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 stuck 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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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.
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, his March 6, 2017 executive order replacing the January ban, and the interior immigration enforcement efforts mapped out in two January 25, 2017 orders along with their implementing Department of Homeland Security memoranda of February 20, 2017. 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 Act 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. 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

10 Elise Foley, Donald Trump Wants to Deport Children, HUFFINGTON POST (Aug. 17, 2016), http://www.huffingtonpost.com/entry/donald-trump-deportations_us_57b390b8e4b0edfa80da135f [https://perma.cc/45Q4-7ANV].
“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.


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

17 Id.
21 Id. at 93.
22 Id. passim; see also id. at 12 (“The nation has built a formidable immigration enforcement machinery.”).
status 25 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).


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

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. Concerns about discrimination also prompted the Administration to oppose state enactments of purportedly complementary enforcement schemes. 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.

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. 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. The Secure Communities program generated heavy criticism from activists. 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.

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-

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.
individuals 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.


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).


46 See Johnson Prosecutorial Discretion Memo, supra note 34.


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.
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.
during a debate in the fall of 2016. This deliberately racialized statement\(^{62}\) 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-

\(^{62}\) On the racial disproportionality of removals, see GOLASH-BOZA, supra note 47.


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. 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. 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. 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. Still, lest there be any confusion, the Kelly enforcement memo also expressly rescinded PEP and restored Secure Communities. 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. 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.

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.

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
To enact the ban on the nationals of the seven listed countries, Trump invoked his power under section 212(f) of the INA. 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. The application of the ban to these countries arguably undercut the equal treatment that the INA extends to foreign nationals of all nations and exceeded the President’s authority. Second, the purported security rationale for the ban was not adequately substantiated; indeed, it was questioned by the Department of Homeland Security itself. 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. The problems with the order prompted several courts to prevent the ban from going into place, at least temporarily.84

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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). 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. 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. 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. 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. On March 6, 2017, the Administration released an updated travel order — 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”).
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.”

Before the revised ban could go into effect, two federal district courts issued temporary restraining orders. 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.

B. Administrative Removals

Trump’s travel ban has received the greatest attention, but his less-examined January 25 orders 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.” That is, unless the individual — generally unrepresented during this interaction with the agent — 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.

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


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.

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. 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. 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, and those who are encountered within 100 miles of an international land border and within fourteen days of entering the country. 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.

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, the Third Circuit held that the Suspension Clause does not protect them. The decision was unprecedented, and seems contrary to established law. If left in place, this decision will strip arriving for-

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102 INA section 242 provides a brief window for raising this kind of constitutional challenge. 8 U.S.C. § 1252(a)(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.
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).
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.").

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


108 Id. at 215–16.

109 Id. at 212.

110 Id. at 212.


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. 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. 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. 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. Most of these individuals


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/DyTS-89FW] (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/q05/ [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”).

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.


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

120 Id. at 2.


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-


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


Dentists have ordered their employees not to perform voluntary investigations into immigration status during otherwise routine stops or other encounters. 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. 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. Statements made by the President and the Attorney General have reiterated these broad threats. The Attorney General has even suggested that federal funding could be clawed back retroactively. Some local governments are already challenging the constitutionality of the threatened funding cuts. 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. 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.

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132 Id.


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. 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. 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. 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.” 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. While President Trump...
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.
