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# Silence and the Second Wall

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# SILENCE AND THE SECOND WALL

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## I. INTRODUCTION

The Trump administration has made its clarion call “build the wall.”<sup>1</sup> From the start of the presidential campaign to the government shutdown to the declaration of a national emergency, he has made the wall the centerpiece of his immigration enforcement strategy. Opposition to the first wall has been strong, ranging from street protests to the marbled halls of Congress. Indeed, as of this writing, President Trump vetoed the House and Senate joint resolutions to repudiate the White House declaration of a national emergency at the border, after an extended fight over appropriations. While public attention has been riveted on these dramatic episodes at the southern border of the U.S., many more subtle challenges to legal migration have been introduced and implemented. Collectively, these constitute a second wall. This second wall is invisible to the public eye and has garnered little attention from immigration advocates or policy reformers. To the extent advocates and reformers have even noticed, their strategies to suspend the second wall have been slight. This essay seeks to expose the features of the second wall, to explain the silence surrounding it, and to propose strategies for countering it.

The second wall exists in several senses. First, the second wall blocks out legal immigrants, rather than the border crossers who contend with the first wall. The Trump administration’s most visible priorities have been Central American asylum-seekers who cross the U.S.-Mexico border without documentation. Restricting their entry entails a physical barrier. The second wall has a broader target and consists of more varied impediments. The second wall is constructed against legal immigrants. It impedes families seeking to unite, employers seeking to sponsor workers for their businesses, and refugees or military service members taking the next steps in their journey toward becoming citizens. The imposition of barriers includes procedural hurdles, such as intensified vetting and heightened scrutiny of petitions, more requests for evidence, and new interview requirements. Like the first wall barriers, these second wall barriers keep families apart, disadvantage noncitizen workers, and render vulnerable immigrants in need of humanitarian benefits. The second wall creates uncertainty in the

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1. President Donald Trump, Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border, White House (Feb. 15, 2019), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>.

immigration process for those who have traditionally felt secure in the passage.

Second, while the Trump administration's aggressive immigration enforcement efforts center on building a wall at the U.S.-Mexico border, they now also follow legal immigrants into the interior and block their integration into American society. A variety of administrative practices govern immigrants in matters of settlement or the quotidian details of their daily lives—work, housing, schools, and social affairs—and constitute a more abstract form of a wall than the barriers to immigrating. Many of these policies are esoteric and may even seem mundane. However, once immigrants have crossed borders to arrive in the U.S., the Department of Homeland Security is limiting their ability to obtain green cards and to naturalize; some naturalized citizens cower in fear of denaturalization. In other words, the border mentality extends beyond initial entry to follow immigrants into the process of settlement.

The bundle of changes to immigration policy manifests in the immigration bureaucracy. In particular, many of the agency practices and policies that we are calling the second wall have built a bureaucratic barrier that is hard to see, understand, and redress. The same is true for changes in other agencies of the immigration bureaucracy, whether in the immigration courts, where immigration judges can no longer grant continuances while applications for relief from removal trudge through the bureaucracy, or in ICE, where officers no longer exercise discretion in humanitarian cases that had been deprioritized under prior administrations. Collectively, these changed agency procedures and policies create intensifying procedures for immigration benefits and shifts in policy toward substantive goals that compete with the provision of immigrant services. The toll can be seen in unprecedented backlogs and long wait times. Evidence abounds that these policies are having an impact on many quarters of life inside the U.S.: the number of H-1B skilled worker petitions declined, international student enrollment is falling, tourism is down, and immigrants are choosing to stay away from the U.S. The “administration has adopted dozens of policies and procedures that are slowing, or even stopping legal immigration.”<sup>2</sup> So while the border wall embodies a physical barrier, it can also be viewed as a social construction. Understanding the wall in this way transforms the border wall from being a tangible marker of divisions to being a symbol of bureaucratizing forces excluding legal immigrants.

Opposition to the first border wall has been strident: from clamoring at the U.S.-Mexico border over mounting obstacles to Central American migrants seeking asylum, to street protests outside Congress and courthouses and churches over ICE raids, to hunger strikes in detention facilities over conditions of confinement. Cumulatively these strategies have created a sanctuary movement to protect undocumented immigrants from federal enforcement. Opposition to the second wall has been quiet by comparison. There has not been a broad public disapproval with the aims of second wall policies, nor the mobilization of a sanctuary movement that empowers local

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2. AM. IMMIGRATION LAWYERS ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 3 (2018), <https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>.

communities to stand up for legal immigrants. Using institutional and policy analysis, the essay explores the distinctive challenges posed to legal migration by the second wall and the difficulty of countering them through traditional means of resistance. One complication with opposing the second wall is its invisibility or obscurity, which makes it difficult to fully comprehend the nature of the challenge or the reach of its consequences. Complexity makes it difficult to counter the policies. A lack of transparency makes it difficult to appeal to the institutions responsible for holding immigration policymakers accountable.

Part I provides some background on legal migration and the immigration bureaucracy. Part II explains the characteristics of second wall policies and provides extensive examples. Part III turns to the emerging challenges to the second wall and analyzes their promise and deficits. Part IV concludes with suggestions on how to restore the federal government's mission of serving immigrants and proposes a multi-pronged strategy for scaling the second wall.

## II. BACKGROUND ON LEGAL MIGRATION

For the past 30 years, U.S. immigration policy has focused on federal enforcement against undocumented immigrants, so-called criminal aliens, and suspected foreign terrorists. Discussions of changes to legal migration have come up from time to time, but without comprehensive immigration reform from Congress there has been no real action to change the architecture of legal migration. The 1952 McCarran-Walter Act is still the edifice of the modern framework of immigration law that includes employer-based, family-sponsored, diversity, and humanitarian visas as the vehicles for legal admissions. This is changing under the Trump Administration, whose immigration policy is so expansive that it has reached new targets and enlisted new actors.

The federal government's immigration apparatus is concentrated in the U.S. Department of Homeland Security (DHS), a behemoth department forged after the terrorist attacks of September 11, 2001 that is comprised of 88 units who claim responsibility for some aspect of national security.<sup>3</sup> The enforcement components of the agency, the Immigration and Customs and Enforcement (ICE) and Customs and Border Protection (CBP), have been the vanguard of modern immigration policy. By comparison, the U.S. Citizenship and Immigration Service (USCIS) is small. USCIS is the immigrant-serving component of the federal immigration bureaucracy. Whereas ICE and CBP primarily contend with undocumented immigrants, USCIS handles most matters concerning legal immigrants: entry visas and immigration benefits for temporary visitors, asylum-seekers, and immigrants; green cards for employers, workers, and families seeking to unify; and naturalized citizenship for those who are eligible. The agency makes adjudicative decisions at service centers and manages all immigration benefit functions that do not relate to enforcement. It is separated from ICE and CBP by institutional design as a way to bolster agency independence and

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3. Opinion, 88, *Count 'Em*, N.Y. TIMES, Jan. 9, 2010, at A18.

improve customer service toward noncitizens. Yet ceasing to process these immigration benefits in a timely fashion and adopting new initiatives that cast a suspicious eye on legal migrants signals that changes at USCIS are central to understanding second wall policies.

A. ORGANIZATIONAL HISTORY: FROM ENFORCEMENT TO IMMIGRATION SERVICES AND BACK

Service to legal immigrants is not confined to USCIS. Other agencies involved in legal immigration include the State Department, U.S. Department of Labor, and the U.S. Department of Health and Human Services. The State Department handles visa applications abroad and recommends levels of yearly refugee admissions. The Departments of Labor and Health and Human Services certify the fitness of immigrants for entry and that the terms of their entry will not pose an economic threat to American taxpayers and workers. Congress establishes ceilings for family-sponsored immigration and diversity visas. However, among the several agencies that are involved in immigration regulation, USCIS is the primary agency tasked with legal immigration and has gone through the most dramatic transformations in the implementation of its statutory mission.

As a key component of the immigration bureaucracy responsible for legal migration, USCIS has over 200 offices around the world and employs roughly 19,000 employees.<sup>4</sup> It is situated in the U.S. Department of Homeland Security, and it performs a variety of functions. It focuses especially on processing petitions and applications for immigrant benefits, including petitions related to three key points on the immigrant's journey towards civic integration: lawful entry on nonimmigrant or immigrant visas, adjusting between statuses, including from temporary to permanent resident status (LPR or green card), and naturalizing as a U.S. citizen. It also handles asylum and refugee claims, employment authorizations, services related to enforcement of immigration workplace laws, such as e-Verify for workplace authorization or SEVIS for certification of international students, and services related to immigrant integration, such as administration of the Immigrant Integration Grants Program and Citizenship Resource Center.<sup>5</sup>

Prior to the creation of USCIS as an agency within the Department of Homeland Security, immigration benefits and enforcement were handled for 70 years within the Immigration and Naturalization Service (INS). The INS operated as a unit within the U.S. Department of Justice from 1940-2003, and was concerned with stemming the flow of immigrants following the nation-building of the world wars. From 1933-1940, the U.S. Department of Labor also assisted in regulating immigration, and was primarily concerned with protecting American workers.<sup>6</sup> Prior to 1933, there were separate

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4. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 2 (2015). The size and scale of USCIS as part of DHS has expanded since 2017 in the Trump Administration.

5. These functions are noted in multiple sources. The USCIS function of encouraging immigrant integration is noted in MICHAEL LEMAY, HOMELAND SECURITY: A REFERENCE HANDBOOK 68 (ABC-CLIO ed. 2018).

6. U.S. CITIZENSHIP & IMMIGRATION SERVS., ORGANIZATIONAL TIMELINE, <https://www.uscis.gov/history-and-genealogy/our-history/organizational-timeline> (last updated Feb. 4, 2016). For more history, see KANDEL, *supra* note 4, at 1-2, 16-18; OVERVIEW OF INS HISTORY, USCIS HIST. OFF. & LIBR.

federal offices administering immigration matters, known as the Bureau of Immigration and the Bureau of Naturalization respectively, and an emphasis on nation-building. The INS was established on June 10, 1933 to merge these previously separate areas of administration.<sup>7</sup> As immigration waned and restriction increased following World War II, the consolidated services shifted their focus back toward enforcement. The result was a tension between enforcement and admission made more complicated by cross-cutting laws governing immigrants' rights and the shifting balance of power between the federal government's headquarters and regional field offices. Negotiating these themes continued throughout the century.

For example, there were several notable instances of agency functions changing to reflect the evolving relationship between immigration services and border control between 1930 and 1980. As Professor Deborah Kang notes in her history of the INS, the INS interacted with border patrol throughout its early history through an informal patchwork of policies and practices to balance enforcement with the entry and employment objectives of border communities. These interactions rendered the INS a policymaking body, not merely a law enforcement body. It initiated a process of negotiating immigrant services and enforcement that continues into more institutionalized forms today. A straightforward example arises in 1932, when Congress proposed to consolidate immigration service and border patrol by using repatriation instead of deportation at the border.<sup>8</sup> A more complex example arose in 1944, when the Bracero Program changed border crossing protocols in a manner that reflected the federal agency's struggle to balance the goals of enabling seasonal agricultural work, closing the U.S.-Mexico border, and honoring good neighbor policies post-world war.<sup>9</sup> While each of these incidents focused on the border, they are emblematic of broader challenges to balance immigration enforcement with immigrant services.

Throughout the 1980-1990s period of expanded immigration enforcement, the INS came under intense criticism for organizational mismanagement. Though there were many factors, a good deal of the dysfunction resulted in part from the unresolved tensions between administering benefits and pursuing removal. The long-simmering tension boiled over in the scenario where an individual denied an immigration benefit—say an application for a green card—could be taken down the hall to the enforcement division that would begin removal proceedings. Or an undocumented parent might be reluctant to take a child who is eligible for an immigration benefit in for their scheduled immigration appointment, for fear of themselves being caught.<sup>10</sup>

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(2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

7. S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954*, at 65–67 (2017). See generally Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (abolishing the INS).

8. KANG, *supra* note 7, at 66.

9. *Id.* See generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (2010).

10. See Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, MICH. J. L. REFORM (forthcoming 2019); Interview with David Martin, former INS senior official and Emeritus Professor, University of Virginia Law School (July 6, 2016) (on file with author).

In the aftermath of September 11, these ruptures split apart the much-maligned agency into separate enforcement divisions.<sup>11</sup> A 9/11 Commission Report pointed out organizational problems that made possible the terrorist attacks. Key among these findings was that 15 of the 19 suspected terrorists entered on visas that could have been barred, if more stringently vetted beforehand.<sup>12</sup> In the broad reorganization of immigration agencies and the creation of the DHS, these longstanding criticisms drove the separation of the two services into discrete agencies. In accordance with the Homeland Security Act of 2002, enforcement split between CBP and ICE inside the DHS, as it also did between DHS and the U.S. Department of Justice's Executive Office of Immigration Review, Bureau of Immigration Appeals, and litigation offices. Within DHS, immigration benefits were consolidated away from enforcement functions—within USCIS.<sup>13</sup> The restructuring reflected a worthwhile aspiration to separate enforcement and service functions, a principle that remains an aspirational goal even if it is not always carried out in practice.

#### B. BALANCING ENFORCEMENT AND INTEGRATION IN THE MODERN IMMIGRATION BUREAUCRACY

Once USCIS became an independent agency from ICE and CBP in 2003, its institutional weaknesses and limited capacity to pursue these objectives were revealed. It was the smallest and least funded of the agencies, with 95% of its budget coming from an Immigration Examination Fee Account that relied, and still relies, on fees paid directly by immigrant applicants to minimize the burden of immigration benefits on U.S. taxpayers, and only 5% from Congressional appropriations.<sup>14</sup> It consistently ran into backlogs and suffered long processing times.<sup>15</sup> Its processes and technologies were out of date. One insider called it the step-sister of the other immigration agencies. The irony of USCIS's unusual funding structure, which is largely funded by user fees rather than an annual budget appropriation, is that it is less accountable to Congress.<sup>16</sup> These known challenges—limited funding, high cost to individual immigrants, poor customer service, slow processes and outmoded technologies, and lack of accountability to Congress given its

11. KANG, *supra* note 7, at 168; LEMAY, *supra* note 5, at 68; LISA M. SEGHELLI, CONG. RESEARCH SERV., RL31388, INS: RESTRUCTURING PROPOSALS FOR THE 107TH CONGRESS 16 (2003).

12. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S., THE 9/11 COMMISSION REPORT 80–82 (2004), <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

13. KANG, *supra* note 7, at 172–73.

14. KANDEL, *supra* note 4, at 1, 7. While self-funding can be a source of insulation from political pressure in independent agencies, there is little evidence in the legislative history that agency independence was the reason for making USCIS self-funded. For a general discussion of the merits self-funding, see Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733 (2013); *cf.* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822 (2012) (discussing methods of congressional control over agencies through funding).

15. Between FY 2002 and FY 2010, Congress called on USCIS to reduce its backlog and provided \$570 million in direct appropriations for this purpose. The extent to which USCIS has successfully done so is contested. Administrative changes and national/world affairs affect the number of applications filed and that, in turn, affects the agency workload. That said, critics say that agency reclassifications of the definition of backlog obscure the need for change that is apparent regardless of fluctuations in caseload, e.g. the predictable rise before fee increases or presidential elections and less predictable responses to changes in immigration law. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, ANNUAL REPORT 2–3, 11–12 (2007).

16. *Id.* at 46–47; KANDEL, *supra* note 4, at Appendix A.

financial independence from the Congressional budget—have left the agency vulnerable in the face of intensified enforcement efforts in the two decades since its creation.

Moreover, there are signs that a different balance is being struck between enforcement and service. Immigration enforcement is not a single-pronged goal in immigration policy. It occurs as one of several policy goals, including the administration of basic services and benefits to immigrants that facilitate their integration into American society. While integration and enforcement are typically treated to a functional division of labor, where the local government or nonprofit organizations are tasked with immigrant integration while the federal government takes on immigration enforcement, the two tasks are inextricably intertwined. The federal government retains responsibility for providing certain immigration benefits, most notably naturalization, in addition to ensuring fidelity to immigration law through its adjudicative functions. USCIS' mission of providing service to immigrants is aligned with local community organizations involved in immigrant integration in important ways, such as by providing grants to local libraries engaged in citizenship-enhancing activities like classes on English and citizenship, or sponsoring naturalization drives and citizenship ceremonies. That is the integration side of the nexus. The enforcement side of the nexus has until recently been implicit, but it is ever-present: screening applications for immigration benefits, making adjudicative decisions about eligibility for asylum at the service centers, and adjudicating petitions for non-immigrant temporary workers. In the instances when an immigrant is deemed ineligible, the benefit is denied. Whether the matter ends there or whether USCIS reaches out to the enforcement minded components by issuing a Notice to Appear (NTA) in immigration court is a discretionary decision. Local sanctuary networks have pushed back against the federal government's efforts to amplify immigration enforcement and promoted norms of inclusion and integration as a general matter, but far less around legal migration.<sup>17</sup>

In addition, choices about the expenditure of resources and the prioritization of programs is significantly impacted by choices in executive enforcement discretion.<sup>18</sup> The exercise of that discretion has shifted toward vigorous front-line officers and a more skeptical bureaucratic culture throughout DHS, including the USCIS.<sup>19</sup>

### C. CHANGING MISSION OF THE MODERN IMMIGRATION BUREAUCRACY

Translating these norms of immigrant inclusion and integration into a national immigration policy requires restoring the balance between enforcement and integration. While enforcement and integration can be seen as opposites, they are linked: enforcement of immigration laws preserves a

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17. Ming H. Chen, *Sanctuary Networks and Integrative Enforcement*, 75 WASH. & LEE L. REV. 1361, 1384 (2019).

18. For one of several articles about immigration enforcement discretion, see generally Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

19. Rabin, *supra* note 10, at 20–21 (describing heavy scrutiny, long delays, and low visibility denials as part of shift in USCIS bureaucratic culture).



space for legal immigration. Instead of enhancing integration at USCIS, there is evidence of enforcement undermining integration. The most vivid illustration of the need to shield federal integration is the Trump Administration's literal rewriting of USCIS' mission statement to say:

U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.<sup>20</sup>

Notably the new statement reorders the priority of its functions to emphasize safeguarding the integrity of a lawful immigration system and securing the homeland, instead of administering immigration benefits as primary examples of how to honor nation's values.<sup>21</sup> The shifting priorities have led to reassignments of staff and duties to fraud and denaturalization, with consequences for the quality and quantity of benefits cases adjudicated. The mission also deletes language saying that the U.S. is a nation of immigrants, shifting the tenor of the agency toward fraudulent or otherwise unlawful immigration and elevating the defensive posture of USCIS that then Director Lee Francis Cissna has called a "sword and shield."<sup>22</sup>

In addition, USCIS has shifted its focus away from customer service and toward centralized administrative priorities. Help desk services for immigrants and their attorneys routinely yield stock replies. Calls go unreturned. Community stakeholder meetings are less frequent. While it has always been underfunded compared to its counterpart agencies in DHS, the agency has distinguished itself as being funded mostly through filing fees rather than Congressional appropriations. While this fee structure has the potential for strong accountability to the immigrants who seek out services, the cost to the immigrants is becoming quite high. Also, it appears that funds intended to be used for adjudicating immigrant benefits are being used to implement central administration goals. Examples include enhanced vetting procedures, staffing for enforcement operations within USCIS, and the initiation of new programs to tighten the link between naturalization and removal or between naturalization and denaturalization.<sup>23</sup> While the use of

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20. *About Us: USCIS Mission Statement*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/aboutus> (last updated Mar. 6, 2018). The former mission, statement read: "USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system." Andrew R. Arthur, *USCIS Changes Its Mission Statement*, CTR. FOR IMMIGRATION STUDIES (Feb. 23, 2018) <https://cis.org/Arthur/USCIS-Changes-Its-Mission-Statement>.

21. News Release, U.S. Citizenship & Immigration Servs., USCIS Director L. Francis Cissna on New Agency Mission Statement (Feb. 22, 2018), <https://www.uscis.gov/news/news-releases/uscis-director-l-francis-cissna-new-agency-mission-statement>.

22. Richard Gonzalez, *America No Longer Nation of Immigrants*, N.P.R. (Feb. 22, 2018, 6:18 PM), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>.

23. See generally *AILA Policy Brief: New USCIS Notice to Appear Guidance*, AM. IMMIGRATION LAWYERS ASS'N (July 17, 2018), <https://www.aila.org/infonet/aila-policy-brief-new-uscis-notice-to-appear> [hereinafter *AILA Policy Brief: New USCIS Notice*]; U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018->

NTAs or Notices of Intent to Deny (NOIDs) for benefit denials has been permitted previously, it was historically not frequently used. It was instead used infrequently only on occasions related to high priority cases.

The recent exclusionary emphasis of USCIS, what public administration scholars have identified as “mission drift,”<sup>24</sup> means that the offices handling legal immigrants have become an extension of the physical wall at the U.S.-Mexico border. Granted, the mission of serving immigrants is not pursued to the exclusion of fidelity to immigration law. USCIS remains an agency with the Department of Homeland Security and several substantive provisions of the INA expressly seek to ensure compliance with immigration laws. As USCIS Director Cissna has said, “I just feel a strong commitment to the law, and to the rule of law . . . None of the things that we’re doing . . . are guided by any kind of malevolent intent.”<sup>25</sup> A similar rule of law justification for the more rigorous requirements associated with legal migration is given by USCIS Spokesman Michael Bars who says “Each year, immigration benefits are attainable for many law-abiding individuals legitimately seeking greater opportunity, prosperity, and security as newly entrusted members of society, and to this end USCIS takes great pride in helping these dreams become a reality . . . Ensuring that individuals who are subject to removal are placed in proceedings is fidelity to the law.”<sup>26</sup>

Whatever their motivation, these accumulated changes in citizenship and immigration policy construct a second wall for immigrants at each stage of their efforts to settle into their lives in the U.S. New and highly technical procedures and policies have complex and sometimes insidious implications within arcane immigration law. Changes to agency practice have reduced transparency and hidden the impact of USCIS policies on legal immigration. Changes to substantive policy prioritize American economic and national security interests while harming vulnerable immigrant groups.

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06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf. USCIS issued a total of 91,711 NTAs in 2017 and 92,229 NTAs in 2016. Of those, 8 out of 10 were issued in cases where an asylum seeker obtained a positive credible fear determination after an interview with an asylum officer. In those cases, an NTA must be issued, under 8 CFR §208.30(f), to give the asylum seeker an opportunity to present his or her case to an immigration judge. In FY 2013, 2014, and 2015, USCIS issued approximately 56,000 NTAs each year. See U.S. CITIZENSHIP & IMMIGRATION SERVS., MONTHLY CREDIBLE AND REASONABLE FEAR NATIONALITY REPORTS (2018), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/FY18CFandRFstats\\_2018\\_06\\_30.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/FY18CFandRFstats_2018_06_30.pdf).

24. As Margo Schlanger once said, being submerged in a broader agency dilutes the purpose. See generally Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014). Political scientist Marissa Golden has said that single-mission agencies tend to be more zealous than those with mixed missions. See generally MARISSA GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000). And that was the point: following the September 11 terrorist attacks, the legacy Immigration and Naturalization Service was reformed to separate the benefit and enforcement functions, but it kept USCIS and ICE both within DHS where intra-agency cooperation is all too easy and principles of the internal separation of powers can be defeated. For more research on mission drift, see generally Alnoor Ebrahim et al., *The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations*, 34 RES. ORGANIZATIONAL BEHAV. 81 (2014); Marshall Jones, *The Multiple Sources of Mission Drift*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 299 (2007). Nina Rabin writes specifically about shifts in USCIS bureaucratic culture in Rabin, *supra* note 10.

25. Ted Hesson, *The Man Behind Trump’s Invisible Wall*, POLITICO (Sept. 20, 2018), <https://www.politico.com/magazine/story/2018/09/20/uscis-director-lee-francis-cissna-profile-220141>.

26. Amanda Holpuch, *Trump’s Invisible Wall: How His 2018 Immigration Policies Built a Barrier*, GUARDIAN (Dec. 25, 2018), <https://www.theguardian.com/us-news/2018/dec/25/trump-wall-immigration-policies-mexico-border>.

### III. CASE STUDIES OF THE SECOND WALL

This section sets out case studies of where administrative agencies pose barriers to legal migration—in effect, instituting a second wall or bureaucratic barrier to immigrants. As the case studies show, the bundle of policies and practices is consequential for the ability of immigrants to obtain lawful status and to integrate into American society. In addition, the policies become a construct that deters immigrants from trying and reifies the sense that they are outsiders even while living inside the U.S. Second wall policies fall into three major categories: those policies erecting new and burdensome procedural hurdles that massively increase the costs of legal migration, those changes in agency practice that have reduced transparency and obfuscated the impact that new agency policies have had on legal immigration, and new shifts in substantive priorities that result in changing policies favoring national security and merit based migration over long-established pathways.

#### A. CREATION OF PROCEDURAL HURDLES TO LEGAL MIGRATION

A variety of second wall policies have made it increasingly difficult for one applying for a legal immigration benefit to complete the process. New procedural hurdles concerning the handling of evidence, referral of immigrants to removal proceedings, calculation of unlawful presence, and refusal to give deference to prior adjudications impose costs on immigrants personally, financially, and temporally.

One such policy relates to the way USCIS treats evidence submitted with petitions. During the summer of 2018, USCIS issued a new policy memorandum regarding when the agency will issue Requests for Evidence (RFEs) or Notices of Intent to Deny (NOIDs) in cases where an adjudicator determines that an applicant has not submitted sufficient evidence to establish eligibility for a benefit. Previous policy essentially held that unless there was an issue with statutory eligibility, an adjudicator would seek additional evidence from an applicant before denying a petition. The prior policy stated that an adjudicator should issue an RFE or NOID where evidence is insufficient to establish eligibility for relief sought unless there was “no possibility that additional information or explanation will cure the deficiency.”<sup>27</sup> Under the new policy, “USCIS in its discretion may deny the benefit request for failure to establish eligibility based on lack of required initial evidence.”<sup>28</sup> This new policy applies to all applications, petitions, and requests received after the effective date.<sup>29</sup> This includes all green card and naturalization applications. This policy means that now some cases will be closed as a matter of course, without an opportunity for the applicant to correct minor mistakes. Even if the immigrant can refile, there will be added costs: over \$1,000 in the case of an application for a green card, and increased delay. Compounding these evidentiary issues is a policy that

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27. U.S. CITIZENSHIP & IMMIGRATION SERVS., REQUESTS FOR EVIDENCE AND NOTICES OF INTENT TO DENY 2 (June 3, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf>.

28. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0163, ISSUANCE OF CERTAIN RFEs AND NOIDs; REVISIONS TO *ADJUDICATOR'S FIELD MANUAL (AFM)* CHAPTER 10.5(A), CHAPTER 10.5(B) 3 (July 13, 2018), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM\\_10\\_Standards\\_for\\_RFEs\\_and\\_NOIDs\\_FINAL2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf).

29. *Id.*

eliminates the prior practice of affording deference to prior adjudicatory decisions for purposes of extensions of nonimmigrant status.<sup>30</sup>

Adding to this, in a policy memorandum issued June 28, 2018, USCIS was directed to begin issuing Notices to Appear (NTA), the charging document that initiates removal proceedings, in drastically more expansive scenarios.<sup>31</sup> While USCIS is statutorily authorized to issue NTAs, policy has long been to prioritize agency resources on “cases that involve public safety threats, criminals, and aliens engaged in fraud.”<sup>32</sup> As the former Immigration and Naturalization Service General Counsel Sam Bernsen explained, an exercise of prosecutorial discretion, that is, the choice not to initiate removal proceedings against an individual, is normally most appropriate “prior to the institution of proceedings . . . it makes little sense to put an alien through the ordeal and expense of a deportation proceeding when his actual removal will not be sought.”<sup>33</sup>

Under the new policy, which USCIS has started to implement as of October 1, 2018,<sup>34</sup> those circumstances warranting the initiation of removal proceedings have been greatly expanded, to include situations where, “upon the issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.”<sup>35</sup> This policy shift will greatly increase the risk an individual immigration benefit or green card applicant will experience, subjecting him or her to the possibility that, at the conclusion of their adjudication, the adjudicating officer will refer him or her to removal proceedings. Once an NTA has been issued, even if the individual then departs from the United States, USCIS will not have the ability to cancel the NTA.<sup>36</sup> Withdrawing an application will not protect an applicant from the issuance of an NTA under this policy.<sup>37</sup> Indeed, although USCIS states that it will generally not issue an NTA during a period in which an applicant may file an appeal or a motion to reopen or reconsider, it does

30. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0151, RESCISSION OF GUIDANCE REGARDING DEFERENCE TO PRIOR DETERMINATIONS OF ELIGIBILITY IN THE ADJUDICATION OF PETITIONS FOR EXTENSION OF NONIMMIGRANT STATUS 2 (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf>.

31. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS 3 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

32. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0050, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS 1 (Nov. 7, 2011) [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf); *see supra* text accompanying note 23.

33. Memorandum from Sam Bernsen, INS General Counsel, to the INS Commissioner, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

34. *USCIS to Begin Implementing New Policy Memorandum on Notices to Appear*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/news/alerts/uscis-begin-implementing-new-policy-memorandum-notices-appear> (last updated Sept. 26, 2018).

35. UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS, *supra* note 31.

36. U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS TELECONFERENCE OF NOTICE TO APPEAR (NTA) UPDATED POLICY GUIDANCE 4 (Sept. 27, 2018), [https://www.uscis.gov/sites/default/files/files/natedocuments/USCIS\\_Updated\\_Policy\\_Guidance\\_on\\_Notice\\_to\\_Appear\\_NTA.pdf](https://www.uscis.gov/sites/default/files/files/natedocuments/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf).

37. *Id.*

expressly reserve the option to issue an NTA before the filing of an appeal, and states that it may be required to coordinate with ICE to ensure ICE is aware of the favorable administrative action.<sup>38</sup> This complicated and burdensome procedure is the result of USCIS having no jurisdiction over removal proceedings, and so once an NTA has been issued, what happens to the immigrant in removal proceedings is almost entirely out of the agency's hands. According to the American Immigration Lawyers Association:

The new NTA policy will also have a chilling effect on legal immigration in general, discouraging many people who are eligible for immigration benefits from applying out of fear they will be subject to unjustified enforcement. Thousands of individuals will face costly delays and severe consequences such as detention, forcible removal, and bars to returning to the United States for years. Moreover, this dramatic shift will divert finite USCIS resources away from its core mission of adjudicating immigration cases, resulting in even greater delays in processing that have plagued the agency for years.<sup>39</sup>

While these new procedural changes facially increase the enforcement authority of USCIS to implement barriers to lawful immigration, other policy changes are more insidious. For instance, in the case of international students, a recent policy memorandum from USCIS has changed the way "unlawful presence" is calculated.<sup>40</sup> As background, when individuals remain in the United States after the period of stay for which they were authorized, they begin to accrue what is known as "unlawful presence." When they have accrued six months of unlawful presence, they become subject to a three-year bar to entering the United States.<sup>41</sup> With one year of unlawful presence, that bar extends to ten years, with the potential of a permanent bar should they attempt to enter the United States while the bar is active.<sup>42</sup>

This new policy subjects international students to the consequences of unlawful presence in circumstances where they may not know that they are unlawfully present. Where previously a judge or adjudicator would have to make a determination that the student had violated her status before unlawful presence began to accrue, the new policy begins counting unlawful presence starting the day after a status violation occurs. While facially this policy does not seem to be as forceful in its effect on lawful immigrants as the new RFE and NTA policies, the application of these new calculation procedures on international students is potentially life-changing. Under this new policy, a student who follows the advice of her designated advisor and takes below the required number of credit hours for a semester, one who works at her on campus job for 21 hours rather than 20 hours one week, one who babysits, or even one who volunteers her time for free at a job that would normally be

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38. *Id.* at 9.

39. See *AILA Policy Brief: New USCIS Notice*, *supra* note 23, at 1..

40. See U.S. Citizenship & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-1060.1, ACCRUAL OF UNLAWFUL PRESENCE AND F, J, AND M NONIMMIGRANTS 1-2 (Aug. 9, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>.

41. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I).

42. Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(II); 1182(a)(9)(C)(i)(I).

compensated will legally become unlawfully present without her knowledge and without any interaction with a U.S. immigration official. Six months later that student will be subject to a mandatory three-year bar to entering the United States. That bar extends to ten years one year after the status violation. Any dependents of the student will similarly find themselves subject to harsh immigration penalties with no notice.

Once these policy changes go into effect, the effective enforcement authority USCIS will have is immense. With the combination of policies allowing massive discretion to deny applications outright combined with the discretion to issue NTAs in massively expanded circumstances at USCIS's disposal, an applicant who, for example, is attempting to adjust her status to lawful permanent resident and thus acquire her green card at the conclusion of her H-1B visa may have her application denied for insufficient initial evidence<sup>43</sup> and be immediately placed in removal proceedings. All foreign nationals attempting to lawfully immigrate will face massive new procedural hurdles that did not exist just two years prior.

#### B. CHANGES IN AGENCY PRACTICE THAT REDUCE TRANSPARENCY

The second wall also manifests in new agency practices that obfuscate the way USCIS operates and how new policies affect the immigration laws in general. For example, a few changed agency practices reflect a concerning trend in USCIS towards becoming less transparent and less accessible. InfoPass, a self-scheduled, face-to-face meeting with USCIS officials meant to give applicants an opportunity to resolve issues in their cases and obtain information on their cases, is being phased out to encourage applicants to use only computerized systems.<sup>44</sup> Whereas before an immigrant would be able to schedule a meeting with a USCIS official to ask questions about the status of her case or the reason behind a decision, this new system would completely phase out the personal, customer service focused procedure.

Advisory work from the USCIS ombudsman has also completely ceased, with no new recommendations posted since December 2016.<sup>45</sup> Similarly, with the ombudsman failing to adequately provide oversight to USCIS, investigations of complaints are not being handled with the requisite oversight. Implementation of new programs for estimating processing times lacks the transparency necessary to review agency conclusions and understand *how* it calculates estimated processing times.<sup>46</sup> For many local chapters of the American Immigration Lawyers Association, USCIS Liaison Committees have been disbanded as well. Before these liaison committees served a symbiotic relationship between the private immigration bar and the

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43. See Kavitha Surana, *Authorities Can Now Deny Visa and Green Card Applications Without Giving Applicants a Chance to Fix Errors*, PROPUBLICA (Sept. 11, 2018), <https://www.propublica.org/article/authorities-can-now-deny-visa-and-green-card-applications-without-giving-applicants-a-chance-to-fix-errors>.

44. News Release, U.S. Citizenship & Immigration Servs., USCIS to Expand Information Services Modernization Program to Key Locations, <https://www.uscis.gov/news/news-releases/uscis-expand-information-services-modernization-program-key-locations> (last updated Oct. 30, 2018).

45. USCIS Ombudsman, *Recommendations by the Ombudsman*, DEP'T OF HOMELAND SECURITY, [www.dhs.gov/recommendations](http://www.dhs.gov/recommendations) (last published Nov. 9, 2017).

46. *How USCIS Estimates Application and Petition Processing Times*, AM. IMMIGRATION COUNCIL (July 18, 2018), <https://www.americanimmigrationcouncil.org/research/uscis-data-application-and-petition-processing-times>.

government agency, allowing for the transmission of information between the attorneys and USCIS. Attorneys could voice concerns with new practices and obtain information directly from the agency. USCIS could use the immigration attorneys to disseminate information related to new policies and practices. Without this avenue for attorneys to speak with USCIS, only general USCIS stakeholder meetings are available.

As a consequence of these and other new policies and adjudication procedures, historically large backlogs and processing delays in nearly every category of immigration benefit have developed, to the point that Congress and advocacy groups say they have reached “crisis levels.”<sup>47</sup> While there does not appear to be a discreet policy decision to slow down the adjudication of benefits, the backlogs have been difficult for applicants to understand without USCIS communication to applicants about the progress of their adjudications. Freedom of Information Act requests filed by immigration advocates have not been fruitful, and lawsuits are currently pending to understand why and how such backlogs developed.<sup>48</sup> Notably, the American Immigration Lawyers Association (AILA)’s findings on the increased backlog include that there has been a surge in case processing times by 46% over the past two fiscal years and a 91% increase since fiscal year 2014.<sup>49</sup> These processing delays have even increased as case receipt volume decreased in fiscal year 2018.<sup>50</sup> These delays have led those seeking green cards or other benefits to be stuck in a legal limbo where they are vulnerable to the highly publicized increased enforcement initiatives of the Trump administration and being unable to utilize the many legal and social benefits that their immigration statuses would impart to them.

### C. SHIFTING SUBSTANTIVE POLICIES THAT PRIORITIZE NATIONAL SECURITY OVER IMMIGRANTS

Shifting administrative priorities have additionally made it more difficult for individuals to obtain lawful status for which they would otherwise be entitled. Specifically, shifting priorities concerning national security and merit-based immigration are changing the landscape for many lawful immigrants seeking to navigate long-established immigration pathways. While the new administration can shift substantive priorities, the impact of these policies is harmful for immigrants, and some appear pretextual.

#### 1. Intensifying Focus on National Security and Islamic Extremism.

With little obfuscation, USCIS has been targeting specific groups, including Muslims suspected of terrorist associations, with intensified screening. For example, USCIS has previously implemented and continues to utilize a screening process known as the Controlled Application Review and Resolution Program (CARRP). CARRP is designed to “ensure[] that immigration benefits are not granted to individuals and organizations that

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47. *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, AM. IMMIGRATION LAWYERS ASS’N (Jan. 30, 2019) [hereinafter *AILA Policy Brief: USCIS Processing Delays*], <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

48. *See e.g., Coalition for Humane Immigrant Rights v. USCIS*, 2:18-cv-08034 (C.D. Cal. filed Sept. 17, 2018).

49. *See AILA Policy Brief: USCIS Processing Delays*, *supra* note 47, at 1..

50. *Id.*

pose a threat to national security. . . .”<sup>51</sup> Because it uses overbroad criteria in making these national security determinations, it is primarily immigrants who are Muslim or are from Middle Eastern countries that are affected.<sup>52</sup> Individuals who are subject to additional scrutiny through CARRP will find themselves suffering from significant delays in adjudication, and almost certain denial.<sup>53</sup> Indeed, even if an individual is not considered a “known or suspected terrorist” after additional screening under CARRP, USCIS officers are not permitted to approve the application without supervisory approval and concurrence from a senior level official.<sup>54</sup>

Among the factors USCIS checks in determining whether individuals would be subject to CARRP are their employment, training, government affiliations, “other suspicious activities,” family members, and close associates.<sup>55</sup> The “other suspicious activities” category covers behaviors ranging from criminal activities such as fraudulent document manufacture and smuggling or persons, drugs or funds, to large scale transfers or receipt of funds, to “[u]nusual travel patterns and travel through *or residence in* areas of known terrorist activity.”<sup>56</sup> All immigrant and nonimmigrant visa applicants, as well as naturalization applicants, are subject to additional screening under CARRP.<sup>57</sup> USCIS actively looks for reasons to deny a CARRP petition, including what would otherwise be minor omissions, including failing to disclose routine stops for secondary inspections at airports.<sup>58</sup>

Other attempts at intensified vetting for Muslims have come in the form of electronic monitoring systems. One such system was the proposed Visa Lifecycle Vetting, an automated system that was to constantly monitor the social media of potential visitors to predict whether a migrant will be a “positively contributing member of society” and “contribute to national interests”; it is a \$100 million system that was termed a “Muslim-ban by

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51. U.S. CITIZENSHIP & IMMIGRATION SERVS. ACAD., CARRP OFFICER TRAINING: NATIONAL SECURITY HANDOUTS, GUIDANCE FOR IDENTIFYING NATIONAL SECURITY CONCERNS 2 (2009), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/Guiance-for-Identifying-NS-Concerns-USCIS-CARRP-Training-Mar.-2009.pdf>; see *Oversight of U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Leon Rodriguez, Director, U.S. Citizenship & Immigration Servs.).

52. Yesenia Amaro, *Little-Known Law Stops Some Muslims from Obtaining U.S. Citizenship*, LAS VEGAS REV.-J. (Apr. 16, 2016), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship>.

53. JENNIE PASQUARELLA, AM. CIVIL LIBERTIES UNION OF S. CAL., MUSLIMS NEED NOT APPLY: HOW USCIS MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 29, 30, 33–36 (2013), [https://www.lccr.com/wp-content/uploads/MUSLIMS\\_NEED\\_NOT\\_APPLY\\_LCCR\\_ACLU\\_SoCal\\_Report.pdf](https://www.lccr.com/wp-content/uploads/MUSLIMS_NEED_NOT_APPLY_LCCR_ACLU_SoCal_Report.pdf).

54. *Id.* at 36.

55. U.S. CITIZENSHIP & IMMIGRATION SERVS. ACAD., *supra* note 51, at 4–5, <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/Guiance-for-Identifying-NS-Concerns-USCIS-CARRP-Training-Mar.-2009.pdf>.

56. *Id.* (emphasis added).

57. See PASQUARELLA, *supra* note 53, at 26.

58. See KATIE TRAVERSO & JENNIE PASQUARELLA, AM. CIVIL LIBERTIES UNION OF S. CAL., PRACTICE ADVISORY: USCIS’S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (Jan. 3, 2017), [https://www.nationalimmigrationproject.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2017\\_03Jan-ACLU-CARRP-advisory.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2017_03Jan-ACLU-CARRP-advisory.pdf).



algorithm.”<sup>59</sup> While in 2018, ICE abandoned the Visa Lifecycle Vetting program in the face of overwhelming public opposition,<sup>60</sup> a different system was implemented, and indeed is still in use.

In 2017, in furtherance of Executive Order 13780, the so-called “Travel Ban,” USCIS implemented a similar system known as “Continuous Immigration Vetting,” which began a process that constantly vets information from immigration benefit applications throughout the entire application period.<sup>61</sup> The system operates by continuously vetting both immigrant and nonimmigrant applications and petitions up to the actual issuance of a naturalization certificate.<sup>62</sup> Where procedural issues, costs, and public opposition caused the end of the Visa Lifecycle Vetting program, the Continuous Immigration Vetting System is still operational. These monitoring operations of such a politically unpopular group demonstrate the unrelenting fixation this administration has on national security.

## 2. Shifting National Security Priorities and the Military.

Similarly, immigrants attempting to naturalize or obtain lawful status through military service have found themselves undergoing forms of intensified vetting justified on national security grounds that have either slowed down or completely eliminated these long-established pathways. Military service has long been a manner in which immigrants have sought their citizenship.<sup>63</sup> Normally a much faster process than naturalizing through a civilian pathway, programs such as Naturalization at Basic Training have made the inducements to obtaining citizenship even greater and the process even faster, though some of these programs have come under criticism for not working as intended and are now being revisited. Additionally, those attempting to undertake a pathway to citizenship through the military have found themselves subject to more strict “intensive” vetting procedures. On October 13, 2017, the Department of Defense announced a change in its screening procedures for lawful permanent residents entering the military.<sup>64</sup> This change implemented increased security restrictions on both initial security screening, as well as for the issuance of certifications of honorable

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59. Faiza Patel & Harsha Panduranga, *DHS’ Constant Vetting Initiative: A Muslim-Ban by Algorithm*, BRENNAN CTR. FOR JUSTICE (Mar. 12, 2018), <https://www.brennancenter.org/blog/dhs-constant-vetting-initiative-muslim-ban-algorithm>.

60. JAKE LAPERRUQUE, *ICE Backs Down on “Extreme Vetting” Automated Social Media Scanning*, PROJECT ON GOV’T OVERSIGHT (May 23, 2018), <https://www.pogo.org/analysis/2018/05/ice-backs-down-on-extreme-vetting-automated-social-media-scanning>.

61. U.S. DEP’T OF HOMELAND SEC., *PRIVACY IMPACT ASSESSMENT FOR THE CONTINUOUS IMMIGRATION VETTING* (Feb. 14, 2019), [https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnsciv-february2019\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnsciv-february2019_0.pdf).

62. *Id.*

63. There are two routes provided in the Immigration and Nationality Act that expedite and streamline naturalization for those in the armed services, as well as specialized programs for those who are entirely without status to acquire a pathway to citizenship. The peacetime route provided for in INA 328, which has not been used since the Iraq War commenced, mirrors the refugee process post-refugee determination in many respects: servicemen become LPRs and may naturalize on a fast track. During periods of hostilities, defined in INA 329, and including the current period following the Iraq War, the citizenship pathway collapses the LPR and citizen phase such that servicemen can be immediately eligible for citizenship once they file an application with a fee waiver.

64. News Release, U.S. Dep’t of Def., *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program* (Oct. 13, 2017), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc>.

service that are required to obtain expedited naturalization through military service.<sup>65</sup> Under this new policy, lawful permanent residents attempting to enter the military must fully complete a background investigation and receive a favorable military security suitability determination prior to beginning their service.<sup>66</sup> By delaying the issuance of these certificates, this new policy effectively ends this method of naturalization, as the needed paperwork cannot be secured. Additionally, lawful permanent residents are further delayed from applying for their citizenship by 180 days if they are serving in active duty, or one year if serving in the reserve.<sup>67</sup> As a side effect of the implementation of these increased vetting procedures, for a period of time, lawful permanent residents were completely barred from entering the Army Reserve, further delaying naturalization for these individuals.<sup>68</sup>

For those immigrants who are completely without status, a specialized program known as the Military Accessions Vital to National Interest (MAVNI) program created a specialized pathway to citizenship for noncitizens possessing specialized skills helpful for military operations. Through this program, established in 2008 by President George W. Bush in order to give the U.S. military access to immigrants with vital medical or language skills, immigrants and nonimmigrants would be given a way to enlist in the military, and thus be given a pathway to citizenship that would not normally be available to them.<sup>69</sup> After ten years, however, the U.S. Army has been discharging immigrant recruits and reservists who enlisted in the military with this “promised path to citizenship.”<sup>70</sup> The future of this program has been called into question, and many individuals have been thrust into a legal limbo as a result.<sup>71</sup> Many of these individuals were told their discharge was the result of being labeled “security risks because they have relatives abroad,” or that the Department of Defense had not completed background checks on them.<sup>72</sup>

In addition to increased vetting for immigrants attempting to enter the military, and the functional ending of MAVNI, data suggests that those who

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65. *Id.*

66. *Id.*

67. *Id.*

68. See Ashley Edwards & Emily C. Singer, *Exclusive: Army Reserve Bans Green Card Holders From Enlisting, a Move That May Break Federal Law*, MIC (Oct. 17, 2017), <https://mic.com/articles/185297/exclusive-army-bans-green-card-holders-from-enlisting-a-move-that-may-break-federal-law#.MdpEYaYT>.

69. See *The MAVNI Program: Military Accessions Vital to the National Interest*, CITIZENPATH (May 1, 2018), <https://citizenpath.com/mavni-program>. Of note, those citizens who eventually naturalized through the MAVNI program were also subject to additional bi-annual security check ins – a practice that a federal judge in Seattle enjoined as illegally discriminatory on January 31, 2019. See Lorelei Laird, *Defense Department Engaged in Illegal Discrimination Against Some Soldiers, District Court Finds*, ABA J. (Feb. 1, 2019, 4:55 PM), <http://www.abajournal.com/news/article/defense-department-engaged-in-illegal-national-origin-discrimination-district-court-finds>.

70. Martha Mendoza & Garance Burke, *US Army Begins Quietly Discharging Immigrant Recruits on Path to Citizenship*, USA TODAY (July 5, 2018), <https://www.usatoday.com/story/news/politics/2018/07/05/army-discharging-immigrants/762021002>.

71. See Tara Copp, *Here's the Bottom Line on the Future of MAVNI: Many Foreign-Born Recruits May Soon Be Out*, MILITARY TIMES (July 6, 2018), <https://www.militarytimes.com/news/your-military/2018/07/06/heres-the-bottom-line-on-the-future-of-mavni-many-foreign-born-recruits-may-soon-be-out>.

72. *Id.* The Department of Defense assured in a prepared statement that “[a]ll service members . . . and those with an honorable discharge are protected from deportation.” However, the Associated Press reports that many of these individuals received an “uncharacterized discharge,” and so it is unclear if this protection will apply to them.

are attempting to naturalize through military service are facing increasingly high denial rates while adjudication rates are rapidly falling. During second quarter of fiscal year 2016, there were 2,409 applications for naturalization specifically through the military.<sup>73</sup> Of those applications, 124 were denied, giving an overall denial rate of approximately 5.1%.<sup>74</sup> Adjudication fell dramatically in fiscal year 2017, while denials increased. In the second quarter of fiscal year 2017 USCIS adjudicated 1,361 applications for naturalization specifically through the military, over 1,000 fewer than the year prior.<sup>75</sup> Of these, 130 were denied, giving a denial rate of approximately 9.5% - nearly double the rate at the same time the previous year.<sup>76</sup> Fiscal year 2018 has thus far shown even higher rates of denials, with adjudications falling far below even the 2017 average. In the first quarter of fiscal year 2018, USCIS adjudicated only 946 applications to naturalize through the military.<sup>77</sup> Of these, 191 were denied, giving an overall denial rate of approximately 20.2%.<sup>78</sup> In the second quarter of fiscal year 2018, USCIS adjudicated only 496 applications for naturalization through the military.<sup>79</sup> Of those, 76 were denied, giving an ultimate denial rate of approximately 15.3%.<sup>80</sup>

### 3. Diminishment of Refugee Admissions.

A final shift in immigration policy that places a new emphasis on national security over legal immigrants is in the context of refugee admissions. The admission of refugees to the United States is authorized by the Immigration and Nationality Act, as amended by the Refugee Act of 1980. This mainstay of U.S. immigration has two basic purposes: to provide a uniform procedure for refugee admissions, and to authorize federal assistance to resettle refugees and promote their self-sufficiency.<sup>81</sup> While legally authorized and, to many, morally appropriate, this humanitarian form of legal migration has also been under attack during the Trump

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73. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., NUMBER OF N-400 APPLICATIONS FOR NATURALIZATION BY CATEGORY OF NATURALIZATION, CASE STATUS, AND USCIS FIELD OFFICE LOCATION JANUARY 1 – MARCH 31, 2016 (May 2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400\\_performancedata\\_fy2016\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2016_qtr2.pdf).

74. *Id.*

75. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., NUMBER OF N-400 APPLICATIONS FOR NATURALIZATION BY CATEGORY OF NATURALIZATION, CASE STATUS, AND USCIS FIELD OFFICE LOCATION JANUARY 1 – MARCH 31, 2017 (June 2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400\\_performancedata\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2017_qtr2.pdf).

76. *Id.*

77. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., NUMBER OF N-400 APPLICATIONS FOR NATURALIZATION BY CATEGORY OF NATURALIZATION, CASE STATUS, AND USCIS FIELD OFFICE LOCATION OCTOBER 1 – DECEMBER 31, 2017 (May 2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400\\_performancedata\\_fy2018\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2018_qtr1.pdf).

78. *Id.*

79. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., NUMBER OF N-400 APPLICATIONS FOR NATURALIZATION BY CATEGORY OF NATURALIZATION, CASE STATUS, AND USCIS FIELD OFFICE LOCATION JANUARY 1 – MARCH 31, 2018 (July 2018), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400\\_performancedata\\_fy2018\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2018_qtr2.pdf).

80. *Id.*

81. CONG. RESEARCH SERV., REFUGEE ADMISSIONS AND RESETTLEMENT POLICY (Dec. 18, 2018), <https://fas.org/sgp/crs/misc/RL31269.pdf>.

administration – beyond even that based on the so called “Travel Ban.”<sup>82</sup> The U.S. Refugee Admissions Program (USRAP) was directed in September, 2017 through a Presidential Determination that a maximum of 45,000 refugees could be admitted in Fiscal Year 2018 – the lowest ceiling ever set.<sup>83</sup> Further, this historically low refugee ceiling was far from reached, with only 19,899 refugees having been admitted as of August 31, 2018.<sup>84</sup> This unexplained failure to even approach the refugee admissions ceiling for fiscal year 2018 has prompted a bipartisan group of 63 U.S. Representatives to send a letter to DHS Secretary Nielsen and DOS Secretary Pompeo in support of the USRAP and requesting an explanation for the decline in refugee admissions during FY 2018.<sup>85</sup> The U.S. government has stated that the refugee ceiling will be further reduced to 30,000 maximum refugee admittances in Fiscal Year 2019.<sup>86</sup> All this in the context of the largest refugee displacement crisis in recent history, with more than 5.6 million Syrians displaced as refugees, and where other countries are significantly ramping up their refugee admissions to accommodate this crisis.<sup>87</sup>

#### D. SHIFTING SUBSTANTIVE POLICY PRIORITIES THAT EMPHASIZE MERIT-BASED MIGRATION

In addition to a renewed emphasis on national security concerns, new immigration policies have started to prioritize immigrants of merit, contrary to the long-established emphasis that the United States immigration system has placed on family and humanitarian immigration.

##### 1. Restrictions on Immigrants Likely to Become Public Charges.

New rules meant to reduce the amount of public benefits utilized by immigrants and to curtail the immigration of those who would use them are one method the new administration has taken to narrow the type of immigrant that the United States will accept. As of September 24, 2018, the Trump administration is tightening restrictions on low-income immigrants by proposing a new rule expanding the scope of the “public charge” ground of inadmissibility.<sup>88</sup> Legally, under the Immigration and Nationality Act, any noncitizen who “in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible [. . .] In determining whether an alien

82. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (March 6, 2017).

83. Presidential Determination No. 2017-13, 82 Fed. Reg. 49,083 (Sept. 29, 2017).

84. REFUGEE PROCESSING CTR., U.S. DEP’T OF STATE, REFUGEE ADMISSIONS REPORT (Aug. 31, 2018).

85. Letter Regarding Refugee Admissions from 63 Members of the U.S. House of Representatives to Kirstjen Nielsen, Sec’y, U.S. Dep’t of Homeland Sec., & Mike Pompeo, Sec’y, U.S. Dep’t of State, (July 17, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-members-qs-dhs-dos-re-refugee-admission>.

86. Lesley Wroughton, *U.S. To Sharply Limit Refugee Flows to 30,000 in 2019*, REUTERS (Sept. 17, 2018), <https://www.reuters.com/article/us-usa-immigration-pompeo/u-s-to-sharply-limit-refugee-flows-to-30000-in-2019-idUSKCN1LX2HS>.

87. *Syrian Refugee Crisis: Facts, FAQs, and How To Help*, WORLD VISION (Feb. 14, 2019), <https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts>.

88. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Proposed Change to Public Charge Ground of Inadmissibility* (Sept. 25, 2018), <https://www.uscis.gov/legal-resources/proposed-change-public-charge-ground-inadmissibility>.

is excludable under this paragraph, the consular officer of the Attorney General shall at minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills. . . ."<sup>89</sup> This policy seeks to ensure that those who immigrate to the United States are self-sufficient, and will not become burdens to society.

However, under this new approach to determining who qualifies as "likely to become a public charge," an immigrant who utilizes food stamps, Medicaid, or housing assistance will find herself unable to sponsor relatives for admission to the United States, and, if she finds herself applying for a green card after using these benefits, she may be found ineligible as someone likely to become a "public charge."<sup>90</sup>

Early studies on the proposed rule from leaked drafts in March 2018 demonstrate that the number of potential noncitizens who could face a public charge determination would increase fifteen-fold.<sup>91</sup> The study anticipates a massive "chilling effect" on immigrants' use of health, nutrition, and social services, and anticipates that these effects are likely to expand beyond the immigrants themselves to the U.S. citizen children of immigrants.<sup>92</sup> Indeed such chilling effects are already being reported despite the final rule not yet going into effect, with fearful immigrants declining food assistance and emergency Medicaid in anticipation that it may affect future immigration proceedings for themselves or their families.<sup>93</sup> It is also not just noncitizens that are impacted by this changed rule – the rule does not differentiate between benefits sought for one's own use and those sought for a U.S. citizen dependent, such as a child. In effect, the consequences of this policy are being pronounced to a large extent on children who ostensibly are not meant to be the target of the policy.

## 2. Restrictions on Temporary Workers.

Similarly, under the guise of protecting American jobs and combatting fraud, new restrictionist policies have started to target temporary workers, specifically prioritizing those temporary workers who have the most academic or economic merit. Executive Order 13,788, better known by the title "Buy American and Hire American" was one such policy change that both directly and indirectly targeted temporary workers.<sup>94</sup> Directly targeted were the high-skilled workers who fell under the H-1B visa category. The executive order explicitly tasked the Department of Homeland Security with implementing policies to ensure that the H-1B visas are awarded only "to the most-skilled or highest-paid petition beneficiaries."<sup>95</sup>

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89. Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4).

90. See Tami Luhby & Tal Kopan, *How Trump's New Definition of 'Public Charge' Will Affect Immigrants*, CNN (Sept. 25, 2018), <https://www.cnn.com/2018/09/25/politics/immigration-public-benefits/index.html>.

91. JEANNE BATALOVA ET AL., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES' PUBLIC BENEFITS USE, MIGRATION POLICY INST. (June 2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

92. *Id.*

93. Paul J. Fleming & William D. Lopez, *Families Are Choosing Between Their Health and Staying Together*, THE CONVERSATION (Jan. 9, 2019), <https://theconversation.com/families-are-choosing-between-their-health-and-staying-together-108865>.

94. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

95. *Id.* at § 5(b).

In practice, when applying for an H-1B visa, employers have to show that they will be paying the “prevailing wage” for the job for which they will be employing an immigrant, as well as show that the individual they employ will be working in a “specialty occupation.”<sup>96</sup> The archetypal H-1B worker works in the Information Technology field and is from either India or China,<sup>97</sup> but with the new priority given to the “most skilled” and “highest paid” beneficiaries, the lower-level computer scientists and programmers are finding it increasingly difficult to obtain visas, or, if already in the United States, to continue their employment. Indeed, new policy memoranda from USCIS subjects those in the information technology field to more strict requirements than it once did.<sup>98</sup>

As the “Buy American and Hire American” policy was implemented, H-1B visas categorically became increasingly difficult to obtain, with data acquired by the National Foundation for American Policy showing an almost immediate increase in denials and Requests for Evidence from USCIS.<sup>99</sup> As the report states, “the proportion of H-1B petitions denied for foreign-born professionals increased by 41% from the 3<sup>rd</sup> to the 4<sup>th</sup> quarter of FY 2017, rising from a denial rate of 15.9% in the 3<sup>rd</sup> quarter to 22.4% in the 4<sup>th</sup> quarter.”<sup>100</sup> Similarly, “[t]he number of Requests for Evidence in the 4<sup>th</sup> quarter of FY 2017 almost equaled the total number issued by USCIS adjudicators for the first three quarters of FY 2017 combined.”<sup>101</sup>

While increasing the denial rates for these visas, the administration also significantly slowed down the application processing by suspending the ability of employers to pay a premium fee for expedited adjudication – a process known as “premium processing.”<sup>102</sup> The suspension was originally slated to last until September of 2018, but was extended to February of 2019.<sup>103</sup> While these slowdowns appear to add simple procedural hurdles to an H-1B applicant, in effect this change may deny a large number of

96. See 8 C.F.R. 214.2(h).

97. Rani Molla, *Workers from India and China Received 82 Percent of U.S. H-1B Visas Last Year*, RECODE (Apr. 13, 2017), <https://www.recode.net/2017/4/13/15281170/china-india-tech-h1b-visas>.

98. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM, PM-602-0142, RESCISSION OF THE DECEMBER 22, 2000 “GUIDANCE MEMO ON H1B COMPUTER RELATED POSITIONS” (Mar. 31, 2017), <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1B-ComputerRelatedPositionsRescission.pdf>.

99. Stuart Anderson, *New Evidence USCIS Policies Increased Denials of H-1B Visas*, FORBES (July 25, 2018, 12:12 AM), <https://www.forbes.com/sites/stuartanderson/2018/07/25/new-evidence-uscis-policies-increased-denials-of-h-1b-visas/#7ff440f55a9f>.

100. *Id.*

101. *Id.* Other forms of temporary worker visas have also been significantly burdened under the new administration. In Guam, from FY 2015 to FY 2016, H-2B visas for construction workers went from an approximately 100% approval rate to a 0% approval rate. A class action lawsuit was filed, and litigation is ongoing on the issue, but approval rates remain at approximately 0% for H-2B visas that do not fall within a specific military exemption, and the Pacific island has been without construction labor for nearly three years now in what is being called the “H-2B crisis.” See, e.g., Kevin Kerrigan, *Delegate Seeks Solution to H-2B Crisis*, GUAM DAILY POST (Jan. 26, 2019), [https://www.postguam.com/news/local/delegate-seeks-solution-to-h--b-crisis/article\\_26fa19da-208a-11e9-b059-bb8d7764ec1e.html](https://www.postguam.com/news/local/delegate-seeks-solution-to-h--b-crisis/article_26fa19da-208a-11e9-b059-bb8d7764ec1e.html).

102. News Release, U.S. Citizenship & Immigration Servs., USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays (Aug. 28, 2018), <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays>.

103. *Id.*; News Release, U.S. Citizenship & Immigration Servs., USCIS Resumes Premium Processing for H-1B Petitions Filed on or Before Dec. 21, 2018 (Feb. 15, 2019), <https://www.uscis.gov/news/news-releases/uscis-resumes-premium-processing-h-1b-petitions-filed-or-dec-21-2018>.

petitions, as the number of visas that may be issued is capped, and that cap is reached within one week of the application opening every year.<sup>104</sup> Most affected by this delay are those workers who are already in the United States and need to travel internationally, as travel while an H-1B change of status request is pending will cause the petition to be considered abandoned by USCIS, leaving many high skilled workers essentially trapped as they wait for an adjudication burdened by significant processing delays.<sup>105</sup>

Other barriers to the high-skilled worker category simply create additional cost and hassle for those attempting to acquire an H-1B visa, or those trying to employ H-1B visa holders. New policies now target employers with high numbers of H-1B workers or those who contract out H-1B workers with on-site visits.<sup>106</sup> These visits are a part of a larger initiative by USCIS to identify and target fraud and abuse within the H-1B system as a whole.<sup>107</sup> Efforts to grant the visa to only the “highest paid” and “most skilled” beneficiaries are undercutting the business model for large numbers of companies who traditionally import temporary workers. Additionally, as the spike in Requests for Evidence demonstrates, the effort and expense of gathering documents and relevant evidence has greatly increased under these new policies.

### 3. Proposals to Curtail Chain Migration and Diversity Visas.

In perhaps the clearest example of the new administration’s shifting policy priorities to favor merit-based immigration, there has been a large push to completely do away with one of the central tenants of U.S. immigration – that of family sponsorship. Derisively branded “chain-migration,” family sponsored immigration has been the basis of the U.S. immigration system since the mid-20<sup>th</sup> century. Under proposed legislation, however, this policy would be curtailed or eliminated in favor of a point-based system that prioritizes high-paid, young, and male applicants.<sup>108</sup> Such a drastic change in the U.S. immigration system would completely remove avenues of immigration for such people as elderly parents, siblings, or adult children of U.S. citizens.

Similarly, the administration has a stated interest in ending the diversity visa program, which has been used since the 1990s to allow for immigrants from countries with low immigration rates to receive green cards and enter

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104. News Alert, U.S. Citizenship & Immigration Servs., USCIS Completes the H-1B Cap Random Selection Process for FY 2019 (Apr. 12, 2018), <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2019>.

105. *H-1B Premium Processing Suspended Until February 2019*, SOCIETY FOR HUMAN RESOURCE MGMT. (Aug. 30, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-h1b-premium-processing-suspended-february-2019.aspx>.

106. News Release, U.S. Citizenship & Immigration Servs., Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse (Apr. 3, 2017), <https://www.uscis.gov/news/news-releases/putting-american-workers-first-uscis-announces-further-measures-detect-h-1b-visa-fraud-and-abuse>.

107. *Combating Fraud and Abuse in the H-1B Visa Program*, U.S. CITIZENSHIP & IMMIGRATION SERVS., (July 23, 2018), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program>.

108. AM. IMMIGRATION COUNCIL, THE RAISE ACT: WHAT LIES BENEATH THE PROPOSED POINTS SYSTEM? 4 (Aug. 11, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_raise\\_act\\_what\\_lies\\_beneath\\_the\\_proposed\\_points\\_system.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_raise_act_what_lies_beneath_the_proposed_points_system.pdf).

the United States.<sup>109</sup> Citing concerns that those seeking the diversity visa were the people that foreign countries “don’t want,” the President has made it clear that he seeks either the diminishment or complete removal of the program in any immigration reform deal.<sup>110</sup>

The effect of these proposals would be to do away with the emphasis that the U.S. has historically placed on diversity in immigration. Similarly it would end the long-term emphasis that the U.S. has placed on family. Instead, the new policies would place more weight on economic priorities to the exclusion of all other factors.

#### IV. SECOND WALL BARRIERS

Resistance to the excesses of immigration enforcement at the first wall has taken the form of a sanctuary movement. The meaning of sanctuary has evolved in different contexts.<sup>111</sup> As a historical matter, sanctuary referred to a church-based movement of shielding Central American asylum-seekers in the 1980s.<sup>112</sup> During the Obama administration, sanctuary referred to local policies resisting the enforcement actions against so-called criminal aliens such as the transfer of immigrants from jails to ICE detention facilities on the completion of their criminal sentences.<sup>113</sup> The Trump Executive Order on interior enforcement identified sanctuary policies as a range of local policies pledging to not cooperate with federal immigration enforcement.<sup>114</sup> These sanctuary policies have become lightning rods for high-visibility litigation in federal courts. They have also served as the organizing principle for a loose network of institutions that seeks to protect a wide range of vulnerable immigrants, whether in churches, campuses, or corporations.<sup>115</sup> The specific goals of the networked resistance ranges from refusing to disclose sensitive information about at-risk immigrants to providing them with safe and

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109. Kaitlyn Schallhorn, *What Is the Diversity Visa Program and Why Does Trump Want to End It?*, FOX NEWS (Jan 15, 2018), <https://www.foxnews.com/politics/what-is-the-diversity-visa-program-and-why-does-trump-want-to-end-it>.

110. *Id.*

111. Rose Cuison Villazor, *What is A Sanctuary?* 61 SMU L. REV. 133 (2008).

112. See ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION 62 (1988) (discussing the biblical roots of sanctuary); Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 928–31 (1995) (examining the biblical foundations of sanctuaries); Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 749–51 (1986) (noting that the concept of sanctuary may be found in several passages of the Bible); Douglas L. Colbert, *The Motion in Limine: Trial Without Jury – A Government’s Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 38–48 (1986) (providing a brief historical discussion of sanctuaries). See also HILARY CUNNINGHAM, GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION 25 (1995).

113. See Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (2016); Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703 (2018).

114. See Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,801 (Jan. 25, 2017) (defining sanctuary jurisdictions as those that “willfully refuse to comply with 8 U.S.C. 1373”). See also *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 519–21 (N.D. Cal. 2017), *reconsideration denied*, 267 F. Supp. 3d 1201, 1211 (N.D. Cal. 2017) (defining sanctuary jurisdictions as those encompassing jurisdictions that have “a policy or practice that hinders the enforcement of Federal law . . .”).

115. See Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks*, 103 MINN. L. REV. 1209 (2018).



affirming spaces.<sup>116</sup> They have extended the momentum and reach of the sanctuary movement as an organized effort to protect immigrants.

These first wall instances of sanctuary networks serve as a baseline for assessing where second wall strategies fall short. Litigation against second wall policies tend to be individual actions with case-by-case impact, low visibility, and limited prospects for setting precedent in federal courts. Political action opposing second wall policies is scant, with few media headlines attracting public attention or escalating political pressure. Outside of mainstream institutions and establishment politics, mass protest to the second wall policies is virtually nonexistent. While there are emerging efforts to counter attacks on legal migration, the opposition to the second wall pales in comparison to mass protests and calls to abolish ICE, cease family separation, or rescind the travel ban. This quiescence toward the second wall is proof of how it's far reaching consequences are not understood as a systematic assault on legal immigrants.

In the context of the second wall, building a more effective strategy of opposition requires building on individual litigation to activate broader political pressure and more coordinated legal action. Part III highlighted examples of second wall opposition. It analyzes them for their promise and pitfalls, finding as obstacles the invisibility, complexity, and competing policy justifications that underlie shifting priorities in immigration policy. Overcoming these obstacles requires scaling the second wall.

#### A. LIMITATIONS TO DIRECT REPRESENTATION

As recounted in Part II, the primary source of resistance to the second wall has been through litigating individual case-by-case challenges. The Transaction Records Access Clearinghouse (TRAC), a data gathering, data research, and data distribution service that provides information about public institutions, at Syracuse University, has issued data noting a massive increase in federal litigation surrounding denials and delays of naturalization applications.<sup>117</sup> Specifically, as of December 2018, TRAC found a 26% increase in federal litigation from six months prior, a 29% increase from one year prior, and a 66% increase from five years prior.<sup>118</sup> Increasingly, these suits are mandamus actions meant to compel USCIS to make a decision on an application—a direct result of a backlog that has many immigrants waiting for many months or years for final decisions. DHS also saw record numbers of Freedom of Information Act (FOIA) requests in 2017, attributed to the new policies coming out of the agencies, and similarly saw a spike in the amount of appeals and litigation surrounding these disclosures.<sup>119</sup>

Yet other major litigation is the result of employers or those seeking employment-based visas feeling the economic effects of tightening legal immigration policies. Information Technology companies have challenged a

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116. Chen, *supra* note 17.

117. *Increased Litigation for Denials and Delays on Naturalization Applications*, TRAC REPORTS (Jan. 22, 2019), <https://trac.syr.edu/tracreports/civil/544/>.

118. *Id.*

119. DEP'T OF HOMELAND SEC., 2017 FREEDOM OF INFORMATION ACT REPORT TO ATTORNEY GENERAL OF THE UNITED STATES AND DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES, at ii (2018), <https://www.dhs.gov/sites/default/files/publications/FY%202017%20DHS%20FOIA%20Annual%20Report.pdf>.

new policy from USCIS allowing for significantly limited visa duration for high-tech workers.<sup>120</sup> Construction companies based in Guam are in the midst of a class-action lawsuit alleging a new, unpublished policy from USCIS has caused approval rates for temporary work visas to plummet from nearly 100% to nearly 0% in less than one year.<sup>121</sup> Foreign nationals seeking investment based EB-5 visas have also filed a class-action lawsuit over the substantial delays and backlogs in the program, alleging that the U.S. government has been miscounting the limited annual supply of visas.<sup>122</sup> Universities organized in opposition to a recent change in policy from USCIS related to how unlawful presence is calculated for international students, utilizing both the public comment process and litigation to voice their opposition.<sup>123</sup> Faith-based organizations have made a resurgence in recent years, with many organizing in opposition to such policies as the public charge rule.<sup>124</sup> Such organizations have been central to challenging laws meant to end “chain migration.”<sup>125</sup> In response to discharges of immigrant recruits, increased scrutiny of noncitizens upon enlistment, and the deportations of veterans, veterans groups have also drastically increased their efforts in advocating for immigrants’ rights.<sup>126</sup>

This eclectic array of groups bringing case-by-case challenges has had mixed success. As Nina Rabin notes, these types of challenges have been effective tools to fight back against the Trump Administration’s enforcement onslaught, and they have achieved individual success on a case-by-case basis.<sup>127</sup> Accumulating individual successes, however, does not by itself add up to a systematic challenge. Some of the reasons the individual litigation has not enlarged into collective action are intuitive. Many of the challenger groups are new to immigration politics, having not often been central figures in prior debates regarding immigration. This may be one reason why litigation against second wall policies has been so issue-specific. The challengers may not be as plugged into well-established issue networks and there may be more start-up costs to mobilizing on any given issue. As a result, these challengers act in relatively uncoordinated ways. For example, in challenging the tightening restrictions on use of public benefits as a result of the new public charge rule, large-scale healthcare organizations, such as the American Medical Association and American Academy of Pediatrics, organized physicians in opposition to the rule, and further attempted to recruit the physicians in their organizations in submitting public

120. See *ITServe All., Inc. v. U.S. Citizenship and Immigration Servs.*, 1:18-CV-02350 (D.D.C. Oct. 11, 2018).

121. See *Guam Contractors Ass’n, v. Sessions*, 1:16-CV-00075 (D. Gu. Oct. 4, 2016).

122. See *Wang v. Pompeo*, 1:18-CV-01732 (D.D.C. July 25, 2018).

123. Complaint, *Guilford Coll. v. Nielson*, Civ. Action 18-891 (M.D.N.C. filed Oct. 23, 2018), <https://dlbjbjzgnk95t.cloudfront.net/1094000/1094960/https-ecf-ncmd-uscourts-gov-doc1-13312981437.pdf>.

124. *Interfaith Immigration Coalition Members Denounce Proposed Changes to Public Charge Definition*, INTERFAITH IMMIGR. COALITION (Sept. 23, 2018), <http://www.interfaithimmigration.org/2018/09/23/interfaith-immigration-coalition-members-denounce-proposed-changes-to-public-charge-rule/>.

125. Maria Benevento, ‘Chain Migration’ Misrepresents Reality, Say Catholic Advocates, NAT’L CATH. REPORTER (Jan. 19, 2018), <https://www.ncronline.org/news/justice/chain-migration-misrepresents-reality-say-catholic-advocates>.

126. Anna Núñez, *We Should Better Serve Immigrant Vets, Protect Them from Deportation*, AM.’S VOICE (Feb. 22, 2018), <https://americasvoice.org/blog/terp-report-veterans/>.

127. Rabin, *supra* note 10.

comments.<sup>128</sup> Disability rights organizations also came together in opposition to the rule, organizing comment campaigns against the new policy that they described as a “dangerous Catch-22 for the disability community.”<sup>129</sup> Gay rights groups fearful of AIDS elimination have mobilized as well.<sup>130</sup> Rather than forging a broad coalition, however, these health groups have fought in isolation to traditional immigrants’ rights groups.

## B. LIMITATIONS TO STRUCTURAL REFORMS

Other reasons that the extant challenges to second wall policies have not generated broad public pressure, despite their individual successes, come to light by considering the features of the second wall that make the ingredients of a social movement elusive: the second wall is hard to understand because of its invisibility and complexity, it is hard to redress because of the lack of political accountability and judicial reviewability, and it is hard to dispute because of the possibly pretextual policy justifications offered in their defense.

### 1. Invisibility.

One of the reasons that resistance is more scant is that the second wall is harder to see than the first. The second wall policies arise within countless individual acts of discretion. Individual immigrants and their advocates see their cases delayed or denied without realizing the broader patterns taking hold. Those caught within the backlog may not even be informed that anything is amiss given the reduced transparency of agency practices. As a result, the issues are perceived singularly, one issue at a time, rather than as part of a broader trend or pattern in enforcement. Without being able to connect the dots, negatively impacted groups do not comprehend the scope or character of the shifting policies. For example, the package of more burdensome procedures for obtaining immigration benefits has not surprisingly contributed to slower processing times and a backlog of adjudications in nearly every category of immigration benefit. Most of the time, these individual defeats do not catalyze coordinated action.<sup>131</sup>

Interest in the backlog has been focused in national immigrant advocacy groups such as the National Partnership for New Americans (NPNA) and the American Immigration Lawyers Association (AILA). NPNA and AILA have

128. *Oppose Harmful Changes to the “Public Charge Rules” Which Could Deter Millions of Legal Immigrants from Seeking Health Care*, MASS. MED. SOC’Y (Nov. 26, 2018), <http://www.massmed.org/Advocacy/Federal-Advocacy/Oppose-harmful-changes-to-the-%E2%80%9CPublic-Charge-Rules%E2%80%9D-which-could-deter-millions-of-legal-immigrants-from-seeking-health-care/>; *Ethics Talk: Commenting on the “Public Charge” and How to Respond to Federal Policy Change Proposals that Will Affect Patients’ Health*, AMA J. ETHICS (Nov. 2018), <https://journalofethics.ama-assn.org/podcast/ethics-talk-commenting-public-charge-and-how-respond-federal-policy-change-proposals-will-affect>.

129. Rebecca Cokley & Hannah Leibson, *Trump’s Public-Charge Rule Would Threaten Disabled Immigrants’ Health and Safety*, CTR. FOR AM. PROGRESS (Aug. 8, 2018, 7:00 AM), <https://www.americanprogress.org/issues/disability/news/2018/08/08/454537/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety/>.

130. See Linda Tam & Theo Cuisson, *Immigration Law*, in AIDS AND THE LAW (Scott Skinner-Thompson ed., 2019).

131. Rabin, *supra* note 10 at 24 (describing the case-by-case strategy as a fight that feels “Sisyphian,” yet plays a crucial role in pushing back against these insidious enforcement trends).

worked hard to collect information about the size and growth of the backlogs in immigration benefits. In one of its campaigns, NPNA enlisted 50 mayors and county officials to press USCIS Director Lee Francis Cissna for explanations for the backlog through a Freedom of Information Act Request (FOIA).<sup>132</sup> They followed up by filing a lawsuit to compel USCIS to disclose information about its naturalization backlog on Citizenship Day. Lawyers in subsequent lawsuits have kept up this pressure and urged that delayed cases be addressed.<sup>133</sup> AILA broadcast the results of NPNA's reports and independent research conducted by TRAC. It took its findings to Congress, urging Congressional oversight over USCIS. Together these groups are mounting a challenge to the procedural delays and growing backlog by highlighting the absence of information as the problem and by providing a narrative frame for illustrating the consequences of the institutional failures for immigrants' civil and future voting rights. The information gathering and the publicity about the lack of transparency helps to frame the consequences of changing policies as a collective action problem, though the success of the strategy will turn on whether it garners attention and generates responses from policymakers.<sup>134</sup>

## 2. Complexity

Another barrier that makes the second wall harder to understand than the first wall is that many of the second wall policies are highly technical. Many involve obscure agency procedures. The updated guidelines for requesting additional evidence, calculating unlawful presence, or declining to defer to prior adjudications, for example, are highly technical, and it is not obvious how they are related to one another. Nor is it obvious how they relate to the increasing backlogs on the adjudication of immigration benefits. Increased backlogs may instead be easily dismissed as procedural defects of a poorly operating bureaucracy rather than understood as a deliberate policy strategy. The combination of poor visibility and poor comprehension impedes social movement mobilization.<sup>135</sup>

That is not to say that these policies have altogether evaded notice. Recognizing the "massive reconfiguration of the immigration laws relating to higher education," several colleges and universities sued USCIS over its new unlawful presence policy on October 23, 2018.<sup>136</sup> The new policies

132. Letter from U.S. Mayors to Lee Francis Cissna, Dir., USCIS (July 30, 2018), <https://www.aila.org/infonet/us-mayors-uscis-backlog-citizenship-applications> (addressing the consistent backlog of citizenship application before USCIS).

133. See *Coalition for Humane Immigrant Rights v. U.S. Citizenship and Immigration Servs.*, 2:18-cv-08034 (C.D. Cal. filed Sept. 17, 2018).

134. The literature on law and social movements articulates the importance of collective action frames and framing processes as critical dynamics for the course of a social movement. Visibility is a prerequisite to strategic framing. For a summary of the framing literature, see Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

135. The translation of individual disputes into collective action problems or legally actionable issues is the essence of framing processes that is described in the law and social movements literature and the legal mobilization literature. See Benford & Snow, *supra* note 134; see also William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980).

136. Complaint at 2, *Guilford Coll. v. Nielson*, Civ. Action 18-891 (M.D.N.C. filed Oct. 23, 2018), <https://dlbjbzgnk95t.cloudfront.net/1094000/1094960/https-ecf-ncmd-uscourts-gov-doc1-13312981437.pdf>.

enhance the consequences of an international student falling out of compliance with statutory requirements on the basis of a complex calculation of time that departs from prior policy and common sense. The suit is still in its nascent stages. So far the universities have obtained a temporary restraining order blocking the application of the new policy precisely because the impact of the policy is hard to understand.<sup>137</sup> Central to the court's decision to grant this injunction was the court's own confusion as to when and if the new policy would apply to the plaintiffs, citing a "lack of clarity" in the policy's application that may pave the way for finding the policy "arbitrary and capricious."<sup>138</sup> Presumably such confusion on the part of legal experts would carry over to international students trying in good faith to remain in compliance with their visa requirements. Larger movements in opposition to the unlawful presence policies are notably lacking, but expert driven litigation remains the primary opposition to complex second wall policies.

### 3. Lack of Accountability.

Additionally, many of the USCIS agency practices change through administrative channels that escape public attention, political oversight, and judicial review because of the discretionary nature of the decisions. Agencies are still subject to Congressional oversight and elicit some public scrutiny when making changes under the Administrative Procedure Act (APA), as seen in the proposed rule to redefine public charge. Typically, the APA requires that changes to policy that have significant practical effects must be subject to public review through an administrative hearing before they go into effect, in order to grant affected parties notice and an opportunity to challenge the rule.

In addition, Congress has done little to engage USCIS policy changes because there is little political pay-off for doing so. They have largely been beholden to, quiescent about, or distracted by the GOP and President's calls for more restrictions rather than seeking to preserve pathways to admission or integration for legal immigrants. These second wall policies may not appear on their radar because of insufficient monitoring and signaling of fire alarms by nonprofit groups or because members score fewer political points for addressing them than they do for addressing the "first wall." Or even if they are on the radar, the rules remain too technical to explain to the public and seem low stakes given that the USCIS is not subject to ongoing monitoring through appropriations as a user-funded agency. Once the political control of the House of Representatives shifted in early 2019, signs of increasing oversight from Congress over USCIS emerged, though the immigration debate remains primarily centered around border issues. Specifically, Congress has sent letters to the Ombudsman of USCIS detailing concerns with derelictions of the statutory duty to serve immigrants, especially in light of the director's former employment as the executive director of the restrictionist organization the Federation for American

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137. *Guilford Coll. v. Nielson*, Civ. Action 18CV891 (M.D.N.C. 2019), [http://www.nafsa.org/\\_/file/\\_/amresource/guilfordorders20190503.pdf](http://www.nafsa.org/_/file/_/amresource/guilfordorders20190503.pdf).

138. Order, Motion for Preliminary Injunction, *Guilford Coll. v. Nielson*, Civ. Action 18-891, at 3 (M.D.N.C. Jan. 28, 2019).

Immigration Reform (FAIR).<sup>139</sup> Additionally, eighty-five House Democrats sent a letter to the director of USCIS raising concerns about the growing backlog in immigration benefits.<sup>140</sup>

Courts are limited in their review of these individual decisions and agency policies after years of jurisdiction stripping.<sup>141</sup> The limited judicial review for courts builds on a long tradition of deference to the political branches and enforcement discretion in immigration, both plenary power from the early days of immigration enforcement and more recently executive enforcement discretion widely used under President Obama and President Trump.<sup>142</sup> To Congress and federal courts, it is not only unclear what the impact of changes in procedures will be, but the available avenues for evaluating the procedural changes is also limited. This creates a classic problem for public law scholars acquainted with the dilemmas of political control of agencies.<sup>143</sup>

#### 4. Competing Policy Justifications.

Finally, many of the second wall policies seem justified as needed protections or fixes for a broken immigration system. Specific immigrant subgroups representing Arab Americans and Muslims have been sensitive to worries that their members are unduly subjected to extra screening, longer delays, and higher denials through programs like CARRP, under the guise of posing national security risks.<sup>144</sup> Civil rights groups raise worries that

139. Letter from U.S. House of Representatives Committee on Oversight and Reform to Julie Kirchner, Ombudsman, USCIS (Feb. 6, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019-02-06.EEC%20to%20Kirchner%20re.%20CIS%20Ombudsman.pdf>.

140. Letter from U.S. House of Representatives Democratic Members to Francis Cissna, Dir., USCIS (Feb. 12, 2019), <https://www.aiala.org/advo-media/whats-happening-in-congress/congressional-updates/us-representatives-demand-accountability-uscis>.

141. The Antiterrorism and Effective Death Penalty Act of 1996, Illegal Immigration Reform and Immigration Responsibility Act, and REAL ID Act are examples of jurisdiction stripping in immigration law. For the harmful effects of jurisdiction stripping on immigration law, see Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the 'Rule' of Immigration Law*, 51 N.Y. L. SCH. L. REV. 16 (2006).

142. Classic articles on plenary power in immigration law include Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L. Q. 925 (1995) and Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power Congressional Power*, Sup. Ct. Rev. 255 (1984).

143. The public law scholarship on this issue includes classic essays from political scientists such as Matthew McCubbins, Roger Noll, and Barry Weingast to legal scholars Peter Strauss, Peter Shane, Elena Kagan, Gillian Metzger, Eloise Pasachoff, and many others. For a select few articles that mention immigration as an example, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984) (discussing *INS v. Chadha*, 103 S. Ct. 2764 (1983)); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031 (2013) (discussing DACA); Ming H. Chen, *Administrator-In-Chief: President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347 (2017) (discussing DACA, Secure Communities, and Operation in Border Guardian).

144. The Arab American Institute lists the Muslim ban, calls for extreme vetting policies, cutbacks on the refugee resettlement programs, the revival of the post-9/11 National Security Entry-Exit Registration system, and massive backlogs along the pathway to citizenship for high-skilled workers and family-sponsored immigrants alike among its chief concerns: "From calling for 'extreme vetting' to include ideological purity tests for incoming immigrants to specifically questioning immigrants regarding their religious views, and regularly calling for the suspension of the U.S. refugee resettlement program, the President-elect's immigration proposals are cause for concern and are reminiscent of some of America's darkest days." *AAI Issue Brief: Bigotry*, ARAB AM. INST. (last visited Mar. 28, 2019), [http://www.aaiusa.org/aai\\_issue\\_brief\\_bigotry](http://www.aaiusa.org/aai_issue_brief_bigotry). The American Arab Anti-Discrimination Committee has submitted comments on proposed changes to the refugee program and has urged Congressional response to the Syrian refugee crisis and the needs of Palestinians, while standing in solidarity with other Latino

naturalization backlogs amount to voter suppression under the guise of unsubstantiated claims of voter fraud. The heads of the immigration bureaucracy refer to a breakdown of law and order.

Some groups that protest discrete second wall policies do regularly entangle themselves in the immigration debate, and when they have turned to these issues they focus on exposing apparent pretexts. The American Civil Liberties Union waged a lawsuit challenging a new government practice of arresting noncitizens at their adjustment of status interviews, which the ACLU states is “subjecting noncitizens to detention and removal while they follow the government’s own regulations for obtaining lawful immigration status based on their marriages to U.S. citizens.”<sup>145</sup> The ACLU has taken up lawsuits on behalf of military recruits impacted by the new intensified vetting policies and ever-increasing backlogs.<sup>146</sup> For those adversely affected by these policies, resistance also takes the form of support networks, such as in the case of Hector Barajas-Varela, who founded the Deported Veterans Support House in Tijuana—an essential oasis for deported veterans.<sup>147</sup> The National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund and Lawyers’ Committee for Civil Rights and Economic Justice have also challenged the administration’s decisions to rescind Temporary Protected Status for several countries as unconstitutionally discriminatory based on race.<sup>148</sup> But their actions to oppose second wall policies are secondary to their advocacy surrounding the first wall.

### C. STYMIED BY SECOND WALL BARRIERS

What is notable about the select challenges to the second wall is how they deviate from the comparatively more successful resistance to first wall immigration policies. They are top-down efforts, driven by elite lawyers and think tanks rather than bottom-up grass-roots advocacy. They are driven by issue experts, rather than by broad publics or the immigrants themselves. Of the handful of pro-immigrant actions bubbling up from communities, most are uncoordinated and hortatory in nature rather than commanding of public attention and legal response, excepting the state attorneys general and the ACLU litigation. For all of their subtlety, the singular intrusions on legal migration are not well understood. Many of the component policies, such as the updated guidelines are highly technical and it is not obvious how they are related to one another or to increased backlogs. They are easily dismissed as the byproduct of a poorly operating immigration bureaucracy, rather than a deliberate policy strategy. The singular intrusions on legal migration add up to a significant policy challenge to immigrants and an even larger challenge for democracy. Countering this threat to democracy, there needs to be a broader rethinking of how our immigration bureaucracy operates and is

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immigrant rights and civil rights groups on general concerns for racial profiling and discrimination, cooperation between ICE and police, and protecting due process for immigrants in the removal process.

145. See *Jiminez v. Nielsen*, No. 1:18-cv-10225-MLW, 2018 WL 910716 (D. Mass. Apr. 10, 2018).

146. See *Kuang v. U.S. Dep’t of Def.*, 3:18CV03698 (N.D. Cal. Jan. 7, 2019).

147. Patrick J. McDonnell, *A Home in Tijuana Is a Refuge for Deported U.S. Veterans*, L.A. TIMES (Sept. 13, 2017, 3:00 AM), <https://www.latimes.com/world/mexico-americas/la-fg-mexico-veterans-2017-story.html>.

148. See, e.g., *Centro Presente v. U.S. Dep’t of Homeland Sec.*, No. 18-10340 (D. Mass. May 9, 2018); *NAACP v. U.S. Dep’t of Homeland Sec.*, No. 18-239 (D. Md. Jan. 24, 2018).

influenced by broader political mobilization and more pointed legal accountability.

## V. SCALING THE SECOND WALL

This Essay has argued that, with the exception of a few still-developing efforts, the second wall response has been inadequate. Our prescriptions for more effectively resisting second wall policies can be arrayed by ambition: enhancing individual challenges, expanding political accountability through structural reform, and building public support through a sanctuary movement.

### A. ENHANCING INDIVIDUAL CHALLENGES

Private attorneys must continue to act as a necessary check on government overreach and poor policy decisions. Private immigration attorneys have previously been and continuously are a check on the government in general and USCIS in particular. For example, when USCIS delays an application, attorneys can file a mandamus action in federal court requesting the court order USCIS to adjudicate the delayed petition either before an interview pursuant to 28 U.S.C. § 1361, or after an interview pursuant to 8 U.S.C. § 1447(b).<sup>149</sup> Attorneys are also able to appeal the denial of an N-400 Application for Naturalization to an immigration officer using form N-336, Request for a Hearing on a Decision in Naturalization Proceedings, or, in cases where USCIS fails to render a decision within 120 days of a naturalization interview, an attorney is able to bring suit in federal court under 8 U.S.C. § 1421(c). Even if the individual case results are critical, widespread policy changes are unlikely to result from individual litigation without precedent-setting impact-litigation.

The profile of private litigation can be amplified with legal actions that seek to tackle systemic barriers. Impact litigation from experienced immigrants' rights organizations is vital. So are the state-sponsored litigation campaigns of state attorneys general. Already groups such as the ACLU are challenging the soundness of many second wall policies through large-scale impact litigation, but this opposition effort must continue and expand. The ability to affect policy through private litigation will continue to be necessary to deconstruct the second wall, and moving to impact litigation strategies raises the stakes and publicity.

Another enhancement to private litigation is the involvement of states. State and local governments are increasingly pushing back against restrictionist immigration policies in a manner that resembles the infrastructure of first wall sanctuary movements. Recently state and localities have inquired into federal practices that hurt immigrants within their communities. For example, a letter was signed by mayors of thirty major cities concerned about the naturalization backlog. Their opposition to these federal policies is largely hortatory, but they gained attention when a FOIA

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149. Federal courts can either (1) conduct a hearing and adjudicate the naturalization application or (2) remand the matter, with appropriate instructions, to the service to determine. 8 U.S.C. § 1447(b) (1991).



lawsuit was filed demanding an explanation of agency practices,<sup>150</sup> and a Colorado State Advisory Committee hearing for the U.S. Commission on Civil Rights was conducted to further investigate.<sup>151</sup> Though their efforts pale in comparison to the high-profile lawsuits against the first wall travel ban and sanctuary cities executive order, they are gaining significance. Twenty-four attorneys general wrote to the Secretary of the Department of Homeland Security in opposition to the changing public charge rule.<sup>152</sup> More lawsuits are expected as the rule is increasingly implemented, including lawsuits related to USCIS's compliance with the strict requirements of the federal Fair Credit Reporting Act.<sup>153</sup> State and local governments opposed to increasingly restrictionist policies have also been updating laws and policies related to immigration as a general matter, limiting information sharing and updating guidelines to enhance immigrants' rights on a range of issues. While promising, these state attorneys generals' and mayors' actions remain exceptional in the effort to scale the second wall and secondary to the groups themselves.

## B. EXPANDING POLITICAL ACCOUNTABILITY THROUGH STRUCTURAL REFORM

Recognizing that immigration policies and procedures are in a state of dysfunction that require fixes that surpasses the capacity of individual challenges, the structure of policymaking needs to be reformed. This requires changes to the funding, policies, and practices of the immigration bureaucracy, as well as revisiting judicial and Congressional oversight.

### 1. Increased Resources for Administering Immigration Benefits

Initially, in order to increase the ability for USCIS to adjudicate applications quickly and efficiently, thus reducing or eliminating some of the massive backlogs that have built up over the last two years, an increase in USCIS's budget is necessary. While USCIS has a unique funding structure that rests 95% of its operations budget on user fees rather than relying on Congressional appropriations,<sup>154</sup> there have been calls to supplement the user-fees with Congressional appropriations.<sup>155</sup> Indeed, there is no indication that this user-based fee structure was meant to ensure USCIS' independence

150. Letter from Thirty U.S. Mayors to USCIS (Nov. 10, 2016) (urging Congress to appropriate funds to reduce the naturalization backlog).

151. Press Release, Colorado Advisory Committee to the U.S. Commission on Civil Rights to Examine Backlog in Citizenship and Naturalization Applications (Feb. 8, 2019), <https://www.usccr.gov/press/2019/02-08-PR.pdf>. As a matter of disclosure, one of the authors is a member of the Colorado Advisory Committee to the U.S. Commission on Civil Rights and participated in this hearing.

152. Letter from 24 Attorneys General to Samantha Deshommes, Chief, Regulatory Coordination Div. Office of Pol'y and Strategy (Dec. 10, 2018), [https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG\\_Balderas\\_Leads\\_Coalition\\_of\\_24\\_Attorneys\\_General\\_Demanding\\_President\\_Trump\\_and\\_ICE\\_Stop\\_Illegal\\_Rule\\_that\\_Would\\_Harm\\_Immigrant\\_Families.pdf](https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Leads_Coalition_of_24_Attorneys_General_Demanding_President_Trump_and_ICE_Stop_Illegal_Rule_that_Would_Harm_Immigrant_Families.pdf) (demanding President Trump and ICE stop an illegal rule that would harm immigrant families).

153. Evan Weinberger, *Trump Immigration Proposal Could Face Credit Reporting Challenge*, BLOOMBERG L. (Dec. 28, 2018; 2:30 AM), <https://news.bloomberglaw.com/banking-law/trump-immigration-proposal-could-face-credit-reporting-challenge>.

154. KANDEL, *supra* note 4.

155. Letter from U.S. House of Representatives to Francis Cissna, Dir., USCIS (June 29, 2019), [https://www.uscis.gov/sites/default/files/files/nativedocuments/N-400\\_processing\\_times\\_-\\_Representative\\_Lofgren.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/N-400_processing_times_-_Representative_Lofgren.pdf).

from Congressional oversight, and so appropriations from Congress may serve the additional purpose of subjecting USCIS to additional institutional checks. Moreover, in order to limit the ability of USCIS to use these funds, or the funds that applicants pay, on enforcement operations, any increase in budget must be accompanied by specific limitations on the budget used for enforcement efforts. Indeed as one Congressional oversight letter noted, USCIS has mysteriously requested that some of its funding be reallocated to ICE enforcement operations while it is struggling to meet its own targets for reducing backlogs. Under the President's proposed budget for Fiscal Year 2019, over \$200 million would be transferred from USCIS' user-funded account to ICE for enforcement operations.<sup>156</sup> In order to reduce mission drift and allow USCIS to refocus itself on effectively and efficiently adjudicating immigration benefit petitions, this practice must not continue.

Relatedly, USCIS must use funding to hire additional attorneys and staff for the purpose of serving legal immigrants.<sup>157</sup> Beyond increasing funds, the funds must be earmarked or guided toward mission-enhancing purposes.<sup>158</sup> The expanding and sometimes conflicting priorities of the agency to serve immigrants and police fraud or national security concerns dilute the available resources for service to immigrants, communication with immigration attorneys, and benefit adjudications. Agency leadership differs in deciding how much centralized control to exert over the allocation of resources within an agency, as opposed to granting localized discretion. As a legal matter, agencies are typically given considerable latitude over such decisions, and there are signs that they are exercising that discretion in favor of immigration enforcement rather than service. Moreover, presidents and their political appointees have the right to appoint leaders who are responsive to changing policy priorities who in turn influence civil servant staff. Still, there are limitations on this political influence given Congress' setting of the statutory mission of the agency and constraints imposed by the Administrative Procedure Act on agency policymaking. Congress' letter to USCIS Ombudsman Julie Kirchner suggests that there has been inadequate restraint on the politicization of the agency.<sup>159</sup>

## 2. Streamlining Procedural Burdens

Improving operations in an agency requires continual rethinking of organizational procedures. Evidence of lapses in the accuracy of immigration benefit adjudication necessitates such reforms. However, increasing

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156. U.S. DEP'T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF (Feb. 21, 2019), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.

157. Jason A. Cade, *Sanctuary as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 Nw. U. L. Rev. 433 (2018) (arguing fees lead to allocating more resources in the U visa program to promptly adjudicate EAD requests). Cade also explores funding solutions like crowd sourced platforms, state victims assistance funds, and philanthropic measures.

158. Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1 (2017) (arguing where legalization or adjustment is possible it is a preferred way of reducing the scope and size of enforcement).

159. Amanda Holpuch, *How Trump's 'Invisible Wall' Policies Have Already Curbed Immigration*, GUARDIAN (Jan. 15, 2019, 1:00 AM), <https://www.theguardian.com/us-news/2019/jan/15/invisible-wall-trump-policies-have-curbed-immigration> ("At least six current and former advisers to Donald Trump, including Kellyanne Conway and Stephen Miller, have ties to FAIR, which for decades has been working to drastically curb immigration."); Letter from U.S. House of Representatives Democratic Members, *supra* note 140.

procedures imposes costs on the agency and the immigrants seeking benefits in the form of time, money, hassle, and negative dispositions on immigration benefits. Careful consideration should be given to whether the costs are justified by the improvements to agency operations and outcomes.

For instance, in the context of new policies related to expedited denials in the context of requests for evidence, administrative efficiency is being prioritized over the potential for erroneous denials of applications for qualifying immigrants. New procedures for issuing notices to appear allow USCIS to entangle itself with ICE and the Executive Office for Immigration Review (EOIR), focusing on combating fraud and increased enforcement at the cost of administrative efficiency and independence. New procedures for calculating unlawful presence seem to stem from the agency's focus on maintaining the integrity of the immigration system to the exclusion of any sort of process. However, the priorities inherent in these kinds of decisions must be examined closely. USCIS must be mindful of the collateral consequences these new procedural burdens possess, both for the immigrant and the agency. Increased scrutiny of applications results in longer processing times, which in turn leads to further increases in crisis-level backlogs. Policies aimed at increasing the enforcement power of USCIS conflict directly with the service-minded, customer service approach of years past.

### 3. Restructured Substantive Priorities

Relatedly, USCIS must re-evaluate its substantive priorities and rebalance the necessity of protecting national security and ensuring the effective enforcement of the country's immigration laws with the collateral effects increased enforcement policies have on lawful immigrants and would-be citizens. The goals of USCIS must be re-evaluated to reflect the institution's policy objectives against the practical consequences of many of its new policies. USCIS must not lose sight of its Congressional mandate and be swept up in the influence of restrictionist rhetoric and policies.

Little evidence has been furnished about the need for increased scrutiny in many of the categories where procedures have been enhanced. No explanation has been given for why initial determinations no longer require deference in subsequent agency dispositions. New requirements for interviews in the adjudication of high-skilled employment visas have led to backlogs and increased denial rates without evidence that the additional steps are necessary. There is a lack of information about the presence of national security risks within the military or from countries of special interest designated under the CARRP program. There has been no proof of alleged welfare fraud, voting fraud, immigration benefit fraud, or other harms to American workers and taxpayers. In the absence of such evidence, it is unclear whether corresponding backlogs and increased denial rates for service members and predominantly Muslim immigrants are justified.

There are valid reasons to take seriously national security threats. But it must be done in a more transparent and fair manner. Additional evidentiary requirements must be required before subjecting military service members, refugees, and immigrants from Muslim-majority countries to heightened scrutiny. Having higher evidentiary burdens serve as a bulwark against

pretextual findings or racial stereotyping, an issue of concern in cases that fall under CARRP, as applicants who may only have lived in an area with high terrorist activity, or who may have a former roommate who has been classified as a national security threat may find themselves in legal limbo with no recourse. It will also permit the agency to better discover and prioritize actual security risks. Vetting for refugees and military service is already strong. It is not clear why further vetting is needed, and new risks to the safety of service members and refugees are introduced while they await the adjudication of their benefits. That is not to say there is not a need to thoroughly investigate national security threats, but these investigations must not be merely pretext to implement policies meant only to restrict legal migration. Further, such new policies must not be immunized from judicial review by couching substantive changes in procedural language. Changes to substantive priorities must be done transparently, allowing independent review of the decision making process. National security threats must be pursued in a manner that respects due process and balances the risks to security with risks to other Constitutional values and the rule of law.

In the same way, sweeping changes to prioritize immigrants of merit must be done thoughtfully, if done at all. The self-sufficiency of immigrants, the viability of the welfare state, and the soundness of tax dollars are important to the United States and important to the immigrants who come here. Still, there are problems associated with broadening definitions of public charge in a manner that unfairly penalizes immigrants for utilizing public benefits to which they are lawfully entitled, especially if it is to an extent that endangers the health and welfare of immigrants and to society in general. Fraudulent use of public benefits is a fair target for investigation, but little evidence of that fraud exists and, indeed, many immigrants are already not entitled to use public benefits. The dangers of potential public charges must not be overblown, nor the benefits of a heightened public charge standard inflated. There are real consequences to this new policy that appear to far exceed any benefits received and dangers countered by it.

Protecting American workers is an important policy goal, and it is one instantiated in immigration law. The safety of U.S. workers can and should be prioritized over temporary foreign workers. Still, myopic policies that erect unnecessary hurdles or unreasonably restrict the types of workers that may enter the U.S. serve only to harm U.S. companies and, by extension, the U.S. economy. Uncovering fraud and combating abuse are valid goals, but new policies must be thoughtfully executed so as to not create more backlogs and inefficiencies.

#### 4. Increased Institutional Independence and Fidelity to Agency Mission

Finally, USCIS has started to shift away from its original mission of integration under the Trump administration. In order to maintain the integrity of the immigration system, USCIS must adhere to its mission of integration rather than continuing its mission drift towards another enforcement branch of the Department of Homeland Security.

To this end, the reasoning behind policy decisions must be established to determine if there is evidence of political motives as pretext for these policy changes. This administration's first claims regarding immigration included

decrying the massive amounts of voter fraud from undocumented individuals in the 2016 election.<sup>160</sup> This led to the creation of a voting integrity commission that, after providing an extremely flawed report that demonstrated no voter fraud, was quietly disbanded.<sup>161</sup> In the present scenario, a Congressional investigation could shed light on whether the alleged fraud that forms the impetus behind many of these policy changes actually exists, or are merely political motives in disguise. Additional transparency from USCIS is also needed at a time when internal operations and policy decisions are leading to massive backlogs, delays, and facially restrictionist policies. Courts have taken the position that there are limits on politically-motivated policies in litigation against the rescission of Deferred Action for Childhood Arrival (DACA), Temporary Protected Status (TPS), and non-immigration programs that have been found arbitrary and capricious. Similar principles ought to animate the evaluation of changes in legal migration.

Finally, USCIS must ensure its fidelity to its statutory mission. While it is a component of the Department of Homeland Security and has responsibilities for ensuring the integrity of immigration law, it has a service mission that is distinct from ICE and CBP. There must be differentiation of USCIS from ICE within the Department of Homeland Security itself, and institutional independence between USCIS and EOIR, which were intentionally separated after the Department of Homeland Security was reorganized in 2003. By keeping appropriate distance, USCIS may cleanly stay in its delineated role as the adjudicator of immigration applications, and not as the enforcer of immigration laws. By keeping its independence from the EOIR, USCIS will further insulate itself from the enforcement branch of the Department of Homeland Security while simultaneously helping protect the independence of the immigration courts.

Additionally, USCIS can support immigration attorneys and community organizations that provide valuable assistance to immigrants with the immigration process. Many of these organizations already receive part of their funding from USCIS, and use this funding to provide such services as naturalization drives and free or low cost legal assistance. USCIS should continue to provide such funding and expand rather than retract its support for immigration attorneys and these community groups with the execution of its service mission.

### C. BUILDING A SANCTUARY MOVEMENT

In normal times, institutional checks on abuse within the immigration system would come from within the agency, from Congress, or from intra-agency watchdogs. Problematic policies would be challenged in court by individual or impact litigation. But these are exceptional times. The traditional overseers and watchmen, are vacating their responsibilities, and Congress, through inaction, has been complicit or quiescent as the second wall has been constructed. Where the traditional fire alarms would sound there is public silence or muted efforts of individual attorneys.

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160. See Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, ASSOCIATED PRESS (Aug. 3, 2018), <https://apnews.com/f5f6a73b2af546ee97816bb35e82c18d>.

161. *Id.*

In order to overcome these structural obstacles, public opposition must be mobilized. Communities with immigrants must be energized and invigorated. Public opposition to second wall policies will be critical to limiting their application and ending their practice. Large scale organizing and grassroots mobilization are imperative in light of the relative lack of political power of those affected by second wall policies. Experts such as the NPNA have rallied opposition to the immense naturalization backlog, both by filing a lawsuit over the causes of the naturalization backlog, and by organizing in a more traditional sense, even acquiring the support of fifty mayors of major cities in their efforts to reduce the backlog and delayed adjudications.<sup>162</sup> Policy briefs from AILA have shed light on the recent failings of USCIS, and sparked Congressional interest in the topic. However, groups that are resisting these second wall policies must be more connected. Newcomers to immigration law must be connected with established networks who have the capacity to confront the invisibility and complexity of the second wall. Coming together will allow the groups to move beyond opposing individual policies that harm their constituencies in order to more effectively tackle the second wall as an overarching construct.

Public pressure will also enhance accountability by allowing government entities to further investigate the policies that comprise the second wall. Already the Colorado Advisory Committee to the U.S. Commission on Civil Rights (USCCR) is holding public hearings to investigate the causes and consequences of the naturalization backlog. The findings it makes about what policies contribute to the backlog and how the backlog impacts civil rights, voting rights, and the fair administration of justice could trigger further evaluation of USCIS' practices toward legal immigrants. With public exposure, Congress may hold public hearings to investigate the rationale for these policies and explore solutions. The information collected through these investigations will assist policy makers, community groups, and private attorneys alike to scale the second wall.

Understanding that politicians are accountable to their constituencies, political organizing around immigration policies will be important in upcoming elections. Without the right to vote, immigrants lack the political power of many other groups. This makes it imperative that advocacy groups and individuals join together in placing emphasis on second wall policies when engaging with elected or campaigning officials. That Congress has the power to check second wall policies has become easier to see with the change in political control over the House that has enabled Congress to begin to utilize some of its oversight authority.

While complex policies and obfuscated practices make scaling the second wall a challenge, mobilizing can bring visibility to the policies and translate that seeming disparate policies into social problems that can be redressed. In this way, second wall policies will be able to tap into the organizing surrounding first wall practices. Immigration policies have concrete and rippling effects for society. It is imperative that groups be equipped to challenge second wall policies by bridging the gap between the first wall and second wall response.

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162. See Letter from U.S. Mayors, *supra* note 132.

## VI. CONCLUSION

The legal effects of the second wall prompt Constitutional and statutory violations, procedural deprivations, and tangible suffering in the form of denied benefits, intense *anxiety*, and feelings of exclusion. Being unfairly judged a national security threat due to being from a Muslim majority country or refugee leads to social exclusion, unlawful discrimination, and disregard for the contributions of immigrants and military service members who serve the U.S. Being unable to obtain a green card due to procedural hurdles impedes the possibility of immigrants permanently settling in the U.S. Being long delayed from naturalizing impedes the possibility of immigrants becoming citizens who can participate fully in society. The barriers to integration and naturalization for legal immigrants are particularly problematic because, unlike visa applications and requests for voluntary waivers, the process for naturalization is provided for in the U.S. Constitution and is a right, not a privilege granted on a discretionary basis. Thus, the deprivations of these rights without a reasoned basis infringe on the command for Congress to provide a uniform rule of naturalization. Also, the unexplained delays and ever present exposure to the risk of removal or even denaturalization implicate due process and potentially violate the Administrative Procedure Act.<sup>163</sup>

Beyond legal concerns, as a normative concern, jeopardizing legal immigration means abandoning the historical legacy of the U.S. as a nation of immigrants, committed to welcoming foreigners rather than excluding them and promoting equality among them rather than sending an exclusionary message. It also undermines the quality of citizenship.<sup>164</sup> The threat of endangering legal permanent residence as a path to naturalized citizenship is that the meaning of citizenship becomes conditional on arbitrary criteria such as political loyalty, perceived Americanness, and racial and cultural prerequisites. Moreover, the fear of immigrants and their advocates of exposure to enforcement that accompanies seeking a benefit exacerbates the problem. They do not want to defend legal immigrants because focusing on legal immigrants deflects attention from more dire first wall policies at the border. These and other chilling effects stymie civic engagement and societal participation. Also, legal immigrants who have previously felt secure in their attempts to comply with the law are now afraid of being swept in to the dragnet and now lie low, preferring to hide in the shadows of a law that ironically ought to protect them rather than stand up and fight for inclusion in the way undocumented immigrants have been willing to do in the absence of alternatives. These changes cumulatively threaten the rule of law and respect for the immigration system, creating perverse incentives and sending negative messages to immigrants seeking to comply with the law and cooperate with the immigration bureaucracy.

Second wall incursions also come at the cost of democratic values and institutional integrity. As a matter of institutional integrity, these expanded

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163. Cf. *Solis v. Cissna*, Civil Action 9:18-cv-00083 (D.S.C. filed Jan 09, 2018) (delay in VAWA did not violate APA or due process because it is discretionary).

164. Masha Gessen, *Trump's New War on Immigrants*, NEW YORKER (Aug. 10, 2018) ("The creation of the task force is undoing the naturalization of more than 20 million naturalized citizens in the American population by taking away their assumption of permanence.").

enforcement operations contribute to mission drift and increased organizational dysfunction of USCIS by taking money from user fees intended for other more integrative purposes, a reappropriation that is potentially itself unlawful. The harms to immigrants from denying the benefits to which they are entitled have already been enumerated. These challenges to legal migration not only create a problem for immigrants, they foment civil rights problem for current and future U.S. citizens. Given that naturalization provides a right to vote, delays and denials of naturalization generate worrisome consequences for Latino racial and national origin minorities whose votes have been suppressed before. Enlisting the votes of newly-naturalized voters might be consequential, even if newly-naturalized immigrants do not necessarily vote as a block.<sup>165</sup> Holding back integration for legal immigrants means either diluting societal participation or outright suppressing votes. This is especially true in states with large minority populations and contested political races.<sup>166</sup>

Staying silent in the face of legal, normative, and societal threats is costly to immigrants and citizens alike. Scaling the second wall will require individual, structural, and public reforms that sound the alarms on the challenges of legal immigrants.

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165. Asian Americans, the fastest-growing minority group with a foreign-born population, show generally progressive opinion across subethnic groups, with Filipino and Vietnamese voter exceptions. See CIV. LEADERSHIP USA, 2018 ASIAN AMERICAN VOTER SURVEY 21 (2018), [http://www.apiavote.org/sites/apiavote/files/2018-AA-Voter-Survey-report-Oct9 0.pdf](http://www.apiavote.org/sites/apiavote/files/2018-AA-Voter-Survey-report-Oct9%20.pdf). Latino voters vote overwhelming Democratic, as well. Polling of Latino voters indicates President Trump and his anti-immigrant policies have displaced the economy as their primary concern. According to the Pew Research Center, 75 percent of Latinos have discussed Trump's anti-Latino behavior and policies with their friends and families, raising expectations they will vote on these issues in upcoming elections. See MARK HUGO LOPEZ, ANA GONZALEZ-BARRERA & JENS MANUEL KROGSTAD, PEW RESEARCH CTR.: HISPANIC TRENDS, MORE LATINOS HAVE SERIOUS CONCERNS ABOUT THEIR PLACE IN AMERICA UNDER TRUMP (2018), <https://www.pewhispanic.org/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/>.

166. See Manuel Pastor, *Immigrants Applying for Citizenship in High Numbers May Swing the November Election*, L.A. TIMES (Sep. 23, 2016, 12:15 PM), <http://www.latimes.com/opinion/op-ed/la-oe-pastor-voter-registration-rates-of-newly-naturalized-citizens-20160926-snap-story.html> (“[I]n a few key battleground states, the newly naturalized voters we counted could make a difference. In Florida, they constitute more than 6% of the voting age population. In Nevada, that share is more than 5%; in Virginia, 4%; and in Arizona, 3%. The results in recent general elections in these states have been so close that these new citizens—if they are registered and turn out—could tip the tallies.”). See also Manuel Pastor et al., *Rock the (Naturalized) Vote II*, CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION (Sep. 2016), [https://dornsife.usc.edu/assets/sites/731/docs/rtnv2016\\_report\\_final\\_v4.pdf](https://dornsife.usc.edu/assets/sites/731/docs/rtnv2016_report_final_v4.pdf); Manuel Pastor, *Rock the (Naturalized) Vote: The Size and Location of the Recently Naturalized Voting Age Citizen Population*, CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION (Oct. 2012), [https://dornsife.usc.edu/assets/sites/731/docs/Naturalization\\_and\\_Voting\\_Age\\_Population\\_web.pdf](https://dornsife.usc.edu/assets/sites/731/docs/Naturalization_and_Voting_Age_Population_web.pdf).