinguishing FDNS from ICE).

347. See Wasem, *supra* note 191, at 15 (describing enforcement duties of FDNS).

348. See Memorandum from John Kelly, Sec’y Dep’t Homeland Sec., Implementing the President’s Border Security and Immigration Enforcement Improvements Policies to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot. et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1-Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (directing USCIS to increase operational capacity of FDNS).

349. See Hamed Aleaziz, *The Top U.S. Asylum Official Has Been Pushed Out by the Trump Administration*, BUZZFEED NEWS (Sept. 4, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-asylum-lafferty-out-reassigned-cuccinelli-trump> [<https://perma.cc/S5BX-SH2H>] (noting Director of Asylum Division critical of new asylum regulations).

350. See *id.* (suggesting reassignment of Director of Asylum Division threatens asylum system).

351. See *id.* (describing impact of Director reassignment).

Presidential managerial control has also been used, contrary to statutory prohibition, to shuffle USCIS staff and resources within DHS. In 2010, through Operation Janus and Operation Second Look, USCIS performed investigatory enforcement functions in an effort to denaturalize and deport citizens believed to have gained citizenship due to faulty background check processes.³⁵² Individuals identified by USCIS were referred to the Department of Justice and ICE for investigation and prosecution.³⁵³ In 2019, USCIS attempted to transfer over \$207.6 million in funds generated from applicant fees to ICE to support these and other “law enforcement fraud investigations,” and hired 300 ICE officers³⁵⁴ The same year, in a remarkable request, leadership even requested USCIS employees “volunteer” to assist ICE and CBP.³⁵⁵ An email sent to USCIS employees, days after an oversight hearing on the agency’s massive backlog in which the agency cited resources and staffing shortages, stated: “Current conditions are placing extreme stress on our colleagues at Immigration and Customs Enforcement . . . I appreciate your willingness to consider helping our colleagues fulfill the DHS mission.”³⁵⁶

IV. THE VETERANS BENEFITS ADMINISTRATION

Since the nation’s founding, the government has sought to care for and compensate veterans and their families. Benefits are provided as a form of gratitude and as a means of recruiting individuals to make such a significant sacrifice.³⁵⁷ The federal government’s administration of the veterans’ benefits system is intended to be service-oriented, but it is also unique in that it is affirmatively pro-claimant.³⁵⁸ The pro-veteran canon is premised on the understanding that the individuals being served by the adjudicatory scheme: “a special class of citizens, those who risked harm to serve and defend their country” are therefore “imbued with special beneficence from a grateful sovereign.”³⁵⁹

352. See Maryam Saleh, *The Justice Department Singled Out This Man in Expanding Efforts to Strip Citizenship. A Judge Doesn’t Think the Case Is Open and Shut*, THE INTERCEPT (Feb. 23, 2019), <https://theintercept.com/2019/02/23/denaturalization-operation-janus-citizenship-trump/> [<https://perma.cc/5RVM-55AQ>] (discussing results of Operation Janus and Second Look).

353. See U.S. DEP’T HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE FRAUD DETECTION AND NATIONAL SECURITY DATA SYSTEM 18-19 (2016) (explaining how immigration data is assessed and shared).

354. See USCIS, Immigration Examinations Fee Account Justification of Program Changes, CIS IEFA 8 (2019).

355. Hamed Aleaziz, *Civil Servants Who Process Immigration Applications Are Being Asked to Help ICE Instead*, BUZZFEED NEWS (July 17, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-immigration-applications-backlog-ice> [<https://perma.cc/97GP-DDLT>].

356. *Id.*

357. See Jeffrey Seiken, *History of VA in 100 Objects, Object 2: Bounty Land Warrant*, DEP’T OF VETERAN AFFS. (2022), <https://department.va.gov/history/100-objects/object-2-bounty-land-warrant/#:~:text=Overall%2C%20the%20different%20bounty%20land,speculators%20at%20a%20reduced%20rate.> [<https://perma.cc/2G-GD-V22B>] (noting Continental Congress approved veteran compensation to “encourage enlistment and reward military service.”).

358. See *Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011) (outlining pro-claimant VA dispute process).

359. See *Barrett v. Principi*, 363 F.3d 1316, 1320 (2004) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring)) (explaining purpose of veteran benefit system).

Congress statutorily mandated the sole purpose of the Department of Veterans Affairs, and, by proxy, the Veterans Benefits Administration (VBA), is to administer the nation's mass adjudication scheme for determining eligibility for and delivery of veterans' benefits.³⁶⁰ The agency oversees the adjudication of non-medical benefits for veterans and their dependents, including educational, vocational rehabilitation, education, insurance, home loans and compensation and pensions, serving roughly 6 million veterans and their families, delivering almost \$135 billion in benefits annually.³⁶¹

Despite its singular pro-claimant mission, the VBA has consistently experienced difficulties serving the veterans under its mandate. The agency has consistently faced extreme backlogs, issues with biased and erroneous decision-making, delayed payments, and complex procedures.³⁶² Benefits are used to encourage individuals to enlist, but they are then exposed to conditions that make them more likely to be ineligible for those same benefits, more often happening to people of color.³⁶³ Further, more than one out of every ten cases are appealed, leaving veterans whose cases are incorrectly decided often waiting three to seven years for life sustaining funds.³⁶⁴ Even though it is the agency's duty to support claimants, veterans have encountered challenges in proving to the government that deployed them that they indeed served.³⁶⁵

This Part first looks at the history of the administration of veterans benefits and the institutional design choices and changes that have led to the current structure. It then looks at how presidents and agency leadership have used internal administrative law and institutional rhetoric to shift the culture within the workforce and the agency's public facing image in the context of its service mandate. It then examines the uniquely pro veteran service mandate and uses the evolution of the agency's duty

360. See 38 U.S.C. § 301(b) (outlining Department of Veterans Affairs).

361. See *About VBA*, DEP'T OF VETERANS AFFS., (Jan. 12, 2024), <https://www.benefits.va.gov/BENEFITS/about.asp> [<https://perma.cc/L2WQ-HVAV>] (describing benefits provided by VBA); *VA History Summary*, *supra* note 7 (tracing history of VBA).

362. See Quil Lawrence, *Black Veterans Are Less Likely to be Approved for Benefits, According to VA Documents*, NPR (Mar. 24, 2023), <https://www.npr.org/2023/03/24/1165977590/black-veterans-are-less-likely-to-be-approved-for-benefits-according-to-va-docum#:~:text=Internal%20documents%20from%20the%20Department,and%20a%20Yale%20law%20clinic.> [<https://perma.cc/C45A-A8EZ>] (discussing racial disparities in benefits decisions).

363. See Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2235–2240 (2021) (detailing consequences of dishonorable discharge for servicemembers of color).

364. See 2020 ACTION PLAN, *supra* note 7, at 11 (raising difficulties associated with large number of benefits decisions and appeals). Injuries connected to service are often not covered when a veteran does not receive the honorable discharge classification. See McClean, *supra* note 363, at 2210–11 (flagging lack of benefits for injuries connected to service for less than honorably discharged veterans).

365. See Byron Pitts, *Why the VA Frustrates Veterans*, CBS (Jan. 1, 2010), <https://www.cbsnews.com/news/why-the-va-frustrates-veterans/> [<https://perma.cc/J7DC-DDDF>] (discussing veteran sent to Vietnam twice on oral orders). A veteran was told there were no records of his two assignments to Vietnam, and those who would have been able to attest to his service had died. See *id.*

to assist veterans to highlight aspects the real-world effects of administrative law theorization on congressional and executive branch means of controlling agencies.

A. Designing the Veterans Benefits Administration

Veteran benefits trace back to the American Revolution, as the country has sought to compensate those who were disabled or wounded during their service.³⁶⁶ The distribution of pensions was first administered by the states but a federal system of distribution began in 1789.³⁶⁷ The current Bureau of Pensions began in the early 1800s as an office of three employees in the War Department under the Secretary of War.³⁶⁸ Initially, the office was responsible for managing the claims of the few thousands of individuals eligible for these benefits.³⁶⁹ After the War of 1812, the program was formalized and administered by the Pension Office, comprised of one head clerk and sixteen other clerks.³⁷⁰ Unable to handle the volume of applications, Congress amended eligibility to require proof of financial need.³⁷¹

In 1832, Congress created a pension program for all Revolutionary War Veterans who served for at least six months, regardless of disability or financial need.³⁷² The Pension Office was again overwhelmed by the volume of applications. The Secretary of War asserted that the lack of an executive officer was the main roadblock to the effective administration of the system.³⁷³ Congress agreed, and in 1833, created a presidentially appointed position of Pensions Commissioner.³⁷⁴ James Edwards became the first Commissioner after serving in the Marine Corps and chief clerk within the Pension Office.³⁷⁵ During his tenure, he strove to reduce the corruption and fraud that had plagued the office.³⁷⁶ In 1849, Congress created the Department of the Interior and the Pension Bureau was placed under this new department.³⁷⁷

366. See Jeffrey Seiken, *History of VA in 100 Objects, Object 16: War of 1812 Widow's Pension Claim*, DEP'T OF VETERANS AFFS. (Mar. 24, 2022), <https://department.va.gov/history/100-objects/object-16-war-of-1812-widows-pension-claim/> [<https://perma.cc/R8YZ-X326>] (explaining benefits expanded to service members' families after War of 1812).

367. See *VA History Summary*, *supra* note 7 (establishing timeline of United States pension system).

368. See *id.*

369. See *id.*

370. See Olivia Holly-Johnson, *Object 7: Portrait of Joseph Winter*, DEP'T OF VETERANS AFFS. (2022), <https://department.va.gov/history/100-objects/object-7-portrait-joseph-winter/> [<https://perma.cc/AY45-JJ2A>]; Scott Hudson, *Object 50: Commissioner of Pensions Annual Report*, DEP'T OF VETERANS AFFS., <https://department.va.gov/history/100-objects/object-50-commissioner-of-pensions/> [<https://perma.cc/YQ4E-GRWN>] (noting limited number of clerks in Pension Office).

371. See Hudson, *supra* note 370 (describing additional requirements for pensions to address influx of applicants).

372. See *id.*

373. See *id.*

374. See *id.*

375. See Hudson, *supra* note 370.

376. See *id.*

377. See *VA History Summary*, *supra* note 7.

The Pension Act of July 14, 1862, as passed in response to the sharp increase in the volume of individuals requiring benefits after the Civil War.³⁷⁸ It was clear that individuals who served this country required housing, medical and other support when they returned home. As a result, the federal government created the National Home for Disabled Volunteer Soldiers in 1865.³⁷⁹ By the 1890s, the number of individuals receiving pensions had more than tripled from the decade prior and pensions made up more than thirty percent of the federal budget. During World War I, Congress created programs for veterans which included disability compensation, insurance, and vocational rehabilitation.³⁸⁰

In 1930, President Herbert Hoover issued Executive Order 5398, consolidating all veteran benefits programs under the new, elevated Veterans Administration, signifying its transition to a federal administration.³⁸¹ The Veterans Administration's workload hit astronomical heights after World War II. Fearing mass unemployment and economic instability for the 16 million veterans after the war's end, Congress passed the Serviceman Readjustment Act of 1944, known as the GI Bill.³⁸² The GI Bill addressed the various forms of difficulties that veterans faced when trying to reintegrate into society after service, greatly expanding the types of benefits veterans and their dependents were eligible for, all under the purview of the Veterans Administration.³⁸³ Shortly after the end of the war, the agency was again overwhelmed by the volume of applications.³⁸⁴ In 1953, the Veterans Administration reorganized in an effort to increase efficiency and reduce the agency's backlog and workload requirements.³⁸⁵ As part of this reorganization, the Department of Veterans Benefits was created to retain responsibility for adjudicating benefits claims.³⁸⁶ In 1958, Congress codified all benefits under Title 38.³⁸⁷

In 1987, President Ronald Regan announced his support for elevating the Veterans Administration into a cabinet-level department.³⁸⁸ He believed doing so would

378. See Claire Prechtel-Kluskens, "A Reasonable Degree of Promptitude" *Civil War Pension Application Processing, 1861-1885*, NAT'L ARCHIVES (2010), <https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html> [<https://perma.cc/B9PQ-YYR6>] (describing changes to pension system during and after Civil War).

379. See Trevor K. Plante, *The National Home for Disabled Volunteer Soldiers*, NAT'L ARCHIVES (2004), <https://www.archives.gov/publications/prologue/2004/spring/soldiers-home.html> [<https://perma.cc/F7E7-8N9C>] (noting ease of passing bill to create home for soldiers).

380. See *VA History Summary*, *supra* note 7.

381. See *id.*

382. See *75 Years of the GI Bill: How Transformative It's Been*, U.S. DEP'T OF DEFENSE (2019), <https://www.defense.gov/News/Feature-Stories/story/Article/1727086/75-years-of-the-gi-bill-how-transformative-its-been/> [<https://perma.cc/H62P-THTM>] (describing U.S. fear of unemployment after WWII).

383. See *id.*

384. See *VA History Summary*, *supra* note 7. The GI Bill was extended numerous times, most used today is the Post-9/11 GI Bill. See *75 years of the GI Bill: How Transformative It's Been*, *supra* note 382.

385. See *VA History Summary*, *supra* note 7 (documenting evolution of VBA).

386. *Id.* (providing history of VBA's creation).

387. See Act of Sep. 2, 1958, Pub. L. No. 85-857, 72 Stat. (1958) (codifying veteran benefits).

388. See Department of Veterans Affairs Act, Pub. L. 100-527, § 2 (Oct. 25, 1988); Barbara Matos, *Object 41: Creating the Department of Affairs*, DEP'T OF VETERANS AFFAIRS (Oct. 6, 2022), <https://department.va.gov/>

better serve veterans through increasing visibility of the issues, creating more accountability, efficiency and effectiveness through increased oversight and coordination of delivery of services.³⁸⁹ On October 25, 1988, President Regan signed the Department of Veterans Affairs Act, redesignating and elevating the Veterans Administration to the Department of Veterans Affairs (VA).³⁹⁰ With this reorganization, the Department of Veterans Benefits was redesignated as the current Veterans Benefits Administration (VBA) under the VA.³⁹¹

B. Presidential Administration of the VBA

The VBA, like previous iterations, continues to struggle to effectively administer the veterans' benefits adjudication system while adhering to its service mission. Presidents and agency leadership utilize different tools to steer the agency's culture, practices, and external perceptions to meet their own policy objectives.

Presidential appointment decisions for agency leadership are one way that the executive can sway the direction of an agency. The timing of VA's authorizing statute is a prime example. President Regan signed the Department of Veterans Affairs Act a week before the presidential election.³⁹² The Act was implemented in March of 1989, enabling the incoming President George H.W. Bush ease in choosing who he wished to head the Department.³⁹³ President Bush appointed Edward J. Derwinski a World War II veteran, as the first Secretary of Veterans Affairs.³⁹⁴ President Bill Clinton appointed Secretary Jesse Brown to lead the VA. Secretary Brown, veteran injured during combat as a Marine, who previously headed the Disabled American Veterans.³⁹⁵ He was a proud advocate for veterans and wanted to be known as the secretary "for" rather than "of" veteran affairs.³⁹⁶

President George W. Bush made examining the VBA's system a top priority.³⁹⁷ In 2001, VA Secretary Anthony Principi created a VA Claims Processing Task Force

history/100-objects/object-41-creating-the-department-of-veterans-affairs/ [https://perma.cc/GK2K-TKYL]. Agency leadership decided to keep the "VA" rather than DVA because of the place that the VA held in the culture writ large. See *Department of Veterans Affairs Act Signed 27 Years Ago*, VA NEWS (2015), https://news.va.gov/23584/departments-veterans-affairs-act-signed-27-years-ago/ [https://perma.cc/ZQZ2-7MKX].

389. See Matos, *supra* note 388 (describing Reagan's interest in raising VA to cabinet).

390. See *Department of Veterans Affairs Act Signed 27 Years Ago*, *supra* note 388.

391. See Department of Veterans Affairs Act, Pub. L. No. 100-527, § 7 (explaining veterans insurance claims under charge of VBA).

392. See *id.* at § 2.

393. See *id.* (indicating President selects head of Department).

394. See T. Rees Shapiro, *Edward J. Derwinski, First Secretary of the Department of Veterans Affairs, Dies*, WASH. POST (Jan. 18, 2012), https://www.washingtonpost.com/politics/congress/edward-j-derwinski-first-secretary-of-the-department-of-veterans-affairs-dies/2012/01/18/g1QA5IIL9P_story.html [https://perma.cc/VM6H-A8LS].

395. See Bill McAllister & John Harris, *VA Secretary Submits Resignation*, WASH. POST (June 7, 1997), https://www.washingtonpost.com/archive/politics/1997/06/07/va-secretary-submits-resignation/3db600bc-7f5c-48fd-9b44-c1b8f5e81850/ [https://perma.cc/3N8Q-GFT2] (describing Clinton and Brown's relationship).

396. See *id.* (noting Brown's work on veteran issues).

397. See Press Release, VA News, *The First 180 Days—VA Accomplishments Under the Administration of President George W. Bush* (Aug. 8, 2001), https://news.va.gov/press-room/the-first-180-days-va-

to report on issues including the backlog, timeliness, and accuracy of benefits decisions.³⁹⁸ This resulted in the establishment of the VA's Office of Regulation and Policy Management, tasked with revising all agency regulations into simpler terms and ensuring they are up-to-date with the times.³⁹⁹

President Obama also made reforming the benefits system a priority on the campaign trail, acknowledging that "no veteran should be burdened by paperwork only to wait months or years to get an appointment at the VA."⁴⁰⁰ However, reform efforts were slow.⁴⁰¹ In 2010, a 60 Minutes report titled "Delay, Deny and Hope that I Die" brought to light the benefits adjudication backlog and the veterans' perception that they were not valued by the agency created to serve them.⁴⁰² While the agency hired more adjudicators to address the backlog, it also created a system where employees bonuses and promotions were tied to meeting quotas, leading to mistakes and poor customer service.⁴⁰³

The VA began issuing informal as well as formal guidance to try to correct the culture throughout the VA. On June 20, 2011, the Secretary of Veterans Affairs published guidelines to the agency, and in July 2012 they were codified.⁴⁰⁴ In 2012, the VA's regulations were amended to codify the "Core Values and Characteristics," internal guidelines for employee conduct and interactions about ethical conduct and responsibilities.⁴⁰⁵ The stated purpose for the regulations read: "Codifying these principles will ensure they receive the proper emphasis at all levels within VA, are clearly understood by the workforce, and, most importantly, become an enduring part of the VA culture . . . The Core Values and Characteristics demonstrate that VA is a 'people-centric' organization."⁴⁰⁶ The Core Values of the VA are stated as Integrity,

accomplishments-under-the-administration-of-president-george-w-bush/ [https://perma.cc/Z2KJ-N9C7] (highlighting DVA accomplishments made in first 180 days of Bush Administration).

398. See Press Release, VA News, VA Establishes Claims Processing Task Force, (Apr. 16, 2001), <https://news.va.gov/press-room/va-establishes-claims-processing-task-force/> [https://perma.cc/ST63-DXY7] (explaining role and goals of task force).

399. See VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71041 (Nov. 27, 2013) (to be codified at 38 CFR pt. 3) (discussing process of reviewing and rewriting agency regulations).

400. See Scott Bronstein, Nelli Black, & Drew Griffin, *Veterans Dying Because of Health Care Delays*, CNN (Jan. 30, 2014), <https://www.cnn.com/2014/01/30/health/veterans-dying-health-care-delays/index.html> [https://perma.cc/Y8GH-LGNF] (emphasizing veterans reforms priority for Obama campaign).

401. See German Lopez, *The VA Scandal of 2014, Explained*, VOX (May 13, 2015), <https://www.vox.com/2014/9/26/18080592/va-scandal-explained> [https://perma.cc/RGW3-3XCY] (examining why VA reform efforts so slow).

402. See Byron Pitts, *Why the VA Frustrates Veterans*, CBS (Jan. 1, 2010), <https://www.cbsnews.com/news/why-the-va-frustrates-veterans/> [https://perma.cc/S6EH-XHUP] (examining why veterans frustrated with system).

403. See *id.* (analyzing why more adjudicators created additional problems).

404. See Core Values and Characteristics of the Department, 77 Fed. Reg. 41273-74 (July 13, 2012) (to be codified at 38 C.F.R. pt. 0) (amending regulations pertaining to ethical conduct and responsibilities of VA).

405. See *id.* at 41274 (establishing VA's Core Values and Characteristics).

406. See 77 Fed. Reg. 41273, *Core Values and Characteristics of the Department*, *supra* note 404, at 41274 (explaining values of VA).

Commitment, Advocacy, Respect, and Excellence, creating the logo ‘I CARE’.⁴⁰⁷ The regulations instruct the logo be displayed across the VA to demonstrate to the public that the agency “cares deeply about its mission.”⁴⁰⁸

Nonetheless, the VA continued to struggle to align with its service mission. As one agency official stated: “[We] had somehow gotten away from the primary mission of organizing the enterprise through the eyes of the customer . . . [We did] things that made sense to us, made it easy for us as the VA, [but], in all of that, we lost the voice of the customer.”⁴⁰⁹ In 2013, the VA again became the center of congressional and public criticism for the astronomical backlog of disability claims.⁴¹⁰ In 2014, there was also a massive national scandal following a news report highlighting forty veterans had died waiting for medical appointments with the VA’s healthcare system, many of whom were on a secret waiting list that was intentionally kept to avoid oversight and repercussions such as pay bonuses.⁴¹¹ This spurred a reexamination of the VA by Congress and the President.⁴¹²

The GAO found that oversight of VA officials was seriously lacking.⁴¹³ Congress changed the bonus structure and allowed for senior executives to more quickly be dismissed or demoted.⁴¹⁴ The VA Secretary Eric Shinseki resigned amidst the fallout.⁴¹⁵ President Obama claimed the scheduling issues were not raised to the level of the Secretary so he was not aware of them, however prior GAO reports showed that the information was available, but there were rarely consequences. President Obama appointed Bob McDonald, a chief executive of Proctor & Gamble, as VA Secretary to address the scandal. He, in turn, created a Chief Veterans Experience Officer, with a direct line to the VA secretary in 2015, to head the Veterans Experience Office to reinvent a pro-service agency culture.⁴¹⁶

Agency leadership attempted to shift the culture through training that was veteran-

407. See *id.* (defining culture and motto of VA). See *Core Values and Characteristics of the Department*, *supra* note 404, at 41274 (77 FR 41273).

408. See 77 Fed. Reg. 41273, at 41274 (introducing VA logo display instruction and objective).

409. See Jeanette Steele, *Did You Know VA Has \$55 Mil Effort To Fix Customer Service For Veterans?*, SAN DIEGO UNION TRIB. (Apr. 16, 2017), <https://www.sandiegouniontribune.com/military/veterans/sd-me-va-experience-20170409-story.html> [<https://perma.cc/U5TC-V7K8>] (reiterating VA’s concern of lack of focus on customers).

410. See *id.* (stating VA’ backlog on disability claims in 2013).

411. See Scott Bronstein & Drew Griffin, *A Fatal Wait: Veterans Languish and Die on a VA Hospital’s Secret List*, CNN (Apr. 23, 2014), <https://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/index.html> [<https://perma.cc/F8WW-VGK6>] (summarizing 2014 VA healthcare scandal).

412. See Steele, *supra* note 409 (noting added supervising on VA).

413. See German Lopez, *The VA Scandal Of 2014, Explained*, VOX (May 13, 2015), <https://www.vox.com/2014/9/26/18080592/va-scandal-explained> [<https://perma.cc/B2JZ-PTZG>] (acknowledging absence in oversight of VA officials).

414. See *id.* (highlighting Congress’s plan on overseeing VA officials).

415. See Bill Chappell, *VA Chief Eric Shinseki Resigns Post, Obama Announces*, NPR (May 30, 2014), <https://www.npr.org/sections/thetwo-way/2014/05/30/317350806/calling-va-problems-indefensible-shinseki-will-fire-phoenix-leaders#:~:text=McNamee%2FGetty%20Images-,Eric%20Shinseki%20signed%20as%20the%20head%20of%20the%20Department%20of,at%20a%20conference%20in%20Washington.> [<https://perma.cc/73ZV-JR2V>] (outlining VA Secretary’s resignation).

416. See Steele, *supra* note 409 (highlighting structural change within VA).

centric and service-oriented to align the workforce with the agency's mission.⁴¹⁷ In addition, the VA began including vetting for customer service skills as part of the hiring process.⁴¹⁸ As part of the effort, the agency hired outside writers to rewrite over one thousand of its boilerplate letters to make them more readable to the public and offer resources rather than just legal jargon.⁴¹⁹

Under the Trump Administration, the workforce suffered from poor morale and became one of the least favorite departments to work for amongst employees.⁴²⁰ David Shulkin, who President Obama appointed as Under Secretary of Veterans Affairs for Health, and President Trump first appointed Secretary of the VA, was the first non-veteran in agency history, rather a doctor and healthcare executive.⁴²¹ President Trump ousted Shulkin by tweet and eventually appointed Secretary Robert Wilkie to lead the VA.⁴²²

The non-inclusive language of the VA's mission statement became a major point of contention between portions of the workforce and agency leadership. The original mission statement of the VA was: "To fulfill President Lincoln's promise—'To care for him who shall have borne the battle, and for his widow, and his orphan'—by serving and honoring the men and women who are America's Veterans."⁴²³ The mission statement was adopted by the Veterans Administration in 1959, though women had been eligible to serve for over a decade.⁴²⁴ In 2018, staff posted an unauthorized change to the mission statement, making it gender-neutral, in an official document posted to the agency's website.⁴²⁵ It exposed internal and external concerns about the treatment of women and other underrepresented groups from the VA.⁴²⁶

417. See *id.* (noting VA's effort in shifting to customer focused service).

418. See *id.* (explaining how VA shifted hiring process towards customer service skills).

419. See *id.* (noting further changes made by VA in customer focused effort).

420. See Donovan Slack & Dennis Wagner, *6 Big Things the New Veterans Affairs Chief Will Have to Address*, USA TODAY (Mar. 29, 2018), <https://www.usatoday.com/story/news/politics/2018/03/29/veterans-affairs-failures-go-beyond-ousted-secoutlive-three-secretaries-soon-four-including-david-sh/470573002/> [<https://perma.cc/BAF2-2WB9>] (describing challenges VA faced after Trump became president).

421. See Steele, *supra* note 409 (noting different VA leadership under Trump).

422. See Maegan Vazquez, *Shulkin Says He Was Fired Via Trump Tweet*, CNN (Apr. 2, 2018), <https://www.cnn.com/2018/04/02/politics/shulkin-tweet-fired-cnntv/index.html> [<https://perma.cc/KMZ4-VBYJ>] (describing high VA turnover under Trump).

423. See *New VA Mission Statement Recognizes Sacred Commitment to All Veterans, Their Families, Caregivers and Survivors*, FLA DEP'T OF VETERANS' AFFS (Mar. 16, 2023), <https://www.floridavets.org/new-va-mission-statement-recognizes-sacred-commitment-to-all-veterans-their-families-caregivers-and-survivors/#:~:text=WASHINGTON%20%E2%80%94The%20U.S.%20Department%20of,%2C%20caregivers%2C%20and%20survivors.%E2%80%9D> [<https://perma.cc/D5R7-H4VR>].

424. See Mariana Alfaro, *Veterans Affairs Modernizes Mission Statement based on Lincoln's Line*, WASH. POST (Mar. 16, 2023), <https://www.washingtonpost.com/politics/2023/03/16/veterans-affairs-motto-abraham-lincoln/> [<https://perma.cc/R3CG-39X3>] (explaining source of new VA mission statement).

425. See Emily Wax-Thibodeaux, *VA Employees Wanted a Gender-Neutral Mission Statement. The Agency Refused.*, WASH. POST (Feb. 14, 2018), <https://www.washingtonpost.com/news/checkpoint/wp/2018/02/14/va-employees-wanted-a-gender-neutral-mission-statement-the-agency-refused/> [<https://perma.cc/4PXN-LS9Y>] (discussing previous unauthorized change of VA mission statement).

426. See *id.* (analyzing concerns regarding minority representation by VA).

There were efforts in Congress to officially change the mission statement of the agency to be more inclusive.⁴²⁷ Secretary Wilkie refused, stating that it amounted to an erasure of history.⁴²⁸ During a Memorial Day speech at Lincoln's hometown, he dedicated a plaque with the gendered language at the national cemetery there and announced plans to place similar plaques at all of the nations' cemeteries to make it more difficult to change the mission statement in the future.⁴²⁹

While the Trump Administration halted efforts at inclusivity at the VA, it, like all prior administrations, used internal administrative law tools to demonstrate commitment to the service mission. In May 2019, the regulations were amended to include customer experience as part of the core values and responsibilities of the agency.⁴³⁰ On December 7, 2020, VA issued a Directive on its Customer Experience policy which claimed: "VA is committed to providing a world-class customer experience to Veterans, Service members, their families, caregivers and survivors with a Veteran-centered culture."⁴³¹ It defined customer experience to include trust, ease, effectiveness, and emotion (measured by feeling as though they are a valued customer).⁴³²

President Biden has continued to make efforts to improve the VBA's image to show a commitment to veterans. Hiring has increased and the VBA now has the highest number of employees in its history.⁴³³ In May 2023, the VA changed its mission statement to the more inclusive: "To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors."⁴³⁴

C. Uniquely Pro-Veteran: The Duty to Assist

The veteran benefits system is uniquely paternalistic, providing procedural protections unavailable in most agency adjudication models.⁴³⁵ The VA's statutory and

427. See Press Release, Congressman Brian Mast, Mast, Rice Reintroduce Bipartisan Legislation to Revise Department of Veterans Affairs Mission Statement (May 24, 2019), <https://mast.house.gov/2019/5/mast-ricereintroduce-bipartisan-legislation-to-revise-department-of-veterans-affairs-mission-statement> [<https://perma.cc/DWW8-UU75>] (discussing inclusivity efforts by Congress).

428. See Alfaro, *supra* note 424 (discussing pushback regarding changing VA mission statement).

429. Richard Sisk, *VA Secretary Moves to Block Gender-Neutral Change to Motto*, MILITARY.COM (Aug. 26, 2020), <https://www.military.com/daily-news/2020/08/26/va-secretary-moves-block-gender-neutral-change-motto.html> [<https://perma.cc/89X9-JY7C>].

430. See Dept. Veterans Affairs, *VA Directive 0010* (2020), https://www.va.gov/vapubs/search_action.cfm?dType=1 (arguing "positive customer experience leads to improved organizational performance").

431. *Id.*

432. *See id.*

433. Tracey Therit, *VA Releases New Workforce Dashboard*, VA NEWS (May 26, 2023), <https://news.va.gov/120386/va-releases-new-workforce-dashboard/> [<https://perma.cc/4PZ7-9KD3>].

434. See Maria Shores, *VA's Mission to Better Serve All: Building Equity and Ending Harassment for Underserved Populations*, VA NEWS (May 7, 2023), <https://news.va.gov/118943/vas-mission-to-better-serve-all/> [<https://perma.cc/7P54-8JCJ>].

435. See James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251-52 (2010) (discussing impact of paternalism on VA system).

regulatory scheme provides a duty to assist claimants navigating the agency's labyrinthine adjudication system to maximize benefits.⁴³⁶ Congress, as well as the courts, have continuously affirmed the adjudication scheme for veterans benefits should be informal, non-adversarial, and affirmatively pro-claimant.⁴³⁷ This includes all parts of the adjudication process, from the beginning through appeals.⁴³⁸ Further, courts have adopted a pro-veteran canon that benefits provisions should be construed in favor of the claimant.⁴³⁹ The VBA's mission is to "serve as a leading advocate for Service members, Veterans, their families and survivors, delivering benefits and services that honor their service, assist in their readjustment, enhance their lives, and engender their full trust."⁴⁴⁰ Since the earliest days of the VBA, however the agency has advocated and used internal administrative law tools to push for a limitation of this duty while also outwardly promoting its pro-veteran system.

The Judicial Review Act, signed weeks after the Department of Veterans Affairs Act, allowed for appeals to a new Article I court, the Court of Appeals for Veterans Claims (CAVC).⁴⁴¹ In the past, benefits decisions lacked judicial review, prompting the implementation of a new appeals process aimed at addressing due process concerns.⁴⁴² The Act also affirmed the pro-veteran adjudicatory scheme by granting claimants the benefit of the doubt when a determination could go either way.⁴⁴³ In April 1990, the agency issued regulations to clarify the procedural protections afforded to claimants for benefits.⁴⁴⁴ In the regulations' "statement of policy" the agency asserted that "it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."⁴⁴⁵ This remains part of the agency's regulations to this day.⁴⁴⁶

The Veterans Judicial Review Act articulated that the claimant bore the burden of "submitting evidence sufficient to justify a belief by a fair and impartial individual

436. See 38 U.S.C. §§ 5102, 5103(a), 5107 (discussing statutory claims assistance); 38 C.F.R. § 3.103 (setting forth procedural and due process requirements for VA benefits claims).

437. See *Walters v. Nat' Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985) (describing process of appealing claims decision by board); *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998) (discussing congressional intent in awarding VA benefits in non-adversarial ways).

438. See *Barrett v. Principi*, 363 F.3d 1316, 1320 (2004) (emphasizing entitlements veterans ought to receive due to service).

439. See *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (explaining Court's reasoning behind decision).

440. See 2020 ACTION PLAN, *supra* note 7.

441. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4106 (1988) (outlining process for submitting claim for benefits).

442. See WILLIAM J. STAAB, U.S. GOV'T ACCOUNTABILITY OFF., B-229398 (Jan. 5, 1989) (noting due process concerns in existing law).

443. See § 102 of the Veterans' Judicial Review Act (outlining adjudicative and rulemaking authority of veterans' administration); 38 U.S.C. § 5107(b) (1991).

444. See Procedural Due Process, 55 Fed. Reg. 13522, 13, 27 (May 11, 1990) (to be codified at 38 C.F.R. pt. 3) (amending procedural due process and appellate rights).

445. Procedural Due Process, 55 Fed. Reg. at 13,527.

446. See 38 C.F.R. § 3.103(a) (2024) (stating VA's policy).

that the claim is well grounded,⁴⁴⁷ but instructed the VA to assist the claimant in developing the claim, as had been the agency's practice.⁴⁴⁸ The VA fought to limit its duty through this new adversarial process. CAVC case law began narrowing the circumstances that triggered the VA's duty to assist, primarily through asserting the claim being "well-grounded" as a precondition to receiving support from the agency.⁴⁴⁹ In 1999, CAVC in *Morton v. West*, took this to new levels by expressly prohibiting the VA from assisting in developing cases that were not well-grounded.⁴⁵⁰ Internal administrative law documents at the time conflicted as they instructed assisting claimants regardless of how well-grounded the claim.⁴⁵¹ Nevertheless, the CAVC found that these documents were in direct contravention to the plain language of the Veterans Judicial Review Act.⁴⁵²

In response to *Morton*, Congress attempted to set the VA back in line with its mission.⁴⁵³ With the Veterans Claims Assistance Act of 2000 (VCAA), Congress set out to "to reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants for benefits."⁴⁵⁴ The VCAA included a duty to assist provision as well as a duty to notify of evidence missing.⁴⁵⁵ The VCAA affirmed the Secretary's duty to assist but limited it stating that there was no duty if "no reasonable possibility exists that such assistance would aid in substantiating the claim."⁴⁵⁶ The Secretary could defer the aid pending submission by the claimant of information missing in their application.⁴⁵⁷

After the passage of the VCAA, in 2001, the VA went about implementing the statutory mandate of issuing duty-to-assist regulations.⁴⁵⁸ With the establishment of the VA's Office of Regulation and Policy Management, the Regulation Rewrite Project sought to make the agency's regulations more "logical, claimant-focused, and user-friendly format, in order to help Veterans, their families, and VA personnel understand regulatory provisions that directly affect compensation and pension determinations."⁴⁵⁹ The project finally culminated in 2013.

447. See § 103 of the Veterans Judicial Review Act (detailing burden of proof).

448. See *id.* (stating VA's assistance to claimant).

449. See Terrence T. Griffin & Thomas D. Jones, *The Veterans Claims Assistance Act of 2000: Ten Years Later*, 3 VETERANS L. REV. 284, 289 (2011) (discussing VA's duty to assist).

450. See *id.* at 291 (discussing importance of *Morton*).

451. See *id.* (citing VA Manual M21-1).

452. See *id.* at 291-92 (concluding VA regulations in conflict with statute).

453. See H.R. Rep. No. 106-781, at 10 (2000) (stating Secretary's goal to assist veterans in developing claims and receiving benefits); S. Rep. No. 106-397, at 3 (2000) (proposing repealing of well-grounded claim rule).

454. See Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, 2096 (codified as amended at 38 U.S.C. §§ 5100-5107) (setting forth VCAA's goal).

455. See § 3, 114 Stat. at 2096-97 (detailing notice and duty-to-assist provisions).

456. See § 3, 114 Stat. at 2097 (stating situation in which Secretary not required to provide assistance).

457. See § 3, 114 Stat. at 2097 (ruling possible Secretary's deferral).

458. See Duty to Assist, 66 Fed. Reg. 45,620, 45,620 (Aug. 29, 2001) (to be codified at 38 C.F.R. pt. 3) (explaining goal of regulation).

459. See VA Compensation and Pension Regulation Rewrite Project, 83 Fed. Reg. 14,803, 14,803 (proposed Nov. 27, 2013) (to be codified at 38 C.F.R. pts. 3, 5).

These regulations were amended in 2013, as part of the Regulation Rewrite Project.⁴⁶⁰ The amended regulations showed the cracks in the pro-veteran mission. A clear example was the issuance of final rules codifying the agency's use of official forms for filing claims.⁴⁶¹ The duty to assist attaches once a claim has been filed, and, at the time, the VA stated that roughly half of claims submitted were through informal filings.⁴⁶² The new regulations eliminated previously permitted informal claims processes⁴⁶³ as well as the prior practice where informal claims would be initiated through reports of examination or hospitalization done by the VA itself.⁴⁶⁴ The amended regulations replaced informal claims with "intent to file" a claim for benefits, which effectively removed the duty to assist until the actual form is filed.⁴⁶⁵ The VA relied on its statutory authority to prescribe "the forms of application by claimants under such laws," stating the statute "explicitly provides that claimants must file 'a specific claim in the form prescribed by the Secretary' in order for VA to pay benefits."⁴⁶⁶

In the agency's defense of public comments that the new rules ran afoul of the VA's statutory obligations toward claimants shows its departure from its core mission. The agency defended the increased obstacles for veterans by saying the informal claims process was not statutorily derived; instead, they assert it as "a longstanding feature of VA's regulations, grounded in VA's authority to administer the veterans benefits claim system in a pro-claimant way."⁴⁶⁷ This articulation put forward by the agency removes the pro-claimant statutory mandate and phrases it as a discretionary feature of the agency under its delegated authority. It also seemingly contradicts one of the VA's codified Core Values. The "A" in I CARE stands for "Advocacy," which is defined by the regulation as: "VA employees will be truly veteran-centric by identifying, fully considering, and appropriately advancing the interests of veterans and other beneficiaries."⁴⁶⁸

460. See VA Compensation and Pension Regulation Rewrite Project, 83 Fed. Reg. at 14,803.

461. See VA Claims and Appeals Modernization, 79 Fed. Reg. 57,660, (Jan. 18, 2019) (to be codified at 38 C.F.R. pts. 3, 8, 14, 19, 20, 21) (requiring claims be submitted on standardized forms and eliminating constructive receipt of VA medical and other records as informal claims).

462. *Id.* at 57,661 (Costs and Benefits: shifting the cost incurred previously by the VA for informal claim to claimants now required file formal claims).

463. See Standard Claims and Appeals Forms, 79 Fed. Reg. 57,659, 57,660 (Sept. 25, 2014) (to be codified at 38 C.F.R. pts. 3, 19, 20) (eliminating informal claims processes). The regulation defines "informal claim" as "any communication or action, i.e., in a non-standard format, indicating a claimant's intent to apply for benefits from a claimant, an authorized representative, a Member of Congress, or a person acting as next friend of a claimant who is not of full capacity or age, which identifies the benefit sought." *Id.* at 57,663. Further, these regulations made the process for appealing a decision more difficult by requiring a form be filled out as a Notice of Disagreement, as opposed to previously where the regulations allowed appellate review by anything that could be "reasonably construed" as a request to appeal. *Id.* at 57,661.

464. See *id.* at 57,660 (detailing changes of new regulation).

465. See *id.* (describing intent-to-file requirement).

466. *Id.* at 57,660 (citing 38 U.S.C. §§ 501(a), 5101).

467. See Standard Claims and Appeals Forms, 79 Fed. Reg. 57,659, 57,663-64 (Sept. 25, 2014) (to be codified at 38 C.F.R. pts. 3, 19, 20).

468. See 38 C.F.R. § 0.601.

Attempts to bring cases that involve the inherent tension with the VA's pro-claimant service mission and its ability to efficiently, fairly and equitably run its mass-adjudication scheme for veterans benefits before the Supreme Court have thus far been unsuccessful. In denying certiorari in *Mathis v. Shulkin*,⁴⁶⁹ Justice Sotomayor stated of the Court's decision: "[S]taying our hand allows the Federal Circuit and the VA to continue their dialogue over whether the current system for adjudicating veterans' disability claims can be squared with the VA's statutory obligations to assist veterans in the development of their disability claims."⁴⁷⁰

V. CONCLUSION

Social welfare programs' very existence is premised on the fact that the individuals requiring benefits are in need of a government service due to a particular issue that society has chosen to assist them with. No matter the subject matter or how universally sympathetic the plight of the claimants, federal agencies across the bureaucracy are consistently unable to administer their large-scale public benefits adjudication schemes while effectuating their service-oriented missions. As this Article has demonstrated, the congressional institutional design, delegation decisions, and vast executive branch control over social welfare agencies foster the creation and perpetuation of mass-adjudication schemes for public benefits that are hostile to the individuals they were created serve.

469. 582 U.S. 941 (2017).

470. *See id.* (explaining Court's reasoning for denying certiorari).