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ESSAY

IMMIGRATION AND THE BULLY PULPIT

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One evening in early February, I sat in a nondescript hall in a local community center in a Southern California city. This city is over seventy-five percent Latino, and a sizable population of unauthorized immigrants live and work alongside U.S. citizens here. In addition to inflicting widespread emotional pain, full enforcement of the nation's immigration laws would hurt the local housing market and general economy, with inevitable ripple effects throughout the regional and state economies. Immigrants, whether lawfully present or not, are a critical part of the lifeblood of the community.

The topic of discussion on that February evening was immigration enforcement. Many concerned members of the audience asked questions about how the incoming Trump Administration's immigration policies would affect not only them, but also their families and the communities they served as educators, health care providers, and local business owners and workers. The evening was full of poignant moments, but one remark by a young immigration activist struck me as singularly important: "We are glad that you are here," he said to the assembled crowd, "but we felt so alone during the Obama years."

In recent weeks, the media has focused on the mood of terror in immigrant communities.¹ These accounts explain this terror as a reac-

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¹ See, e.g., Deepti Hajeli & Amy Taxin, *Immigrants Fearing Deportation Under Trump Change Routines*, ASSOCIATED PRESS NEWS (Feb. 23, 2017), <https://www.apnews.com/cdecbo58f4a9481oaf45189bc7c5444a> [https://perma.cc/5G3L-R4YE]; Tal Kopan, *Democrats, Advocates Question ICE Raids After Hundreds of Arrests*, CNN (Feb. 14, 2017), <http://www.cnn.com/2017/02/10/politics/democrats-question-ice-enforcement-raids/> [https://perma.cc/NZ5D-8HPR]; Joe Mozingo et al., *"I Can See the Fear": Multicultural Los Angeles Senses a Different World Under Trump*, L.A. TIMES (Feb. 2, 2017), <http://www.latimes.com/local/california/la-me-ln-los-angeles-immigration-ban-react-20170131-story.html> [https://perma.cc/8YMP-NSPW]; Anabel Munoz, *Local Immigrants Fear Separation from Families, Deportation Under New Administration*, ABC7 (Feb. 10, 2017), <http://abc7.com/news/immigrant-families-fear-separation-deportations-under-new>

tion to the evolving immigration enforcement policies of President Donald J. Trump. Professor Peter Markowitz, who directs an immigration law clinic at Cardozo Law School in New York, uttered a common refrain when he noted: “I have never seen the level of panic that is gripping our immigrant communities. Fielding a deluge of calls from panicked immigrants is now a regular part of my day, as it is for immigrant advocates across the city and across the nation.”²

Long before he was President, Trump intentionally stoked these fears. Throughout his campaign, he made no secret of his desire to upend what he clearly perceived as failed administrative practices around immigration enforcement.³ Upon election, President Trump spent his first four weeks in office rolling out immigration enforcement policies with a great deal more fervor than competence.⁴ The worried reactions to these events are real and understandable.

The current focus on this cresting wave of terror, however, obscures an important reality that was captured by the young adult in the community center in Southern California. The fear experienced by immigrants in the United States did not start with Trump. The policies that President Trump has espoused and the resulting concern of affected communities have deep roots in the past. Old laws and policies have generated the vulnerabilities that the Trump Administration now seeks to exploit. Understanding the Trump Administration’s emerging immigration policies and the reactions to them therefore requires looking backward as well as forward.

This is not to say that President Trump’s immigration enforcement policies should be conflated with those of his predecessors. His rhetoric of unconstrained severity matters a great deal, and not just because the Administration’s tone fuels a climate of fear. The words have consequences. The bombastic enforcement promises, when combined with seeming indifference to certain constitutional rights and administrative realities, have apparently encouraged agents at the lowest administrative levels to exercise their own power in a manner insufficiently constrained by law. Additionally, the new President’s first few weeks in office have reflected a disheartening failure to internalize any of the hard-learned lessons of previous administrations.

-Administration/1747796/ [https://perma.cc/4ZSW-66TQ]; Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/> [https://perma.cc/R2LT-L4DT].

² Peter L. Markowitz, *Understanding What Makes Trump’s Immigration Orders Truly Chilling*, N.Y. DAILY NEWS (Feb. 24, 2017), <http://www.nydailynews.com/opinion/trump-chilling-immigration-orders-article-1.2981758> [https://perma.cc/A2GC-P26T].

³ Domenico Montanaro et al., *Fact Check: Donald Trump’s Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM), <http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration> [https://perma.cc/6VKV-WQNV].

⁴ See discussion *infra* Part II.

This Essay explores President Trump's emerging immigration enforcement strategies in historical context. It starts with a look back at the "lonely" years of immigrant activism. Part I of this Essay explains the enforcement landscape the Obama Administration inherited and the evolution of that Administration's own enforcement policies. This Part surveys the lessons learned — and not learned — by the Obama Administration. Part II of this Essay details the new Administration's enforcement efforts, including the thwarted January 27, 2017 executive order containing the now infamous travel ban on certain foreign nationals and refugees,⁵ his March 6, 2017 executive order replacing the January ban,⁶ and the interior immigration enforcement efforts mapped out in two January 25, 2017 orders⁷ along with their implementing Department of Homeland Security memoranda of February 20, 2017.⁸ This analysis reveals the extent to which Trump's policies constitute a doubling-down on some of the least productive approaches to enforcement.

I. KNOWING HISTORY: IMMIGRATION ENFORCEMENT UNDER OBAMA.

President Trump never hesitates to look backward opportunistically. In a surreal moment during his second debate against Hillary Clinton, his rival for the presidency, he argued that the "wall" that he promised so vehemently throughout his campaign was also supported by President Obama and Hillary Clinton, both of whom had voted as senators for the Secure Fence Act⁹ in 2006. When questioned critically about his plans to deport families, then-candidate Trump responded by pointing out that President Obama himself had overseen mass deportations.¹⁰ And, in moments when he seeks to placate critics of his immigration policy from the political left, he notes the continuities between his policies and those of his predecessors. To that audience, he asserts that his inept travel ban of January 27, 2017, was not the

⁵ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Ban E.O. I].

⁶ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter Ban E.O. II].

⁷ Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter Border Enforcement E.O.]; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Interior Enforcement E.O.].

⁸ Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot. et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/BY5F-L56V>] [hereinafter Kelly Enforcement Memo].

⁹ Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

¹⁰ Elise Foley, *Donald Trump Wants to Deport Children*, HUFFINGTON POST (Aug. 17, 2016), http://www.huffingtonpost.com/entry/donald-trump-deportations_us_57b390b8e4boedfa80da255f [<https://perma.cc/45G4-7ANV>].

“Muslim ban” of his campaign-trail fomentations,¹¹ but a neutral security policy premised on President Obama’s own findings about sites of national security threats.

About much of this, President Trump is not wrong. The Obama Administration did generate the list of countries around which Trump organized his initial travel ban, although that Administration never did advocate (and presumably never would have advocated) for anything like Trump’s blanket travel ban on the nationals of those countries. As senators, Clinton and Obama did support the construction of a physical and technological wall along portions of the border,¹² and more broadly, supported policies that generated hundreds of violent deaths in the Southwestern border region.¹³ President Obama did remove record numbers of foreign nationals every single year of his presidency,¹⁴ splitting up parents and children, and earning the unflattering moniker of “Deporter in Chief” from immigrants rights activists.¹⁵

But President Trump’s invocation of history is selective and problematic, for even as he answers his left-leaning critics with examples of Obama-era enforcement excesses, he paints a very different picture of those efforts for his restrictionist base. To that audience, he suggests that the Obama Administration was incompetent in matters of national security and completely absent from immigration enforcement efforts. For his many supporters, President Trump paints a picture of a nation besieged by a flood of criminal and terrorist immigrants — one that flows directly out of the neglect of the prior Administration.

¹¹ Helena Horton, *Muslim Ban Statement “Removed” from Donald Trump’s Website*, THE TELEGRAPH (Nov. 10, 2016, 10:18 AM), <http://www.telegraph.co.uk/news/2016/11/10/muslim-ban-statement-removed-from-donald-trumps-website/> [https://perma.cc/T4P9-8ZYZ].

¹² Annie Linskey, *In 2006, Democrats Were Saying “Build That Fence!”*, BOS. GLOBE (Jan. 27, 2017), <https://www.bostonglobe.com/news/politics/2017/01/26/when-wall-was-fence-and-democrats-embraced/QE7ieCBXjXVxO63pLMTegO/story.html> [https://perma.cc/2NUH-LB44].

¹³ See, e.g., Jeremy Slack et al., *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 J. LATIN AM. GEOGRAPHY 7, 10–11 (2016) (discussing the link between border militarization and an increase in deaths); Kendal Blust, *Deaths per 10,000 Border Crossers Are Up 5 Times from a Decade Ago*, ARIZ. DAILY STAR (May 21, 2016), http://tucson.com/news/local/border/deaths-per-border-crossers-are-up-times-from-a-decade/article_c1279aaf-4ad8-51c9-82d8-3143b836f52e.html [https://perma.cc/YP8A-TCMS] (exploring the connection between deterrence policies and border deaths); Reece Jones, *Death in the Sands: The Horror of the U.S.-Mexico Border*, THE GUARDIAN (Oct. 4, 2016), <https://www.theguardian.com/us-news/2016/oct/04/us-mexico-border-patrol-trump-beautiful-wall> [https://perma.cc/L9A8-P9ET] (discussing the same link).

¹⁴ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2015 YEAR-BOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf [https://perma.cc/6LZ4-YB9J].

¹⁵ See, e.g., Matt Welch, *Opinion, Trump May Have Bad Intentions, But Obama Was a Deporter-in-Chief Too*, L.A. TIMES (Feb. 17, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-welch-immigration-enforcement-obama-trump-20170216-story.html> [https://perma.cc/25YN-Y92Y].

The picture that President Trump paints for his base is difficult to square with the facts. The Obama Administration's eight years saw the deportation of over two million foreign nationals,¹⁶ the annual detention of approximately 400,000 foreign nationals¹⁷ (and hundreds of American citizens¹⁸), the exponential expansion of family immigration detention centers,¹⁹ unprecedented levels of spending on border enforcement,²⁰ and record prosecutions of immigration crimes.²¹ By every measure, immigration enforcement reached its historic peak in the Obama years. The Migration Policy Institute dubbed the resulting enforcement complex a "formidable machinery."²² Why did this happen?

President Obama inherited an immigration enforcement system that had been forged in two important moments. First, in 1996, Congress passed and President William J. Clinton signed a series of laws that amended the existing Immigration and Nationality Act²³ (INA).²⁴ These laws significantly narrowed existing pathways to legal

¹⁶ See OFFICE OF IMMIGRATION STATISTICS, *supra* note 14, at 103 tbl.39.

¹⁷ *Id.*

¹⁸ See Eyder Peralta, *You Say You're an American, but What If You Had to Prove It or Be Deported?*, NPR: THE TWO-WAY (Dec. 22, 2016, 12:29 PM), <http://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported> [<https://perma.cc/UN8P-EHC3>] (reporting that "hundreds of American citizens each year find themselves" in an immigration detention facility). Moreover, many U.S. citizens are wrongly deported. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011); see also *id.* at 618–29 (reporting data on the incidence rate of such wrongful detention and deportation); *Preface: Ace's Story*, in *CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS* (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017) (providing a first-person account of a U.S. citizen wrongly deported).

¹⁹ See César Cuauhtémoc García Hernández, *Migration Myths, Detention Realities*, CRIMMIGRATION (Nov. 11, 2014, 4:00 AM), <http://crimmigration.com/2014/11/11/migration-myths-detention-realities/> [<https://perma.cc/X8T9-3XL3>]; Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [<https://perma.cc/E7WH-SVNM>].

²⁰ DORIS MEISSNER ET AL., *MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 2 (2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> [<https://perma.cc/NE2G-P8FC>].

²¹ *Id.* at 93.

²² *Id. passim*; see also *id.* at 12 ("The nation has built a formidable immigration enforcement machinery.")

²³ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)).

²⁴ Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 15, 18, and 28 U.S.C.).

status²⁵ and vastly expanded grounds for deportation and exclusion, particularly those related to criminal convictions.²⁶ These legal changes generally left immigrants — including those lawfully present — more vulnerable to deportation than at any point since the INA's overhaul in 1965.²⁷

Second, President Obama inherited an immigration enforcement bureaucracy funded and forged in the wake of September 11, 2001. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) were established during the previous Administration by President George W. Bush with an antiterrorism mandate.²⁸ The rapid staffing that ensued in the period following the 2003 creation of the Department of Homeland Security produced new agencies dominated by individuals with a particular enforcement mindset.²⁹ These new hires had neither a bureaucratic nexus with nor interest in

²⁵ *E.g.*, IIRIRA § 304(b), 110 Stat. at 3009-597 (repealing INA § 212(c)); IIRIRA sec. 304(a), § 240A, 110 Stat. at 3009-587 to -597 (replacing INA § 212(c) with the much more limited relief of INA § 240A).

²⁶ AEDPA § 440, 110 Stat. at 1276-79 (expanding the list of deportable offenses to include a wide range of offenses including gambling, transportation related to prostitution, passport fraud, and failure to appear at a judicial proceeding); IIRIRA sec. 321, § 101(a)(43), 110 Stat. at 3009-627 to -628 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012)) (amending the INA aggravated felony definition to require lower threshold amounts for deportation, for money laundering and tax evasion, and adding other deportable crimes).

²⁷ *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 368 (2010) (discussing Congress's elimination of the Immigration and Nationality Act's former section 212(c) and that section's discretionary relief for persons with criminal convictions); BILL ONG HING, *DEPORTING OUR SOULS* 52-87 (2006) (describing the impact of the legal changes on particular individuals and communities); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 *CARDOZO L. REV.* 1751, 1775-90 (2013); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 *N.C. J. INT'L L. & COM. REG.* 639, 651-52 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *WASH. & LEE L. REV.* 469, 482-86 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 *B.C. THIRD WORLD L.J.* 81, 112-22 (2005); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 *HARV. L. REV.* 1936, 1938-41 (2000).

²⁸ PRESIDENT GEORGE W. BUSH, *THE DEPARTMENT OF HOMELAND SECURITY* (2002), https://www.dhs.gov/sites/default/files/publications/book_o.pdf [<https://perma.cc/65YX-G7KJ>] (proposing a Department of Homeland Security to deal with the "changing nature of the threats facing America," *id.* at 1); *see also* Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (codified at 6 U.S.C. § 111 (2012)) (establishing the Department of Homeland Security with the mission to "prevent terrorist attacks" and other functions related to "securing the homeland").

²⁹ *See* Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 *CONN. L. REV.* 1827, 1856 (2007) (questioning terrorism justification for immigration policy); *see also* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *AN ASSESSMENT OF THE PROPOSAL TO MERGE CUSTOMS AND BORDER PROTECTION WITH IMMIGRATION AND CUSTOMS ENFORCEMENT* 119, 124 (2005), https://www.oig.dhs.gov/assets/Mgmt/OIG_06-04_Nov05.pdf [<https://perma.cc/VB2S-UXC2>] (describing, for example, CBP's "priority on keeping terrorists and terrorist weapons from gaining entry," *id.* at 119, and ICE's mission as "prevent[ing] acts of terrorism," *id.* at 124).

immigration services. And because rapid hiring forced a reduction in hiring standards, some of these agents, particularly in CBP, over time proved themselves incompetent, corrupt, or both.³⁰

Assuming the presidency in the middle of the financial crisis, President Obama abandoned campaign promises to pursue a legislative immigration reform solution, focusing his efforts instead on simple economic stimulus and complex health care reform. Having achieved that agenda, President Obama lost critical legislative support for his reforms when the Democrats lost their majority in the House of Representatives. In 2010, Republicans gained control of the House, and the prospect of legislative immigration reform died.

Indeed, during the early Obama years, it sometimes seemed that immigration enforcement proceeded on autopilot. High levels of deportation and detention, aggressive border enforcement, and workplace raids continued apace in the transition from President George W. Bush to President Obama. The Administration appeared to treat vigorous enforcement as a down payment on comprehensive immigration reform — one that would convince skeptics that the Administration could be trusted to enforce the laws when and if Congress enacted a legalization scheme. Not only did this investment in enforcement fail to persuade immigration skeptics to embrace reform, but it also arguably backfired. By doubling down on the popular but factually bankrupt narrative that immigration enforcement was an integral part of an effective public safety agenda, the Administration legitimated a wrongheaded national approach to immigration as a crime and security problem to be solved rather than as a largely positive phenomenon in need of a more effective governing legal framework.

But the story of immigration policy in the Obama era is not a story of constant, unexamined severity. It is a story of evolution. In response to pressure from advocacy groups and consistent with the values of many of those working within the Administration itself, over time President Obama's immigration enforcement efforts reflected increasing centralization and control, as well as an increasingly nuanced approach to the selection of enforcement targets. Two examples illustrate the point.

First, over time, the Administration took increasingly seriously the mounting evidence that federal delegation of enforcement powers to state and local law enforcement agencies did nothing to enhance public safety, but did fuel racial profiling and distrust between immigrant communities and police. Internalizing the findings of academic studies

³⁰ See Mica Rosenberg, *Former Border Patrol Officials Question Trump Plan to Add Agents*, U.S. NEWS & WORLD REP. (Feb. 24, 2017, 1:24 PM), <https://www.usnews.com/news/top-news/articles/2017-02-24/former-border-patrol-officials-question-trump-plan-to-add-agents> [<https://perma.cc/L6B9-JH4K>].

and the information provided by immigrant advocates across the country, the Administration scaled back its contracts with states and localities that had allowed those sub-federal contractors to enforce immigration law under section 287(g) of the INA.³¹ Concerns about discrimination also prompted the Administration to oppose state enactments of purportedly complementary enforcement schemes.³² Rather than supporting sub-federal immigration enforcement efforts, the Administration began investigations of local law enforcement agencies whose overly zealous approaches to such enforcement thinly masked discriminatory policing of Latino communities.³³

Second, the Administration began to exercise its own enforcement discretion more selectively in an effort to keep more immigrant communities intact pending broader immigration reform. By 2014, the Administration had set new and narrower enforcement priorities.³⁴ Those enforcement priorities began to play an important role in determining which arrestees were prioritized for removal. Prior to that time, the Department of Homeland Security (DHS) had rolled out its so-called “Secure Communities” program, whereby the fingerprints of every arrestee in the country were run through a DHS database to identify immigration violators.³⁵ The Secure Communities program generated heavy criticism from activists.³⁶ Academics were also critical, finding that the program had no positive effects on public safety and appeared to have been rolled out in a way that targeted jurisdictions with large Latino populations first.³⁷

³¹ 8 U.S.C. § 1357(g) (2012).

³² See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497–98 (2012).

³³ See, e.g., Roy L. Austin, Jr., Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, Speech at the East Haven Police Department Investigative Findings Announcement (Dec. 19, 2011), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roy-l-austin-jr-speaks-east-haven-police-department> [<https://perma.cc/A7NL-BXG2>]; Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty. (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [<https://perma.cc/H5G3-ZKGC>].

³⁴ See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to U.S. Immigration & Customs Enf’t, U.S. Customs & Border Prot., U.S. Citizenship & Immigration Servs., et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/K854-45E8>] [hereinafter Johnson Prosecutorial Discretion Memo].

³⁵ *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> [<https://web.archive.org/web/20170126151120/https://www.ice.gov/secure-communities>] (last visited Jan. 26, 2017).

³⁶ See, e.g., DHS’s “Secure Communities”: *No Rules of the Road*, NAT’L IMMIGR. L. CTR. (Mar. 2011), <https://www.nilc.org/issues/immigration-enforcement/scomm-no-rules-of-road-2011-03-07/> [<https://perma.cc/6A4C-NJUV>].

³⁷ See, e.g., Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 939, 948–49 (2014).

Responding to criticisms, former DHS Secretary Johnson rolled back the Secure Communities program, replacing it with the Priority Enforcement Program (PEP).³⁸ Arrests were still run through the database in the same way under this program as under Secure Communities, but DHS was instructed not to act on the information unless an individual was a priority for removal — hence priority enforcement. Unless an individual had committed a serious crime, constituted a threat to national security, or was a recent entrant, the individual would not be prioritized for removal regardless of arrest.

Throughout this period, the Administration increasingly granted parole and other forms of humanitarian relief to help qualifying individuals — particularly members of military families — normalize their status where possible.³⁹ But it was with the Deferred Action for Childhood Arrivals (DACA) program that the Administration formalized the exercise of prosecutorial discretion at the highest levels in a very public way. The DACA program allowed qualifying individuals — immigrants who arrived as children, who had little to no criminal history, and who completed high school or its equivalent — to seek a formal designation of deferred action.⁴⁰ The Obama Administration took advantage of a preexisting regulatory scheme that allowed deferred action designees to access the benefits of work authorization and social security numbers.⁴¹ This scheme allowed DACA designees to work and drive lawfully, living in compliance with the law while awaiting legislative reforms that might allow them to normalize their immigration status. Notwithstanding the shortcomings of their liminal legality,⁴² the positive effects of the DACA program on the lives of in-

³⁸ See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., Secure Communities (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/24NW-ZGC6>].

³⁹ SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 95–97 (2015) (discussing a 2011 memorandum guiding the use of prosecutorial discretion, which included multiple provisions for service-members and their families).

⁴⁰ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/2FKE-B6VE>] (last updated Dec. 22, 2016).

⁴¹ See Anil Kalhan, *Executive Action on Immigration and the Judicial Artifice of “Lawful Presence,”* DORF ON LAW (June 3, 2015, 9:10 PM), <http://www.dorfonlaw.org/2015/06/executive-action-on-immigration-and.html> [<https://perma.cc/H5SN-FY3F>] (explaining the interaction of deferred action status and other benefits permitted under the regulatory structure, including work authorization).

⁴² Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 727–30 (2015) (describing the material and emotional toll of uncertainty and collecting related sources). Ongoing research that I am doing with a research team funded by the National Science Foundation provides further evidence of the costs of this legal uncertainty for DACA and potential DAPA recipients.

dividuals so designated, and upon the U.S. economy as a whole, are well documented.⁴³

The Administration's attempt to sort immigrants into high and low priority groups was certainly reassuring to some, but it was also inherently troubled, relying as it did upon problematically constructed notions of criminality.⁴⁴ The most important categorical basis for a determination that an immigrant was a high enforcement priority was, and remains, that individual's criminal record. It does not take much of a criminal record to become a priority target for deportation. Criminal grounds for removal have become so expansive that virtually any controlled substance offense and a whole host of relatively minor offenses (including those committed at a time when the offense was not yet a deportable offense) will convert immigrants (including lawful permanent residents) into "criminal aliens"⁴⁵ with high-priority status for removal.⁴⁶ Under existing law, individuals who fit into these overbroad categories have almost no way to argue for discretionary relief from deportation once removal proceedings have been initiated. Moreover, their criminal records arise in the context of a criminal justice system that overpolices and underprotects many immigrant communities.⁴⁷ Conduct that gets a warning on college campuses can get you arrested, convicted, and deported in heavily policed, low-income neighborhoods. The Obama Administration certainly did not invent this longstanding false dichotomy of "good and bad immigrants,"⁴⁸ but arguably took insufficient steps to subvert it.

⁴³ See, e.g., TOM K. WONG, NAT'L IMMIGRATION LAW CTR. & CTR. FOR AM. PROGRESS, NATIONAL SURVEY RESULTS (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/07/DACA-Wong_NILC_CAP-Codebook-PDF.pdf [<https://perma.cc/5YGE-2JFM>]; Roberto G. Gonzales et al., *Becoming DACAdmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 AM. BEHAV. SCIENTIST 1852, 1866 (2014) (finding that DACA beneficiaries had "experienced greater access to U.S. institutions" and "overcome . . . elements of exclusion").

⁴⁴ Chacón, *supra* note 29, at 1840–48 (analyzing how the rhetoric of migrant criminality morphs into an all-encompassing descriptor for immigrants); see Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 658–59 (2016) (rejecting facile distinctions between "criminal aliens" and other immigrants).

⁴⁵ Chacón, *supra* note 29, at 1843–48.

⁴⁶ See Johnson Prosecutorial Discretion Memo, *supra* note 34.

⁴⁷ Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 968–69 (2015) (noting the layering effect of a racially skewed criminal justice system upon a harsh and overinclusive removal system); see also TANYA MARIA GOLASH-BOZA, DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM 9–11 (2015); Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809, 853–59 (2013) (discussing the targeting of Muslim immigrant communities for heightened surveillance and policing).

⁴⁸ Elliot Young, *Felons and Families*, UNC PRESS BLOG (Apr. 3, 2017, 9:00 AM), <http://uncpressblog.com/2017/04/03/elliott-young-felons-and-families/> [<https://perma.cc/MQB7-3L5L>].

Recent arrivals were also a priority for removal under President Obama.⁴⁹ The Obama Administration therefore pursued policies meting out harsh treatment, including family detention, for Central Americans who arrived in the period from 2013–2016, fleeing a wave of heightened violence in the Northern Triangle countries.⁵⁰ The resulting enforcement efforts had negative effects upon a broad swath of the Central American immigrant community, who were fearful that the targeting of recent arrivals jeopardized even well-established immigrants.⁵¹ Their concerns exposed the difficulties of drawing lines between “good” immigrants and “bad” and between “settled” populations and “recent” arrivals in a world where the fates of transnational families are so imperfectly sliced and diced by U.S. immigration categories.

Thus, as is often the case, President Obama’s neatly organized paper priorities were messy on the ground. In November 2014, when he announced his intention to extend his deferred action program to a broader band of young arrivals and to the parents of U.S. citizens and lawful permanent residents (the DAPA program), he stressed the need to target for deportation “[f]elons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”⁵² But felons are part of families, and mothers working hard to provide for their kids can easily be classified as “associates” of gang members. At the same time, the Administration’s practice of detaining recent arrivals to “deter” the northbound flight of other desperate families in Guatemala, El Salvador, and Honduras meant detaining families on U.S. soil at a scale not seen since the Japanese internment of World War II.

To the end, the Obama Administration was hampered by the intransigence of a political minority that repeatedly blocked popular comprehensive immigration reform measures from even coming to a vote in Congress and that froze the DAPA program — by far the boldest of the Administration’s executive relief plans — in the courts. This left all of the intended DAPA recipients vulnerable to removal

⁴⁹ Johnson Prosecutorial Discretion Memo, *supra* note 34.

⁵⁰ Suzanne Gamboa, *Central Americans Picked up in Raids Get Deportation Pause*, NBC NEWS (Jan. 6, 2016, 9:28 PM), <http://www.nbcnews.com/news/latino/central-americans-picked-raids-get-deportation-pause-n491246> [https://perma.cc/4GD9-K8C7].

⁵¹ See Elena Shore, *Raids on Central American Families Spark Fear in S.F.*, NEW AM. MEDIA (Jan. 7, 2016), <http://newamericamedia.org/2016/01/raids-on-central-american-families-spark-fear-in-sf.php> [https://perma.cc/25AZ-AN2G]; see also Jose Torres, *Mobilization Strategies Within the Immigrant Rights Movement in Los Angeles* (unpublished manuscript) (on file with the Harvard Law School Library) (containing ethnographic accounts of the impact of enforcement policies on Central American families in the Southern California area).

⁵² President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [https://perma.cc/9MDC-4HCK].

throughout the Obama presidency, notwithstanding the revised priority categories and rhetoric that promised to protect “families.” In general, however, long-term residents who — through some combination of virtue and luck — managed to avoid contact with law enforcement in the Obama era had official assurance that they were unlikely to be a priority for deportation. As they had for decades, they shouldered the hardships of living without official recognition as a fact of life. Since Donald J. Trump assumed the Presidency, their situation has changed for the worse.

II. REPEATING HISTORY

In contrast to the Obama Administration, President Trump’s Administration has not attempted to soothe the fears of long-term residents who are out of status or otherwise removable. To the contrary, the new Administration’s strategy seems intentionally designed to stoke the insecurity of immigrant communities. In his first two weeks in office, President Trump and his Department of Homeland Security issued executive orders and memoranda that called for a temporary ban on the admission of certain foreign nationals and almost all incoming refugees,⁵³ the addition of 15,000 new CBP and ICE agents,⁵⁴ the broad extension of streamlined removal processes to many individuals formerly given more robust immigration court hearings,⁵⁵ the greatly expanded use of immigration detention,⁵⁶ the extension of priority removal status to many immigrants not covered by the Obama Administration’s priorities,⁵⁷ federal funding cuts for jurisdictions that decline to cooperate with federal enforcement initiatives,⁵⁸ increased delegation of immigration enforcement powers to state and local law enforcement agents,⁵⁹ and an exploratory study of the construction of a wall on the U.S.-Mexico border.⁶⁰

The early orders and memos from the Trump Administration aligned with President Trump’s campaign rhetoric. “[W]e have some bad hombres here and we’re going to get them out,”⁶¹ he promised

⁵³ Ban E.O. I, *supra* note 5.

⁵⁴ Border Enforcement E.O., *supra* note 7, § 8 (calling for the addition of 5000 Border Patrol agents); Interior Enforcement E.O., *supra* note 7, § 7 (calling for the addition of 10,000 ICE officers).

⁵⁵ Border Enforcement E.O., *supra* note 7, § 11(c); Kelly Enforcement Memo, *supra* note 8, at 3.

⁵⁶ Border Enforcement E.O., *supra* note 7, § 6.

⁵⁷ See Interior Enforcement E.O., *supra* note 7, § 5; Kelly Enforcement Memo, *supra* note 8, at 1–2.

⁵⁸ Interior Enforcement E.O., *supra* note 7, § 9.

⁵⁹ *Id.* § 8; Kelly Enforcement Memo, *supra* note 8, at 3–4.

⁶⁰ Border Enforcement E.O., *supra* note 7, § 4.

⁶¹ Donald Trump: We Need to Get out ‘Bad Hombres’, CNN (Oct. 19, 2016), <http://www.cnn.com/videos/politics/2016/10/19/third-presidential-debate-trump-immigration-bad-hombres>

during a debate in the fall of 2016. This deliberately racialized statement⁶² indicated President Trump's intention to deport some subset of the unauthorized immigrant population — the “bad *hombres*” — and then (perhaps) to figure out what to do with the rest. President Trump's intention to sort good and bad immigrants was also reflected in his statement, made immediately after the election in a *Time* interview, that, notwithstanding his repeated campaign promise to revoke DACA on day one, he now plans to try to “work something out” for deserving immigrant youth that will “make people happy and proud.”⁶³

Because his language signals some intention to exercise enforcement discretion, his policies have been analogized to President Obama's. The analogy is not entirely wrong, and President Obama's uncritical rhetorical use of the good/bad dichotomy has paved the way for President Trump's own rhetoric and policies. But the numbers that President Trump cited in the lead-up to his inauguration suggested that he would not be sticking to the Obama-era script when it came to defining his deportation priorities, and the deviations are at least as significant as the continuities.

In the weeks leading up to his inauguration, President Trump stated that he intended to remove two to three million noncitizens in his first year in office.⁶⁴ This extraordinary number far exceeds the number of unauthorized migrants with criminal convictions. Estimates by the Migration Policy Institute suggest that there are only about 820,000 noncitizens with criminal convictions that render them removable.⁶⁵ Many of those individuals are not actually “bad *hombres*” either. Some have recently committed youthful indiscretions, whereas others have decades-old convictions, but now have steady jobs, U.S. citizen children, and even histories of U.S. military service. All of the-

-sot.cnn [https://perma.cc/DW5K-R4SN]. Trump's use of Spanish not-so-subtly telegraphed the notion that he believed these individuals would be Latino.

⁶² On the racial disproportionality of removals, see GOLASH-BOZA, *supra* note 47.

⁶³ Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME, <http://time.com/time-person-of-the-year-2016-donald-trump/> [https://perma.cc/B3YR-6RNE]; *see also 60 Minutes: President-Elect Trump Speaks to a Divided Country* (CBS television broadcast Nov. 13, 2016), <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/> [https://perma.cc/6BXY-38Y5] (discussing his willingness to possibly seek a solution for the “terrific people” covered by DACA).

⁶⁴ Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/> [https://perma.cc/UHD2-ZLWL].

⁶⁵ Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL'Y INST. (Nov. 2016), <http://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal> [https://perma.cc/Z5FF-FKUS].

se individuals would need to be counted among the “bad hombres” in a drive to reach deportation figures of two to three million, and even that would not be enough.

Satisfying this high deportation target number would also require the removal of individuals without criminal records but who have had any contact with law enforcement.⁶⁶ President Trump’s new enforcement priorities and restoration of the Secure Communities program will facilitate such removals. Deportation priorities are no longer defined in terms of serious criminal convictions.⁶⁷ Anyone who has been arrested, anyone who has committed any conduct that could be the basis of a criminal prosecution, and anyone who has been identified as being associated with a gang is now a priority for removal.⁶⁸ The Priority Enforcement Program died two deaths under these new policies. First, the Interior Enforcement order and its implementing memorandum made PEP a practical impossibility insofar as *all* arrestees are now a priority for removal under the new list of deportation priorities.⁶⁹ Still, lest there be any confusion, the Kelly enforcement memo also expressly rescinded PEP and restored Secure Communities.⁷⁰ As a practical matter, this express rescission is unnecessary since all arrestees are now priorities under the executive order, but the restoration of an Obama-era program that was the *bête noire* of immigrant justice advocates does important symbolic work in conveying the new Administration’s message of toughness unencumbered by the accumulated evidence of Secure Communities’ past failings.⁷¹ The new priorities also undercut the security of the DACA program. The new removal “priorities” are already being used to justify the detention and possible removal of DACA recipients on the basis of unsubstantiated charges of gang membership and low-level contact with law enforcement.⁷² In

⁶⁶ Madeline Conway, *Kris Kobach Explains Trump’s Immigration Math*, POLITICO (Nov. 15, 2016, 2:11 PM), <http://www.politico.com/story/2016/11/kris-kobach-trump-immigration-231430> [<https://perma.cc/YTS7-DT9S>] (noting that Trump surrogate Kris Kobach stated the order was intended to include “those arrested but not yet convicted in some cases”).

⁶⁷ Interior Enforcement E.O., *supra* note 7, § 5; Kelly Enforcement Memo, *supra* note 8, at 1–2.

⁶⁸ Kelly Enforcement Memo, *supra* note 8, at 2.

⁶⁹ Interior Enforcement E.O., *supra* note 7, § 5; Kelly Enforcement Memo, *supra* note 8, at 2.

⁷⁰ Kelly Enforcement Memo, *supra* note 8, at 3.

⁷¹ See Miles & Cox, *supra* note 37, at 969–70.

⁷² See, e.g., Andrea Martinez, *San Antonio DACA Recipient Released from ICE Custody Days After Arrest*, KENS 5 EYEWITNESS NEWS (Feb. 16, 2017, 10:11 PM), <http://www.kens5.com/news/san-antonio-daca-recipient-arrested-facing-deportation/409094058> [<https://perma.cc/J3Z3-SPPT>] (discussing ICE’s detention and release of DACA recipient Josue Romero on the basis of alleged possession of less than two ounces of marijuana); Mike Carter, *Seattle ‘Dreamer’ Sues over His Detention Under Trump’s Immigration Actions*, SEATTLE TIMES, (Feb. 14, 2017, 8:29 PM), <http://www.seattletimes.com/seattle-news/seattle-dreamer-sues-over-detention-under-trump/> [<https://perma.cc/H7X5-GXAP>] (quoting attorney of DACA recipient Daniel Ramirez Medina, who was arrested and detained based on his purported gang membership, denying the charge); *DACA Recipient Detained by U.S. Immigration Authorities*, NPR (Feb. 15, 2017, 4:29 PM),

the first three months of his presidency, the number of immigration arrests of foreign nationals with no criminal convictions doubled as compared to the same period last year.⁷³

Much about the recent executive orders and memos on immigration enforcement reflects a likeminded preference for sending a threatening message of enforcement severity to immigrant communities at the expense of considerations of legality and efficacy. Four additional examples help to illustrate the point: the flawed travel bans of January and March, the proposed expansion of administrative removals, the proposed expansion of immigration detention, and the proposed devolution of enforcement authority. Each of these proposals signals a severity that will generate fear in immigrant communities. At the same time, each also reflects an unwillingness to internalize past lessons and to respect established legal limits on executive authority. Indeed, each example demonstrates how the new Administration relies on inflated rhetoric to promote enforcement practices that exceed formal legal authority but take on a quasi-legal character because of their widespread and unchecked nature.⁷⁴

A. *The Flawed Travel Bans*

On January 27, the Administration announced that, for ninety days, it would exclude all incoming foreign nationals of seven predominantly Muslim countries.⁷⁵ The Administration also proposed a ban on the admission of all Syrian refugees and a 120-day ban on the admission of all refugees, with the exception of individuals of minority religions in predominantly Muslim countries.⁷⁶ This ban was messaged differently by Trump and his surrogates to different audiences — to supporters, it was the promised Muslim ban, but to courts, it was not.⁷⁷

<http://www.npr.org/2017/02/15/515441744/daca-recipient-detained-by-u-s-immigration-authorities> [<https://perma.cc/R2XZ-HVNS>] (same).

⁷³ Maria Sacchetti, *ICE Immigration Arrests of Noncriminals Double Under Trump*, WASH. POST (Apr. 16, 2017), https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html [<https://perma.cc/AMS6-VUG2>].

⁷⁴ On the importance of centering discussions of such enforcement practices, which the authors label “paralegal,” see Inés Valdez et al., *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. (forthcoming 2017), <http://dx.doi.org/10.1080/13621025.2016.1277980>.

⁷⁵ Ban E.O. I, *supra* note 5.

⁷⁶ *Id.*

⁷⁷ For example, Trump stated on Facebook that the order was “not a Muslim ban.” Donald J. Trump, *Statement Regarding Recent Executive Order Concerning Extreme Vetting*, FACEBOOK (Jan. 29, 2017), <https://www.facebook.com/DonaldTrump/posts/10158567643610725> [<https://perma.cc/MD8K-JKKY>]. However, in July 2016, Trump stated that his focus on territories rather than religion was not a “rollback” of his Muslim ban proposal. *Meet the Press — July 24, 2016*, NBC

To enact the ban on the nationals of the seven listed countries, Trump invoked his power under section 212(f) of the INA.⁷⁸ The provision does give the President broad authority to ban categories of foreign nationals from the country for security reasons, but the strategy here suffered from three problems. First, section 212 had never before been applied anywhere near as broadly as Trump's seven-country ban.⁷⁹ The application of the ban to these countries arguably undercut the equal treatment that the INA extends to foreign nationals of all nations⁸⁰ and exceeded the President's authority.⁸¹ Second, the purported security rationale for the ban was not adequately substantiated; indeed, it was questioned by the Department of Homeland Security itself.⁸² Finally, there was ample evidence that the ban was meant to effectuate Trump's Muslim ban and, as such, reflected impermissible and irrational religious animus.⁸³ The problems with the order prompted several courts to prevent the ban from going into place, at least temporarily.⁸⁴

NEWS (Jul. 24, 2016, 11:47 AM), <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [<https://perma.cc/YLH5-R9AY>] ("I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim.").

⁷⁸ 8 U.S.C. § 1182(f) (2012).

⁷⁹ See generally KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF (2017).

⁸⁰ David J. Bier, Opinion, *Trump's Immigration Ban Is Illegal*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/opinion/trumps-immigration-ban-is-illegal.html> [<https://perma.cc/FEU4-9WGP>]. Of course, the Supreme Court has never struck down an immigration enforcement order or an act of Congress concerning immigration on equal protection grounds.

⁸¹ Jeffrey Gorsky, *An Alternative Legal Argument Against Trump's Travel Ban*, LAW360 (Apr. 10, 2017, 1:29 PM), <https://www.law360.com/immigration/articles/911744/an-alternative-legal-argument-against-trump-s-travel-ban> [<https://perma.cc/CTY4-KE9G>].

⁸² Matt Zapposky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/world/national-security/dhs-report-casts-doubt-on-need-for-trump-travel-ban/2017/02/24/2a9992e4-fadc-11e6-9845-576c69081518_story.html [<https://perma.cc/4EFQ-ZP54>]; see also *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (temporarily preventing the Administration from implementing the travel ban based in part on a rejection of the purported security rationale); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam) (upholding the district court's temporary restraining order and denying the government's emergency motion for a stay).

⁸³ See William Saletan, *Donald Trump Doesn't Care If You Think He Wants to Ban Muslims*, SLATE (Dec. 22, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/12/donald_trump_doesn_t_care_if_you_think_he_wants_to_ban_muslims.html [<https://perma.cc/GJ5G-AHJN>].

⁸⁴ See, e.g., *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC, 2017 WL 1018235 (D. Md. Mar. 16, 2017); *Aziz v. Trump*, No. 1:17-cv-00116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Mohammed v. United States*, No. 2:17-cv-00786, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017). But see *Louhghalam v. Trump*, No. 17-cv-10154, 2017 WL 479779 (D. Mass. Feb. 3, 2017) (denying extension of temporary restraining order).

The mechanics of the ban also raised legal questions. Most significantly, the ban initially applied not just to individuals arriving for the first time but to long-term holders of nonimmigrant visas and, most surprisingly, to lawful permanent residents (LPRs).⁸⁵ As any student of immigration law could have informed President Trump, compared to other arriving immigrants, LPRs, particularly those returning from a brief stay abroad, are entitled under clearly established law to a more robust process than the summary exclusion to which many of them were subjected.⁸⁶ Consultation with career lawyers in DHS surely would have exposed such technical problems with the order. But such lawyers were apparently not consulted, and it took a full two days for Secretary of Homeland Security John Kelly to issue a “waiver” for LPRs, and a few more days to announce that the ban did not apply to LPRs at all.⁸⁷ This “clarification” occurred only after litigants had already successfully sought injunctions for this aspect of the ban in court.

Troublingly, even after courts acted to enjoin the ban, some CBP agents still enforced it because their marching orders from Washington were not entirely clear.⁸⁸ It is unsettling that a document so plainly at odds with existing law was allowed to go into effect at all. It is even more unsettling that agents newly empowered to exercise harsh enforcement discretion were not responsive to court orders when that discretion was deemed potentially unconstitutional. This episode painfully highlighted the very real, on-the-ground effects of overblown enforcement rhetoric.

The Administration ultimately withdrew the travel ban order with the promise that a new order was in the works.⁸⁹ On March 6, 2017, the Administration released an updated travel order⁹⁰ — the new order

⁸⁵ See generally Ban E.O. I, *supra* note 5.

⁸⁶ See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (requiring that a returning lawful permanent resident be given more robust procedures than those to which an arriving foreign national is entitled); *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (declining to apply exclusion grounds to a lawful permanent resident returning after a trip that was “innocent, casual, and brief”).

⁸⁷ Noah Bierman, *Trump Administration Further Clarifies Travel Ban, Exempting Green Card Holders*, L.A. TIMES (Feb. 1, 2017, 12:45 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-administration-further-clarifies-1485979330-htmstory.html> [https://perma.cc/53MK-NX62].

⁸⁸ Edward Helmore & Alan Yuhas, *Border Agents Defy Courts on Trump Travel Ban, Congressmen and Lawyers Say*, THE GUARDIAN (Jan. 30, 2017, 3:57 PM), <https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban> [https://perma.cc/SMR4-Q9S6]. This revelation prompted some frenzied speculation on whether the nation was facing a constitutional crisis.

⁸⁹ Jaweed Kaleem & Maura Dolan, *Trump Says He'll Repeal Travel Ban, Replace It With a New One Next Week That's 'Tailored' to Court Decisions*, L.A. TIMES (Feb. 16, 2017, 11:52 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-says-he-will-repeal-travel-ban-1487273979-htmstory.html> [https://perma.cc/RV8Y-EC29].

⁹⁰ See Ban E.O. II, *supra* note 6.

dropped Iraq from the list of excluded countries, “exempt[ed] permanent residents and current visa holders, and drop[ped] language offering preferential status to persecuted religious minorities.”⁹¹ Before the revised ban could go into effect, two federal district courts issued temporary restraining orders.⁹² Despite the Administration’s changes to the scope and operation of the ban, these courts concluded that the plaintiffs challenging the ban had made a sufficient showing that the new ban, like the old ban, was primarily motivated by impermissible anti-Muslim animus.⁹³

B. Administrative Removals

Trump’s travel ban has received the greatest attention, but his less-examined January 25 orders⁹⁴ raise a number of other legal questions. One of the most pressing is the question of whether Trump’s plan to expand an administrative removal measure known as expedited removal to a broad swath of the unauthorized population is lawful.

The expedited removal provision of the INA specifies that an immigration officer “shall order” foreign nationals without appropriate entry documents “removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section [208 of the INA] or a fear of persecution.”⁹⁵ That is, unless the individual — generally unrepresented during this interaction with the agent⁹⁶ — asserts a fear of persecution, she can be ordered removed without any additional process. She can be detained throughout the process, and there is no statutory right to judicial review if an individual is determined to be inadmissible absent a claim for asylum in these proceedings.⁹⁷

⁹¹ Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants From Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html> [<https://perma.cc/TG9Q-3LX7>].

⁹² See *Int’l Refugee Assistance Project v. Trump*, No. 8:17-cv-00361-TDC, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017); *Hawai’i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673, at *17 (D. Haw. Mar. 15, 2017).

⁹³ See *Int’l Refugee Assistance Project*, 2017 WL 1018235, at *13; *Hawai’i*, 2017 WL 1011673, at *14.

⁹⁴ See *Border Enforcement E.O.*, *supra* note 7; *Interior Enforcement E.O.*, *supra* note 7.

⁹⁵ Immigration and Nationality Act § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

⁹⁶ Recently, the Ninth Circuit held that an individual in expedited removal proceedings was not entitled to counsel. *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1134 (9th Cir. 2017). Courts should reconsider this case and similar rulings and, in all events, read them narrowly, lest they open up a procedural black hole for the substantial number of residents subject to expedited removal by the terms of President Trump’s Executive Order, particularly when read in connection with the Third Circuit’s recent decision in *Castro v. DHS*, discussed *infra* at notes 103–07 and accompanying text.

⁹⁷ 8 U.S.C. § 1225(b)(1)(A)(i) (vesting authority in immigration officers “without further hearing or review”).

The statute allows for expedited removal of anyone who cannot establish that they have been present in the United States for at least two years, in the sole discretion of the Secretary of Homeland Security.⁹⁸ But no administration to date has applied the provision so broadly, and former officials, including Julie Myers Wood, who directed ICE under President George W. Bush, have suggested that they avoided doing so out of concern that a broader application of the law would raise constitutional due process problems.⁹⁹ To date, expedited removal has been applied only in cases involving individuals at ports of entry, those who arrived by sea and are encountered by the government within two years,¹⁰⁰ and those who are encountered within 100 miles of an international land border and within fourteen days of entering the country.¹⁰¹ The idea of removing a resident of up to two years with no hearing before an immigration judge raises significant constitutional concerns. Courts will be asked to review the constitutionality of the expedited removal if the Administration applies it so expansively.¹⁰²

To operate as an effective check on administrative excesses, however, courts may need to reassert their power to do so. Recently, when a group of Central American migrants detained in U.S. detention centers in Texas and Pennsylvania argued that this absence of recourse to the courts under section 235 — the expedited removal provision — constituted an unconstitutional violation of the Suspension Clause,¹⁰³ the Third Circuit held that the Suspension Clause does not protect them.¹⁰⁴ The decision was unprecedented, and seems contrary to established law.¹⁰⁵ If left in place, this decision will strip arriving for-

⁹⁸ *Id.* § 1225(b)(1)(A)(iii)(II); 8 C.F.R. § 235.3(b)(1)(ii) (2016).

⁹⁹ Alan Gomez, *Trump's Quick Deportation Plan May Be Illegal, Past Immigration Chiefs Say*, USA TODAY (Feb. 26, 2017, 1:00 PM), <http://www.usatoday.com/story/news/nation/2017/02/24/president-trumps-expedited-removal-plan-may-be-illegal/98276078/> [https://perma.cc/WF33-P4T4].

¹⁰⁰ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

¹⁰¹ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004) (“[T]his notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border.”).

¹⁰² INA section 242 provides a brief window for raising this kind of constitutional challenge. 8 U.S.C. § 1252(e)(3). Some due process questions about expedited removal are currently being litigated in the Ninth Circuit. See Appellant’s Petition for Panel Rehearing and Suggestion for Rehearing En Banc at 5, *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. Apr. 7, 2017) (Nos. 14-50393, 14-50394).

¹⁰³ U.S. CONST. art. I, § 9, cl. 2.

¹⁰⁴ *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 425 (3d Cir. 2016), *cert. denied*, 2017 WL 1366739 (U.S. Apr. 17, 2017).

¹⁰⁵ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 755, 771 (2008) (concluding that the Suspension Clause protects foreign nationals designated enemy combatants and detained in a place over which the United States has de facto, if not de jure, sovereignty).

eign nationals of any court protections as they are detained¹⁰⁶ and their cases are processed by federal administrative agents at the border. Given the substantial expansion of section 235 procedures envisioned by President Trump's recent orders, the threat of the elimination of judicial review in this context is troubling, particularly in light of the lack of counsel — and perhaps of a right to counsel — in these proceedings.¹⁰⁷

In *Shaughnessy v. Mezei*,¹⁰⁸ the Court upheld the indefinite detention of a long-time resident on the basis of secret evidence in administrative exclusion proceedings.¹⁰⁹ But even in that case, the Court noted that the requirements of due process applied to foreign nationals “who have once passed through our gates, even illegally.”¹¹⁰ The modern specter of mass detention and removal of established residents without a judicial backstop may push courts to expand upon the opening created by *Landon v. Plasencia*¹¹¹ to review the process in exclusion proceedings for constitutional adequacy.

C. Expanded Immigration Detention

As with expedited removal, the Immigration and Nationality Act authorizes detention — sometimes discretionary, and sometimes mandatory — for individuals in standard exclusion and deportation proceedings.¹¹² Congress's addition of an expansive mandatory detention provision to the statute in 1996¹¹³ fueled the rapid expansion of the immigration detention system in the United States.¹¹⁴ This system is

¹⁰⁶ The statute mandates detention throughout the process. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”).

¹⁰⁷ See *supra* note 96 (discussing *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017)).

¹⁰⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

¹⁰⁹ *Id.* at 215–16.

¹¹⁰ *Id.* at 212.

¹¹¹ 459 U.S. 21 (1982).

¹¹² Immigration and Nationality Act § 236, 8 U.S.C. § 1226 (2012).

¹¹³ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, sec. 303(a), § 236(c), 110 Stat. 3009-546, 3009-585 (codified as amended at 8 U.S.C. § 1226(c)).

¹¹⁴ Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.—C.L. L. REV. 601, 610–11 (2010) (explaining that the Antiterrorism and Effective Death Penalty Act of 1996 “toughened . . . immigration detention,” *id.* at 610, and that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “expanded the scope of mandatory detention,” *id.* at 611); Miller, *supra* note 27, at 89–91 (discussing the federal government's use of immigration detention after the attacks of September 11, 2001); Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 348–54 (David A. Martin & Peter H. Schuck eds., 2005); see also César Cuauhtémoc García Hernández, *Naturalizing Immigrant Imprisonment*, 103 CALIF. L. REV. 1449, 1453, 1455 (2015) (identifying the bed mandate, *infra* text accompanying notes 115–16, as one of a host of forces that underlie an expansion of racialized immigrant incarceration).

largely privatized. Approximately 65% of detention facilities are run by private corporations, another 25% by state and local governments under contract with the federal government, and only 10% are operated directly by the federal government.¹¹⁵ The federal government therefore has the ability to expand detention capacity relatively quickly by contracting with states and localities for empty bed space in existing facilities and by relying on private companies to increase their own detention capacity.

President Trump's Border Enforcement executive order envisions a significant expansion of immigration detention.¹¹⁶ The apparent goal of detaining almost everyone who is in removal proceedings, if met, could have devastating consequences. Currently, there are simply not enough immigration courts and immigration judges to process these claims in anything like a timely fashion.¹¹⁷ Even as they portend a substantial increase in the number of immigrants in proceedings, President Trump's orders do nothing to increase the staffing or capacity of immigration courts. Instead, the orders suggest that people will be detained up to and throughout their proceedings — and detention is thus offered as the implicit solution to the lack of sufficient court capacity.

As more people are detained for longer periods of time, it is all but certain that more people with potentially valid claims for relief from removal will sign away that relief by entering stipulated orders of removal. Stipulated orders of removal are entered when a foreign national signs away her rights to a hearing and agrees to her own removal. Immigration judges review and sign these, converting them into formal removal orders, but without a hearing. In the past, ICE officials have been encouraged to pressure detained immigrants without counsel to stipulate to their removal.¹¹⁸ Most of these individuals

¹¹⁵ HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [<https://perma.cc/7K6S-SPTV>].

¹¹⁶ See Border Enforcement E.O., *supra* note 7, § 6.

¹¹⁷ As the Obama Administration prioritized recent entrants for detention and removal, long-term residents in removal proceedings are already receiving hearing dates that extend to the end of the first Trump term. Immigration attorneys in Denver and in other places around the country now have clients getting court dates for 2020. Nancy Lofholm, *Immigrants Facing Years-Long Waits in Denver Immigration Court*, DENVER POST (Apr. 25, 2016, 6:48 PM), <http://www.denverpost.com/2015/02/04/immigrants-facing-years-long-waits-in-denver-immigration-court/> [<https://perma.cc/D7TS-85FW>] (noting that during 2015 master calendar hearings, immigration judges were scheduling merits determination hearings for late 2019); *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGRATION (Sept. 21, 2015), <http://trac.syr.edu/immigration/reports/405/> [<https://perma.cc/DB78-LPS6>] (noting the Denver dates and explaining that “thousands of hearings won’t commence until even later; for ten percent, the wait time for the hearings ranged from 1,552 days to 1,766 days into the future”).

¹¹⁸ JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 2 (2011), <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf>

faced deportation due to minor civil immigration infractions. ICE has sometimes provided misleading or incomplete information to immigrants to encourage them to sign stipulated removal orders.¹¹⁹ Many people capitulate to the practice in order to avoid an indefinite period of detention.¹²⁰ Such practices will likely become more common in an Administration that is committed to removing as many noncitizens as quickly as possible and that is willing to leverage immigration detention more aggressively to achieve these ends.¹²¹

In short, President Trump's executive orders promote the use of detention to leverage stipulated orders of removal, and these, along with expedited removal and other forms of administrative removal,¹²² will be the means by which the new Administration will expand its immigration enforcement capacity. This is not an entirely new phenomenon. The American Civil Liberties Union calculated that in Fiscal Year 2013, 83% of removals took place solely on the basis of the order of an immigration agent without any review by an immigration court.¹²³ If President Trump is true to his word, that rather startling figure will likely grow larger, as will the absolute numbers of such removals. Without the old enforcement priorities in place, the risk grows that long-term residents with solid claims for relief will be removed in this way.

By largely removing courts — even administrative courts — from the equation in many removal proceedings, these accelerated removal practices put much greater power in the hands of agents of ICE and CBP. Individuals in removal proceedings are often unrepresented, and the remedies for constitutional violations in policing are even weaker in removal proceedings than in criminal proceedings. Internal disciplinary processes have also failed to keep up with abuses and violations. Unless the Administration is committed to rooting out abuses in these agencies, there is little that constrains abusive agents.

[<https://perma.cc/6GBG-F5UJ>]; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013).

¹¹⁹ KOH ET AL., *supra* note 118, at 10–11.

¹²⁰ *Id.* at 2.

¹²¹ See Jill E. Family, *Due Process Sleight of Hand*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 21, 2017), <http://yalejreg.com/nc/due-process-sleight-of-hand-by-jill-e-family/> [<https://perma.cc/U4YA-LRCZ>].

¹²² See, e.g., 8 U.S.C. § 1228 (2012) (providing for expedited removal of foreign nationals convicted of aggravated felonies).

¹²³ AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), https://www.aclu.org/files/assets/120214-expeditedremoval_o.pdf [<https://perma.cc/52E6-JXZA>].

D. Expanded Devolution

Past experience suggests that in localities where law enforcement is eager to engage in immigration enforcement, the arrest-to-deportation pipeline will not only place law-abiding people in the removal system, but will also expose a broader population of citizens and foreign nationals to racial profiling as agents without training in immigration law seek to contribute to immigration enforcement efforts.¹²⁴ The new Administration is ignoring what past experience has taught in this regard. The January Interior Enforcement executive order announced the Administration's intention to engage in robust expansions of the section 287(g) program.¹²⁵ This coincides unpropitiously with the Department of Justice's announcement that it will "pull back" on civil rights investigations into state and local law enforcement's discriminatory practices.¹²⁶ Racial profiling by law enforcement agents apparently will be viewed as an acceptable cost of doing business now, not as a constitutional scourge to be rooted out.

Some states and localities may try to check heightened federal enforcement efforts, and to provide a bulwark against unconstitutional practices of racial profiling and unreasonable searches and seizures of members of immigrant communities. Many jurisdictions, concerned about their exposure to liability for Fourth Amendment violations, have already adopted policies that prohibit their officials from detaining individuals without probable cause upon mere request by federal immigration officials.¹²⁷ Some jurisdictions concerned about the dangers of racial profiling and the costs of alienating their immigrant resi-

¹²⁴ TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 8 (2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [<https://perma.cc/SX9H-LBP7>]; AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 6 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [<https://perma.cc/Q33E-E3UQ>]; DEBORAH M. WEISSMAN ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS 25-32 (2009), <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> [<https://perma.cc/Q4N5-XMG3>].

¹²⁵ See Interior Enforcement E.O., *supra* note 7, § 8.

¹²⁶ Pete Williams, *AG Sessions Says DOJ to 'Pull Back' on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2017, 1:52 PM), <http://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-726826> [<https://perma.cc/6P8L-AQ8A>].

¹²⁷ See, e.g., *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *4-11 (D. Or. Apr. 11, 2014) (finding that holds executed pursuant to an ICE request lacked basis in law and constituted a Fourth Amendment unreasonable seizure); see also CHRISTOPHER LASCH, IMMIGRATION POLICY CTR., THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS 2, 4-7 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch_on_detainers.pdf [<https://perma.cc/K854-AWE3>]; Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 32-37 (2017); CALIFORNIA TRUST ACT, <http://www.catrustact.org/> [<https://perma.cc/676B-J5LS>].

dents have ordered their employees not to perform voluntary investigations into immigration status during otherwise routine stops or other encounters.¹²⁸ The State of California is considering legislation that would codify such limitations at the state level and generally limit voluntary investigation and enforcement of immigration law by state and local agencies.¹²⁹ Immigrant-rich cities like San Francisco, New York, and Chicago, concerned with protecting their relationships with their own residents, have led the march away from voluntary immigration enforcement cooperation, but a number of smaller jurisdictions and state entities have followed suit.

The precatory language in the Interior Enforcement order suggests that such efforts will be met with retaliatory cuts to federal funding.¹³⁰ Statements made by the President and the Attorney General have reiterated these broad threats.¹³¹ The Attorney General has even suggested that federal funding could be clawed back retroactively.¹³² Some local governments are already challenging the constitutionality of the threatened funding cuts.¹³³ A federal judge recently enjoined such expansive application of the funding provisions of the executive order on the grounds that such cuts would violate the Tenth Amendment.¹³⁴ Current Tenth Amendment doctrine prohibits the federal government from compelling sub-federal officials to perform federal functions, and bars coercive spending cuts designed to spur such cooperation.¹³⁵

¹²⁸ *E.g.*, L.A., Cal., Office of the Chief of Police Special Order No. 40 (Nov. 27, 1979), http://assets.lapdonline.org/assets/pdf/SO_40.pdf [<https://perma.cc/DW9D-43ZY>]; S.F., CAL., ADMIN. CODE ch. 12H (2016); *cf.* UNIV. OF CAL., UNIVERSITY OF CALIFORNIA STATEMENT OF PRINCIPLES IN SUPPORT OF UNDOCUMENTED MEMBERS OF THE UC COMMUNITY (2016), <http://undoc.universityofcalifornia.edu/files/uc-principles-in-support-of-undocumented-members-of-the-uc-community.pdf> [<https://perma.cc/CM4Q-SKCE>].

¹²⁹ S.B. 54, 2017–2018 Reg. Sess. (Cal. 2016).

¹³⁰ *See* Interior Enforcement E.O., *supra* note 7, § 9 (proposing funding cuts to jurisdictions deemed to be in violation of federal laws authorizing state and local information sharing with immigration enforcement officials); *see also* Octavio Blanco, *Sanctuary Cities Risk Billions in Defiance of Trump*, CNN MONEY (Nov. 19, 2016, 9:28 AM), <http://money.cnn.com/2016/11/19/news/economy/sanctuary-cities-trump-funding> [<https://perma.cc/6VJV-YALQ>].

¹³¹ *County of Santa Clara v. Trump*, No. 17-cv-00574-WHO, 2017 WL 1459081, at *2 (N.D. Cal. Apr. 25, 2017).

¹³² *Id.*

¹³³ *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *City and County of San Francisco v. Trump*, No. 4:17-cv-00485 (N.D. Cal. Jan. 31, 2017), ECF No. 1; Office of the Cty. Counsel, *Federal Defunding Lawsuit*, COUNTY OF SANTA CLARA (Apr. 14, 2017, 5:03 PM), <https://www.sccgov.org/sites/cco/overview/Pages/fedlawsuit.aspx> [<https://perma.cc/T25W-PWJP>]; Tatiana Sanchez, *Judge Appears Baffled by Trump Administration's Case Against Sanctuary Jurisdictions*, MERCURY NEWS (Apr. 15, 2017, 3:30 AM), <http://www.mercurynews.com/2017/04/13/county-lawsuit-against-trumps-order-defunding-sanctuary-cities-goes-before-a-san-francisco-judge-today/> [<https://perma.cc/UHZ3-MFNC>].

¹³⁴ *Santa Clara*, 2017 WL 1459081, at *2, *16.

¹³⁵ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–08 (2012) (holding that threats of federal cuts in funding intended to incentivize state enforcement of federal law may be uncon-

Litigation aside, most of the policies enacted by so-called “sanctuary cities” do not seem to violate 8 U.S.C. § 1373, and the operative language of the Interior Enforcement order states that violations are the legal trigger for funding cuts.¹³⁶ Nevertheless, some jurisdictions are already scaling back their immigrant-protective measures in the face of the Administration’s threats, while others are being much more cautious about enacting such measures.¹³⁷ Administration officials also rely on the very existence of protective policies to explain and justify problematic enforcement choices, such as the arrests of immigrants in state courthouses around the country.¹³⁸ Once again, the rhetorical effects of the orders are at least as important as their legal effects.

CONCLUSION

When President Theodore Roosevelt coined the phrase “the bully pulpit” to describe the presidency, he had in mind a more positive construction of the term “bully.”¹³⁹ But when it comes to immigrants, President Trump has used his pulpit in ways that exemplify the negative, contemporary connotations of the term. By stoking a climate of fear, the new Administration has made it difficult for immigrants to vindicate their legal rights and to seek the law’s protection. The climate of fear renders immigrants more susceptible to workplace exploitation and to criminal victimization.¹⁴⁰ While President Trump

stitutional if they are so large as to constitute a coercive funding condition); *Printz v. United States*, 521 U.S. 898, 933, 936 (1997) (holding that federal commandeering of state officials for the enforcement of federal law violates the Tenth Amendment).

¹³⁶ See Interior Enforcement E.O., *supra* note 7. This has not stopped the Administration from making broad rhetorical attacks on all jurisdictions that publically resist enforcement collaboration. As in other matters, the fear-inducing rhetoric is the main point of the Administration’s efforts. Some scholars have suggested that 8 U.S.C. § 1373 itself may be unconstitutional. See, e.g., Bernard W. Bell, *De-Funding Sanctuary Cities*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 28, 2017), <http://yalejreg.com/nc/de-funding-sanctuary-cities-by-bernard-w-bell/> [<https://perma.cc/XC85-KW6X>].

¹³⁷ See, e.g., Alan Gomez, *Miami-Dade Commission Votes to End County’s ‘Sanctuary’ Status*, USA TODAY (Feb. 17, 2017, 8:27 PM), <http://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976/> [<https://perma.cc/R5TC-7SVP>].

¹³⁸ Jennifer Chacón, *California v. DOJ on Immigration Enforcement*, TAKE CARE (Apr. 11, 2017), <https://takecareblog.com/blog/california-v-doj-on-immigration-enforcement> [<https://perma.cc/PS4T-V9JF>].

¹³⁹ Michael Patrick Cullinane, *A (Near) Great President: Theodore Roosevelt as the First Modern President*, in PERSPECTIVES ON PRESIDENTIAL LEADERSHIP 73 (Michael Patrick Cullinane & Clare Frances Elliott eds., 2014).

¹⁴⁰ For detailed discussion of the intertwined discursive and legal creation of this type of “illegality” and “deportability” that makes immigrants more vulnerable to exploitation, see, for example, Nicholas P. De Genova, *Migrant ‘Illegality’ and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419 (2002). See also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 10–66 (2005) (discussing and providing examples of challenges faced by immigrant workers in the workplace); Chacón, *supra* note 42, at 728; Josiah McC.

touts his “Office for Victims of Crimes Committed by Removable Aliens,”¹⁴¹ his orders and enforcement policies generate a perfect storm of conditions for immigrant victimization. At the same time, the mean-spirited rhetoric has encouraged enforcement practices that stretch beyond the outer limits of the legal envelope.

This is certainly not the first time that immigrants have been forced to bear more than their share of the blame for the nation’s ills. Unfortunately, the new Administration’s imperviousness to the lessons of history doom the nation to repeat many of the same old inhumane and ineffective immigration policy choices of its past.

Heyman, *State Effects on Labor Exploitation: The INS and Undocumented Immigrants at the Mexico–United States Border*, 18 *CRITIQUE ANTHROPOLOGY* 157, 157 (1998); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *STAN. L. REV.* 1103, 1107 (2009); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 *U. CHI. LEGAL F.* 193, 195.

¹⁴¹ See Interior Enforcement E.O., *supra* note 7, § 13; see also President Donald Trump, Joint Address to Congress (Feb. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress> [<https://perma.cc/N2X7-TCW4>] (referring to the creation of a DHS office called “V.O.I.C.E. — Victims of Immigration Crime Engagement”). The creation of a registry of crimes committed by immigrants is eerily reminiscent of the Nazi-era registry of crimes committed by Jews. *Nazis Once Published List of Jewish Crimes, Trump Now Pushing to Do the Same for Immigrant Crimes*, DEMOCRACY NOW (Feb. 2, 2017), https://www.democracynow.org/2017/2/2/nazis_once_published_list_of_jewish [<https://perma.cc/HC73-MPKM>].