IMMIGRATION CRISES IN THE SECOND TRUMP ADMINISTRATION

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I. INTRODUCTION

Since President Trump began his second term as president, his administration has rolled out immigration policies at breakneck speed.[1] Punitive and harsh in their conception, these policies cover a range of immigration enforcement issues, including detention, temporary relief programs like parole, humanitarian relief like asylum, and deportation to countries with which migrants have no connection.[2] In some cases, immigration officials have wrongly and unlawfully deported people but no matter: they are pushing ahead anyway, exhibiting disinterest in correcting their mistakes.[3] Many within the administration have argued that such aggressive and comprehensive policies are necessary in the face of immigration crises generated by continued unauthorized migration

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1. *See* Tara Watson & Jonathon Zars, *100 Days of Immigration under the Second Trump Administration*, BROOKINGS (Apr. 29, 2025), https://www.brookings.edu/articles/100-days-of-immigration-under-the-second-trump-administration/ [https://perma.cc/29JT-XSAP].

2. *See id.*

3. *See* Mattathias Schwartz & Alan Feuer, *Trump Officials Deported Another Man Despite Court Order*, N.Y. TIMES (May 30, 2025), https://www.nytimes.com/2025/05/30/us/politics/trump-deportation-el-salvador.html [https://perma.cc/2PMV-WXEH].

and the dangers posed by "criminal illegal aliens."[4] Congress has fallen in line. It has both passed legislation increasing immigration authority over certain noncitizens in the United States and diverted more resources to immigration enforcement agencies.[5] In the face of this massive and cruel expansion of law enforcement, immigrants and defenders of immigrant rights have argued that the Trump administration's "solutions" are themselves the problem.[6] Deeply unsettling, and well beyond the scope of executive power, advocates have criticized immigration officials for destabilizing immigrant communities through punitive actions that are hard if not impossible to justify.[7] With Congress unwilling to claw back any of its delegated power to the Executive branch,[8] the political branches seem to be in complete alignment with President Trump's immigration policies.

This raises the predictable public law question of what, if anything, the courts will do to constrain immigration officials as they pursue these punitive anti-migrant policies. One, possibly optimistic, answer comes from a line of Supreme Court decisions addressing anti-migrant actions undertaken by agency officials during the first Trump presidency.[9] In a few notable instances, the Court invalidated marquee policies such as the rescission of the Deferred Action for Childhood Arrivals ("DACA")

4. *See* U.S. DEP'T OF HOMELAND SEC., 100 DAYS OF MAKING AMERICA SAFE AGAIN (Apr. 29, 2025), https://www.dhs.gov/news/2025/04/29/100-days-making-america-safe-again [https://perma.cc/DUZ2-5CEX].

5. *See generally* Laken Riley Act, Pub. L. No. 119–1, 139 Stat. 3 (2025) (codified as amended in scattered sections of 8 U.S.C.); *see also* One Big Beautiful Bill Act, Pub. L. No. 119–21, §§ 100051–54, 139 Stat 72, 385–92 (2025) (expanding immigration enforcement funding and authorities).

6. *See Mass Deportation: Analyzing the Trump Administration's Attacks on Immigrants, Democracy, and America*, AM. IMMIGR. COUNCIL (July 23, 2025), https://www.americanimmigrationcouncil.org/report/mass-deportation-trump-democracy/ [https://perma.cc/X3GH-KJN6].

7. *See* Alexandra Hutzler, *'Unprecedented': How Trump has Pushed the Limits of Presidential Power in His First 100 Days*, ABC NEWS (Apr. 29, 2025, at 05:07 ET), https://abcnews.go.com/Politics/unprecedented-trump-pushed-limits-presidential-power-100-days/story?id=121124189 [https://perma.cc/M644-X32P]; Cameron Santoro, *Trump's Immigration Crackdown Fuels Health Crisis: Detention, Depression, Deportation, and Disease*, AM. J. MANAGED CARE (Mar. 5, 2025), https://www.ajmc.com/view/trump-s-immigration-crackdown-fuels-health-crisis-detention-depression-deportation-and-disease [https://perma.cc/FN35-4T2T]; Daniel Costa, *Trump Attacks on Temporary Immigration Protections like TPS Hurt the Economy and Strip Millions of Their Workplace Rights*, ECON. POL'Y INST. (May 12, 2025 at 08:00 ET), https://www.epi.org/blog/trump-attacks-on-temporary-immigration-protections-like-tps-hurt-the-economy-and-strip-millions-of-their-workplace-rights/ (on file with Rutgers University Law Review).

8. *See* Hutzler, *supra* note 7.

9. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020) [hereinafter *U.C. Regents*]; Dep't of Com. v. New York, 588 U.S. 752 (2019).

program,[10] as well as an attempt to add a question about citizenship status on the census,[11] which would have undoubtedly led to an undercounting of immigrants as a part of that process.[12] But the Court also invalidated other, more technical, and less politically galvanizing policies implemented at the agency level, such as administrative processes governing the issuance of official immigration-related documents.[13] When read together, these Supreme Court decisions sent an unmistakable message to political appointees and other agency officials to adhere to principles of good governance even as they sought to regulate migrants in a policy arena in which they are normally entitled to judicial deference.[14] These cases provide a useful backdrop for evaluating the immigration policies rolled out during the first year of the second Trump presidency. With President Trump overseeing immigration agencies that are using mass deportation as a population management tool,[15] many are waiting to see whether and how much the federal courts can push back on some of the more brazen policies of this administration. If courts push back, the good governance cases will surely inform their response.

But will they? And how? In this essay, I want to make two points. First, the policies rolled out during the second Trump administration's first year are testing the limits of the good governance principles laid out by the Court. While in some instances, the administration has demonstrated a willingness to adhere to core administrative principles like fulsome reason-giving and notice, in others, it has sought to expedite implementation by invoking justifications rooted in perceived crises related to immigration.[16] In framing policies as necessary evils to address

10. *See generally U.C. Regents*, 591 U.S. 1 (addressing the legality of the recission of the DACA program).

11. *See generally Dep't of Com.*, 588 U.S. 752 (discussing the proposed citizenship question on the 2020 census).

12. Beth Jarosz, *Citizenship Question Risks a 2020 Census Undercount in Every State, Especially Among Children*, PRB (Oct. 5, 2018), https://www.prb.org/resources/citizenship-question-risks-a-2020-census-undercount-in-every-state-especially-among-children/ [https://perma.cc/FV3M-XAFH].

13. *See, e.g.*, Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021).

14. For my part, I analyzed the Court's response to the DACA rescission decision which can be found here: Stephen Lee, *DACA and the Limits of Good Governance*, REGUL. REV. (July 29, 2020), https://www.theregreview.org/2020/07/29/lee-daca-good-governance/ [https://perma.cc/V3TJ-BKTW].

15. *See* Alec Hernández, *Tom Homan Takes to Conservative Media to Outline Trump's Plan for Mass Deportations*, NBC NEWS (Dec. 11, 2024, at 11:20 ET), https://www.nbcnews.com/politics/donald-trump/tom-homan-trump-mass-deportations-plan-conservative-media-rcna182885 [https://perma.cc/RWG6-B4VB].

16. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 4.

migration emergencies,[17] agency officials have put the Court in the position of having to decide whether its prior demands for greater process, deliberation, and transparency can adapt to a regulatory environment in which the government insists on importing its entire immigration enforcement strategy into crisis management terrain and the judicial deference norms that typically follow.

This leads to my second point: the immigration policies of the second Trump administration demonstrate that crises are not always natural or inevitable events. While natural disasters like earthquakes and hurricanes arise outside of the state, forcing agency officials to respond, other events generating a seismic impact can arise from wholly within the state. The Trump administration's policies illustrate crises of this latter type.[18] If crises can sometimes emerge as legal and political constructions, then they can operate both as a tool for governance as well as for resistance. The essay concludes with some thoughts on where such acts of resistance are already forming.

II. GOOD GOVERNANCE CONSTRAINTS ON EXECUTIVE OVERREACH

During the first Trump administration, the Supreme Court issued a series of opinions that sought to define the outer limits of executive power to regulate noncitizens both within the context of the immigration system as well as within related areas.[19] Some of these cases address the legality of policies rolled out during the Trump administration,[20] but other cases involve well-established policies that align with the administration's pro-enforcement and punitive approach.[21] Challengers to these policies did secure some victories, but none of them did so on constitutional grounds.[22] Instead, the modest gains achieved during this period relied on longstanding administrative doctrines that governed the court-agency relationship central to the field of administrative law.[23] The reasoning coursing through these opinions embraced an overriding concern with principles of good governance—that is, ensuring that agency practice and policy-setting offered transparent, consistent, and reasoned justifications

17. *See id.*

18. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 4 ("On day one, President Trump declared a national emergency at the southern border.") (emphasis omitted).

19. *See, e.g.*, *U.C. Regents*, 591 U.S. 1 (2020); Trump v. Hawaii, 585 U.S. 667 (2018); Dep't of Com. v. New York, 588 U.S. 752 (2019); Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021).

20. *See, e.g.*, *Trump*, 585 U.S. 667.

21. *See, e.g.*, *Pereira*, 585 U.S. 198; *Niz-Chavez*, 593 U.S. 155.

22. *See Pereira*, 585 U.S. at 208–212; *Niz-Chavez*, 593 U.S. at 156–57.

23. *See Pereira*, 585 U.S. at 208–212; *Niz-Chavez*, 593 U.S. at 156–57.

for ordering (or disordering) migrant lives.[24] So while migrants "won" in several of these cases,[25] many of these decisions relegated migrant harms and injustices to an afterthought. The driving force behind these cases was a commitment to broader systemic values, not individual rights.

The most notable example of this body of cases concerns the Trump administration's failed attempt to rescind the DACA program.[26] In *Department of Homeland Security v. Regents of the University of California* ("*U.C. Regents*"), while the Court recognized the Trump Administration's general authority to terminate such a program,[27] a five-justice majority invalidated the Administration's specific effort to do so in that case.[28] Chief Justice Roberts joined what were then the four most liberal justices to achieve this bare majority.[29] The majority grounded its opinion in highly technical administrative law principles.[30] It discarded many of the administration's justifications as "post hoc rationalizations,"[31] scrutinized the remaining justification in light of the serious reliance interests engendered by the existing policy,[32] and ultimately invalidated the attempt to end DACA because the agency provided an incomplete explanation.[33] A super majority of the Court rejected the constitutional claims that challenged the rescission on equal protection grounds.[34]

A 2019 decision, *Department of Commerce v. New York*, focused on actions undertaken by the Commerce Secretary, who oversees the administration of the decennial census.[35] The Secretary attempted to include a question about the citizenship status of household members on

24. *See Pereira*, 585 U.S. at 208–212; *Niz-Chavez*, 593 U.S. at 156–57.

25. *See generally Pereira*, 585 U.S. 198 (holding that a notice to appear lacking the time and place of the hearing does not trigger the stop-time rule); *Niz-Chavez*, 593 U.S. 155 (holding that the stop-time rule is triggered only by a single complete notice to appear).

26. *See generally U.C. Regents*, *supra* note 9 (addressing the legality of the recission of the DACA program).

27. *Id.* at 16 ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.").

28. *See id.* at 35–36; Lee, *supra* note 14; Cristina M. Rodriguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 2–3 (2020).

29. Nina Totenberg, *Supreme Court Rules for DREAMers, Against Trump*, NPR (June 18, 2020, at 10:12 ET), https://www.npr.org/2020/06/18/829858289/supreme-court-upholds-daca-in-blow-to-trump-administration [https://perma.cc/B867-T8SV].

30. *See U.C. Regents*, 591 U.S. at 20–33.

31. *See id.* at 21–23.

32. *See id.* at 30–34.

33. *See id.* at 35–36.

34. *See id.* at 33–35. Only Justice Sotomayor would have permitted the claims of unconstitutional racial bias to proceed. *See id.* at 36–39 (Sotomayor, J. dissenting).

35. *See* Dep't of Com. v. New York, 588 U.S. 752, 758–64 (2019).

the census questionnaire, inviting a legal challenge.[36] The Trump Administration appealed the district court's order enjoining the Secretary's attempt to include the citizenship question in the census.[37] On appeal, the parties raised both constitutional and administrative law claims.[38] While the Court held that including a citizenship question on the census did not violate the Constitution's Enumeration Clause, it nevertheless held that the method used for adding the citizenship question violated the Administrative Procedure Act, thus handing the administration a defeat in its attempt to roll out an exclusionary policy.[39] This case did not address the immigration code nor did it touch upon immigration policy,[40] but it did have significant implications for immigrant communities. With census data informing important funding decisions related to public services, questions focusing on sensitive information like citizenship status pose the threat of undercounting.[41] Once again, it was Chief Justice Roberts joining the four-liberal-justice bloc to thwart the Trump Administration's efforts.[42] To be clear, these cases were not necessarily representative of the Court's response to the broad array of policies affecting immigration and immigrant communities during the first Trump Administration. Other high-profile and controversial policies aimed at excluding and punishing immigrants survived.[43] But the DACA rescission and citizenship census cases demonstrated that a bare majority of justices was willing to impose some limits.

Aside from these blockbuster cases, the Supreme Court resolved disputes arising from deep within the immigration bureaucracy that implicated questions central to the day-to-day practice of immigration law.[44] Despite the highly technical and seemingly narrow questions at

36. *See id.* at 761–64.

37. *Id.* at 765–66.

38. *See id.* at 770–73.

39. *See id.* For a helpful analysis of the broader implications of this decision, *see* Jennfier M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231 (2019).

40. *See generally Dep't of Com.*, *supra* note 9 (discussing the proposed citizenship question on the 2020 census).

41. *See* J. David Brown & Misty L. Heggeness, *Citizenship Question Effects on Household Survey Response*, J. POL'Y ANALYSIS & MGMT., 2025, at 1, 19, 21.

42. Joan Biskupic, *Exclusive: How John Roberts Killed the Census Citizenship Question*, CNN (Sep. 12, 2019, at 13:33 ET), https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court [https://perma.cc/VSM2-DFAR].

43. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 673–76 (2018) (upholding Presidential Proclamation No. 9645 which barred entry by nationals from certain countries).

44. *See, e.g.*, Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021).

the heart of these cases,[45] the throughline connecting them to the high-profile ones from that same era is a commitment to broader principles of good governance. A pair of cases involves a somewhat technical but important tool for managing immigrant applicants for relief from removal.[46] Cancellation provides one way for otherwise removable noncitizens to maintain or secure lawful permanent residence by negating or "cancel[ing]" their removability from the United States.[47] To prevail, migrants must demonstrate, among other things, continuous residence or presence in the United States for a period of years.[48] But the clock can stop running under certain conditions, with the effect of not giving migrants credit for time spent in the United States.[49] In particular, this "stop-time rule" stops the clock when the government issues a Notice to Appear ("NTA"),[50] which instructs the noncitizen to appear in immigration court and apprises the noncitizen of the factual and legal basis of their suspected removability.[51] Such a rule confers upon the government a significant advantage over noncitizens by taking away one major off-ramp for noncitizens once the NTA starts them down the road towards removal. Not surprisingly, as a matter of administrative practice, the government had construed the NTA requirement so that immigration officials need to provide only a bare-bones document in order to get the benefit of the stop-time rule.[52] This practice pre-dated the Trump administration,[53] but the Department of Justice, headed by then-Attorney General Jeff Sessions, fully embraced and defended its

45. These cases focused on whether a notice of appeal under section 1229(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) must include the time and place of a noncitizen's removal proceeding to trigger the Act's stop-time rule, *Pereira*, 585 U.S. 198, and whether a notice of appeal under the IIRIRA must be a single document with all the statutorily required information about the noncitizen's removal hearing to trigger the Act's stop-time rule. *Niz-Chavez*, 593 U.S. 155.

46. *See Pereira*, 585 U.S. at 201–02; *Niz-Chavez*, 593 U.S. at 158.

47. *See* 8 U.S.C. § 1229b.

48. *See id.* (number of years depends on permanency status).

49. *See* 8 U.S.C. § 1229b(d)(1) ("[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . .").

50. 8 U.S.C. § 1229b(d)(1)(A).

51. *See* 8 U.S.C. § 1229(a). The NTA serves a similar role to the charging document or indictment in the criminal legal process. *See The Notice to Appear*, IMMIGRANT LEGAL RES. CTR. (July 2020), https://www.ilrc.org/sites/default/files/resources/nta_practice_advisory.pdf?utm [https://perma.cc/CUP7-RTCZ].

52. *See* In re Camarillo, 25 I. & N. Dec. 644, 645 (B.I.A. 2011) ("[T]he DHS contends that even though the Notice to Appear did not specify a date and time of the hearing, the respondent's continuous residence ended when it was served in person . . . .").

53. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,332 (Mar. 6, 1997).

legality.[54] This practice conferred a significant substantive advantage to the government, allowing it to stop the clock with little more than a document missing facts and light on ostensible legal violations that could lead to removal.

In *Pereira v. Sessions*, an eight-justice majority held that an NTA that failed to include the time and place of the relevant removal proceedings did not satisfy the statutory requirements for the government to gain an upper hand through the stop-time rule.[55] In *Pereira*, Justice Sotomayor called the government's position "absurd" as a matter of common sense, one that she was "not willing to impute to Congress."[56] Often, the government points to administrative convenience or practical realities as a relevant factor or justification for setting procedural rules that seem more informal or ad hoc.[57] The government argued that "administrative realities" made it difficult to provide a specific date and time for hearings.[58] The reasoning goes that immigration enforcement is a regulatory project that requires fast and decisive action.[59] And because the machinery responsible for the adjudication of immigration cases is slow-moving and clunky, the government needs to act fast, otherwise each passing day makes it harder to extricate otherwise removable noncitizens from the interior of the United States.[60]

In the lone dissent, Justice Alito argued that good governance principles would be better served by allowing the government to continue its practice of issuing bare-bones NTAs.[61] The predictable outcome of the majority's holding, he argued, would be the government providing arbitrary dates which could be confusing for noncitizens.[62] Justice Sotomayor rejected this idea, pointing to the availability of scheduling systems and the opportunity for agencies to simply update noncitizens with new NTAs if and when the date and time of hearings change.[63] Ultimately, *Pereira* elevated the legal standards that agencies had to

54. *See generally* Brief for Respondent, Pereira v. Sessions, 585 U.S. 198 (2018) (No. 17–459) (discussing the Board's interpretation of the stop-time rule in removal proceedings).

55. Pereira v. Sessions, 585 U.S. 198, 201–02 (2018).

56. *Id.* at 212 (internal citations omitted).

57. *See* Brief for Respondent, *supra* note 54, at 19.

58. *Pereira*, 585 U.S. at 217.

59. *See* Brief for Respondent, *supra* note 54, at 46–47.

60. *See id.* at 6, 37.

61. *See Pereira*, 585 U.S. at 225–36 (Alito, J., dissenting).

62. *Id.* at 229.

63. *Id.* at 218.

meet in order to start the removal process and thwart migrant efforts to obtain relief from removal.[64]

A subsequent and related case, *Niz-Chavez v. Garland*, focused on the notice requirements the government had to meet to initiate removal proceedings against a potentially removable migrant.[65] Aside from the mechanics of beginning the process, these requirements determined whether the government would gain an upper hand in the process.[66] Under existing statutory requirements, noncitizens could apply only for relief such as cancellation if they could demonstrate continuous presence in the United States for a number of years.[67] Importantly, the issuance of the NTA stopped the clock,[68] thereby giving the government the power to pause the crediting of time spent in the U.S., thus handing it an undue advantage in cases involving migrants with a significant number of years present in the United States.[69]

Describing the government's position as the "notice-by-installment" theory, Justice Gorsuch held that the government could not gain the benefit of the stop-time rule in this fashion.[70] The entire opinion hinges on the meaning of a single statutory term—the meaning of the word "a"—but it unfolds against a backdrop concerning governmental abuse.[71] Justice Gorsuch acknowledges that the stop-time rule confers a "procedural advantage" on the government and, in this way, recognizes the appeal of issuing an NTA piecemeal.[72] But the power differential between the government and the noncitizen demands a different approach. While it may be a "chore" forcing the government to assemble a single NTA to satisfy the stop-time rule,[73] it is similarly burdensome for migrants in most instances: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."[74]

64. Professor Jill Family has noted that immigration agencies often prefer channeling policies through informal channels to avoid being bound by them in the future. *See* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 568 (2012).

65. *See generally* Niz-Chavez v. Garland, 593 U.S. 155 (2021) (rejecting the government's practice of "notice-by-installment").

66. *See id.* at 170–72.

67. *See* 8 U.S.C. §§ 1229b(a)–(b).

68. 8 U.S.C. § 1229b(d)(1)(a).

69. *See Niz-Chavez*, 593 U.S. at 170–72.

70. *Id.* at 160, 172.

71. *Id.* at 161–65.

72. *Id.* at 172.

73. *Id.* at 169–70.

74. *Id.* at 172.

In *Niz-Chavez*, Justice Gorsuch focused on a concern that broadly plagues the administration of statutes and regulations, namely agencies cutting corners with procedural rules and engaging in abusive and self-serving exercises of power.[75] In *Pereira*, the Court had to contend with the argument that overly stringent NTA requirements would encourage noncitizens to "buy time" and engage in gamesmanship to keep alive the possibility of seeking relief such as cancellation.[76] By contrast, in *Niz-Chavez*, Justice Gorsuch focused squarely on *the government* as the party most likely to engage in this kind of gamesmanship.[77]

All these cases make a simple point: the government needs to follow its own rules. *Pereira* and *Niz-Chavez* scrutinized the government's attempts to confer upon itself a procedural advantage within an administrative setting that already heavily disfavors the noncitizen.[78] This is a common move that courts make in stymying efforts to roll out controversial immigration policies. By insisting that agencies adhere to its stated procedures, courts can preserve the power of the executive to maintain totalizing authority over migrants while dispensing limited victories to migrants in particular cases. In this regard, these highly technical decisions issued by the Roberts Court reflect similar rebukes of overly punitive immigration policies of prior eras.

To be clear, the good governance cases should not give off the impression that the Roberts Court has embraced a robust vision of immigrant rights in the face of executive overreach. Many cases show how the justices endorse a broad vision of discretionary immigration power. *Trump v. Hawaii*, which upheld the anti-Muslim travel ban,[79] illustrates the Court's willingness to give the executive branch considerable discretion in setting the conditions under which those outside of the United States may enter and stay.[80] In a similar fashion, *Patel v. Garland*, which was issued during the Biden administration, upheld a jurisdictional bar preventing courts from reviewing agency fact findings related to the adjudication of immigration applications for relief.[81] Finally, *Department of State v. Muñoz*—also a Biden-era decision—held that the doctrine of consular nonreviewability prevented

75. *See generally Niz-Chavez*, 593 U.S. (rejecting the government's practice of "notice-by-installment").

76. Pereira v. Sessions, 585 U.S. 198, 219 (2018).

77. *See Niz-Chavez*, 593 U.S. at 170.

78. *See generally Pereira*, 585 U.S. (holding an incomplete or undated Notice to Appear does not entitle the government to invoke the time-stop rule); *Niz-Chavez*, 593 U.S. (rejecting the government's practice of "notice-by-installment").

79. Trump v. Hawaii, 585 U.S. 667, 710–11 (2018).

80. *See id.* at 702–04.

81. Patel v. Garland, 596 U.S. 328, 331 (2022).

courts from reviewing agency adjudications of visa applications that transpire outside of the United States.[82] *Trump*, *Patel*, and *Muñoz*, show that the Court is perfectly willing to let agency officials have free rein when policies concern those outside of the United States. But the good governance cases show that the Supreme Court is willing to hold officials to account for failure to follow their own rules, at least when cases involve migrants facing agency overreach within the interior of the United States and with longstanding ties to their communities.

III. CRISIS GOVERNANCE

In assessing the good governance cases as a bulwark against executive overreach, it is worth noting that all those cases involve migrants challenging policies of the "business as usual" variety. None of the positions staked out by the government in the DACA, census, and cancellation cases involved invocations of an emergency or crisis. Instead, they implicated technical or bureaucratic duties ostensibly of little concern to the public beyond the obvious interested parties. This suggests the Court—and federal courts more broadly—might be more likely to contain enforcement policies when they involve the basic machinery of government touching upon our day-to-day lives. In some obvious ways, the immigration policies of the second Trump administration reflect an interest in infusing the bureaucracy with exclusionary principles,[83] suggesting that courts might be empowered to invalidate these actions for good governance reasons. Moreover, many of the policies and actions undertaken within the first year of the current administration have unfolded within the interior, making doctrines of judicial deference much less forceful than action taking place at the border.[84] Many of the noncitizens facing detention and removal have longstanding ties[85] or elite

82. Dep't of State v. Muñoz, 602 U.S. 899, 902–03 (2024).

83. *See After Day One: A High-Level Analysis of Trump's First Executive Actions*, AM. IMMIGR. COUNCIL (Jan. 22, 2025), https://www.americanimmigrationcouncil.org/fact-sheet/after-day-one-high-level-analysis-trumps-first-executive-actions/ [https://perma.cc/Y99E-5QSN].

84. *See* Adriel Orozco, *Trump's Day 1 Orders Use Fearmongering to Expand His Immigration Authority*, AM. IMMIGR. COUNCIL (Jan. 23, 2025), https://www.americanimmigrationcouncil.org/blog/trumps-day-1-orders-use-fearmongering-to-expand-his-immigration-authority/ [https://perma.cc/6B3V-5RA3].

85. *See, e.g.*, Derick Waller, *Beloved Waiter at NYC Diner Detained at Immigration Office Visit*, CBS NEWS (July 12, 2025, at 23:38 ET), https://www.cbsnews.com/newyork/news/tribeca-square-diner-waiter-detained-ice/ [https://perma.cc/DWY3-VKS3].

academic credentials,[86] placing them in the same political ecosystem as other sympathetic figures like Dreamers and DACA beneficiaries. But in some other, less obvious ways, the actions undertaken by the second Trump Administration stand apart from the actions that were invalidated on administrative grounds. For this reason, this more recent spate of enforcement activity is better equipped to survive administrative challenges.

First, the executive orders issued in January 2025 expressly invoked statutory provisions that delegated authority to the President himself, not to some agency or agency head under his supervision.[87] For example, the policy of mobilizing the U.S. military to support immigration efforts at the U.S.-Mexico border cites section 212(f), a provision of the immigration code that empowers the President to suspend the admission of migrants "as he shall deem necessary."[88] So does the Trump policy of halting the admission of refugees.[89] In this regard, the exercise of these types of power differentiates it from most of the legal schemes addressed by the good governance cases. From a democratic accountability standpoint—a core feature of legitimate exercises of administrative power—policies that flow directly from President Trump enjoy greater legitimacy than those issued by agency heads (in the cases of *U.C. Regents* and *Department of Commerce*)[90] or lower-level bureaucrats (in the cases of *Pereira* and *Niz-Chavez*).[91]

86. *See, e.g.*, Lauren Aratani, *Brown University Professor Deported Despite Judge's Order, Defying US Court*, THE GUARDIAN (Mar. 17, 2025, at 12:51 ET), https://www.theguardian.com/us-news/2025/mar/17/brown-university-rasha-alawieh-deported-lebanon [https://perma.cc/6HSJ-6AXL].

87. *See Declaring a National Emergency at the Southern Border of the U.S.*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-emergency-at-the-southern-border-of-the-united-states/ [https://perma.cc/AV9R-5KEC].

88. *See* 8 U.S.C. § 1182(f); *Declaring a National Emergency at the Southern Border of the U.S.*, *supra* note 87.

89. *See* Exec. Order No. 14,163, 90 Fed. Reg. 8459 (Jan. 20, 2025); *see also* 8 U.S.C. § 1157(b) (conferring upon the President additional discretionary power to adjust refugee admissions as a response to an "emergency refugee situation").

90. *See generally* Dep't of Com. v. New York, 588 U.S. 752 (2019) (holding that the Secretary of Commerce's decision to add a citizenship question to the 2020 census violated the Administrative Procedure Act); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020) (holding that the Department of Homeland Security's decision to terminate DACA violated the Administrative Procedure Act).

91. *See generally* Pereira v. Sessions, 585 U.S. 198 (2018) (holding an incomplete or undated Notice to Appear does not entitle the government to invoke the time-stop rule); Niz-Chavez v. Garland, 593 U.S. 155 (2021) (rejecting the government's practice of "notice-by-installment"); *see also* Greg Rosalsky, *Trump is Asserting Extraordinary Power Over Independent Agencies. Is the Fed Next?*, NPR (Mar. 4, 2025, 6:30 ET), https://www.npr.org/sections/planet-money/2025/03/04/g-s1-51515/trump-asserting-

Wrongful deportations and outsourcing detention to third-party countries with spotty human rights records are horrifying, and they are likely unlawful violations of what Congress has mandated, but they leave no doubt as to the source of these policies. And this is the point of a system that relies on people holding officials politically accountable for their policy choices. The significant immigration policies of this second Trump administration[92] have avoided those pitfalls. Recall that in *U.C. Regents*, the Court disregarded the statements offered by then Homeland Security Secretary Kirstjen Nielson because it wasn't clear whether the DACA rescission reflected her thinking or that of her predecessor, Acting Secretary Elaine Duke.[93] Similarly in *Department of Commerce*, the citizenship question case, the Court focused on the deliberate manner in which Commerce Secretary and the Attorney General attempted to obfuscate the origins of the new policy.[94] Far from concealing their motives, President Trump and his surrogates have openly aired their ugly motivations.[95] Finally, the stop-time rule cases involve even more democratically opaque machinery given that individual immigration officers and government bureaucrats make the call in crafting and issuing NTAs.[96]

Some of the Trump 2.0 policies also seem to reflect greater deliberation and a more concerted effort to justify their shifts at least compared to prior initiatives. On his first day in office of his second term, the President announced by way of executive order his intention to end the parole program for Cubans, Haitians, Nicaraguans, and Venezuelans ("CHNV").[97] Two months later, the Department of Homeland Security issued a 12-page memorandum detailing the Administration's reasons for departing from the prior administration's policy and posted this decision in the Federal Register.[98] This approach departed from the less formal approach taken by the prior Trump Administration when it attempted to end DACA by way of information posted and updated on an

extraordinary-power-over-independent-agencies-is-the-fed-next [https://perma.cc/2THX-VARP] (discussing efforts to expand presidential control over independent agencies).

92. *See Declaring a National Emergency at the Southern Border of the U.S.*, *supra* note 87; 8 U.S.C. § 1182; Exec. Order No. 14,163, 90 Fed. Reg. 8459 (Jan. 20, 2025).

93. *See U.C. Regents*, 591 U.S. at 1–3.

94. *See Dep't of Com.*, 588 U.S. at 780–85.

95. SARAH PIERCE, ET AL., TRUMP'S FIRST YEAR ON IMMIGRATION POLICY: RHETORIC VS. REALITY 1–2 (2018).

96. *See Pereira*, 585 U.S. at 202–05; *Niz-Chavez*, 593 U.S. at 158–60.

97. *See* Exec. Order No. 14,165, 90 Fed. Reg. 8467 (Jan. 20, 2025).

98. *See* Termination of Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, 90 Fed. Reg. 13611 (Mar. 25, 2025).

agency website.[99] Moreover, seemingly as a response to the *U.C. Regents* decision, the DHS specifically addressed equity concerns like reliance interests in its memorandum terminating the CHNV parole program.[100]

A second and notable feature of the immigration policies of this Trump Administration is its invocation of crises and emergencies in justifying new policies.[101] As a strategy for governance, such invocations permit agencies to maximize authority and minimize judicial scrutiny.[102] President Trump's effort to militarize border policy illustrates this point.[103] By proclamation, the President directed military resources to the border, describing immigration to the United States as an "invasion" that is causing "widespread chaos and suffering."[104] The proclamation acknowledges the historical exercise of this power at ports of entry but argues that it should be extended to include the president's power to deter migrants from physically entering the U.S. anywhere.[105] It then cites the president's inherent power to control borders under Article II.[106] References to invasions, terrorism, and threats to national sovereignty abound in various other policies as well.[107]

The administration's effort to govern in the mode of "crisis management" has not been limited to the border or other zones of sovereignty that have traditionally invited judicial deference.[108] This administration has used various interior enforcement powers to target

99. *See* Dep't Homeland Sec., Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sep. 5, 2017), https://www.dhs.gov/archive/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/GL6L-2DQV].

100. *See* Termination of Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, 90 Fed. Reg. at 13617–18. A group of parolees have brought suit against the administration, arguing that officials can only terminate parole status on a case-by-case basis, not as a categorical matter through a policy change. The Supreme Court is permitting the termination of parole policy to go into effect while the merits of the suit are being resolved. *See* Noem v. Doe, 145 S. Ct. 1524 (2025).

101. Peter Stone, *'Perpetual Crisis Mode': How Trump Uses Emergency Declarations to Push Radical Agenda*, THE GUARDIAN (June 23, 2025), https://www.theguardian.com/us-news/2025/jun/23/trump-emergency-declarations-politics-law [https://perma.cc/XRM8-G373].

102. *See id.*

103. *See id.*

104. *See* Proclamation No. 10,886, 90 Fed. Reg. 8327, 8327 (Jan. 20, 2025).

105. *See id.* at 8327–29.

106. *See id.*

107. *See* Exec. Order No. 14,165, 90 Fed. Reg. 8467.

108. *See generally* Khalil v. Joyce, 780 F. Supp. 3d 476 (D.N.J. 2025) (concerning the federal government's initiation of removal proceedings against a lawful permanent resident under 8 U.S.C. § 1227(a)(4), where the government alleged his presence in the United States would have potentially serious adverse foreign policy consequences).

migrants living in the United States with status.[109] When ICE officers apprehended Columbia University graduate student, Mahmoud Khalil, they apparently did not realize that he had adjusted his status from a student visa holder to a lawful permanent resident.[110] In justifying this brazen assertion of executive power, immigration officials pointed to a little-used provision of the immigration code in which the Secretary of State personally determines that the noncitizen's continued presence in the United States would pose serious foreign policy consequences and threaten national foreign policy interests.[111] Similarly, the Trump administration has expanded the use of expedited removal from within the interior of the United States.[112] Prior policy had empowered immigration officials to fast-track the removal of migrants found in the interior except where noncitizens asserted claims for asylum, which diverted such noncitizens into screening interviews to determine the credibility of their fear of persecution.[113] Invoking an "invasion" that threatened state governments and communities, President Trump issued a proclamation prohibiting such assertions of asylum claims.[114] To be clear, the invocation of crises is not uniquely characteristic of the second Trump administration. The policies of the first administration employed similar references and justifications.[115] Having campaigned in the months leading up to the 2016 election on the promise to build a wall at the Southern U.S. border, once in office, President Trump invoked the National Emergencies Act in declaring a national emergency at the U.S.-Mexico border in order to justify diverting funds towards the construction

109. *See id.*

110. *See id.* at 486.

111. *See id.* at 486–87; 8 U.S.C. § 1227(a)(4).

112. *Fact Sheet: Expanded Expedited Removal*, NAT'L IMMIGR. F. (May 14, 2025), https://immigrationforum.org/article/fact-sheet-expanded-expedited-removal/ [https://perma.cc/QDD8-UNVD].

113. *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL, at 1 (2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2017/02/a_primer_on_expedited_removal_0225.pdf [https://perma.cc/75AU-2NG6].

114. The proclamation prohibits the assertions of "provisions of the INA that would permit [migrants'] continued presence in the United States, including, but not limited to" the asylum statutory provisions. *See* Presidential Proclamation No. 10,888, 90 Fed. Reg. 8333, 8335 (Jan. 20, 2025). A lawsuit has challenged the legality of this practice. *See* Complaint at 1, Refugee and Immigr. Ctr. for Educ. & Legal Servs. v. Noem, 2025 WL 1825431 (D.D.C. July 2, 2025) (No. 25-306).

115. Ilya Somin, *Trump's "Emergencies" Are Pretexts for Undermining the Constitution*, CATO INST. (May 15, 2025), https://www.cato.org/commentary/trumps-emergencies-are-pretexts-undermining-constitution [https://perma.cc/D4HT-KZ5V].

of a wall.[116] Similarly, he attempted to impose tariffs on products from Mexico under the International Emergency Economic Powers Act (IEEPA).[117] Foreshadowing the full embrace of crisis governance strategies that have come to characterize his second administration, Trump justified that initial use of IEEPA power by stating that "the emergency at the Southern Border" was created by the "illegal immigration" crisis.[118] But a full-scale assessment of the legality of these programs never came to fruition as the lawsuits challenging these programs became moot once Joseph Biden assumed the presidency.[119] This time around, President Trump lodged these controversial crisis management policies in the first 100 days, ensuring a greater lead time for challenges to make their way through the courts.[120] It seems increasingly likely that the Court will be forced to consider whether administrative ideals such as procedural consistency will prevail or yield in the face of assertions of national emergencies.

As the Court begins to consider the legality of these policies, it should remember the role it has played in enabling the current situation. Many of the EOs laying out these far-reaching policies cite section 212(f) of the immigration code,[121] a provision that gives the president power to temporarily suspend classes of migrants from being admitted into the United States.[122] This suspension provision was the statutory provision that the administration used to justify the Muslim travel ban during the first Trump presidency, a policy the Supreme Court upheld in *Trump v. Hawaii*.[123] Similarly, the Court has mostly refused to provide noncitizens access to federal courts unless and until a removal order has been entered against them even where clerical errors and bureaucratic incompetence may be the basis of the underlying agency adjudication.[124] Those

116. *See* Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019)*;* National Emergencies Act, Pub. L. No. 94–412, 90 Stat. 1255 (1976); 50 U.S.C. § 1621(a).

117. *See* Tom Hals & Brendan Pierson, *Trump's Mexican Tariffs Test Limits of U.S. Emergency Powers: Legal Experts*, REUTERS (May 31, 2019, at 21:40 ET), https://www.reuters.com/article/business/trumps-mexican-tariffs-test-limits-of-us-emergency-powers-legal-experts-idUSKCN1T12AB/ [https://perma.cc/78V3-F2U6].

118. *See* Statement from the President Regarding Emergency Measures to Address the Border Crisis (May 30, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/ [https://perma.cc/2UTZ-Z7YC].

119. *President Biden Cancels Funding for Trump Border Wall*, BBC NEWS, (Feb. 11, 2021), https://www.bbc.com/news/world-us-canada-56031481 [https://perma.cc/KUD3-6M6C].

120. *See* Exec. Order No. 14,165, 90 Fed. Reg. 8467.

121. *See* 8 U.S.C. § 1182(f); Trump v. Hawaii, 585 U.S. 667, 676–80 (2018).

122. *See* 8 U.S.C. § 1182(f).

123. *Trump*, 585 U.S. at 684–85.

124. *See* Patel v. Garland, 596 U.S. 328, 347–48 (2022) (Gorsuch, J., dissenting).

decisions preserved large swathes of executive power despite the constraints imposed by the good governance immigration cases.[125]

One response might be that the Supreme Court and the judiciary more generally were not sufficiently primed to the dangers posed by the first administration's actions in the immigration realm. But the Court issued the good governance cases during a period when scholars and advocates sounded the alarm on American democracy descending into crisis.[126] These critics focused on the Trump administration's specific brand of populism flowing from exclusionary and xenophobic undercurrents, which opened the way to quickly consolidating power and unsettling norms surrounding inclusion and equality.[127] During Trump's first administration, scholars raised the concern that his efforts to expand and push the executive branch beyond acceptable norms would erode the very foundation of American democracy.[128] Even then, scholars whispered concerns that such policies could lead down a road to authoritarianism.[129] This time around, no such ambiguity exists. Recent immigration policies show an effort to expand and push beyond the restraints imposed by the Court, providing valuable new context as the federal courts once again consider how to reconcile traditional norms of deference against fresh examples of agency abuse of power in the immigration context.[130]

IV. CONSTRUCTED CRISES

Currently, legal challenges to various Trump policies and actions are making their way through the courts.[131] It remains to be seen whether

125. *See* Shalini Bhargava Ray, ERODING IMMIGRANTS' RIGHTS THROUGH THE "NEW" NEW TEXTUALISM 1 (ACS Supreme Court Review, 6th ed.), https://www.acslaw.org/wp-content/uploads/2023/11/Ray-%E2%80%93-Eroding-Immigrants-Rights-Through-the-New-New-Textualism-1.pdf [https://perma.cc/DZL8-RCP6].

126. *See* K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1554–55 (2018).

127. *See id.* at 1556–57; K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 1–2, 11 (Cambridge Univ. Press 2019).

128. *See* Rahman, *supra* note 127, at 1560–61.

129. *See* Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 153 (2017).

130. *See* Exec. Order No. 14,165, 90 Fed. Reg. 8467.

131. *See generally* Noem v. Abrego Garcia, 145 S. Ct. 1017 (2025) (concerning the wrongful deportation of Kilmar Armando Abrego Garcia to El Salvador); Nat'l TPS All. v. Noem, No. 24A1059, 2025 WL 1427560 (May 19, 2025) (concerning the termination of the TPS program for Venezuelan nationals); Doe v. Noem, No. 25-cv-10495, 2025 WL 1099602 (D. Mass. April 14, 2025) (concerning the termination of the CHNV parole program); *Khalil*, 780 F. Supp. 3d 476 (concerning Mahmoud Khalil case).

the courts as a whole or the Supreme Court in particular will rein in these enforcement policies. Answers will not appear for months, maybe years. But in the meantime, it is worth reflecting on whether law can rein in the worst consequences of discretionary power consolidated through assertions of manufactured crises.

Crisis governance is neither an inherently beneficial nor harmful mode of governance. It is helpful to think of it as a tool for breaking legislative stasis or for creating quick and temporary solutions in the face of a dynamic regulatory environment. Indeed, the invocation of crises does not have to be used to implement exclusionary goals. In the past, government officials have invoked this framing to advance inclusionary agendas. For example, writing about how analogies to natural disasters help establish welfare entitlements in the New Deal, Michele Dauber describes disasters this way: "[W]e should see its definition and boundaries as precisely what is at stake in many contests over the allocation of federal resources."[132] Similarly, as the COVID-19 virus continued to pose a threat to the public, the Occupational Safety and Health Administration (OSHA) attempted to exercise its power to set "*emergency* temporary standard[s]" in creating a "vaccine-or-test" rule.[133] In justifying this policy, the Secretary of Labor—who oversees OSHA—explained that such a policy was necessary to confront "the current national crisis."[134]

At the same time, crisis governance unmistakably permits the quick consolidation of power. Rapid response exercises of power can pose threats to already vulnerable communities, even where agencies proceed with sensitivity and self-awareness. This last point highlights an important, broader insight gleaned from the second Trump administration: the legal machinery that enables agencies to manage emergencies operates on the assumption that government officials are acting in good faith. President Trump and other high-profile officials have demonstrated a willingness to manufacture crises through reckless and false characterizations, such as describing migration to the United

132. Michele L. Landis, "*Let Me Next Time be 'Tried by Fire'": Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967, 971 (1998).

133. *See* 29 U.S.C. § 655(c)(1) (emphasis added). The Supreme Court invalidated this rule.

134. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, Occupational Safety and Health Administration, 86 Fed. Reg. 61402, 61424 (Nov. 5, 2021). As litigation ensued and the lower courts split on whether the vaccine-or-test policy should be stayed, the Supreme Court upheld the stay in response to an emergency application as a part of its shadow docket. *See* National Federation of Independent Business v. Department of Labor, 595 U.S. __ (per curium) (2022).

States as an invasion. [135] Thus, this show of bad faith on the part of agencies invites courts to consider expanding good governance principles developed during the first Trump administration.

Separate from operating as a mode of governance, some scholars—especially in the humanities and social sciences—have begun exploring whether crises can be utilized as a strategy for *resistance,* especially in the face of unresponsive government processes. In the modern context of environmental justice battles, anthropologist Chloe Ahmann describes "crisis" as "a privileged designation—a moment of rupture—that incites action and brings contradictions to light."[136] In the context of police abuse and racialized policing practices, the use of technology and social media to document police abuse has affirmed the important role that spectacular forms of violence can play in pressuring police to reform their practices and policies.[137] Immigrant rights advocates have used such strategies in the past. An early example is the efforts taken by nine undocumented childhood arrivals.[138] The DACA program was announced in 2012.[139] Shortly thereafter, in 2013, a group of migrants—dubbed the "Dream 9"— left the United States for Mexico, and then attempted to re-enter the United States at the port of entry at Nogales, Arizona.[140] This protest fits within a broader effort by immigrant rights activists to critique the notion that Dreamers "deserved" some form of immigration relief while their parents and other community members did not.[141] As one news story explained it: "To draw attention to what they see as a crisis, and to put pressure on Congress to introduce real reform in

135. I do not mean to romanticize President Trump's predecessors. Here, I am thinking about President George W. Bush's efforts to respond to the 9/11 terrorist attacks and Hurricane Katrina, President Obama's attempts to address the Great Recession, and President Biden's response to COVID-19. I do not want to romanticize these prior policy responses because some of them—especially the War on Terror during President Bush's administration—engaged in lawless behavior as well. But these government responses tried to point to facts when justifying their policies, which feels different from the immigration policies during the second Trump administration.

136. Chloe Ahmann, *"It's Exhausting to Create an Event Out of Nothing": Slow Violence and the Manipulation of Time*, 33 CULTURAL ANTHROPOLOGY 142, 144 (2018) (internal citations omitted).

137. *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 438 (2016).

138. *See* Rory Carroll & Ed Pilkington, *Dream Nine Immigration Activists Freed*, THE GUARDIAN, (Aug. 7, 2013, at 11:16 ET), https://www.theguardian.com/world/2013/aug/08/dream-nine-immigration-activists-freed [https://perma.cc/VV42-8RW3].

139. *Ten Years of DACA*, THE BARAK OBAMA FOUND., https://www.obama.org/stories/daca-10-years/ (last visited Jan. 7, 2025) [https://perma.cc/N8M2-6UU9].

140. *See* Rory Carroll & Ed Pilkington, *supra* note 138.

141. *See id.*

America's creaking immigration system, a protest movement was spawned."[142] From an advocacy perspective, reframing harms in terms of ongoing crises helps to prevent members of the public from growing too numb to the "bigness" of the problems within our immigration system.[143]

My observation that crisis can operate as both a mode of governance and a tool for resistance should not be mistaken as an attempt to draw an equivalence between these two invocations of emergency-laden rhetoric. DHS efforts to conduct mass deportation campaigns in order to stem the "crisis" of unauthorized migration neither complements nor mirrors acts of protest or civil disobedience challenging those acts. My point is that while many crises are natural disasters or have an empirical basis, others are constructed, and like all legal and political constructions, crises can often serve to exacerbate power inequalities when wielded by agency actors. By emphasizing the constructed nature of crises—and hence the malleability of the power that can be exercised within crisis management regimes—many things get crowded out of the picture. In the case of crisis governance, focusing on how immigrants are "overrunning" this country distracts from the ways that immigrants live their lives among ordinary Americans—at school, at work, and in churches. In the case of crisis resistance, elevating one type of harm (such as family separation) or one class of migrants (such as DREAMers) means downgrading other types and classes. Unlike state and agency actions that exact "spectacular" harms or create "crisis-like" conditions, a range of other agency actions lead to similarly debilitating harms over the long-term but do not possess the same visible qualities necessary to generate a strong public reaction and social change.

In this case, the distance separating officials engaging in crisis *governance* from protesters engaging in crisis *resistance* can be filled precisely by the way our legal system empowers agencies to engage in the use of force and violence. Indeed, when immigration officers engage in acts of force like arrest, detention, and deportation, they are not engaging in violence at all under the law because violence assumes the illegitimate exercise of force. The shooting of protestors Renee Good and Alex Pretti by immigration officers in Minnesota[144] illustrates the way that agencies like DHS assert the presence of crisis conditions to justify extreme acts of force, even death, and paint government responses as

142. *See id.*

143. *See* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2383 (2019).

144. Joshua Barajas, *Shooting Deaths Climb in Trump's Mass Deportation Effort*, PBS NewsHour (Jan. 29, 2026, at 5:26 PM ET), https://www.pbs.org/newshour/nation/a-look-at-shootings-by-federal-immigration-officers [https://perma.cc/KH94-HCUY].

legitimate and necessary. This dynamic, unfortunately, is not new and has long frustrated many efforts to reform the use of force in policing, but the novelty comes from the use of immigration agents operating in this fashion within the interior and against citizens.

This leads to a final observation about crisis governance: Although the expansion of immigration enforcement has proceeded under the guise of a crisis, like crises of the natural disaster variety, manufactured crises can also be hard to contain. Immigration laws are often perceived as policies that affect only those who lack citizenship, but this is simply false. Even routine exercises of immigration power affect those in a noncitizen's orbit and community, a reality that immigration officials in the last several months were probably willing to accept. But the degree to which people in Minnesota and elsewhere have protested has brought out many whose day-to-day lives operate at a distance from immigration law. The tragic death of Good, Pretti, and many others illustrates the dangers of crisis governance.[145]

In light of this violent reality, exploring whether judicial admonitions regarding the importance of reason-giving and agencies following their own rules might feel like a futile academic exercise. At the very least, this juxtaposition between good governance principles and roving patrols engaging in indiscriminate violence exposes a gap in the laws that courts and the public ordinarily look to for constraints on agency lawlessness.[146] But naming these agency actions for what they are—agency assertions of crises to govern in bad-faith and in dangerous ways—can help slow or even stop the process by which these temporary actions become a "forever" crisis. Telling the truth about what an agency action does or means is important in this regard. I understand the protests in this light and am hoping this light reaches the courts as well.

145. In a letter to Homeland Security Secretary Kristi Noem, Senate Democrats noted that 53 people had died while in ICE or Border Patrol custody. *See* Letter from Members of Congress to Kristi Noem, Sec'y of Homeland Sec. (Jan. 22, 2026), https://democrats-homeland.house.gov/imo/media/doc/chs_letter_to_noem_re_ice_and_cbp_condemning_deaths.pdf [https://perma.cc/AC7T-FZ9N].

146. *See generally* Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. 727 (2025) (discussing the administrative state's authority to employ physical force).