

BINDING THE ENFORCERS: THE ADMINISTRATIVE LAW STRUGGLE BEHIND PRESIDENT OBAMA'S IMMIGRATION ACTIONS

Michael Kagan *

INTRODUCTION

President Obama has made executive action and prosecutorial discretion his signature contributions to immigration policy. His aim has been to focus enforcement against immigrants caught at the border or with criminal records while easing the path toward integration for others.¹ These actions—a collection of policies that use discretion to improve the legal standing of millions of unauthorized immigrants or at least shield them from arrest and deportation—may benefit as many as 87% of the unauthorized immigrants in the United States.² The most important of these

* Associate Professor at the University of Nevada, Las Vegas, William S. Boyd School of Law. B.A., Northwestern University; J.D., University of Michigan Law School. This article benefited from insights and feedback from Jill E. Family, Hiroshi Motomura, and David Rubenstein. All errors are mine.

1. See generally Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083 (2015) (describing President Obama's immigration policy reforms); Jerry Markon, *Obama Administration Scales Back Deportations in Policy Shift*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a_story.html (discussing President Obama's immigration policy shift toward integration).

2. Julia Preston, *Most Undocumented Immigrants Will Stay Under Obama's New Policies, Report Says*, N.Y. TIMES (July 23, 2015), <http://www.nytimes.com/2015/07/23/us/politics/most-undocumented-immigrants-will-stay-under-obamas-new-policies-report-says.html>. The Obama Administration has made it clear that those people granted deferred action will also receive employment authorization, which, in addition to allowing a person to be legally employed, facilitates obtaining Social Security numbers and other benefits. See *Frequently Asked Questions: DACA and Your Workplace Rights*, NAT'L IMMIGRATION L. CTR. (July 15, 2015), <https://nilc.org/dacaworkplacerrights.html>. Beyond deferred action, President Obama's Department of Homeland Security ("DHS") has announced the criteria it uses to decide whether to prioritize non-citizens for deportation (or non-deportation), which has the potential to allow many unlawfully present immigrants to know in advance whether they are likely to be pursued by Immigration and Customs Enforcement ("ICE"), even if they are not formally granted deferred action. See Markon, *supra* note 1.

programs are known popularly by their acronyms—DACA (Deferred Action for Childhood Arrivals) and DAPA (Deferred Action for Parental Accountability). These policies have been explained by the President as part of a struggle between himself and congressional Republicans.³ President Obama has been frustrated in his push for comprehensive immigration reform through legislation and thus has used unilateral executive action as an alternative to achieve his policy goals.

This article makes the case that President Obama's immigration actions should also be understood as the result of a struggle within the Executive Branch.⁴ As such, the ultimate resolution of the DACA/DAPA controversy may determine how much power Presidents in the future will have to control the frontline operation of the Executive Branch that they nominally head, especially in situations where the employees of key agencies personally oppose the President's policy orientation. The current internal Ex-

3. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) [hereinafter Remarks by the President], <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> ("I worked with Congress on a comprehensive fix, and last year, 68 Democrats, Republicans, and independents came together to pass a bipartisan bill in the Senate. . . . But for a year and a half now, Republican leaders in the House have refused to allow that simple vote I continue to believe that the best way to solve this problem is by working together to pass that kind of common sense law. But until that happens, there are actions I have the legal authority to take as President . . . that will help make our immigration system more fair and more just.").

4. In recent articles, Professors Hiroshi Motomura, Adam B. Cox, and Cristina M. Rodríguez have also observed that tension within the executive branch was a critical context for the evolution of President Obama's immigration enforcement policies. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187–94 (2015) [hereinafter Cox & Rodríguez, *President and Immigration Law Redux*]; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. (forthcoming) (manuscript at 1–2) (on file with author). This has also been noted in passing or in brief discussions by other commentators. See, e.g., Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), <http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html>; Anil Kalhan, *Is Judge Hanen's Smack-down of Executive Action on Immigration "Narrowly Crafted"?* DORF ON L. (Feb. 21, 2015), <http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html> ("[E]nforcement patterns in the field often diverged significantly from the enforcement priorities and guidelines for the exercise of discretion set from above, in part due to Congress's dramatic expansion in the categories of individuals who are potentially deportable, in part due to the massive growth in the scale of enforcement that has occurred as a result, and in part due to resistance to those priorities by officials in the field, in the form of what immigrants' rights lawyer Ahilan Arulanantham goes so far as to characterize as an 'insurrection.'").

ecutive Branch struggle over immigration policy has placed, on one side, the President and his appointed agency heads, who have sought to use prosecutorial discretion to shield many unauthorized immigrants from deportation and to target immigration enforcement efforts against “[f]elons, not families.”⁵ On the other side of this struggle are frontline immigration enforcement officers and their union representatives who do not agree with the President’s agenda.⁶ This struggle is the essential context necessary to comprehend what is really at stake in some of the technical administrative law arguments that have become decisive in the litigation regarding President Obama’s policies. However, this is a difficult story for the Administration itself to tell because it depicts a President having difficulty controlling agencies that ostensibly answer to him, which the public may interpret as a sign of weakness.⁷

President Obama’s use of executive action to change immigration policy has been extremely controversial and has been subject to multiple court challenges. In February 2015, just days before applications were to begin for DAPA and an expanded version of DACA that the President announced in November 2014, a coalition of twenty-six states led by Texas succeeded in obtaining a preliminary injunction against implementation of the programs.⁸ This litigation continues at the time of writing.⁹

Already an interesting evolution has developed in the arguments about the policies’ legality. Initially, objections by Republican politicians¹⁰ and conservative legal scholars¹¹ focused on a

5. Remarks by the President, *supra* note 3.

6. *See generally* Motomura, *supra* note 4 (manuscript at 1) (arguing that President Obama’s immigration actions are justified by a practical and historical context in which “he is in command of a highly discretionary enforcement system, and his subordinates in the field resist the enforcement priorities that he has adopted to guide the exercise of prosecutorial discretion”).

7. *Cf.* Arulanantham, *supra* note 4 (“For obvious reasons, the Administration has not discussed the failure of the Morton memos in any of its recent public statements—they tell a story of an agency at war with its political leadership.”).

8. *See* Texas v. United States, 86 F. Supp. 3d 591, 604, 677–78 (S.D. Tex. 2015).

9. *See* Texas v. United States, 787 F.3d 734 (5th Cir. 2015) (denying an emergency appeal of the district court’s preliminary injunction); Texas v. United States, 2015 WL 6873190 (5th Cir. 2015) (affirming the preliminary injunction); Michael D. Shear & Julie Preston, *In Courts, Running out the Clock on Obama Immigration Plan*, N.Y. TIMES (Oct. 13, 2015), <http://www.nytimes.com/2015/10/14/us/in-courts-running-out-the-clock-on-obam-a-immigration-plan.html>.

10. *See, e.g.*, Eric Bradner & Jedd Rosche, *Republicans Hammer Legal Case Against*

separation of powers argument. The basic claims were that the President was unilaterally usurping Congress's authority to make laws and defying the Constitution's requirement that the President "shall take [c]are that the [l]aws be faithfully executed."¹² Justice Scalia, in a loud dissent in *Arizona v. United States*, claimed that the Administration was "exempting from immigration enforcement" millions of unlawful immigrants and that President Obama "declines to enforce" immigration statutes.¹³ This line of argument has slipped into the background, at least in court, because the Supreme Court (Justice Scalia notwithstanding) has repeatedly affirmed the legitimacy of prosecutorial discretion in immigration enforcement.¹⁴

Instead of focusing on the constitutional arguments rooted in the Take Care Clause, the district court in the Texas litigation justified its preliminary injunction on a more technical argument under the Administrative Procedure Act ("APA"), namely that the DAPA and DACA¹⁵ programs are invalid because they are a form of rulemaking that did not go through a notice-and-comment process.¹⁶ This later became known as the APA procedural ground.¹⁷ On its face, this is a considerably more modest claim. It effectively assumes that the Department of Homeland Security ("DHS") can initiate the deferred action programs by which the government decides to temporarily decline to pursue deportation of certain non-citizens who are unlawfully present according to the Immigration and Nationality Act, but that it just did not follow

Obama on Immigration, CNN (Nov. 21, 2014, 5:59 PM), <http://www.cnn.com/2014/11/20/politics/republican-response-obama-immigration-speech/>; Erin Kelly, *Congress Responds to Obama with Bitter Partisan Split*, USA TODAY (Nov. 20, 2014, 5:59 PM), <http://www.usatoday.com/story/news/politics/2014/11/20/immigration-executive-action-congressional-reaction-boehner/70031622/>.

11. See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

12. U.S. CONST. art. II, § 3.

13. 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting).

14. See discussion *infra* at Part I.A.

15. The *Texas* case only challenges DAPA and the expanded version of DACA announced in November 2014, not the original version of DACA announced in 2012. *Texas v. United States*, Civ. No. B-14-254, 2015 U.S. Dist. LEXIS 45483, at *1 (S.D. Tex. Apr. 7, 2015). I explain the differences in these programs in Part I.B. While the states chose not to challenge the original DACA program, their administrative law objections appear to apply to that program as well.

16. See discussion *infra* Part III.C.

17. See *Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *2 (5th Cir. 2015).

the steps required by administrative law.¹⁸ This argument implicitly concedes that executive discretion is part of immigration law and does not focus on separation of powers between the President and Congress. But the notice-and-comment objection raises a different question, namely who within the Executive Branch should exercise this discretion as a default matter. Should the President and his cabinet decide against whom to enforce immigration law, or should frontline officers?

In November 2015, the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction, noting that there were three alternative substantive challenges to DAPA and DACA: the APA procedural argument, a claim that the programs violated the APA substantively, and the argument that the President had violated the Constitution's Take Care Clause.¹⁹ The court of appeals affirmed on the APA procedural ground,²⁰ as well as on the APA substantive ground.²¹ This article will not address the APA substantive argument.²²

The claim that DACA and DAPA required a notice-and-comment process draws support from a muddled body of case law emanating from the D.C. Circuit, which the Fifth Circuit has largely adopted.²³ In these cases, most explicitly in *Appalachian Power Co. v. EPA*,²⁴ the D.C. Circuit indicated that a notice-and-comment process may be required whenever an agency headquarters issues a policy that directs field agents how to exercise discretion.²⁵ However, this interpretation appears to have been dicta in D.C. Circuit case law and is by no means the only way to interpret the APA. Moreover, the D.C. Circuit has been inconsistent about whether it really meant to set down as strict a rule as it

18. The decision by the District Court in *Texas* has been faulted for myriad distortions of immigration law and other factual matters that were important to the legal analysis. See Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 64 (2015) [hereinafter Kalhan, *Deferred Action*].

19. *Texas*, 2015 WL 6873190, at *2.

20. *Id.* at *18–22.

21. *Id.* at *22–25.

22. *Cf. id.* at 47 (King, J., dissenting) (disputing whether it was proper for the court of appeals to consider the APA substantive claim since it was not a basis for the district court's injunction and thus was not fully addressed in the appellate arguments).

23. See discussion *infra* Part III.B.

24. 249 F.3d 1032 (D.C. Cir. 2001).

25. See discussion *infra* Part III.B.

seemed to articulate in *Appalachian Power*. The Texas litigation against President Obama's immigration policies are thus pursuing an expansion of a questionable legal doctrine that strengthens the power of public employees and weakens the authority of the President over the Executive Branch he ostensibly heads. Thus, there is a critical question about whether the APA should be interpreted in this manner.

The administrative law challenge to DACA and DAPA contests innovations that President Obama has made in how Presidents use their discretionary power to enforce immigration law.²⁶ Previous administrations used deferred action.²⁷ While President Obama did not invent prosecutorial discretion in immigration enforcement, he has made such policies uniquely prominent and transparent, announcing them with considerable political fanfare and making them central to his legacy in domestic policy. While previous administrations kept their deferred action policies closely guarded, the Obama Administration announced clear-cut criteria under which millions of unauthorized immigrants may apply for deferred action. The Administration established an application procedure that appears much like the application system the U.S. Citizenship and Immigration Services ("USCIS") uses for statutory visa categories. It is precisely because the Obama policies are so clear and transparent that questions have been raised about whether they should have been subject to a notice-and-comment process.

The shifts that have occurred in the DACA and DAPA litigation are a reminder that immigration law is a creature of administrative law.²⁸ Accordingly, broader theories of administrative law should be invoked to consider how immigration enforcement policy should be made in the Executive Branch. In particular, there are compelling reasons why presidential control over agencies—a prominent but contentious idea in administrative law scholarship—is especially important in the immigration arena.

26. See *Texas v. United States*, 86 F. Supp. 3d 591, 613–14 (S.D. Tex. 2015).

27. See generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) [hereinafter Wadhia, *Role of Discretion*] (describing the evolutionary history and use of deferred action).

28. See generally Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012) (discussing immigration law as a type of administrative law).

This article argues that President Obama's immigration policies represent a strategy by which the elected Chief Executive and the head of an agency seek to thwart resistance from their policies by subordinate public employees. Criteria for the use of discretion have been dictated with such clarity that the frontline officers have no real discretion remaining and thus less ability to make decisions contrary to the President's preferences. Discretionary authority has thus effectively been moved from low-level public employees to the Secretary of Homeland Security and the President. In this light, President Obama's policies are a pro-management measure that legitimizes longstanding critiques of the power of public employees over public policy, a line of argument normally associated with conservative politicians and scholars. These efforts to strengthen the President's control over frontline enforcement have been stymied by litigation filed by Texas and twenty-five other states—ironically, primarily politically conservative governors and state attorney generals—arguing that the President is illegally taking discretion away from anonymous public employees who never have to stand for election and who are essentially not accountable to voters.

The Obama immigration actions depend on the premise that the President should be able to control executive agencies. To make this case, liberal backers of immigration reform can borrow heavily from conservative critiques of public sector employees. At the same time, it is important for conservative jurists to question whether weakening the power of the elected executive vis-à-vis public employees serves the purposes of administrative law. The managerial strategies that the Obama Administration developed in immigration may be used by future Presidents for a variety of policy goals, both liberal and conservative. Thus this may be a useful opportunity to develop a common understanding about how Presidents can use executive discretion and how they may direct frontline field agents to pursue their policy goals.

To address these urgent questions, this article proceeds as follows. Part I summarizes how executive discretion has evolved in immigration law and how the Obama Administration changed its approach to discretion from 2009 through 2014. Then, Part II illustrates the resistance that President Obama faced from frontline enforcement agents within the DHS and how this resistance supported the litigation by Texas and other states against DACA

and DAPA. Part III examines the ambiguities within administrative law that made this litigation possible and effectively strengthened the power of subordinate employees of the DHS vis-à-vis the head of the Department and the President. In Part IV, this article draws two analogies to illustrate the problems for constitutional democracy that result from giving public employees the ability to undermine the policy preferences of elected leaders. One of these analogies concerns public sector unions, which, conservative scholars note have the potential to thwart voters' ability to influence policy through the democratic process. The second analogy comes from First Amendment law, where courts have seen the need to distinguish public employees' freedom to dissent as private citizens from their obligations to fulfill their official duties at work.

I. IMMIGRATION DISCRETION IN THE OBAMA ADMINISTRATION

A. *Discretion in Immigration Law Generally*

While President Obama's initial priority was to enact legislative immigration reform, his election triggered interest in what the President might be able to do to change immigration policy without congressional action. Writing around the time of the 2008 election, Professors Adam Cox and Cristina Rodríguez argued that the President had broad discretion to shape how immigration law is enforced.²⁹ For them, the dysfunctional nature of immigration law gave the President a far more important role in decision making.³⁰ While Congress has tightly regulated who could legally enter the country, it has also designated far more people theoretically deportable than could actually be deported.³¹ As a

29. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 462–64 (2009) [hereinafter Cox & Rodríguez, *President and Immigration Law*]. But see Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 84 (2012) (acknowledging that his perspective contrasted with Cox and Rodríguez's view because in his view, the President's actual power was constrained by internal resistance within the government).

30. Cox & Rodríguez, *President and Immigration Law*, *supra* note 29, at 461, 463.

31. *Id.* at 463–64; Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, Reg'l and Dist. Counsel 4 (Nov. 17, 2000) [hereinafter Memorandum from Doris Meissner], <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf> (noting the government does not have the resources to investigate and prosecute all immigration violations).

result, Cox and Rodríguez argued that the President has the “power to decide which and how many noncitizens should live in the United States . . . through the exercise of prosecutorial discretion with respect to whom to deport”³² They argued that “the inauguration of a new President can bring with it remarkable changes in immigration policy.”³³

Prosecutorial discretion is a widely accepted doctrine that holds that police, prosecutors, and regulators are under no obligation to strictly and aggressively enforce the letter of the law in every case.³⁴ In administrative law, the leading case on prosecutorial discretion is *Heckler v. Chaney*, where the Supreme Court found that a decision by an agency not to enforce a particular law is “presumptively unreviewable.”³⁵ According to a footnote in *Heckler*, prosecutorial discretion has some undefined limit if non-enforcement were to become “so extreme as to amount to an abdication of [an agency’s] statutory responsibilities.”³⁶ However, the Supreme Court has yet to clarify when the *Heckler* footnote might apply.

In the immigration context, the Supreme Court has repeatedly endorsed the general authority of the Executive Branch to decide not to enforce the law in every case. In *Reno v. American-Arab Anti-Discrimination Comm.*, the Court found that the Executive may decide whether to initiate or continue deportation proceedings “for humanitarian reasons or simply for its own convenience.”³⁷ In 2012, in *Arizona v. United States*, the Court reiterated that “broad discretion” is a “principal feature” of the immigration system.³⁸ This discretion was a central part of the Court’s reasoning that Arizona Senate Bill 1070 interfered with federal immigration law, even though the letter of the Arizona statute mir-

32. Cox & Rodríguez, *President and Immigration Law*, *supra* note 29, at 464.

33. *Id.*

34. See Maria Fufidio, “You May Say I’m a Dreamer, but I’m Not the Only One”: Categorical Prosecutorial Discretion and Its Consequences for US Immigration Law, 36 *FORDHAM INT’L L.J.* 976, 979 (2013). See also Wadhia, *Role of Discretion*, *supra* note 27, at 244 (characterizing prosecutorial discretion as a “welcome and necessary component of immigration law”); Memorandum from Doris Meissner, *supra* note 31, at 3 (describing support for the prosecutorial discretion doctrine from the courts and legislature).

35. 470 U.S. 821, 832 (1985).

36. *Id.* at 833 n.4.

37. 525 U.S. 471, 484 (1999).

38. 132 S. Ct. 2492, 2499 (2012).

rored the federal immigration statute.³⁹ Despite the statutory similarity, the Court found that independent state enforcement efforts would obstruct the federal authority to decide how to enforce the law.⁴⁰

Discretion not to enforce the law in every case is a classic form of prosecutorial discretion, which is exercised routinely by law enforcement officers, police agencies, and prosecutors at all levels of government.⁴¹ Non-enforcement is the absence of an action; it involves the government simply deciding not to enforce the law against a certain person.⁴² In a strict sense, simple non-enforcement does not even require the knowledge of the beneficiary.⁴³ As background, previous research by Professor Shoba Sivaprasad Wadhia documented that prosecutorial discretion in the field of immigration dates back at least to the Nixon administration.⁴⁴ But previous administrations went to considerable lengths to shield such policies from public view.⁴⁵ Public knowledge of such policies in immigration enforcement stemmed initially from Freedom of Information Act litigation relating to the federal government's attempts to deport John Lennon in the 1970s.⁴⁶

A common rationale for prosecutorial discretion is that enforcement resources are limited, and so the Executive must set priorities regarding how to enforce the law.⁴⁷ But the Court has been clear that other concerns may also justify discretion, even if enforcement resources are available. Expanding on the reference to "humanitarian reasons" in *American-Arab*, the *Arizona* Court said this:

39. *Id.* at 2502. ("Arizona contends that § 3 [of S.B. 1070] can survive preemption because the provision has the same aim as federal law and adopts its substantive standards.")

40. *Id.* at 2502–03.

41. See Fufidio, *supra* note 34, at 979.

42. See Wadhia, *Role of Discretion*, *supra* note 27, at 246.

43. See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 *TEMPLE POL. & CIV. RTS. L. REV.* 369, 369 (2010).

44. See Wadhia, *Role of Discretion*, *supra* note 27, at 246–48.

45. See, e.g., Memorandum from Dr. Emilio T. Gonzalez, Dir., USCIS, to Prakash Khatri, USCIS Ombudsman (Aug. 7, 2007), https://www.dhs.gov/xlibrary/assets/CISombudsman_RR_32_O_Deferred_Action_04-06-07.pdf (suggesting that information about deferred action not be posted on the USCIS website).

46. See Wadhia, *Role of Discretion*, *supra* note 27, at 246–52.

47. See Kagan, *supra* note 1, at 1084–85.

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.⁴⁸

In *Arizona*, the Court discussed discretion in order to explain why the federal government could preempt states in setting immigration enforcement strategy, not only in establishing the criteria for legal immigration.⁴⁹ Because this discretion is exercised by the Executive, immigration represents a situation where, in addition to Congress's ability to preempt states through legislation, the President can preempt states through prosecutorial discretion.⁵⁰

At some level, assessment of humanitarian factors requires a value judgment. Deportation is always a harsh measure, so it is an open question when "immediate human concerns" are weighty enough to mitigate against it. Although it is clearly established that this discretion belongs to the federal government (and not to the states), the critical question is who within the federal government should be empowered to make this decision. This article shall return to this below in Parts III and the conclusion. For now, it is enough to note that prosecutorial discretion can be exercised in many different ways and that there may not be an objectively correct way to do so. In a democracy, it is normally considered desirable for such policy choices to be made through a political process that is ultimately accountable to voters.

B. *Immigration Discretion in the Obama Administration*

President Obama came into office promising to promote comprehensive legislative reform of America's immigration laws.⁵¹ But these efforts stalled in his first term. In 2010, the DREAM Act, which would have provided a legal status for unauthorized

48. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

49. *Id.* at 2501, 2506.

50. See Catherine Y. Kim, *Immigration Separation of Power and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 732 (2014).

51. See Josh Hicks, *Obama's Failed Promise of a First-Year Immigration Overhaul*, WASH. POST (Sept. 25, 2012), http://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html.

immigrants who came to the United States as children, passed the House of Representatives, but only fifty-five senators voted to end a filibuster, five short of the sixty required to end debate, effectively killing the bill.⁵² The high water mark for legislative immigration reform during the Obama Administration came in 2013 when the Senate passed S.744 by a 68-32 vote.⁵³ But the bill was never brought up for a vote in the House, and the issue remains a high profile political stalemate as the 2016 election campaign begins to take shape.⁵⁴ Assuming that Congress does not take action during the presidential campaign, two full decades will have passed since the enactment of the last major immigration reform law, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which was signed by President Bill Clinton during his re-election campaign in 1996.⁵⁵

President Obama’s first major executive innovation in the field of immigration discretion was transparency. In 2007, the Bush Administration rebuffed a recommendation by the USCIS Ombudsman to make deferred action policies public.⁵⁶ But in 2011 the Obama Administration made public two memoranda about prosecutorial discretion from John Morton, the then-Director of Immigration and Customs Enforcement (“ICE”).⁵⁷ The Morton

52. See Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. J. (Dec. 19, 2010, 9:36 AM), <http://www.wsj.com/articles/SB10001424052748704368004576027570843930428>.

53. S. 744, 113th Cong., 159 CONG. REC. 5330 (2013).

54. See Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/>.

55. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.). Although IIRIRA is often described as the last broad legislative change to immigration law, more recent changes to immigration law have focused on more narrow problems. For example, in 2000, Congress established new visa categories for crime victims and trafficking victims, known as the U Visa and T Visa, respectively. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518, § 1502(a) (included in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464) (codified as amended at 8 U.S.C. § 1101).

56. Wadhia, *Role of Discretion*, *supra* note 27, at 262–63.

57. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf’t, to Agency Pers., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enf’t, to Agency Pers., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain->

Memos, as they became known, may have been notable more for their publication than for their actual content. The Morton Memos noted that the Administration built on previous internal policies dating mainly from the late Clinton Administration and the George W. Bush Administration, as well as one policy from 1976.⁵⁸ They further stated that prosecutorial discretion should be “regularly exercise[d]” by ICE officers and attorneys and could be exercised “at any stage of an enforcement proceeding.”⁵⁹

In terms of when and how discretion should be exercised, the Morton Memos left much unclear.⁶⁰ They provided a list of nineteen bullet-point factors to consider.⁶¹ The first factor was opaque: “the agency’s civil immigration enforcement priorities.”⁶² Others were more specific. For example, one factor was “whether the person has a U.S. citizen or permanent resident spouse, child, or parent.”⁶³ Another was, “the person’s criminal history, including arrests, prior convictions, or outstanding arrest warrants.”⁶⁴ Some of the bullet points contained multiple sub-factors and considerable legal complexity, such as “whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime.”⁶⁵ Others were highly specific: “whether the person or the person’s spouse is pregnant or nursing.”⁶⁶

The Morton Memos noted that “[t]his list is not exhaustive and no one factor is determinative.”⁶⁷ But then on the following page,

victims-witnesses-plaintiffs.pdf.

58. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf’t, to Agency Pers., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, *supra* note 57, at 1.

59. *Id.* at 2, 5.

60. See Cox & Rodríguez, *President and Immigration Law Redux*, *supra* note 4, at 185–90 (describing the limitations of the Morton Memos).

61. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf’t, to Agency Pers., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, *supra* note 57, at 4.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

they list eight positive factors and four negative factors that merit “particular care and consideration.”⁶⁸ These include, for example, “individuals present in the United States since childhood” as a positive factor and “known gang members” as a negative factor.⁶⁹

The trouble with the Morton Memos is that, while each factor is perhaps relatively uncontroversial when taken in isolation, it is not clear how much weight should be given to each one or how they should be weighed against each other in the complexity of a real case. Should deportation proceedings be initiated against an unlawfully present person who was brought to the United States as a child, has a misdemeanor theft conviction, and was a member of a gang ten years ago but today is a nursing mother who cares for her U.S. citizen child and her elderly mother? The Morton Memos do not provide a clear answer.

Put another way, the Morton Memos required judgment calls, a feature that is inherent in prosecutorial discretion. Because the Morton Memos did not prescribe how to make these decisions, they left much in the hands of frontline ICE officers to decide how to evaluate individual cases. This reality produced considerable frustration from immigration activists who complained that sympathetic immigrants were still being placed into removal proceed-

68. *Id.* at 5. These factors are:

Positive factors:

- (a) veterans and members of the U.S. armed forces;
- (b) long-time lawful permanent residents;
- (c) minors and elderly individuals;
- (d) individuals present in the United States since childhood;
- (e) pregnant or nursing women;
- (f) victims of domestic violence, trafficking, or other serious crimes;
- (g) individuals who suffer from a serious mental or physical disability; and
- (h) individuals with serious health conditions.

Negative factors:

- (a) individuals who pose a clear risk to national security;
- (b) serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- (c) known gang members or other individuals who pose a clear danger to public safety; and
- (d) individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Id.

69. *Id.*

ings.⁷⁰ An attorney with the American Civil Liberties Union summarized the problems as follows:

[I]n practice the memos did almost nothing to change enforcement practices on the ground. I experienced this failure first-hand. . . . Despite Director Morton’s explicit guidance to the field, ICE’s review of approximately 300,000 pending cases resulted in less than *two percent* of them being closed. As a report concluded one year after the memos’ release, “For an initiative that was expected to help potentially millions of individuals who fit the ‘low-priority’ criteria . . . the statistics show a resounding failure of the DHS to implement the policy.”⁷¹

The early frustrations with the implementation of the Morton Memos are an essential context to explain how President Obama and the DHS have used executive discretion since 2012.⁷²

The Morton Memos remained in place officially until November 2014.⁷³ They were then replaced by more concrete “enforcement priorities.”⁷⁴ DHS now has three priority groups for immigration enforcement.⁷⁵ Leaving aside national security cases, the en-

70. See, e.g., Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437, 532 (2013) (describing the failure to apply Morton Memo criteria in a particular case).

71. Arulanantham, *supra* note 4 (quoting *One Year Later: Report Shows Morton Memo Hasn’t Delivered on Promises of Relief*, REFORM IMMIGRATION FOR AM., <http://reformimmigrationforamerica.org/30one-year-later-report-shows-morton-memo-hasn-t-delivered-on-promises-of-relief/> (last visited Dec. 1, 2015)).

72. See also Cox & Rodríguez, *President and Immigration Law Redux*, *supra* note 4, at 187–92 (describing the failures of the Morton Memos in changing enforcement practice).

73. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Customs and Immigration Enf’t, et al. 2 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (rescinding the Morton Memos).

74. *Id.* at 2–8.

75. The full list of enforcement priorities:

Priority 1

- (a) Noncitizens apprehended at the border while attempting to enter the United States.
- (b) Felons, as defined by state or federal law.
- (c) Aggravated felons, as defined by the Immigration and Nationality Act.
- (d) “Aliens engaged in or suspected of terrorism or espionage.”
- (e) Noncitizens who “pose a danger to national security.”

Priority 2

- (a) Noncitizens with three or more misdemeanor, non-traffic convictions.
- (b) Noncitizens with a conviction for a “significant misdemeanor,” a new term of arm meaning:

an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the

forcement priorities closely track the Obama Administration's policy of prioritizing convicted criminals and enhanced border patrol, while deprioritizing unauthorized immigrants who have been in the country for some time and who have no criminal record.⁷⁶ Thus, a person will be a priority for deportation if she entered the country since January 1, 2014, or is caught at the border, or if she has certain serious criminal convictions (or any three non-traffic misdemeanors).⁷⁷ This suggests that non-recent arrivals who have no criminal record may be left alone; although, the policy does not guarantee this.⁷⁸

Simple non-enforcement of immigration law has been overshadowed by a new initiative that took a very different approach to immigration discretion. On June 15, 2012, as his re-election campaign accelerated, President Obama went to the Rose Garden to announce a new immigration initiative.⁷⁹ He lamented that Congress had failed to pass either comprehensive immigration reform or the DREAM Act, which would have benefited immigrants brought to the United States illegally by their families and who went to school in the United States; he then announced the program now known as DACA.⁸⁰ He called it "a temporary stopgap

individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence)

(c) Noncitizens who cannot show they were physically present in the U.S. since January 1, 2014.

(d) Significant abusers of visa waiver programs.

Priority 3

(a) Noncitizens subject to a removal order issued after January 1, 2014.

Id. at 3–4.

76. *Id.*; See Press Release, The White House Office of the Press Sec'y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

77. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Customs and Immigration Enf't, et al., *supra*, note 73, at 4.

78. *Id.* at 5. ("Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified.")

79. See President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

80. See Kalhan, *Deferred Action*, *supra* note 18, at 61; Press Release, The White House Office of the Press Sec'y, *supra* note 76.

measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people.”⁸¹ He discussed his policy of prioritizing deportation of non-citizens with criminal records, and said that DACA was a means by which “we’ve improved on that discretion.”⁸²

DACA built on the pre-existing legal mechanisms of deferred action, by which beneficiaries of prosecutorial discretion have been formally told that the government had decided not to deport them.⁸³ Deferred action in immigration typically includes something more than simple non-enforcement of a statute. It informs the beneficiary of the no enforcement decision and tells her that she need not worry, at least for a certain period of time. The Notice of Action sent to beneficiaries states that DHS “has decided to defer action in your case,” which is analogous to a prosecutor telling a suspect that she has decided not to press charges at the present time.⁸⁴ The deferred action notice indicates that the decision remains in place “unless terminated.”⁸⁵ To be clear, deferred action grants only a reprieve, not a visa.⁸⁶ Nevertheless, because the law enforcement agency informs the beneficiary of the decision, deferred action is conceptually distinct from many other forms of prosecutorial discretion in which the beneficiary may not even know that discretion was exercised in her favor.

In terms of its human impact, the most important benefit of deferred action may be its implications for legal employment. Deferred action beneficiaries receive a notice with the promise that “[a]n Employment Authorization Document [(“EAD”)] will arrive separately in the mail.”⁸⁷ This EAD, a credit card-sized identification document, affords the right to obtain a Social Security number.⁸⁸ In many states, an EAD can be the basis for obtaining a

81. Press Release, The White House Office of the Press Sec’y, *supra* note 76.

82. *Id.*

83. See Wadhia, *Role of Discretion*, *supra* note 27, at 248 (describing the history of deferred action).

84. See I-797 Notice of Action, Dep’t of Homeland Security (on file with author).

85. *Id.*

86. See *id.*

87. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

88. See SOC. SEC. ADMIN., RM 10211.420 EMPLOYMENT AUTHORIZATION FOR NON-IMMIGRANTS, <https://secure.ssa.gov/poms.nsf/lnx/0110211420> (last visited Dec. 1, 2015).

driver's license or even facilitate professional licensure.⁸⁹ In July 2015, a survey reported that 96% of DACA recipients were employed or in school, and that they are buying automobiles at higher rates than prior to the DACA.⁹⁰ Among the respondents, 69% reported moving to a job with better pay, and 54% reported moving to a job with better working conditions.⁹¹ The study found that DACA increased average hourly wages from \$11.92 to \$17.29 per hour.⁹²

The criteria for eligibility to apply for DACA in its original form are fairly simple and straightforward. According to the USCIS website, noncitizens may request deferred action under DACA if they:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching [their] 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making [their] request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.⁹³

USCIS made an application form available for DACA, the I-812D, which looks much like any other immigration application form.⁹⁴ Importantly, the costs of processing the applications are paid for by the application fee of \$465 (including \$85 for a bio-

89. See *DACA and Driver's Licenses*, NAT'L IMMIGRATION L. CTR., <http://www.nilc.org/driverlicenses.html> (last visited Dec. 1, 2015).

90. Tom K. Wong et. al., *Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact*, CTR. FOR AM. PROGRESS (July 9, 2015), <http://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact>.

91. *Id.*

92. *Id.*

93. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 87.

94. U.S. Citizenship & Immigration Servs., Form I-821D, Consideration of Deferred Action for Childhood Arrivals (2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

metric criminal background check).⁹⁵ This self-financing mechanism made it difficult for Congress to block DACA and DAPA through the appropriations process.⁹⁶

While simple non-enforcement of immigration law has a clear analogy to prosecutorial discretion in the criminal context, prosecutors do not actually issue permits to let people continue to engage in unlawful activity.⁹⁷ While non-enforcement of the law leaves people essentially as they were, the grant of employment authorization leaves DACA recipients substantially better off. In theory and in practice, DHS can grant deferred action to any deportable person.⁹⁸ But DACA made deferred action a more defined benefit for which a person applies, knowing that he or she meets the eligibility criteria.⁹⁹ Thus, on the surface it appears that the Obama Administration is granting significant immigration benefits to people who, according to statute, are ineligible to even enter the country.¹⁰⁰

In November 2014, President Obama announced two additional programs that followed DACA's general format. An expanded version of DACA would remove the age restriction that limited the original program to those who were under thirty-one in June 2012.¹⁰¹ Thus, a person who entered the U.S. before age sixteen three decades ago could be eligible.¹⁰² A new program, DAPA, would give deferred action to unauthorized immigrants who had U.S. citizen children and who had been in the country since Jan-

95. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 87.

96. See Jennifer Bendery, *House Appropriations Committee Confirms Congress Can't Defund Obama's Immigration Action*, HUFFINGTON POST (Nov. 20, 2014, 11:49 AM), http://www.huffingtonpost.com/2014/11/20/defund-obama-immigration-action_n_6191958.html.

97. See Kate M. Manuel & Todd Garvey, Cong. Research Serv., *Prosecutorial Discretion in Immigration Enforcement: Legal Issues 9–11* (2013), <https://fas.org/sgp/crs/misc/R42924.pdf>.

98. See Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Serv., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

99. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 87.

100. See generally 8 U.S.C. § 1182 (2012) (defining classes of excludable noncitizens).

101. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2015); see *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 87.

102. *Executive Actions on Immigration*, *supra* note 101.

uary 2010.¹⁰³ DAPA thus potentially includes millions of unauthorized immigrants who had children born in the United States. The DHS planned to hire around 1000 new employees to process the applications.¹⁰⁴ But the expanded DACA and DAPA programs were delayed by the injunction in the *Texas* case.¹⁰⁵

II. THE CHALLENGES TO EXECUTIVE ACTION

A. *Frontline Resistance*

As we have seen in Part I.B, the Obama Administration did not publicly emphasize prosecutorial discretion as an important immigration policy tool until the latter part of the President's first term. The Morton Memos were not issued until 2011 and led to considerable frustration as they promised a more lenient approach than immigrant activists saw in the field. DACA then followed the next year, as the President was campaigning for a second term. This shift was undoubtedly linked to the dimming prospects for congressional action on immigration reform. Indeed, the Administration's interest in executive action grew proportionately as prospects for legislation diminished. But the Administration's evolving approach to executive action also reflected a struggle within the Executive Branch.

At the dawn of the Obama Administration, Professors Cox and Rodríguez argued that the President had considerable power to shift immigration policy without congressional action, as this article explained *supra* at Part I.A. But shortly before the announcement of the DACA program, Professor Mariano-Florentino Cuéllar articulated an important note of skepticism about presidential power after serving as co-chair for immigration of the Obama-Biden transition, and then as a White House domestic policy advisor during the first two years of the Obama Administration.¹⁰⁶ Cuéllar contended that it was a mistake to view the

103. *Id.*

104. Stephen Dinan, *Homeland Security Already Hiring 1,000 Employees to Carry Out Obama Amnesty*, WASH. TIMES (Dec. 3, 2014), <http://www.washingtontimes.com/news/2014/dec/3/dhs-hiring-1000-employees-carry-out-obama-amnesty/?page=all>.

105. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

106. *Associate Justice Mariano-Florentino Cuéllar*, CAL. COURTS, <http://www.courts.ca.gov/28724.htm> (last visited Dec. 1, 2015). Cuéllar is now a justice on the California Supreme Court. *Id.*

political stalemate on immigration as a purely legislative matter.¹⁰⁷ He argued that by creating and funding a fragmented but large immigration enforcement apparatus, Congress had created powerful organizational interests within the Executive Branch that buttressed a dysfunctional immigration policy embodied in the statute.¹⁰⁸ These interests ensured considerable continuity in aggressive immigration enforcement from one presidential administration to the next.¹⁰⁹ In other words, they acted as a significant constraint on presidential discretion.¹¹⁰

With a large number of enforcement officers hired before 2009, and increasingly efficient mechanisms in place to apprehend immigrants, Cuéllar wrote that the Obama Administration in its early years had difficulty reigning in or re-directing the massive deportation machinery that it inherited.¹¹¹ He noted that in the first two years of the Obama Presidency, there were “considerable challenges that senior administration officials have encountered . . . in asserting control over the routine actions of lower-level enforcers who have increasing access . . . to detained individuals who have not been found guilty of committing crimes.”¹¹²

Cuéllar’s account of entrenched Executive Branch interests constraining the President’s power was published in the early part of 2012. It represented an astute description of the state of affairs roughly a year after the Morton Memos, but several months before DACA. This was a time of considerable frustration for advocates of immigration reform, and—one may speculate—for the Administration itself. There were complaints that immigrants were still being aggressively pursued by law enforcement, despite the public announcement of prosecutorial discretion policies.¹¹³

As the Obama Administration shifted its focus toward executive action on immigration, it had to find a strategy by which to translate the policy goals of the President into changes in behavior by frontline enforcement agents. This was no easy task. In

107. Cuéllar, *supra* note 29, at 58.

108. *See id.* at 51–54.

109. *See id.* at 54–55.

110. *See id.* at 53–54.

111. *Id.*

112. *Id.* at 54.

113. *See id.* at 6.

particular, the ICE officers' union (known as the National ICE Council) had become a vocal public critic of the Administration's policies. In January 2012, the union, which represents 7000 ICE officers, blocked efforts by the DHS to train its members on how to prioritize deportation cases and exercise discretion.¹¹⁴ Overcoming this challenge takes more than reiterating the legal foundation of prosecutorial discretion. As noted in Part I.A., the Supreme Court has embraced consideration of "immediate human concerns."¹¹⁵ However, not everyone perceives the weight of these concerns the same way. The factors that might be compelling reasons to defer deportation in a particular case to senior Obama officials might not seem compelling to the ICE agents who actually process deportation cases.

The challenge that the Obama Administration faced is common whenever one tries to induce a government agency to exercise self-restraint against what it sees as its core mission. This insight has recently been highlighted by Professor Margo Schlanger in her study of the Office of Civil Rights and Civil Liberties in the DHS.¹¹⁶ Her study focused on why "[i]nducing governmental organizations to do the right thing" is inherently difficult "when 'the right thing' means executing not only a primary mission but also constraints on that mission . . ."¹¹⁷ Schlanger built on sociologist James Q. Wilson's description of the power of a shared "sense of mission" within a bureaucracy.¹¹⁸ For present purposes, Schlanger's important insight is that it is always a challenge to get an enforcement agency to incorporate values that compete with its own primary sense of purpose, even when the change is desired by nominally superior elected officials.¹¹⁹ Schlanger, like Cuéllar, offers an explanation for why democratically elected office holders may have less ability than often assumed to change

114. Julia Preston, *Agents' Union Stalls Training on Deportation Rules*, N.Y. TIMES (Jan. 7, 2012) [hereinafter Preston, *Agents' Union*], <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html>.

115. See discussion *supra* Part I.A.

116. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 103 (2014).

117. *Id.* at 54.

118. *Id.* at 103 (quoting JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 14 (1978)).

119. See *id.* at 103.

how laws are enforced at the frontlines by unelected, largely anonymous civil servants and law enforcement officers.¹²⁰

For an immigrant advocate critical of aggressive immigration enforcement, it might seem that ICE agents are simply heartless because they energetically detain and deport sympathetic immigrants. But the point that Cuéllar and Schlanger make is broader in application and less moralistic. It simply assumes that most people who work in federal agencies believe their work is important. For example, it assumes that people who work at the Environmental Protection Agency (“EPA”) believe it is important to protect the environment, that military officers believe it is important to defend the country through a professional military, and that people who work in the Anti-Trust Division of the Justice Department believe it is important to control corporate monopolies. In a similar vein, it is only natural to assume that people who work for ICE believe it is important to enforce immigration law. The central problem that President Obama has faced is that it can be a challenge to induce employees of any of these government agencies to change how they work when the proposed change seems to conflict with their own understanding of their agency’s core mission and values.

The structure of DACA and DAPA represent a management strategy by which the Obama Administration effectively overcame frontline resistance from immigration enforcement agents.¹²¹ The strategy has two important parts.

First, by establishing a new application procedure designed to attract potentially millions of applications, the Administration necessitated a large-scale hiring program. USCIS hired hundreds of additional workers to handle DACA applications in 2012.¹²² The

120. See *id.* at 103–05; *supra* text accompanying notes 103–09.

121. See Arulanantham, *supra* note 4 (“If supervisory officials like the Secretary of Homeland Security have authority to prioritize the resources of the agencies they direct, but field officers ignore their supervisory directives, one might expect that the supervisors would *then* have authority to take further steps—beyond those they normally would be permitted to take—in order to ensure that their priorities are followed. The administration’s new relief program can be understood as exercising authority in just such a situation. By providing precise criteria for determining who qualifies for low priority status as well as documentation individuals can use to prove that they have received that designation, the new program will make it harder for line enforcement agents and attorneys to ignore the priorities that the administration tried to set three years ago.”).

122. Daniel Hanlon, *USCIS Ramps Up Hiring for DACA Processing*, *ASIAN J.* (Aug. 28, 2012, 9:03 AM), <http://asianjournal.com/immigration/uscis-ramps-up-hiring-for-daca-proc>

Administration planned to hire around 1000 workers to process an expected surge of applications after the new DAPA and expanded DACA programs went into effect in 2015.¹²³ While justified by the expected caseload and paid for by the application fees, hiring new people is also a useful means of combatting entrenched resistance from existing employees.¹²⁴ Rather than having to persuade longtime DHS personnel to change how they have long enforced immigration law, DACA and DAPA allow the Administration to recruit new people who would be trained from the beginning under the Administration's new policies.¹²⁵

Second, DACA and DAPA—as well as the new system of enforcement priorities—are defined by clear cut criteria that do not call on frontline enforcement agents to exercise much judgment.¹²⁶ In this way, the announcement of DACA in 2012 signaled an important shift away from the approach embodied by the Morton Memos and by prosecutorial discretion policies of the past. While pre-DACA policies called for an open-ended balancing of factors, leading ultimately to a value judgment about an individual case, the new approach is highly prescriptive, making transparent for all the criteria that the Administration considers warranting a favorable exercise of discretion.¹²⁷ The value judgments and criteria setting are made at the highest levels of government, while frontline agents are asked simply to assess eligibility.¹²⁸ Clearly, prescriptive guidelines about when to exercise prosecutorial discretion takes the power to make judgment calls away from frontline agents and thus reduces their ability to resist the President's policies. But as the article will discuss in Part II.C, this prescriptive strategy has been used as a legal vulnerability.

The crucial legal test that DACA and DAPA now face is whether Presidents can use this managerial strategy to overcome resistance by frontline Executive Branch employees. The remainder

essing/.

123. Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES (Dec. 25, 2014), <http://www.nytimes.com/2014/12/26/us/politics/little-noticed-in-immigration-overhaul-a-government-hiring-rush.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>.

124. See Arulanantham, *supra* note 4.

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

of this article focuses on this question. Conceptually, this question brings up a contest between two different visions of how administrative agencies should operate. Under the presidential control model, Presidents should be able to direct agencies, especially if they do so publicly (as President Obama has), since the President is accountable to voters and can thus render agencies more accountable by taking more responsibility for their policies. But under the deliberative model, agency action is more legitimate if civil servants can play a greater role in setting policy, ensuring that policies take greater account of their expertise and are somewhat insulated from politics. In Part III.D, the article returns to Schlanger and Cuéllar's insights and argues that they help explain why the deliberative model is a poor fit for the immigration context.

B. *Initial Legal Challenges to DACA and DAPA*

When President Obama announced the original DACA program in 2012 and again when he announced DAPA and an expansion of DACA in November 2014, initial objections focused on the claim that he had usurped the power of Congress.¹²⁹ This included both public reactions of Republican congressional leaders¹³⁰ and from legal scholars.¹³¹ In an article published in 2013, Professors Robert J. Delahunty and John C. Yoo argued that the President was violating his obligation to “take care” to faithfully execute the laws as they had been enacted by the legislative branch.¹³² This argument that the President is violating his constitutional obligations mirrors an argument raised by ICE agents that they are being required to violate their oaths.¹³³

In August 2012, several ICE agents and the State of Mississippi sued to try to stop implementation of DACA.¹³⁴ The named

129. Shear, *supra* note 123.

130. See, e.g., Bradner & Rosche, *supra* note 10; Kelly, *supra* note 10.

131. See, e.g., Peter H. Schuck, *Why Congress Can Impeach Obama*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/opinion/the-impeachment-of-obama-on-immigration-may-be-legal-but-its-wrong.html> (arguing that Obama's actions are illegal).

132. See Delahunty & Yoo, *supra* note 11, at 785.

133. See generally Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. 96, 97 (2015) (arguing that DACA and DAPA are unconstitutional).

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

plaintiff in the case, ICE agent Christopher Crane, also serves as head of the union that represents ICE agents.¹³⁵ He, along with Kenneth Palinkas, who heads the union representing USCIS employees, were previously in the public eye as advocates against the Senate immigration reform bill.¹³⁶ In the lawsuit, Crane and other ICE agents argued that the Morton Memos and the DACA program required them to violate their oaths to uphold the Constitution and laws of the United States.¹³⁷ The court dismissed this challenge on standing and jurisdictional grounds.¹³⁸ In April 2015, the Court of Appeals for the Fifth Circuit held that neither the state of Mississippi nor the ICE agents had shown a sufficient injury-in-fact to establish standing.¹³⁹

Within weeks of the DAPA/DACA announcements of November 2014, the United States District Court for the Western District of Pennsylvania found that the President's policies were unconstitutional because they invaded the authority of Congress.¹⁴⁰ However, that finding has been disputed by another federal court, questioning whether the issue should even have been raised in that case.¹⁴¹ Moreover, the Pennsylvania decision posed no immediate threat to the program's implementation. Another federal district court dismissed a challenge by the Sheriff of Maricopa County, Arizona, finding both a lack of standing and emphasizing the general validity of prosecutorial discretion in immigration.¹⁴² Thus, the initial challenges to DACA and DAPA based on the claim that deferred action programs violated the duty to execute the laws bore little fruit for opponents of the programs.

The Administration received a warning that DACA and DAPA might pose significant legal problems through the Office of Legal

135. Stephen Dinan, *GOP Lawmakers Want Obama to Hear out Head of ICE Union*, WASH. TIMES (May 24, 2013), <http://www.washingtontimes.com/news/2013/may/24/gop-lawmakers-want-obama-to-hear-out-head-of-ice-u/>.

136. *Id.*

137. *Napolitano*, 920 F. Supp. 2d at 734–35.

138. *Id.* at 747.

139. *Crane v. Johnson*, 783 F.3d 244, 255 (5th Cir. 2015).

140. *See United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 779, 788 (W.D. Pa. 2014) (concluding that the Obama policies are unconstitutional in a case concerning a criminal conviction).

141. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 208 n.12 (D.D.C. 2014) (disputing the *Juarez-Escobar* decision on jurisdictional grounds and defending the norm of prosecutorial discretion).

142. *Id.* at 190, 207–10.

Counsel's ("OLC") review of the November 2014 executive actions.¹⁴³ The OLC called DACA and DAPA "class-based" deferred action programs and warned that such programs posed a particular problem unless they incorporate an individualized, case-by-case review with room to deviate from general rules in individual cases.¹⁴⁴ The OLC noted that, unlike a pure decision to not enforce a law in a particular case, deferred action "represents a decision to openly tolerate an undocumented alien's continued presence" and "carries with it benefits in addition to non-enforcement itself."¹⁴⁵ Rather than merely enable immigration enforcement officers to exercise discretion, "class-based deferred action programs . . . set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status."¹⁴⁶

The fact that DACA and DAPA use clear threshold criteria to define a class of beneficiaries has become a central issue in the litigation about the programs, but it was not immediately clear why the OLC thought it a problem. The OLC concluded that "the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency."¹⁴⁷ The OLC framed the issue in separation of powers terms and concluded that "individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law . . ."¹⁴⁸ While initial legal challenges focused on the concern that the Executive might be usurping Congress's role in setting immigration law, the fight quickly moved to a new question: do DACA and DAPA unlawfully strip frontline immigration officers of their power to exercise discretion on a case-by-case basis because they have not gone through a notice-and-comment process?

143. The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 1, 15, 18, 20, 33 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (referring to "class-based deferred action" and the "categorical variety" of deferred action).

144. *Id.* at 18 n.8, 22–23.

145. *Id.* at 20.

146. *Id.*

147. *Id.* at 23.

148. *Id.*

C. *The Texas Attack on DACA and DAPA*

The case that has proven to be the gravest threat to the DACA/DAPA programs has been *Texas v. United States*, a challenge joined by twenty-six states (or state governors in some cases). In February 2015, Judge Andrew Hanen of the Southern District of Texas issued a preliminary injunction against implementation of DAPA and the expanded DACA program.¹⁴⁹ A request for an emergency stay of the injunction was denied in a split 2-1 decision by Judge Jerry Smith of the Court of Appeals for the Fifth Circuit on May 26, 2015.¹⁵⁰ In November, the Court of Appeals affirmed the preliminary injunction, again in a 2-1 decision, with Judge Smith again writing the majority decision.¹⁵¹ The Department of Justice has asked the Supreme Court to review that decision.¹⁵²

This case involves significant disputes about reviewability and standing, which, if they had been resolved in the federal government's favor, would have ended the litigation.¹⁵³ However, this article does not delve into these questions. What is most important for present purposes is how the arguments on the merits have shifted. As we have seen, initially the central objection to DACA and DAPA was that the programs violated the Constitution, specifically the Take Care Clause and, more generally, the separation of powers between the Executive and Legislative branches.¹⁵⁴ This concern subsequently fell into the background as the *Texas* case proceeded.

Instead of focusing on a constitutional separation of powers theory, the APA procedural argument focuses on a violation of section 553 of the Administrative Procedure Act because the ex-

149. *Texas v. United States*, 86 F. Supp. 3d 591, 604, 677 (S.D. Tex. 2015).

150. *See Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (denying the motion to stay the injunction issued by the district court pending appeal).

151. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *1 (5th Cir. 2015)

152. Petition for Writ of Certiorari, *United States v. Texas*, No. 15-674 (S. Ct. Nov. 20, 2015), <http://www.justice.gov/opa/pr/cert-petition-filed-case-texas-vs-united-states>.

153. *See Texas*, 2015 WL 6873190 at *3.

154. *See id.* (noting the states argued that DAPA violated the Take Care Clause of the Constitution); *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 776, 786 (explaining the separation of powers issues raised by President Obama's executive action and holding that the President impermissibly crossed the line between legislating and executing the law).

panded DACA and DAPA programs were not submitted for notice and comment.¹⁵⁵ The technical question regarding section 553 is whether DACA and DAPA represent legislative rules, in which case notice and comment is required, or “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,” in which case it is not.¹⁵⁶ Distinguishing these two types of rules is a classic problem of administrative law, which this article will explore in detail in Part III.

The court of appeals affirmed Judge Hanen’s finding that the DACA/DAPA rules are binding and thus required a notice-and-comment process, because they do not leave DHS employees free to exercise genuine discretion on a case-by-case basis.¹⁵⁷ Both the district court and the court of appeals relied on statistics showing that only 5% of applications for DACA have been denied and on a declaration by the President of the union representing USCIS staff.¹⁵⁸ In the declaration, the union chief said that “DACA applications are simply rubberstamped if the applicants meet the necessary criteria.”¹⁵⁹ In short, because the DACA/DAPA criteria are for the most part clear-cut, DHS employees are left little flexibility to make their own case-by-case assessments. The Obama Administration has always argued that they are not binding because they are discretionary and a rejected applicant cannot go to court to force the government to grant deferred action.¹⁶⁰ That is, DACA and DAPA are not binding for a member of the public against DHS. Nonetheless, Texas and other states have argued that DACA and DAPA are legislative because they are binding for the agents who decide each application. Moreover, a general criteria for the deferred action program is that the applicant “present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”¹⁶¹

155. *Texas*, 787 F.3d at 762; *Texas v. United States*, 86 F. Supp. 3d 591, 603, 671 (S.D. Tex. 2015).

156. *See* 5 U.S.C. § 553(b)(3)(A) (2012).

157. *See Texas*, 2015 WL 6873190, at *18–21; *Texas*, 787 F.3d at 763–67.

158. *See Texas*, 2015 WL 6873190, at *19; *Texas*, 787 F.3d at 763–64.

159. *Texas*, 787 F.3d at 764.

160. *But see* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 57–63 (2013) [hereinafter Wadhia, *Role of Judiciary*] (arguing that deferred action decisions may be judicially reviewable under the APA).

161. *Texas*, 2015 WL 6873190, at *30 (King, J., dissenting).

Even if the “rubberstamp” theory of DACA and DAPA is correct, this article argues that the court of appeals and the district court made a fundamental legal error. In short, they misunderstood what it means for an agency policy to be binding. At this stage, it is important to observe how the focus on administrative law, rather than constitutional separation of powers, shifts the legal debate. The thrust of the constitutional argument against President Obama’s executive actions is that the DACA and DAPA programs are beyond the President’s authority and cannot be implemented without congressional authorization. By contrast, the administrative argument does not challenge the President’s authority to establish these programs. Instead, the argument is simply that he established them using the wrong procedure and, in practical terms, too quickly because DHS did not make a formal public notice about its intention to engage in rulemaking followed by publication of a draft rule, a period of public comments, and, finally, publication of a final rule.¹⁶²

This shift to administrative law changes the debate in two key ways. First, so long as the focus is on the APA, it is not about the separation of power between the Legislative and Executive branches. Instead, the question is entirely about how the Executive Branch should operate. This shift is not surprising given—as discussed in Part I.A—there is extensive case law supporting the authority of immigration agencies to choose not to enforce immigration statutes in every case. As a result, those challenging immigration non-enforcement confront a difficult legal terrain if they want to argue that DHS cannot grant deferred action to non-citizens who are technically deportable. Second, the administrative law challenge turns on the question of who within the Executive Branch may exercise discretion. The fact that the head of a union of DHS employees provided critical support to the *Texas* challenge illustrates that there is significant tension within the Executive Branch about immigration enforcement. Instead of an inter-branch separation of powers question, the legal struggle

162. See *Texas*, 787 F.3d at 745–46 (“First, [the states] claimed that DAPA is procedurally unlawful under the APA because it is a substantive rule that is required to undergo notice and comment, but DHS had not followed those procedures.”). The states, in the alternative, also asserted that DHS lacked authority for DAPA and that the program violates the Take Care Clause. But these were secondary, alternative arguments. *Id.* at 746. The district court did not address these latter arguments, focusing instead on the notice and comment argument. *Id.*

over DACA and DAPA evolved into a struggle between parts of the Executive Branch. At the time of writing (June–August 2015), this litigation was still evolving.

III. THE ADMINISTRATIVE LAW PROBLEM

A. Overview

This section surveys the administrative law terrain in which the Obama immigration actions have emerged. Part B describes the difference in the APA between legislative rules, which must go through notice and comment, and nonlegislative rules, which do not. The Court of Appeals for the D.C. Circuit has taken the lead in trying to delineate the difference between these categories, but it has not been wholly successful in doing so.¹⁶³ In the *Texas* case, too much stress has been placed on particular phrases that the D.C. Circuit has used in some decisions. In short, the D.C. Circuit has found that legislative rules are distinctive because they are “binding,” but it has not been consistent about exactly what this means.¹⁶⁴ In some cases, the D.C. Circuit seemed to say that a notice-and-comment process is required if an agency rule seeks to bind frontline decision makers,¹⁶⁵ a premise that operates as the lynchpin of the Fifth Circuit’s preliminary injunction against DACA and DAPA. But the D.C. Circuit has never been consistent about the framing of this definition, and in these cases, it appears to use loose phraseology that should not be applied strictly or literally. Moreover, the D.C. Circuit’s most recent decisions appear to back away from the approach that the Fifth Circuit is now following.

Part C of this section argues that it is more useful to think about DACA and DAPA in the context of broader concerns about the place of administrative discretion in our constitutional democracy, rather than focus on inconsistent dicta and word choice from the D.C. Circuit. There is rich scholarly literature setting

163. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1321 (1992).

164. See *infra* Part III.B.

165. See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting *American Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)).

out alternative conceptions about how best to ensure that agency policy making will retain democratic legitimacy and be subject to checks and balances. The Obama immigration actions are easily justifiable under the theory that the President should be able to control executive agencies (at least under certain circumstances), because this control provides a mechanism by which agency behavior may be accountable to the electorate.

Part D of this section summarizes contrary visions of administrative action that oppose presidential control. These visions typically argue that agency action will be more legitimate if civil servants inside the agency are given more influence through a deliberative rulemaking process. This is a reasonable approach in certain policy-making contexts, especially when Congress has specified that it wants regulatory policy to be set by technical expertise rather than by political considerations. However, these arguments are not convincing in the immigration enforcement context.

B. *The D.C. Circuit's Confused Focus on "Binding" Rules*

Section 553 of the APA requires a notice-and-comment process for "rulemaking."¹⁶⁶ A "rule" is defined as a "statement of general or particular applicability and future effect."¹⁶⁷ On its face, notice-and-comment seems to be a fairly simple process, so it may be unclear why the Administration would not choose to utilize it and thus avoid the kind of challenges that have delayed DACA and DAPA. Rulemaking requires public notice of a proposed rule, which is meant to allow all members of the public affected by a rule the opportunity to participate in the rulemaking process and to enhance political accountability.¹⁶⁸ It requires publishing a notice that the agency intends to engage in rulemaking, publication of a proposed rule, an opportunity for public comment, consideration of public comments, and publication of a final rule which can go into effect thirty days later.¹⁶⁹

166. 5 U.S.C. § 553(b), (c) (2012).

167. *Id.* § 551(4).

168. *See* 1 RICHARD H. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 497 (5th ed. 2010).

169. 5 U.S.C. § 553(b)–(d).

Rulemaking under section 553 comes with significant downsides.¹⁷⁰ Even though an agency does not need congressional approval to issue a rule, the notice-and-comment process can be extremely time consuming and burdensome on an agency's resources.¹⁷¹ These burdens extend not only to issuing new rules, but also to rescinding rules.¹⁷² Thus, to require rulemaking under section 553 is to significantly limit an agency's flexibility. For these reasons, there has been significant concern that agencies seek to avoid rulemaking when they can.¹⁷³ One might also suggest that the difficulty of rulemaking can undermine one of its goals: to enhance political accountability. Once a final rule is in force, a notice-and-comment process requirement makes it more difficult to change the rule, even if a new President is elected on a platform proposing to do just that.¹⁷⁴

Section 553 does not apply to "general statements of policy."¹⁷⁵ This creates a classic problem of administrative law: how to distinguish a legislative "rule" from a "general statement of policy" (general statements of policy and interpretive rules are often referred to as nonlegislative rules).¹⁷⁶ In *Chrysler Corp. v. Brown* in 1979, and again in *Lincoln v. Vigil* in 1993, the Supreme Court stated that the definition of a general statement of policy is a statement "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."¹⁷⁷ The Supreme Court has thus apparently stressed the value of encouraging agencies to inform the public about how they will use their discretion.¹⁷⁸ But the *Chrysler* and *Vigil* definition in many ways begs the question. A legislative rule that is subject to section 553 would also presumably inform the

170. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 403–04 (1985) (discussing the resource and time burdens of rulemaking).

171. *Id.* at 404 (estimating that rulemaking on non-controversial issues takes six to twelve months, and longer on controversial issues); see also KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW* 425 (2010).

172. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Insur. Co.*, 463 U.S. 29, 38 (1983).

173. See HICKMAN & PIERCE, *supra* note 171, at 513–14.

174. See *infra* Part IV.A.

175. 5 U.S.C. § 553(b)(3)(A) (2012).

176. See Asimow, *supra* note 170, at 381.

177. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp.*, 441 U.S. at 302 n.31).

178. See *Chrysler*, 441 U.S. at 313–15.

public about how an agency will exercise power in the future. Therefore, it is not entirely clear from this definition how legislative and nonlegislative rules and policy statements differ. The Supreme Court has avoided delving much deeper into the policy-rule distinction; although, as discussed below, in its 2015 term the Court reiterated the principle that notice-and-comment requirements need not always apply.¹⁷⁹ The *Texas* case could give the Supreme Court an opportunity to fill this void.

In the absence of clearer guidance from the Supreme Court, it has thus been left largely to the Court of Appeals for the D.C. Circuit to flesh out the difference between a policy statement and a legislative rule. In its first important decision on the subject, *Pacific Gas & Electric Co. v. Federal Power Commission*, the D.C. Circuit found that the concept of a legislative rule should not be construed broadly, since Congress clearly meant to carve out a significant exception for general statements of policy.¹⁸⁰ General statements of policy are useful, the court of appeals reasoned, because they “encourage[] public dissemination of the agency’s policies prior to their actual application.”¹⁸¹ The distinguishing feature of a policy statement is that it does not have “the force of law.”¹⁸² It is not a “binding norm.”¹⁸³ A policy statement announces an agency’s “tentative intentions for the future,” without creating a binding, enforceable rule.¹⁸⁴ In this seminal case on the policy-rule distinction, the D.C. Circuit echoed the Supreme Court’s focus on encouraging agencies to inform the public about how they planned to use their discretion and thus sounded a relatively positive note about the utility of general policy statements that did not go through notice and comment.¹⁸⁵ In *Pacific Gas*, the D.C. Circuit reasoned that it is a good thing for agencies to be able to announce tentative policies without going through notice and

179. See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015); *Vigil*, 508 U.S. at 196–97 (“Determining whether an agency’s statement is what the APA calls a ‘rule’ can be a difficult exercise. We need not conduct that exercise in this case, however.”).

180. 506 F.2d 33, 37 (D.C. Cir. 1974).

181. *Id.* at 38.

182. See *id.*

183. *Id.* (quoting Reginald Parker, *The Administrative Procedure Act: A Study in Over-estimation*, 60 YALE L.J. 581, 598 (1951)).

184. *Id.*

185. See *id.*

comment because this possibility discourages the agency from keeping its “initial views” secret.¹⁸⁶

Although *Pacific Gas* was the basis for subsequent case law, the tone of later D.C. Circuit case law shifted toward increasing concern that agencies were overusing the exception to the notice-and-comment process. The D.C. Circuit developed a two-part test in *Community Nutrition Institute v. Young (CNI)*¹⁸⁷ and *American Business Ass’n v. United States*.¹⁸⁸ First, a general statement of policy “is one that does not impose any rights and obligations.”¹⁸⁹ Second, a policy statement “genuinely leaves the agency and its decision makers free to exercise discretion.”¹⁹⁰ This second part has become the pivotal issue in the DACA/DAPA litigation. The current legal problem stems from the D.C. Circuit’s reference in *CNI* to “the agency *and its decisionmakers*.”¹⁹¹ The insertion of these words—“*and its decisionmakers*”—raises a question whether the agency as a whole must be free to exercise discretion or whether each and every frontline decision maker must be free to exercise discretion on an individual basis.

This phrasing from the D.C. Circuit’s decision in *CNI* was quoted in the key Fifth Circuit case distinguishing legislative rules from non-binding policy statements.¹⁹² This phrase then became the doctrinal lynchpin for the court of appeals decision affirming the injunction in the *Texas* case.¹⁹³ This article will now explain that a great deal depends on these precise words, which is a problem because it is not at all clear that the D.C. Circuit has always been careful about its choice of words.

There are two possible ways in which an agency statement may be binding so as to be considered a rule under the APA. Under the first possibility, a statement is a binding rule if it binds the agency vis-à-vis the public. That is, a statement would fall under sec-

186. *Id.*

187. 818 F.2d 943, 940 (D.C. Cir. 1987).

188. 627 F.2d 525, 529 (D.C. Cir. 1980).

189. *Id.*

190. *CNI*, 818 F.2d at 946 (quoting *Am. Bus. Ass’n*, 627 F.2d at 529).

191. *Id.* (emphasis added).

192. *See Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

193. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *18 (5th Cir. 2015).

tion 553's notice-and-comment requirement if it would prevent the agency from changing course or deviating in an individual case and allow a would-be beneficiary to ask a court to mandate the agency to follow the policy. Under the second possibility, a statement is a binding rule if it forces agency employees to decide cases in a prescribed way, without a meaningful role for individualized judgment calls by frontline staff. Under this view, it is irrelevant whether the public would be able to force the agency to take certain action. What matters is that the agency's employees are bound by their superiors, who issue the prescribed criteria and thus constrain the discretion of frontline staff. Critically, this second possibility gives lower level employees in federal agencies considerably more power because it would force their superiors to go through an arduous notice-and-comment process in order to prescribe them how to handle individual cases. It would become more difficult for their superiors to tell them how to exercise discretion.

It is not clear why the D.C. Circuit included the critical words "and its decisionmakers" in *CNI*,¹⁹⁴ and thus it may be problematic jurisprudence to place so much stress on such brief dicta. Before *CNI*, the D.C. Circuit referred more obliquely to binding rules as a type of policy statement that "limits administrative discretion."¹⁹⁵ Moreover, there is little indication from other cases decided around the same time that the D.C. Circuit actually placed much significance on those three words. One year before *CNI*, in *Brock v. Cathedral Bluffs Shale Oil Co.*, a panel including then-Circuit Judge Antonin Scalia and future Supreme Court nominee Judge Robert Bork found that an "Enforcement Policy" issued by the Secretary of Labor concerning mine safety was a nonlegislative rule which did not require notice and comment.¹⁹⁶ In that case, the D.C. Circuit found it important that "[t]he language of the guidelines is replete with indications that *the Secretary* retained his discretion to cite production-operators as he saw fit."¹⁹⁷ *Brock* made no mention of any public servants below the

194. 818 F.2d at 946 (quoting *Am. Bus. Ass'n*, 627 F.2d at 529).

195. *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

196. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986).

197. *Id.* at 538 (emphasis added).

level of the cabinet-level secretary.¹⁹⁸ One year after *CNI*, in *McLouth Steel Products Corp. v. Thomas*, the D.C. Circuit articulated the standard two different ways in the same paragraph:

In practice, there appears some overlap in the *Community Nutrition* criteria; the second criterion may well swallow the first. If a *statement denies the decisionmaker* discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations, in the sense those terms are used in *Community Nutrition*. The question for purposes of § 553 is whether a statement is a rule of present binding effect; the answer depends on whether the statement *constrains the agency's discretion*.¹⁹⁹

The D.C. Circuit's inconsistency in phrasing continued into twenty-first century cases. In *National Ass'n of Broadcasters v. FCC*, the court quoted *CNI*, but used ellipses in place of the fateful three words ("and its decisionmakers") so that the test was rephrased to read "the policy 'genuinely leaves the agency . . . free to exercise discretion.'"²⁰⁰ The court gave no indication of whether this was a conscious omission or a stylistic attempt to shorten a sentence. This inconsistency also appears in the leading Fifth Circuit case on the subject.²⁰¹ This pattern of inconsistent phrasing should sound a warning that it may be an error to place too much significance on the D.C. Circuit's reference to an "agency" or to a "decision maker." This may simply represent two alternative means of describing the same thing. After all, the head of an agency is also a decision maker, and that person's subordinates usually make decisions by delegation. For example, the immigration statute assigns enforcement powers explicitly to the Secretary of Homeland Security, and in certain cases, to the Attorney General, not to individual agents in ICE or USCIS.²⁰²

However, there are some cases from the D.C. Circuit in which the court gave some additional indication that there may be intentional meaning behind the alternative phrasing. In particular,

198. *See id.*

199. *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (emphasis added).

200. *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

201. *See Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596, 601 (5th Cir. 1995) (stating that notice and comment is not required "as long as *the agency* remains free" while in other passages referring to "agency decisionmakers") (emphasis added).

202. *See* 8 U.S.C. § 1103(a) (2012).

in *Appalachian Power Co. v. E.P.A.*, the court expanded on the idea that a general policy statement may not be binding on front-line decision makers:

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."²⁰³

Appalachian Power has been understood as a step toward tightening the definition of nonlegislative rules in order to prevent agencies from circumventing the notice-and-comment process. But its tighter, more skeptical approach to policy statements contrasts with a 2015 Supreme Court case that—much like *Pacific Gas*—seemed more favorable to the idea that avoiding notice and comment is not always a bad thing. In *Perez v. Mortgage Bankers Ass'n*, the Supreme Court said:

Not all "rules" must be issued through the notice-and-comment process . . . [T]he critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."²⁰⁴

This statement suggests that there may be no particular need to worry if agencies are opting for general statements of policy in order to avoid notice and comment, since these statements achieve the goal of informing the public.

After *Perez*, the D.C. Circuit decided a case concerning new Federal Aviation Administration ("FAA") guidance that encouraged airlines to allow passengers on commercial flights to use tablet computers during takeoff and landing.²⁰⁵ The FAA did this through a guidance document issued to its safety inspectors to as-

203. 208 F.3d 1015, 1021 (D.C. Cir. 2000).

204. 135 S. Ct. 1199, 1203–04 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

205. *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 714 (D.C. Cir. 2015).

sist in interpreting a pre-existing regulation.²⁰⁶ Arguably, this guidance notice effectively instructed field inspectors about what they should consider to be safe for commercial airlines, and it indeed led most airlines to change their policies.²⁰⁷ Although this might have failed under *Appalachian Power*, the D.C. Circuit found that the FAA guidance did not need to go through notice and comment because it “does not determine any rights or obligations, or produce legal consequences.”²⁰⁸ In this case, the D.C. Circuit said that statements of policy “are binding on neither the public nor the agency,’ and the agency ‘retains the discretion and the authority to change its position . . . in any specific case.’”²⁰⁹ Under this approach, the central question is whether a statement can be used by the public to bind the agency.²¹⁰

In *Texas*, the Court of Appeals for the Fifth Circuit (in the emergency stay appeal) concluded that DACA and DAPA are subject to section 553 of the APA because they do not leave frontline DHS officers free to make individualized decisions, since the program criteria are so prescriptive.²¹¹ In this, the Fifth Circuit followed some of the D.C. Circuit’s case law. But it did not address in detail the most recent case law on the subject. The central questions about DACA and DAPA would be whether a person refused deferred action could go to court to force DHS to grant it and whether the Department could change its policy without notice. Given the track record of the D.C. Circuit on this subject, it is difficult to know if the doctrinal pendulum has swung meaningfully, or if judges simply use a range of alternative phrases for concepts that they perceive as having the same meaning. But it does appear that the Fifth Circuit may have been cherry picking D.C. Circuit case law rather than analyzing its case law as a whole.

206. *Id.* at 712.

207. *Id.* at 714.

208. *Id.*

209. *Id.* at 716 (quoting *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997)).

210. *See Syncor*, 127 F.3d at 94.

211. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *19 (5th Cir. 2015).

C. Presidential Control and Administrative Accountability

The D.C. Circuit's inconsistent statements on the relevance of binding frontline decision makers reflect the weak jurisprudential pedigree of this concept, stemming from a few stray words in *CNI*. But this line of cases reveals that the ambiguity inherent in the APA is subject to more than one possible interpretation. Rather than choose arbitrarily among the D.C. Circuit's inconsistent statements and their possible interpretations, a court should consider the purposes of the provisions in the APA. The Supreme Court has not provided clarity about the definitional distinction between legislative and nonlegislative rules, but it has repeatedly and recently emphasized two points. First, there is great value in transparency and in publicizing administrative policies. Second, there is no overriding necessity to always engage in notice and comment, so long as the interest in transparency is served. One should note that, in addition to rules and general statements of policy, there is a third possibility which lurks in the background: that is, for unstated, ad hoc, or de facto policies to take hold within agencies without any transparency. One of the virtues of general statements of policy is that it makes it easier for agencies to avoid this third, less desirable path.²¹²

In the confusion concerning nonlegislative versus legislative rulemaking, there is a background question about presidential power. Specifically, how much power should Presidents have over the agencies within the Executive Branch? DACA and DAPA are rooted in a presidential control model by which the President and his cabinet-level officers may (and sometimes should) direct agencies how to operate. Adopting a more permissive approach toward nonlegislative rules, by which agency heads have wider latitude to adopt generally applicable policies without an arduous notice-and-comment process, gives the heads of agencies—and thus the President who appoints them—more tools by which to change agency behavior. This would make it easier for the election of a new President to usher in a new approach to enforcement, much as Cox and Rodríguez argued should occur with immigration.²¹³

212. See *id.* at *40 (King, J., dissenting) (“Requiring each and every policy channeling prosecutorial discretion to go through the notice-and-comment process would perversely encourage unwritten, arbitrary enforcement policies.”).

213. See *supra* Part I.

By contrast, to require a notice-and-comment process in order to bind frontline decision makers to a discretionary policy would amount to a substantial obstacle in the way of the President and his appointed agency heads in shaping how agencies use discretion in the field. As the dissenting judge in the Fifth Circuit's *Texas* decision noted, "[A]ll statements of policy channel discretion to some degree—indeed, that is their purpose."²¹⁴

The question of whether, and to what degree, the President should control administrative agencies dates back to the New Deal Era, though it has assumed more prominence since the late 1970s.²¹⁵ According to some accounts, this question emerged as early as the Jackson Administration.²¹⁶ Most recently, through both Republican and Democratic administrations, there has been a general trend toward greater presidential control over policy making.²¹⁷ Typically, the primary concern with this trend is that the expanding power of the presidency may usurp the role of Congress.²¹⁸ This concern was heightened by the rise of the "unitary executive" theory, especially during the Administration of George W. Bush.²¹⁹ In its strongest form, the unitary executive theory posits that the Constitution assigns executive authority to the President, and, as a result, Congress may not assign executive autonomy to any other subordinate agencies.²²⁰ It is worth noting that the unitary executive theory would support President Obama's authority to use prosecutorial discretion to reshape immigration policy.²²¹ But the unitary executive theory is justifiably controversial because it would constrain Congress's ability both to

214. *Texas*, 2015 WL 6873190, at *40 (King, J., dissenting) (quoting *Prof'l & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995)).

215. See generally RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 84–86 (5th ed. 2009) (summarizing arguments for and against executive control dating to the President's Committee on Administrative Management in 1937).

216. See Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 706–07 (2007).

217. PIERCE, SHAPIRO & VERKUIL, *supra* note 215, at 97.

218. *Id.* at 85.

219. See *id.* at 116–17.

220. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 663 (1994) ("[S]ince the President's grant of 'the executive Power' is exclusive, Congress may not create other entities independent of the President and let them exercise his 'executive Power.'").

221. See, e.g., *id.* at 658 (arguing that the President controls prosecutors and all prosecutorial discretion is vested in the President).

check the power of the executive and to make meaningful policy decisions. Such a concern may be especially acute for agencies that are largely or completely self-funded, like USCIS.²²²

One need not adopt the unitary executive theory to find a basis for the use of executive discretion in the Obama Administration. The unitary executive theory provocatively posits that Congress simply cannot assign autonomy to an agency independent of the President. However, there is considerably more agreement that the President has the authority, at least, to oversee the Executive Branch as a general matter, even if Congress may sometimes make certain agencies more independent.²²³ Under more limited theories of presidential authority, Congress may choose to limit presidential power over particular areas of policy by, among other things, creating an independent agency or by assigning decision-making power explicitly to inferior officials.²²⁴ There is some nuanced disagreement about how to interpret the more common scenario whereby the statute assigns decision making to a cabinet-level head of agency. Under one view, such congressional delegations should be understood as implicitly permitting the President to direct the agency, so long as Congress has not acted more explicitly to limit such presidential power.²²⁵ Under another view, the President would have such authority only if explicitly granted it by Congress.²²⁶ In other words, there is room for debate about whether power to direct agency policy making should always rest with the President (the unitary executive), be presumed to rest with the President unless *explicitly withheld* by Congress, or be *explicitly granted* by Congress.

222. See Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735 (2013); WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERV., U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING, 5–6 (2015), <http://www.fas.org/sgp/crs/homesecc/R44038.pdf>.

223. See PIERCE, SHAPIRO & VERKUIL, *supra* note 215, at 117 (“Undoubtedly, the power of the President to control subordinates can be hedged, if not controlled, by congressional delegations.”). See *generally* Strauss, *supra* note 216, at 715–16 (noting “common ground” among varying perspectives on executive authority).

224. PIERCE, SHAPIRO & VERKUIL, *supra* note 215, at 101, 115.

225. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2326–31 (2001) [hereinafter Kagan, *Presidential Administration*]; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 84 (1994).

226. See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

Fortunately, it is unnecessary to delve any further into these varying positions in order to wrestle with the Obama immigration policies. In the case of immigration enforcement policy, Congress assigned authority explicitly to the DHS Secretary,²²⁷ and there is no daylight between the President's position and the Secretary's. President Obama has taken public ownership of the policies by announcing and promoting them in high profile speeches and in White House issued materials.²²⁸ But the actual policies are embodied by and implemented through memoranda issued by Secretary Johnson.²²⁹ Thus, even if one adopts a limited view of *presidential* authority, Congress has explicitly empowered the DHS Secretary, who implements the President's policies.²³⁰ As a result, the Obama immigration policies do not actually rely on an expansive theory of presidential authority.

Whether authority rests with the President or the DHS Secretary, these are both highly visible officials who gain office either through a national election or through a highly public confirmation process. Most importantly, these are officials who can lose their jobs (and will lose their jobs) with the coming of a new administration. This fact underlines one of the primary advantages for democracy in vesting policy-making authority in the highest political levels of the executive, rather than with anonymous frontline enforcement officers. Before she was on the Court, then-Professor Elena Kagan argued that Presidents should use the power of regulatory agencies to achieve policy goals because they

227. 8 U.S.C. § 1103(a)(1) (2012).

228. *See, e.g.*, Remarks by the President, *supra* note 3.

229. *See* 8 U.S.C. § 1103(a)(3).

230. The immigration scenario appears different from Obama Administration policy regarding Guantanamo Bay detainees. In that situation, Congress has authorized the Secretary of Defense (and not the President) to decide when to transfer detainees, and the Secretary appears to be more reluctant to do so than the President may desire. *See* Daphne Eviatar, *Why Can't Obama Get His Defense Secretary to Release This Guantanamo Prisoner?*, DEFENSE ONE (Aug. 21, 2015), <http://www.defenseone.com/ideas/2015/08/why-cant-obama-get-his-defense-secretary-release-guantanamo-prisoner/119358/>; Tim Mak & Nancy A. Youssef, *The Pentagon Is Keeping Half of Gitmo Locked Up—Against the White House's Wishes*, DAILY BEAST (Aug. 9, 2015, 8:53 PM), <http://www.thedailybeast.com/articles/2015/08/09/he-s-keeping-half-of-gitmo-locked-up-against-the-white-house-s-wishes.html>; Paul D. Shinkman, *Defense Secretary: Guantanamo Bay Could Stay Open*, U.S. NEWS (Sept. 1, 2015, 1:03 PM), <http://www.usnews.com/news/articles/2015/09/01/defense-secretary-ash-carter-indicates-guantanamo-bay-could-stay-open> (“Reports have emerged in recent weeks citing White House sources complaining [Defense Secretary] Carter is not moving quickly enough to match Obama’s urgency to clear out the prisoners.”).

can be subject to political accountability through elections.²³¹ In theory, a central rationale for courts to defer to administrative agencies is that they are subject to political accountability through the democratic process. As the Supreme Court said in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.²³²

This emphasis on political accountability supports the theory that *Chevron* represents a constitutional orientation in which political branches of government are presumed to be better suited than courts to decide questions of public policy.²³³ This passage from *Chevron* also highlights an important tension. Administrative agencies, on their own, are not very politically accountable, except through presidential control.²³⁴

In *Sierra Club v. Costle*, the D.C. Circuit held that when agencies engage in rulemaking, the President and his staff in some instances may hold ex parte discussions to influence the agency, separate from the public notice-and-comment process.²³⁵ The court noted that even though Congress may delegate authority to a certain agency, the President retains authority to influence the agency because the Constitution established a unitary executive:

The executive power under our Constitution, after all, is not shared—it rests exclusively with the President. The idea of a “plural executive,” or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders

231. See Kagan, *Presidential Administration*, *supra* note 225, at 2369.

232. 467 U.S. 837, 865–66 (1984).

233. See Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 289–90 (2011) (tracing a constitutional principle of “policy interference avoidance” to Chief Justice John Marshall’s statement in *Marbury v. Madison* that “there exists, and can exist, no power to control that discretion. The subjects are political The acts of such an officer, as an officer, can never be examinable by the courts.”) (quoting *Marbury v. Madison*, 5 U.S. 137, 166 (1803)).

234. One might also suggest that congressional oversight is an important means of political accountability, but it is not the one that the Court relied on in *Chevron*.

235. See 657 F.2d 298, 407 (D.C. Cir. 1981) (“The purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting.”).

chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution²³⁶

In a recent article following up on their earlier study of presidential immigration discretion, Professors Cox and Rodríguez also highlight Elena Kagan’s argument that centralizing agency power in the President has important virtues.²³⁷ Their essential argument is that constraining frontline discretion with categorical policies does not represent a constitutional problem, as some claim, because it generally enhances consistency, the rule of law, and accountability.²³⁸ However, the litigation challenging DACA and DAPA has largely eschewed this constitutional concern, focusing instead on the interpretation of the APA so as to require a formal rulemaking process in order to bind frontline enforcers to exercise discretion in a particular way. The APA need not be interpreted this way, as such an interpretation makes it more difficult for superior political officials to direct the activity of executive agencies.

D. *The Trouble with Civil Servant Deliberation*

The presidential control model argues that agency discretion should be controlled through elected officials, who in turn are accountable to voters.²³⁹ This approach explicitly embraces the potential, and even the desirability, for raw political calculations and/or political ideologies to shape agency policy making. As a result, some writers refer to this approach as “the political control model.”²⁴⁰ Even critics acknowledge that this has become the dominant model in administrative law,²⁴¹ although as discussed in Part III.C, there are actually different views among its proponents about how far presidential control extends in relation to congressional prerogatives to constrain executive discretion.

236. *Id.* at 405–06.

237. Cox & Rodríguez, *President and Immigration Law Redux*, *supra* note 4, at 184–85, 208.

238. *See id.* 175–76.

239. *See id.* 167–70.

240. *E.g.*, Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1400 (2013) [hereinafter Seidenfeld, *Role of Politics*].

241. *See, e.g., id.* at 1400 n.15.

There is by no means a consensus in favor of presidential control, and the D.C. Circuit's inconsistent jurisprudence on the necessity (or lack thereof) for notice-and-comment processes reflects this ambivalence. In some cases, these divisions relate to differing policy preferences; a person who disagrees with the President on policy may be more resistant to giving the President more control. The *Texas* litigation against DACA and DAPA could certainly be explained this way.²⁴² But there are also serious critiques of presidential control, as well as alternative models.²⁴³ For example, in a recent essay Professor Mark Seidenfeld critiques Elena Kagan's political accountability theory, arguing that voters will typically be unaware of regulatory issues, and even if they are aware, it is difficult for voters to express their myriad policy preferences through the election of a single office holder.²⁴⁴ Professor David S. Rubenstein sounds a note of caution about administrative power and the growth of agency control over public policy, arguing that there is a greater need to establish checks and controls on that power.²⁴⁵

In order to create a check on presidential control, critics argue for more deliberative policy making at the agency level, especially through notice-and-comment rulemaking.²⁴⁶ For instance, Seidenfeld argues that this process "empower[s] stakeholders or the public directly to provide necessary input into agency rulemaking in such a way that the agency will act in accordance with the values held by the policy as a whole."²⁴⁷ It also tends to involve agency experts with differing knowledge sets, creating the potential for a better informed policy-making process.²⁴⁸ However, proponents of deliberative administration differ on the degree to which they see agency staffs as a direct check on presidential power. For example, Seidenfeld argues that deliberative policy making is

242. See Cox & Rodríguez, *President and Immigration Law Redux*, *supra* note 4, at 114 n.17.

243. See generally David S. Rubenstein, "Relative Checks": *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2186–213 (2010) (describing the judicial control, presidential control, and congressional control models).

244. Seidenfeld, *Role of Politics*, *supra* note 240, at 1416–18.

245. Rubenstein, *supra* note 243, at 2173, 2179–80.

246. See, e.g., Seidenfeld, *Role of Politics*, *supra* note 240, at 1426.

247. *Id.* at 1429.

248. *Id.* at 1427–28.

useful in engaging more stakeholders and focusing policy alternatives, but acknowledges that policy choices ultimately involve value judgments that should be made by the President, who can claim the legitimacy that flows from his election mandate.²⁴⁹ By contrast, other writers argue that internal fragmentation within the Executive Branch offers a form of separation of powers analogous to constitutional separation of powers between the three branches of government.²⁵⁰ In a recent provocative study, Professor Jon D. Michaels describes a self-regulating system of administrative rivals in which agency fragmentation operates as a self-check on executive power.²⁵¹

This article argues that alternative models of deliberative or fragmented administration are often quite useful, but are not especially well-suited to the immigration context. It is interesting to observe or describe the potential for fragmented parts of the Executive Branch to act as rivals to each other; indeed, it has been a primary purpose of this article to describe how such internal rivalry has had an impact on immigration policy.²⁵² But, unlike Congress and the President, agency civil servants are not elected.²⁵³ Empowering agency staffs as a check on the power of elected officials ultimately disempowers voters in a way that empowering Congress to check the power of the President does not. In his study of agency fragmentation, Michaels describes the potential for civil servants to form alliances with groups outside government “to better resist the powerful agency heads (backed by the President).”²⁵⁴ This is an apt description of exactly how frontline immigration enforcement officers have allied with external opponents of President Obama’s immigration policies to block DACA and DAPA. Even though he is generally sympathetic to the virtues of agency fragmentation, Michaels acknowledges that such resistance can go too far, ultimately threatening the integrity of

249. *Id.* at 1443–44.

250. See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426–29 (2009); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. (forthcoming 2016) (manuscript at 3).

251. Michaels, *supra* note 250, (manuscript at 2–3).

252. See discussion *supra* Part II; see also Cuéllar, *supra* note 29 (discussing agency involvement in failing immigration policies).

253. See U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amends. XII, XVII.

254. Michaels, *supra* note 250, (manuscript at 33).

the separation of powers system established by the Constitution.²⁵⁵

There should be no need to adopt a single model applicable to all administrative contexts. It should be possible to adopt an optimal mechanism for administrative control tailored to the dynamics of specific policy contexts.²⁵⁶ The deliberative model has particular appeal when Congress prescribes that a particular policy question should be set according to scientific data with minimal or no room for political or ideological judgment calls.²⁵⁷ For instance, a court intervened to prevent political interference with agency decision making regarding over-the-counter sale of the Plan B contraceptive pill.²⁵⁸ In that case, the statute provided that drugs should be approved if they are effective and safe, based on scientific tests.²⁵⁹ Also, there is good reason to demand more transparent deliberation when an agency issues policies in a particularly opaque manner that is difficult for the public to access.²⁶⁰ When policy is highly technical and not very visible, there is good reason to doubt the real efficacy of political accountability through the election of the President.²⁶¹ Deliberative models are better suited to this context.

Deliberative models of agency decision making are not well suited to immigration enforcement, however. Unlike FDA approval of a drug, discretion in immigration enforcement is driven by “immediate human concerns.”²⁶² There is little or no reason to think that ICE agents have any special expertise about these

255. *See id.*

256. Rubenstein, *supra* note 243, at 2219–20 (arguing for a “tailored” approach); *see also* Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 MICH. J. L. REFORM 1, 27 (2013) [hereinafter Family, *Easing*] (arguing for an agency-by-agency approach).

257. *See, e.g.*, Metzger, *supra* note 250, at 423 (noting concerns about politicization of decisions by the EPA or the Food and Drug Administration).

258. *Tummino v. Torti*, 603 F. Supp. 2d 519, 550 (E.D.N.Y. 2009).

259. *Id.* at 524; 21 U.S.C. § 355 (2012).

260. *See, e.g.*, Family, *Easing*, *supra* note 256, at 9–20 (summarizing historical problems with the creation of USCIS guidance policies).

261. *See* Rubenstein, *supra* note 243, at 2203 (noting that much “‘presidential’ influence is actually performed by politically unaccountable surrogates . . .”). However, one might counter that even when the voting public is not highly engaged in the technical details of a policy, presidential candidates do often articulate a general approach to regulatory policy which may attract or repel voters even if the details will be implemented by surrogates out of public view.

262. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

matters. Moreover, Schlanger's insights about how agency staff tend to focus on their perceived core mission suggests that it actually may be difficult for frontline officers to balance their enforcement orientation against any competing concerns.²⁶³ It is one thing to require a bottom-up deliberative process when lower level staff have specific expertise that would otherwise be ignored, or when Congress wanted to insulate policy making from political considerations. But in the case of immigration enforcement, it is harder to make the argument that there is any objective expertise that would be added to the process, and subjective political judgments appear to be exactly what is required.

In taking a tailored approach to administrative governance, it is also relevant to consider the transparency of presidential acts. The Supreme Court has not said much about the difference between legislative and nonlegislative rules, but it has spoken in favor of measures that "advise the public."²⁶⁴ This makes sense in terms of political control models of administrative law. The theory that presidential control establishes electoral accountability depends on the assumption that the public knows how the President is using this power. From this perspective, DACA and DAPA should be more defensible because the President announced and promoted them so publicly. The details of these programs have been published by the agency and there has already been a vigorous public debate. In this context, it is more difficult to articulate what a notice-and-comment process would add.

In Elena Kagan's article promoting presidential control over agency policy making, she noted that the kind of political accountability she advocated could only function if the President's policies are disclosed to the public.²⁶⁵ This political accountability cannot work if it is difficult for agency heads to direct field agents how to exercise discretion. This argument has been developed recently by Professor Catherine Y. Kim, who argues for a functional approach to political accountability, rather than formalistic in-

263. See discussion *supra* Part III.

264. See discussion of *Perez v. Mortgage Bankers Ass'n* and *Lincoln v. Vigil*, *supra* Part III.

265. Kagan, *Presidential Administration*, *supra* note 225, at 2369 ("The President's involvement, at least if publicly disclosed, vests the action with an increased dose of accountability, which although not (by definition) peculiarly legislative in nature, renders the action less troublesome than solely bureaucratic measures from the standpoint of democratic values.").

sistence on a rigid notice-and-comment process for every situation.²⁶⁶ She notes that this argument is especially salient with regard to enforcement discretion:

Highly visible policy decisions announced by high-level administrative officials directing categorical grants of relief, even when issued through informal policy statements, may well be more attentive to states' interests, subject to greater political accountability, and more carefully and extensively deliberated than granular case-by-case decisions rendered by street-level officials.²⁶⁷

In the field of immigration enforcement, the APA should not be interpreted in a manner that would make it difficult for the President, or the head of an agency, to categorically constrain his or her officers in the field, especially if it is done through a transparent, public statement of policy. In fact, such actions should be encouraged because they help fulfill central goals of administrative law. They encourage agencies to be more public about how they use their power, and they locate discretionary authority in an agency head and, ultimately, the President. This facilitates political accountability and gives voters a viable role in influencing how executive discretion will be used. By contrast, the *Appalachian Power* approach would empower anonymous public employees who exercise discretion largely out of public view and in a manner that is difficult for voters to change.

To bolster this point, Part IV draws analogies to two other areas of law where either scholars or the Supreme Court saw reason to worry about the power of low-level public employees over public policy. One of these concerns a longstanding critique on the influence of public sector unions over public policy. Another concerns free speech law, where the Court has limited free speech by dissenting public employees in the workplace context.

266. See Kim, *supra* note 50, at 726 (“[P]rocedural formality serves as a poor proxy for determining the extent to which a given decision considered state interests, is subject to political accountability, or was carefully deliberated.”).

267. *Id.* at 729.

IV. PUBLIC SECTOR EMPLOYEE INFLUENCE OVER PUBLIC POLICY: ANALOGIES

A. *Overview*

So far, this article has argued that the concept of a rule being binding, and thus subject to notice and comment under section 553 of the APA, may be understood in two different ways. Under the view most favorable to the President, a rule is subject to notice and comment only if it is binding on the agency as a whole. Thus, the head of an agency may issue strict, categorical policies about how the agency should exercise discretion without going through notice and comment. But, under the view that has been adopted by the lower courts in the initial stages of the *Texas* litigation against DACA and DAPA, a rule is subject to notice and comment if the head of an agency issues directives that constrain the discretion available to his or her subordinate officers in the field.²⁶⁸ This latter approach is problematic because it gives unelected public employees considerable ability to influence public policy, while making it more difficult for elected leaders to change how the government behaves at the frontline. This interpretive problem should lead a court to wrestle with the place of public employees in setting public policy.

Public employees are, on the one hand, part of a government apparatus in which policy should be set according to the rules of constitutional democracy. On the other hand, they are citizens who have the right to dissent and who may not agree with the public policy choices made by their superiors. The need to balance these roles is not new. One analogous area of law in which attention has been paid to the potential for public employees to thwart the policy goals of elected officials concerns collective bargaining. As we have seen in Part II, the unions representing ICE and USCIS agents have played a pivotal role in the legal challenges to President Obama's executive actions on immigration. They resisted training under the Morton Memos, filed lawsuits against DACA and DAPA, and supplied the critical affidavits on which

268. *Texas v. United States*, 86 F. Supp. 3d 591, 665–66 (S.D. Tex. 2015).

Judge Hanen relied to conclude that DACA and DAPA were binding on frontline officers and thus supposedly subject to section 553 of the APA.²⁶⁹

Even before the *Texas* case reached Judge Hanen's courtroom, frontline resistance played a pivotal role in shaping how the Administration designed its deferred action programs. As discussed, the post-2012 Obama immigration actions were designed strategically to bind frontline immigration officers to force them to follow the President's views on how discretion should be used rather than their own.²⁷⁰ By holding that the Administration had to first go through a notice-and-comment process,²⁷¹ the *Texas* litigation effectively imposed a significant check on the President's ability to direct his own administration and, in the process, empowered public employees at the expense of elected leaders who are their nominal superiors.

The frontline resistance to the Obama immigration policies has been highlighted by some writers as an example of civil servant resistance.²⁷² It has been argued that civil servant resistance "may represent one tool for ensuring executive compliance with the rule of law."²⁷³ In some ways, this argument is similar to the deliberative model of administrative rulemaking, in that it places a high premium on civil servant involvement in policy making as a check on political influence. But rulemaking engages civil servants through a process defined by statute with steps and an eventual endgame. There is also the potential for civil servants to resist executive policies outside of any internal administrative procedure, for instance by publicly speaking out, lobbying against policy goals, or suing to avoid having to enforce a policy with which they disagree.²⁷⁴ Alex Hemmer recently argued that such resistance fills a useful role, since the civil servants can give voice to dissenting legal objections that may otherwise never get a hearing.²⁷⁵

269. *Id.* at 669–70; *Crane v. Napolitano*, 920 F. Supp. 2d 724, 730 (N.D. Tex. 2013); Preston, *Agents' Union*, *supra* note 114.

270. *See generally* discussion *supra* at Part III.A.

271. *See Texas v. United States*, 787 F.3d 733, 765–66 (5th Cir. 2015).

272. *See, e.g.*, Alex Hemmer, *Civil Servant Suits*, 124 *YALE L.J.* 758, 773–77 (2014).

273. *Id.* at 762.

274. *Id.* at 760.

275. *Id.* at 762, 768–72.

Part III.D argued that the call for a robust role for civil servants in deliberative policy making is more compelling when Congress has made clear that decisions should be made according to technical criteria and not according to political considerations or if high level officials would otherwise be inclined to act secretly. This is not the case, however, with immigration enforcement discretion in the Obama Administration, which inherently involves subjective value judgments and is a subject on which the voting public is highly engaged. Moreover, in immigration enforcement there is little reason to think that frontline officers and civil servants possess particular expertise. Rather, they appear to simply embody a competing set of subjective values that may be at odds with those of the President.

This section turns to two analogies to illustrate why it can be problematic to give civil servants a privileged role in policy making, especially if this means allowing subordinate employees to thwart the policy goals and value judgments of superior elected officials simply because they disagree with them. Part B explores the analogy to public sector unions and the collective bargaining process, which conservative scholars have criticized for establishing an extra-constitutional constraint on policy making. Part C focuses on First Amendment cases in which the Supreme Court and lower courts have drawn a distinction between public employees participating in public debate in their capacity as private citizens and when they do so from their privileged position as government officials. In the immigration context, there should be space for frontline enforcers to have their opinions heard by the public and by Congress, even if their views differ from those of the President. But it would be far more problematic to allow them, in their official capacities, to resist or disobey policy established by their superiors.

B. *The Critique of Public Sector Unions*

That a conservative coalition would act to strengthen the hand of public sector employees vis-à-vis the President is rich in irony.²⁷⁶ During his first term in office, President Reagan engaged in

276. See Linda Greenhouse, *Judicial Energy and the Supreme Court*, N.Y. TIMES (Nov. 12, 2015), http://www.nytimes.com/2015/11/12/opinion/judicial-energy-and-the-supreme-court.html?_r=0 (comparing conservative arguments for a strong executive during Repub-

a controversial effort to re-direct (to use a deliberately neutral term) the enforcement efforts of the EPA.²⁷⁷ Reagan's defenders could point to the fact that he had campaigned against government regulations, including environmental regulations, in 1980 and that, upon being elected, he had a democratic mandate to change how the agency operated by scaling back, targeting, or prioritizing enforcement efforts.²⁷⁸ In a sense, this presented an analogous situation to President Obama's battle with ICE employees. As discussed in Part II.A, one may make the assumption that employees of a government agency are generally devoted to the core mission of their agency. Thus, one should anticipate that if a President and his political appointees tell the EPA staff to not aggressively pursue polluters, the EPA staff may be inclined to resist, much as ICE officers have resisted Obama Administration directives not to aggressively pursue all unlawfully present immigrants. A defender of President Reagan might say that, in a democracy, questions about how executive discretion should be exercised should be left to the voters, which means that elected officials must be able to give direction to unelected public employees.

The insight that elected officials may face resistance from unelected agency employees connects closely to a longstanding critique about the influence of public sector unions on public policy. This critique was articulated in legal literature in the early 1970s.²⁷⁹ The central concern of the early writers on this topic was the collective bargaining process, which they perceived as raising different concerns in the public sector than with private companies and, as a result, called for different regulations.²⁸⁰ The subject of collective bargaining for a public sector union invariably involves questions of public policy that constitutionally should be

lican administrations to critiques of the same during the Obama Administration).

277. See Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y. TIMES (Jan. 2, 1989), <http://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html?pagewanted=all>.

278. See William A. Niskanen, *The Concise Encyclopedia of Economics: Reaganomics*, LIB. OF ECON. & LIBERTY (Oct. 4, 2015), <http://www.econlib.org/library/Enc1/Reaganomics.html>.

279. See HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 2 (1971); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1158 (1974).

280. See Lee C. Shaw & R. Theodore Clark, Jr., *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867, 868 (1972).

determined by elected officials. Unlike other citizens, public sector unions have two routes by which they may achieve their public policy goals, one through the legislative process and the other through collective bargaining.²⁸¹ As Clyde Summers wrote in 1974, “[t]he introduction of collective bargaining in the private sector restructures the labor market, while in the public sector it also restructures the political process.”²⁸²

A particularly pointed critique here is that collective bargaining agreements can effectively constrain the legislative process. An obvious example is the budget process. Collective bargaining can give public employees a degree of influence over public budgets that other citizens do not enjoy. A labor contract may bind a government body to certain allocations for wages and benefits and the obligation to collectively bargain in good faith obligates public officials to give the union access to a process by which the government may be influenced and from which other citizens are simply excluded.²⁸³ Summers pointed out that, once a collective bargaining agreement is finalized, its terms may be harder to undo than some legislation and regulations.²⁸⁴ While a legislature or agency could normally undo a statute or a regulation as easily as it was enacted in the first place, anything covered by a binding labor agreement might require the consent of the union to amend.²⁸⁵ As a result, whenever mandatory bargaining applies to a question of public policy, the need to negotiate with the union arguably imposes an extra-constitutional step in the policy-making process.²⁸⁶

The early scholarly critique of public sector collective bargaining was quite nuanced.²⁸⁷ Until the 1960s, the predominant view

281. *See id.* at 872.

282. Summers, *supra* note 279, at 1156.

283. *See id.* at 1164.

284. *Id.* at 1165.

285. *Id.*

286. For example, the teachers unions have argued that school districts may not establish new teacher evaluation policies without first negotiating them through collective bargaining. *See, e.g.,* Barbara Jones, *Did LAUSD Violate Teachers Union Contract? UTLA Files Complaint*, HUFFINGTON POST (Aug. 23, 2013, 2:35 PM), http://www.huffingtonpost.com/2013/08/23/lausd-violate-teachers-union_n_3804627.html.

287. *Cf.* Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective From the United States*, 36 COMP. LAB. L. & POL'Y J. 277, 279–81, 289–91 (distinguishing the “traditional attack” on public sector unions from “the new attack” that has been prominent in Wisconsin and other states since 2011, and noting that the

was that collective bargaining was inappropriate in the public sector.²⁸⁸ In 1962, President Kennedy issued an executive order initiating collective bargaining in the federal government, heralding a wave of public sector unionization at all levels of government.²⁸⁹ The academic scrutiny of public sector unions in the 1970s was intended as a corrective to this wave, but did not aim to entirely reverse it. As Summers articulated it, the main point was that collective bargaining in the public sector “constitutes something of a derogation from traditional democratic principles” and as a result should be limited and subject to careful balancing tests.²⁹⁰ However, Summers argued that public sector bargaining could be justified where the interests of public employees were directly opposed to the interests of taxpayers, which is the case whenever the budget and compensation are at issue.²⁹¹ In other words, early critics of public sector unions did not object to collective bargaining over wages, benefits, and working hours. Instead, they argued that collective bargaining becomes more problematic if it begins to cover other matters of public policy. The difficulties in drawing this line have long animated legal disputes about whether particular policies and decisions are subject to mandatory collective bargaining.²⁹²

In recent years, controversy about public sector unions has surged, fed by conservative governors and state legislatures that have promoted legislation to limit or eliminate them.²⁹³ Wisconsin Governor Scott Walker led the most prominent of these efforts, generating massive protests but nonetheless succeeding in eliminating collective bargaining for most state employees.²⁹⁴ A primary argument for these measures has been the longstanding critique that public sector unions distort democracy. Governor Walker, for instance, argued that collective bargaining agree-

early critics did not call for a total elimination of public sector collective bargaining).

288. Cf. Deborah Prokopf, *Public Employees at the School of Hard Knox: How the Supreme Court is Turning Public-Sector Unions into a History Lesson*, 39 WM. MITCHELL L. REV. 1363, 1366–68 (2013) (summarizing the history of public sector unionization).

289. See *id.* Malin, *supra* note 287, at 279; Prokopf, *supra* note 288, at 1366.

290. Summers, *supra* note 279, at 1192–93.

291. See *id.* at 1180–81, 1193.

292. See, e.g., Eric C. Scheiner, *Taking the Public out of Determining Government Policy: The Need for an Appropriate Scope of Bargaining Test in the Illinois Public Sector*, 29 J. MARSHALL L. REV. 531, 531 (1996).

293. See Malin, *supra* note 287, at 277.

294. See *id.* at 277; Prokopf, *supra* note 288, at 1364.

ments constrained local and state legislatures' flexibility to make sensible choices when they needed to cut their budgets.²⁹⁵ At least for recent conservative critics, these longstanding concerns have been augmented by new attacks on state administration of union dues, which critics view as fueling political activities that mainly benefit the Democratic Party at the expense of Republicans.²⁹⁶ As a result, the controversy about public sector unions has a highly partisan cast. But it is also worth noting that the partisan nature of anti-union ideology can shift in specific cases if a public sector union is seen as taking a position that is more right-wing. A recent example may be criticism of police unions in the context of protests regarding police violence against people of color.²⁹⁷ Police unions have often been seen as more supportive of the political right, reversing the usual politics associated with public sector unions.²⁹⁸

It is not the purpose of this article to parse these controversies comprehensibly, nor to summarize the legislative and judicial debates about limitations on public sector collective bargaining.²⁹⁹ Collective bargaining has not been a central problem for President Obama's immigration policies. Nor have wages and benefits. But critiques of public sector unions show that it can exert special influence on policy matters and thus must be understood as an extra-constitutional part of the governmental process.³⁰⁰ Summers

295. Scott Walker, *Why I'm Fighting in Wisconsin*, WALL ST. J. (Mar. 10, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704132204576190260787805984>.

296. See Malin, *supra* note 287, at 289–305.

297. See, e.g., Steven Rosenfeld, *The Real Reason Police Unions Enable the Worst Cop Abuses*, ALTERNET (Jan. 8, 2015), <http://www.alternet.org/civil-liberties/real-reason-police-unions-enable-worst-cop-abuses>.

298. See Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html?_r=0 (“[T]hanks to a mix of cultural affinity, conservative support for law-and-order policies and police union support for Republican politicians, there hasn’t been a strong right-of-center constituency for taking on their privileges. . . . In an irony typical of politics, then, the right’s intellectual critique of public-sector unions is illustrated by the ease with which police unions have bridled and ridden actual right-wing politicians. . . . There are many similarities between police officers and teachers: Both belong to professions filled with heroic and dedicated public servants, and both enjoy deep reservoirs of public sympathy as a result. But in both professions, unions have consistently exploited that sympathy to protect failed policies and incompetent personnel.”).

299. See, e.g., *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1684–94 (1984) (discussing judicial decisions, as of 1984, regarding the scope of public sector collective bargaining).

300. See Summers, *supra* note 279, at 1157 (arguing that public sector bargaining “must be examined as a part of the governmental process”).

cautioned that there is greater reason for concern about public sector unions when matters other than compensation become the target of collective bargaining because the inclusion of any subject in a labor contract “may preempt the exercise of any meaningful political restraints” by preventing voters and their representatives from setting policy in the normal legislative process.³⁰¹

Collective bargaining is only one way in which public employees may be able to resist efforts by elected executives and legislatures to set policy. This is clear in the immigration context where unions have utilized a variety of other strategies to achieve their policy goals. The broader lesson is that the potential for public sector employees to assert influence over public policy is inherently anti-democratic if it means that public employees have more capacity to influence policy than other citizens. Since government is a human institution, it is probably impossible and unnecessary to completely eliminate this influence. But it is important to make sure that it remains in check.

The simplest way to ensure that public employees do not influence government policy in an extra-constitutional manner is to make sure that public employees remain subordinate to their elected superiors. Since government policy is set by elected leaders, the public ought to be wary of any effort to establish a process that makes it more difficult for elected officials to direct the work of unelected public employees. Requiring an arduous notice-and-comment process would do exactly that, especially when there is no statutory basis for insulating a regulatory decision from political influence. Thus, if one assumes that granting deferred action is within the discretionary authority of an agency, one should be wary of an effort to impose notice-and-comment requirements if elected officials want to provide subordinate agency employees binding direction regarding the exercise of that discretion. To interpret the APA so as to impose such a requirement has a worrisome anti-democratic impact.

301. *Id.* at 1181. As an illustration, Summers argued that there is a difference between a teachers union negotiating for higher salaries than negotiating for greater control of the curriculum. *Id.* at 1181–82.

C. *The Free Speech Challenge*

Another area of law that highlights the complicated role of public employees in setting public policy is free speech cases in which public employees express criticisms of the agencies they work for or of the policies set by their superiors. First Amendment law recognizes that public sector employees occupy an ambiguous position because they are simultaneously citizens with rights to petition their government and to speak about matters of public concern, while also serving as employees of the government—or, more precisely, an unelected part of the government. This ambiguity can be seen vividly in the case of immigration enforcement agents.

As discussed in Part II.A, the unions representing immigration enforcement officers—most importantly, the National ICE Council—have publicly advocated positions adverse to the Obama Administration’s positions on immigration. For example, in 2010, the union issued a “vote of no confidence” in John Morton, the Director of ICE, expressing “growing dissatisfaction and concern among ICE employees . . . that [ICE leaders] have abandoned the Agency’s core mission of enforcing United States Immigration laws and providing for public safety, and have instead directed their attention to campaigning for programs and policies related to amnesty”³⁰²

In 2013, the union’s president wrote a public letter to the White House noting his recent testimony to the House of Representatives and the union’s lawsuit against the DHS, complaining that “our officers effectively have to choose between enforcing the law as we’re trained or losing their jobs.”³⁰³ Three months later, the National ICE Council sent a letter to Congress co-signed by thirty-one local law enforcement officers expressing opposition to the comprehensive immigration reform bill, S. 744, which was one of President Obama’s high legislative priorities.³⁰⁴ The Na-

302. Press Release, Nat’l Council 118—Immigration and Customs Enf., Vote of No Confidence in ICE Dir. John Morton and ICE ODPP Assistant Dir. Phyllis Coven (June 25, 2010), <http://iceunion.org/download/259-259-vote-no-confidence.pdf>.

303. Letter from Chris Crane, President, Nat’l ICE Council, to the President of the United States (Feb. 12, 2013), <http://iceunion.org/download/2615-council-ltr-white-house-02-13-2013.pdf>.

304. Letter from Chris Crane, President, Nat’l ICE Council, et al., to Members of Congress (May 9, 2013), <http://iceunion.org/download/2738-letter-lawmakers-05-09-13-1.pdf>.

tional ICE Council has also publicly feuded with the American Federation of Labor and Congress of Industrial Organizations, its parent organization, which has been more supportive of comprehensive immigration reform.³⁰⁵ Such public advocacy raises the question: can public employees be opponents of government policy while also being responsible for implementing that policy?

When public employees express themselves publicly on matters of public policy, a great deal depends on whether they are doing so in a purely private capacity. In *Rutan v. Republican Party of Illinois*, the Supreme Court held that a state may not condition public employment hiring decisions on a person's private political beliefs.³⁰⁶ But in *Garcetti v. Ceballos*, the Court found that public employees *can* be fired for things they say as part of their job responsibilities.³⁰⁷ This line between private opinions and work-related expression has never been easy to draw, especially since public employees are likely to be most interested in the areas of public policy with which they work, and their views are likely to contribute significantly to public debate on those topics.

The Supreme Court highlighted the need to strike a delicate balance with its 1968 decision in *Pickering v. Board of Education*, which involved a public school teacher who was dismissed after writing a letter to a newspaper criticizing the board of education and the district superintendent for their handling of school district tax revenue.³⁰⁸ The Court observed that government employees, like any citizens, have the right to participate in public debate about matters of public concern.³⁰⁹ But when a government employee criticizes the operation of a government agency, he or she is also criticizing her own employer. This poses a constitutional challenge, since government agencies must be able to effectively manage their operations like any other employer, and employers naturally have concerns when their employees become public critics. Justice Marshall, writing for the *Pickering* Court

305. Press Release, Nat'l ICE Council, ICE Agents Union President Defends Lawmakers from AFL-CIO Threats, Encourages Rubio to Leave Gang of 8 (Apr. 12, 2013), <http://iceunion.org/download/2692-ice-council-release-04-12-13-2.pdf>.

306. 497 U.S. 62, 75 (1990) ("[P]romotions, transfers, and recalls after layoffs based on [private] political affiliation or support are an impermissible infringement on the First Amendment rights of public employees.").

307. 547 U.S. 410, 426 (2006).

308. 391 U.S. 563, 564–65 (1968).

309. *Id.* at 572.

explained, “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”³¹⁰

A critical, distinguishing fact in *Pickering* is that there was no evidence the letter to the editor impeded Mr. Pickering’s duties as a teacher.³¹¹ Moreover, it is difficult to imagine any kind of expression that is more at the core of the First Amendment than writing a letter to the editor of a local newspaper about school taxes. The Court held that, “[i]n these circumstances we conclude that the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”³¹²

Pickering was thus an easy case, with only one Justice in partial dissent.³¹³ By finding that Mr. Pickering had the same right as any other citizen to express his opinion in the newspaper in a private capacity,³¹⁴ the Court set down an important marker that makes clear that government’s authority as an employer cannot completely swallow its employees’ freedom of speech.

Pickering recognizes that there is a balance to be struck, but it proved to be less than clear in establishing an analytical approach that would be able to resolve more difficult situations. The Court has struggled ever since to define how the line should be drawn. Was Mr. Pickering’s speech protected because of its content, since he spoke about a matter of public concern? Was it protected because he spoke in a public forum? Was it protected because the school made no showing that it had a detrimental effect at work? The Court has wavered between focusing on close exam-

310. *Id.* at 568.

311. *See id.* at 572–73 (“What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.”).

312. *Id.* at 573.

313. Justice White argued that the teacher’s statements should not be protected if they are demonstrably false. *See id.* at 583–84 (White, J., dissenting).

314. *See id.* at 573–74.

ination of the content of the speech to focusing more on the context in which the speech occurs.

A context-based approach is more sound doctrinally because it is less likely to produce discrimination based on the identity of the speaker. For present purposes, the tension between a content-based or a context-based approach to public employee speech is useful for understanding the role that ICE agents have played in resisting President Obama's policies. If the First Amendment attaches when public employees express themselves on matters of public concern (the content-based approach), then there is a strong argument for defending the prerogative of civil servants to use their position in the government to resist policies with which they disagree. But if context matters more—which is the approach taken by more recent case law—then public employees should not have much latitude to act on their personal opinions while carrying out their official duties. From this point of view, they should be free to express themselves in contexts where they can speak as private citizens. When they are at work, however, they may literally have to do as they are told.

The Court has handled two more public school teacher speech cases and resolved both in favor of the employees' speech. In *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, the Court found that a teacher was constitutionally permitted as a citizen to criticize collective bargaining negotiations during a public school board meeting.³¹⁵ This is perhaps unsurprising because it involved public comment in a public meeting about a matter of public concern and thus implicated a core type of speech protected by the First Amendment.³¹⁶ Perhaps more interesting, the Court also ruled for the teacher in *Givhan v. Western Line Consolidated School District*, when the teacher was fired for criticizing the lack of racial diversity among school staff.³¹⁷ A key fact here was that the teacher expressed her criticisms privately to her superior, and so the decision cannot be explained by the public nature of the forum.³¹⁸ As a result, a reasonable conclusion from these early cases is that content matters most in deciding whether public employee speech is protected by

315. See 429 U.S. 167, 175–77 (1976).

316. See *id.* at 174–76.

317. See 439 U.S. 410, 412–13 (1979).

318. See *id.* at 412, 415.

the First Amendment. The teacher in *Givhan* spoke out only privately and at work, but the substantive issue that she spoke about—racial discrimination in school employment—is just as ripe for public debate as taxes or collective bargaining.³¹⁹

This content-focused approach appeared to be confirmed when the Court set down another marker in the opposite direction in *Connick v. Myers*. Sheila Myers, an Assistant District Attorney, was fired after circulating a questionnaire to fifteen of her fellow Assistant DAs asking their opinions about their supervisors, office morale, and various office policies.³²⁰ A divided 5-4 Court found this was not protected speech because the expression in question was not about a matter of public concern but rather “is most accurately characterized as an employee grievance concerning internal office policy.”³²¹ In *Connick*, the Court seemed to focus especially on the content of the speech at issue to decide whether it enjoyed First Amendment protection.³²² The *Connick* Court spent much of its opinion analyzing the questions in the employee’s questionnaire to measure the degree to which it dealt with matters of public concern versus matters of simple grievance.³²³

This content-focused approach confronts significant problems, the most obvious of which is the difficulty in distinguishing public employee grievances from legitimate subjects for public debate. Content analysis also has implications for speaker discrimination because it would seem to imply that public employees cannot speak freely about certain topics in certain contexts. The Court recognized that nearly anything that goes on in a government office could be legitimate fodder for public discussion in theory but feared that “[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.”³²⁴ Still, the Court did not establish a clear rubric by which to draw

319. *See id.* at 412–13, 415–16.

320. *Connick v. Myers*, 461 U.S. 138, 141 (1983).

321. *Id.* at 154.

322. *See id.* at 146–52.

323. *See id.* at 148–52.

324. *Id.* at 149.

the line, observing that the content, form, and context of speech are all relevant.³²⁵

The Court's focus on content in employee speech cases appeared again in the 1994 case of *Waters v. Churchill*, where the Court failed to produce a majority opinion.³²⁶ Two nurses at a public hospital had a conversation at work during their break.³²⁷ One nurse, Cheryl Churchill, advised her colleague not to transfer to her department because it was a bad place to work.³²⁸ Churchill's supervisor, Cynthia Waters, heard about Churchill's statements, and ultimately had her fired.³²⁹ Before going any further, it should be obvious from these facts why the Court has feared that even the most tedious employment issue can become a constitutional case if the employer happens to be the government. That this fairly mundane workplace speech—the kind of situation normally derided as office politics—managed to split the Supreme Court so severely is perhaps a good indicator that the Court had failed to find an effective doctrinal test for employee speech cases.

Justice O'Connor, writing for the plurality, explained why free speech cannot apply in government workplaces the way it does in the public square.³³⁰ Justice O'Connor stated that, "surely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."³³¹ Nevertheless, four Justices ended up analyzing at considerable length a conversation between two off-duty nurses who were talking about whether a particular hospital department was a pleasant place to work.³³² They concluded that the case required a remand for further fact finding about Waters' true motivation for firing Churchill, thus pulling the Constitution and the federal courts ever deeper into the internal workings of the McDonough District Hospital.³³³

325. *Id.* at 147–48.

326. *See* 511 U.S. 661 (1994) (plurality opinion).

327. *Id.* at 664.

328. *Id.* at 664–65.

329. *Id.* at 665–66.

330. *See id.* at 672–73.

331. *Id.* at 673.

332. *See id.* at 679–82.

333. *See id.* at 681–82.

In *Waters*, seven Justices agreed that Churchill's comments to her fellow nurse were not entitled to First Amendment protection.³³⁴ But they failed to agree on the rationale. The plurality focused first on the content of what Churchill said, that "[d]iscouraging people from coming to work for a department certainly qualifies as disruption."³³⁵ The plurality also believed that a public employer needed to establish some procedure to discern whether specific instances of employee speech enjoyed constitutional protection.³³⁶ Justices Scalia, Kennedy, and Thomas disagreed with this procedural requirement.³³⁷ But they all appeared to agree that the content of the speech determined the outcome.³³⁸ Nevertheless, lower courts applying the content-based approach have been divided, at least to some extent, about how to determine if public employee speech is a matter of public concern or not.³³⁹

The Supreme Court turned away from the content-focused approach in *Garcetti v. Ceballos*.³⁴⁰ In this case, Richard Ceballos, a deputy district attorney in Los Angeles, wrote internal memoranda expressing concerns about police conduct in a case.³⁴¹ His supervisors decided to persist in the prosecution and allegedly retaliated against Ceballos, who testified for the defense.³⁴² In terms of substantive content, Ceballos seemed to have a stronger First Amendment claim than Myers or Churchill, whose dissenting speech dwelled more on internal employment-related grievances. Ceballos was fired for expressing an opinion about police misconduct, which would seem to be a public concern that resonates with the core purposes of the First Amendment.³⁴³ But the majori-

334. *Id.* at 663, 681.

335. *Id.* at 680.

336. *Id.* at 668–69.

337. *Id.* at 686 (Scalia, J., concurring in judgment).

338. *See id.* at 686, 689–90.

339. *See* Erika Eisenoff, *Hear No Evil, See No Evil . . . Speak No Evil? A Re-Examination of Public Employee Free Speech Rights*, 9 FIRST AMEND. L. REV. 643, 644 (2011); Sarah L. Fabian, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee—Who Decides?*, 43 U.C. DAVIS L. REV. 1675, 1688 (2010); Thomas Keenan, *Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 841–42 (2011).

340. 547 U.S. 410 (2006).

341. *Id.* at 414.

342. *Id.* at 414–15.

343. *See id.* at 432–34 (Souter, J., dissenting).

ty found that the decisive issue was the context and forum in which he expressed his opinion, not the subject matter.³⁴⁴ He was in a position to offer his views only because of his job as a prosecutor, and “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”³⁴⁵

Rather than focus on the substance and content of what the employee said, *Garcetti* shifts the focus to the context in which the employee speaks.³⁴⁶ This can be an easier test for courts to apply in the public sector. Consider, for example, a Fifth Circuit case decided just a few months after *Garcetti* concerning whether an employee at a county hospital had a right to wear a “Union Yes” button, in violation of a uniform non-adornment policy.³⁴⁷ Using the pre-*Garcetti* content-focused approach, this could be a difficult case because pro-union sentiment may touch on both a general matter of public concern and more individualized grievances.³⁴⁸ The court worried that if a pro-union button were permitted, buttons with more divisive political statements would also be permitted.³⁴⁹ Had *Garcetti* been decided in favor of protecting any speech on any matter of public debate, it would have been difficult to escape this. But the Fifth Circuit was able to resolve the case on simpler grounds because the button was being worn at work and the government employer had a neutral uniform policy.³⁵⁰

There is considerable friction between the Supreme Court’s decision in *Garcetti* and, in particular, *Givhan*.³⁵¹ One line of thought is that the Court’s cases since *Pickering* have marked an erosion of employee speech rights and have effectively rendered

344. *Id.* at 418, 421.

345. *Id.* at 421–22 (“The significant point is that the memo was written pursuant to Ceballos’ official duties.”).

346. As Lawrence Rosenthal observes, it is the context of the Ceballos memo rather than its content that distinguishes it from a classic whistleblower case. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008).

347. *Comm’n Workers of Am. v. Ector Cnty. Hosp. Dist.*, 467 F.3d 427, 430 (5th Cir. 2006) (en banc).

348. *See id.* at 438 (discussing the ways in which the message was ambiguous in terms of matters of public concern).

349. *Id.* at 441.

350. *See id.* at 441–42.

351. *See Garcetti v. Ceballos*, 547 U.S. 410, 429–30, 440 (2006) (Souter, J., dissenting).

public employees equivalent to private sector workers.³⁵² This limits public employees from contributing to public debate on matters about which they have considerable expertise.³⁵³ Others have argued that it is impractical or unfair to ask civil servants to turn on and off the citizen or employee aspects of their identity, depending on whether they are at work or at home.³⁵⁴ The trouble is that the Court has repeatedly and recently expressed concern that the First Amendment should not be an opening for every government employment dispute to be constitutionalized and necessitate judicial intervention.³⁵⁵ The cases before *Garcetti* illustrate the potential under the content-based approach for the Supreme Court to be drawn into fairly pedestrian disputes between supervisors and subordinates.

The Court of Appeals for the Second Circuit developed a valuable approach that would escape these difficulties. In the wake of *Garcetti*, the Second Circuit found the key to determining whether the First Amendment applies in full is whether the speech is made as part of an employee's official duties.³⁵⁶ If it is not—in other words, if the speech is made in a private capacity—then it enjoys far stronger constitutional protection.³⁵⁷ To determine whether an employee is speaking in an official or private capacity, the Second Circuit asks whether the speech in question has a “civilian analogue.”³⁵⁸ The idea here is that, if a non-government employee could engage in a similar form of expression, then it is private speech, even if it takes place at work.³⁵⁹ This explains

352. See Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 6 (2013).

353. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) (“Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should be spent.”); Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide “Your Conscience or Your Job,”* 41 IND. L. REV. 187, 189 (2008); Diane Norcross, *Separating the Employee from the Citizen: The Social Science Implications of Garcetti v. Ceballos*, 40 U. BALT. L. REV. 543, 548 (2011); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1177 (2007).

354. See Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2163 (2010).

355. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011); *Connick v. Myers*, 461 U.S. 138, 149 (1983).

356. See *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir. 2010).

357. See *Garcetti v. Ceballos*, 547 U.S. 410, 421, 423 (2006).

358. See *id.* at 424; *Jackler v. Byrne*, 658 F.3d 225, 229 (2d Cir. 2011); *Weintraub*, 593 F.3d at 203–04.

359. See *Jackler*, 658 F.3d at 241; Caroline A. Flynn, *Policeman, Citizen, or Both? A*

Garcetti, because a civilian could never be in a position to write internal legal memoranda for a District Attorney's office.

The official duties exception to the First Amendment is useful as an analogy for understanding the proper role for dissent by public employees, such as the ICE officers. Just as teachers may speak as private citizens at school board meetings, it makes sense that ICE officers, privately or through their union may advocate their views in the press or to Congress. But it is a different matter if they resist carrying out the directives and policies set by their superiors when they are at work. In his study of civil servant suits, Hemmer makes an analogous distinction between "civil servant *disobedience* and civil servant *disclosure*."³⁶⁰ He notes that whistleblower statutes protect civil servants who disclose information about law violations to the public.³⁶¹ However, this exception does not embrace broader forms of resistance where public employees simply refuse to carry out policies with which they disagree.³⁶² Empowering public employees to participate in public debate—including, in extreme cases, by revealing misconduct—is one thing. Allowing them to directly refuse to carry out government policy is quite another.

The potential for public employees to participate vigorously in public debate is easy to see in the immigration context. Frontline DHS officers spoke out against President Obama's policy—both his legislative goals and his executive actions. They also filed suit in court to stop policies they believed to be illegal and offered critical evidence in the *Texas* litigation.³⁶³ These activities should be protected under the First Amendment. Moreover, the capacity for public employees to express themselves provides a means by which their input can be heard, even when the policy is not set through a formal deliberative process. It is a different matter once these public employees decide to implement their opinions instead of the President's in the course of their official duties.

In the *Texas* case, the courts have been asked to make it more difficult for the President to direct frontline enforcers how to ex-

Civilian Analogue Exception to Garcetti v. Ceballos, 111 U. MICH. L. REV. 759, 774–75 (2013).

360. Hemmer, *supra* note 272, at 789.

361. *Id.*

362. *See id.* at 789–90.

363. *See supra* Part III.C.

ercise discretion. Put another way, the courts were asked to make it easier for DHS officers to exercise discretion differently than the President would want. A President should tolerate dissent, but need not tolerate disobedience by his own Executive Branch. Public employees, because of their unique experience and knowledge, are in a unique position to persuade their fellow citizens and to change policy through the political process. But they should accomplish this through the power of persuasion and not by using their position of employment.

CONCLUSION

The position adopted by the Fifth Circuit and by District Judge Hanen have made it more difficult for the President and his DHS Secretary to determine how discretion is exercised in immigration enforcement, by reasoning that DHS must go through notice and comment to enact a clearly prescribed policy on deferred action. Essentially, the Fifth Circuit's position is that, as a default, discretion belongs at the bottom, with the frontline enforcers.³⁶⁴ If the heads of government agencies or the President want to prescribe how discretion should be exercised, they must go through a cumbersome and time consuming rulemaking procedure.

The APA is regrettably ambiguous about this issue. It requires notice and comment for legislative rules, but not for non-legislative rules or "general statements of policy."³⁶⁵ The Supreme Court has stressed that administrative law aims to make the public better informed about how an agency plans to enforce the law. They appear to have no particular suspicion of policy statements that do not go through notice and comment but nevertheless accomplish the goal of transparency.³⁶⁶ But it has fallen on the D.C. Circuit to put meat on the bones of the distinction between policy statements and rules. In so doing, the D.C. Circuit has focused on whether a statement of policy is "binding."³⁶⁷

Unfortunately, any attempt to discern the doctrinal clarity to separate binding rules from general statements of policy con-

364. See discussion *supra* Part III.B.

365. See 5 U.S.C. § 553(b) (2012).

366. See discussion *supra* Part III.B.

367. See discussion *supra* Part III.B.

fronts three significant problems. First, the concepts probably represent a continuum on which different statements and policies are distinguishable only as a matter of degree. Second, the Supreme Court has had relatively little to say on the subject. Third, the D.C. Circuit has articulated a number of different tests to make this separation, but it has not always been clear about the purpose of using one test versus another.

The two clearest articulations of a rationale appear in *Pacific Gas* and in *Appalachian Power*. In *Pacific Gas*, the D.C. Circuit indicated that statements of policy can be useful to encourage agencies to be more transparent with the public about how they exercise their powers.³⁶⁸ This view appears fairly consistent with the Supreme Court's recent statement in *Perez* that there can be good reasons to avoid notice and comment, so long as an agency accepts the trade-offs.³⁶⁹ By contrast, in *Appalachian Power* the D.C. Circuit took a far more skeptical approach, suggesting that any time "a document issued at headquarters is controlling in the field," notice and comment may be required.³⁷⁰ Indeed, in the context of the struggle between low-level immigration enforcement officers and the Obama Administration, many of the President's immigration actions appear to intentionally tie the hands of subordinates who might otherwise resist his policies. Requiring a more formal deliberative process would be justified if the court has reason to worry that an agency is eluding public transparency regarding its policies or if there would be no other effective means by which the public may be heard on the issue. But it is harder to defend the focus on headquarters controlling the field, since that is an internal agency management issue and does not relate directly to the agency's relationship with the public.

The reference to "binding the field" contrasts with the D.C. Circuit's post-*Perez* case law, where the court focused on whether a policy creates "rights and obligations" vis-à-vis the public.³⁷¹ To reach the conclusion that headquarters must go through notice

368. See *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); discussion *supra* Part III.B.

369. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203–04 (2015); discussion *supra* Part III.B.

370. See *Appalachian Power v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

371. See *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015); discussion *supra* Part III.B.

and comment in order to bind the field, the court should explain why one should be alarmed by the head of an agency telling its field agents what to do. References to headquarters binding the field in D.C. Circuit case law should be considered stray comments, not to be read strictly, which have in any case been superseded by more recent decisions.

The DACA/DAPA litigation could be an opportunity clarify the legislative/nonlegislative rule distinction. This article offered analogies to public sector unions and to First Amendment claims by public employees to illustrate that there are serious problems with public employees—who are anonymous and largely beyond the reach of voters—having too much influence over policy. This article suggests that the questions of transparency and of whether a policy is binding are indeed relevant, but the central issue in administrative law is about the relationship between the government and the general public, not about the relationship between headquarters and a field office within an agency.

It makes sense to require rulemaking when a rule would be binding on an agency vis-à-vis the public. Likewise, if an administration tries to change policy in secret, it may be useful for democracy to force the process into the open through notice and comment. But DACA and DAPA do not raise these concerns. They do not create enforceable rights for would-be beneficiaries. The policies can be changed at a moment's notice by a future administration or, for that matter, by the current one. Or, the agency could decide to simply not grant deferred action in a particular case where the applicant appeared eligible according to the published criteria. Moreover, the President has informed the public about his policies in the highest profile manner possible. As a result, if the public is displeased by the policies, the public can change them by electing a different President. In this context, it is not clear what goals would be achieved by requiring notice and comment, other than simply delaying the process. More to the point, our default should be to give discretionary powers to our elected President, who is accountable to the public, not to anonymous public employees.

Weighing the resource constraints and human equities involved in potential deportation requires value judgments, and there may not be any immediate, objectively correct approach. In our system of government, it is important that such judgment

calls be made in a manner that is democratically accountable. The answer to the ultimate administrative law question—who decides?—ought to be the voters, who can choose among candidates who might exercise this judgment in different ways. For this to be possible, the President needs to be able to direct his or her administration about how to exercise discretion. Ultimately, the choice is not between having a rule or not having a rule. Nor is it a choice between exercising discretion in immigration enforcement or not doing so. The real choice is between having discretion exercised by an anonymous frontline officer, or by the President and a cabinet secretary who set policy in full public view. Courts should be reluctant to impose constraints on such discretionary policies, so long as the President is transparent with the public about them, thus permitting the voters to change these policies in the next election.