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## Inventing Deportation Arrests

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# INVENTING DEPORTATION ARRESTS

Lindsay Nash\*

*At the dawn of the federal deportation system, the nation's top immigration official proclaimed the power to authorize deportation arrests "an extraordinary one" to vest in administrative officers. He reassured the nation that this immense power—then wielded by a cabinet secretary, the only executive officer empowered to authorize these arrests—was exercised with "great care and deliberation." A century later, this extraordinary power is legally trivial and systematically exercised by low-level enforcement officers alone. Consequently, thousands of these officers—the police and jailors of the immigration system—now have the power to solely determine whether deportation arrests are justified and, therefore, whether to subject over a hundred thousand people annually to the extended detention and bare process of our modern deportation system.*

*This deportation arrest regime—still anomalous in our law enforcement system—has been justified by the notion that immigration enforcement has always been different when it comes to arrest constraints and that the validity of the modern deportation arrest system is evidenced through its history. This Article investigates and ultimately challenges those justifications. It focuses on the advent of administrative arrest authority in the federal immigration scheme and explores how the once "extraordinary" and confined power to authorize deportation arrests became legally trivial and diffuse. It not only provides the first account of the invention and development of federal deportation arrest authority from its inception to the modern day, but also one that differs from and complicates the conventional account in critical ways. Specifically, it reveals an early system of deportation arrest procedures that, even at a time of virulent hostility toward immigrants and overtly racist immigration regulation, was designed to impose significantly greater checks on enforcement officers' arrest authority and more robust independent review than does the modern immigration scheme. This Article also describes why that eventually changed, providing important insight on why we are where we are today.*

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\* Associate Professor of Law, Benjamin N. Cardozo School of Law. I thank Emily Bremer, Gabriel Jack Chin, Paul Finkelman, Mark Fleming, Mary Holper, Eisha Jain, Michael Kagan, S. Deborah Kang, Daniel Kanstroom, Michael Kaufman, Peter Markowitz, Kathryn Miller, Nicholas Parrillo, Michael Pollack, and the participants of the Eighth Annual Administrative Law New Scholarship Roundtable and Junior Faculty Workshop at Cardozo Law for generous feedback on prior drafts and other helpful engagement. I am indebted to Kar Nowakowski, Gabe Cahn, Saul Thorkelson, and H el ene Barthelemy for excellent research assistance and to Eugene Lee and the *Michigan Law Review* staff for insightful editorial work.

*Ultimately, this Article contests the conventional narrative that the modern deportation arrest regime is justified by its past and casts doubt on the near-unanimous case law that has relied on it. In so doing, it gives courts a reason to reconsider the constitutional validity of this scheme and provides historical support for calls to fundamentally transform the deportation arrest system.*

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#### INTRODUCTION

At the dawn of the federal deportation system, the nation's top immigration official proclaimed the power to authorize deportation arrests "an extraordinary one" to vest in administrative officers.<sup>1</sup> He reassured the nation

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1. 1909 COMM'R GEN. IMMIGR. ANN. REP. 147–48. Throughout this Article, the Commissioner General of Immigration's Annual Reports will be abbreviated as "CGAR."

that this immense power—then wielded by a cabinet secretary, the only executive officer empowered to authorize these arrests—was exercised with “great care and deliberation.”<sup>2</sup>

A century later, this extraordinary power is legally trivial and diffuse, systematically exercised by low-level enforcement officers alone.<sup>3</sup> As a result, thousands of these officers—the police and jailors of the immigration system—have the power to solely determine whether deportation arrests are justified, and therefore, whether to subject over a hundred thousand people annually to the extended detention and the bare process of our modern deportation system.<sup>4</sup>

In some sense, the administrative power to authorize deportation arrests has remained “extraordinary,” an anomaly in even our now-vast enforcement state. That is because in most other contexts, arresting officers remain constrained by a neutral-and-detached-review rule.<sup>5</sup> The rule requires them to either obtain a warrant pre-arrest by demonstrating probable cause to a judicial officer, or, in circumstances where an *ex ante* warrant is not required, promptly seek a judicial determination of probable cause post-arrest.<sup>6</sup> To be sure, “judicial” in this context does not always refer to a judge in the technical sense and its boundaries remain undefined,<sup>7</sup> but it has long been clear that these “judicial” officers deciding whether an arrest would be (or was) valid must possess two critical characteristics: neutrality and detachment from the prosecution.<sup>8</sup> And while the application of this rule can be complicated,<sup>9</sup> the animating premise is not: because enforcement officers “lack sufficient objectivity” to determine whether there is adequate cause to justify deprivations of individual liberty, neutral and detached adjudicators must intercede.<sup>10</sup>

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2. *Id.* (describing measures to ensure the requisite “great care and deliberation” was exercised in adjudicating arrest warrant applications).

3. *See infra* Part I.A. (explaining who has authority to authorize arrests for removal proceedings); *infra* notes 382–385 and accompanying text (using newly obtained information to show who actually authorizes the majority of these arrests).

4. Dep’t of Homeland Sec., Immigr. & Customs Enf’t, ICE Response to FOIA Request 2020-ICFO-02230 (on file with author) [hereinafter ICE Aug. 11, 2021 Response]; 2020 U.S. IMMIGR. & CUSTOMS ENF’T ANN. REP. 2; U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 13 (2019); U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2018 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2018).

5. *See, e.g.*, Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 436 (2021).

6. *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975).

7. *Shadwick v. City of Tampa*, 407 U.S. 345, 351–52 (1972); *see also* Nash, *supra* note 5, at 452.

8. *Coolidge v. New Hampshire*, 403 U.S. 443, 446–47, 450 (1971); *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also* *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 317 (1972).

9. *See, e.g.*, *United States v. Barnes*, 895 F.3d 1194, 1199–1204 (9th Cir. 2018); *United States v. Bennett*, 170 F.3d 632, 637 (6th Cir. 1999).

10. *Steagald v. United States*, 451 U.S. 204, 212 (1981); *see Gerstein*, 420 U.S. at 114; *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963).

But in the civil immigration arrest context, low-level enforcement officers alone make these calls. No magistrate—not even a neutral administrative officer—deliberates over the permissibility of the arrest beforehand.<sup>11</sup> No neutral officer evaluates probable cause after the fact.<sup>12</sup> Instead, enforcement officers—typically low-level enforcement agents—occupy the role that judicial officers play elsewhere.<sup>13</sup> These officers either sign off on the validity of arrests beforehand by signing an administrative form labeled “warrant”<sup>14</sup> or make the arrest without any review of the validity of the arrest, even after it has taken place.<sup>15</sup> And while the neutral-and-detached-review rule governing arrests in nearly every other context seeks to prevent reliance on the potentially biased assessment of officers involved in the very arrest under review,<sup>16</sup> immigration enforcement diverges there too: not only are probable cause determinations made by enforcement officers within the prosecuting agency, they may be made by officers “intimately involved” in the investigation or even the arrest itself.<sup>17</sup> In other words, immigration enforcement officers alone authorize their colleagues or even themselves to arrest and detain people for civil immigration prosecutions.<sup>18</sup>

The consequences of this arrest regime are as troubling as they are predictable. Freeing arresting officers from any obligation to justify the arrest to a detached arbiter has, unsurprisingly, played an important role in allowing

11. 8 C.F.R. §§ 236.1(b), 287.5(e)(2) (2021) (permitting more than fifty kinds of nonjudicial immigration officials—all enforcement officers within the prosecuting agency—to issue arrest warrants for civil immigration violations).

12. Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 127–30, 157 (2015) (arguing that, given this deficiency, the government should “establish a mechanism of regular judicial review of immigration arrests and detention”); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1305 (2010) (“[T]hose arrested for civil immigration violations without a warrant have no . . . right to a judicial determination of probable cause.”). Even in the limited instances in which individuals seek suppression in immigration court on the basis of unconstitutional arrests, courts often do not decide whether there was probable cause because the standard for suppression under the Fourth Amendment in immigration proceedings requires an “egregious” Fourth Amendment violation. See *Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

13. See *infra* notes 64–68 and accompanying text.

14. See, e.g., U.S. DEP’T OF HOMELAND SEC., FORM I-200: WARRANT FOR ARREST OF ALIEN (rev. 2016); see also 8 C.F.R. § 236.1(b) (2021).

15. 8 U.S.C. § 1357(a); 8 C.F.R. §§ 287.3, 287.5(c)(1) (2021); see also *infra* notes 61–68 and accompanying text.

16. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

17. *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008).

18. Kagan, *supra* note 12, at 157–58, 163 (analogizing the scheme “to allowing police detectives to have their warrantless arrests reviewed by fellow detectives in the same department”); Nash, *supra* note 5, at 457.

race-based policing to persist.<sup>19</sup> This arrest scheme has also allowed ill-investigated,<sup>20</sup> contrary-to-statute,<sup>21</sup> and retaliatory arrests,<sup>22</sup> and led to countless erroneous arrests of U.S. citizens.<sup>23</sup> This—and the fact that so many people are not entitled to release post-arrest<sup>24</sup>—has resulted in an incalculable number of days of unlawful and unnecessary detention, as even nondeportable people who are arrested may remain detained for weeks or months before their removal proceedings commence<sup>25</sup> and sometimes years before their removability is ultimately determined.<sup>26</sup> It has also resulted in unjust deportations, as even arrests that violate the statute or Constitution often do not result in the exclusion of evidence or termination of removal proceedings.<sup>27</sup>

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19. This is especially true in the context of “collateral arrests,” where immigration officers arrest people who were not the original targets of the enforcement action, often based on impermissible factors such as race and ethnicity. Ed Kilgore, *ICE Has Tripled the Number of Undocumented Immigrants Without Criminal Records It Arrests*, N.Y. MAG. (Aug. 13, 2018), <https://nymag.com/intelligencer/2018/08/ice-arrests-of-non-criminal-undocumented-immigrants-surge.html> [<https://perma.cc/6Y5A-KQLU>]; Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018, 5:00 AM), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania> [<https://perma.cc/YX88-RFNL>]; see also *Sanchez v. Sessions*, 904 F.3d 643, 646–48, 656 (9th Cir. 2018).

20. See, e.g., Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He’s Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 12:00 AM), <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-html-story.html> [<https://perma.cc/P8QQ-Z6NA>] [hereinafter St. John & Rubin]; Caitlin Dickerson, *A Rare Look Inside Trump’s Immigration Crackdown Draws Legal Threats*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2020/07/23/us/trump-immigration-nation-netflix.html> [<https://perma.cc/E2VA-JKFX>].

21. See, e.g., *United States v. Santos-Portillo*, 997 F.3d 159, 161 (4th Cir. 2021); *United States v. Pacheco-Alvarez*, 227 F. Supp. 3d 863, 890–93 (S.D. Ohio 2016).

22. See, e.g., Charles R. Davis, *A College Student Says ICE Arrested Him in Retaliation for Reading a Poem about America*, BUS. INSIDER (Nov. 16, 2020, 8:46 PM), <https://www.businessinsider.com/college-student-says-ice-arrested-him-in-retaliation-for-poem-2020-11> [<https://perma.cc/PL9L-4QLZ>]; *Bello-Reyes v. Gaynor*, 985 F.3d 696, 702 (9th Cir. 2021).

23. See, e.g., AARTI KOHLI, PETER L. MARKOWITZ & LIZA CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* 4–5 (2011), [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) [<https://perma.cc/S5N5-KPMZ>].

24. See *infra* note 385 and accompanying text.

25. Paul Moses & Tim Healy, *‘The Bizarro-World’ Immigration Courts Where the Constitution Isn’t Applied*, DAILY BEAST (June 4, 2020, 10:01 AM), <https://www.thedailybeast.com/the-bizarro-world-immigration-courts-where-the-constitution-isnt-applied> [<https://perma.cc/PBK2-8Z7K>]; *infra* note 69 and accompanying text.

26. See, e.g., St. John & Rubin, *supra* note 20.

27. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034, 1040 (1984) (affirming that “[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation hearing” and that “the exclusionary rule need not be applied in such a proceeding”); *Westover v. Reno*, 202 F.3d 475, 479–80 (1st Cir. 2000); see *supra* note 12 (describing the heightened standard for suppression).

Although deportation arrest practices conflict with otherwise foundational arrest constraints, they have long been justified by the notion that, historically, deportation arrest authority has been placed in executive hands.<sup>28</sup> This narrative did not originate in 1960, but it assumed constitutional import then, when the Supreme Court blessed it in dicta in *Abel v. United States*.<sup>29</sup> There, the Court considered a Fourth Amendment challenge based on the fact that the petitioner's deportation arrest was executed pursuant to a warrant issued by an administrative officer.<sup>30</sup> Despite ultimately declining to decide whether the Constitution required that a judicial—rather than executive—officer issue warrants in the deportation arrest context,<sup>31</sup> the Court devoted five pages of the opinion to describing what it saw as the “long-sanctioned” use and “uncontested historical legitimacy” of purely executive probable cause determinations for deportation arrests.<sup>32</sup> And, largely on this basis, the Court all but affirmed the “constitutional validity” of the arrest procedure used in Mr. Abel's case.<sup>33</sup>

Based on *Abel's* “forceful” account of this history<sup>34</sup> and the perceived historical sanction for deportation arrests authorized only by executive officers, the government—with nearly unbroken success—has defended its modern arrest practices in litigation.<sup>35</sup> Courts have long rejected challenges to these arrests based on the purportedly “overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens,”<sup>36</sup> and the assumption that the “historical development of immigration proceedings” shows the longstanding belief that “administrative officers and not neutral magistrates [may] make the probable cause determinations” for deportation arrests.<sup>37</sup> The government has also used this narrative to deflect

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28. See *infra* note 87 (collecting cases) and accompanying text.

29. 362 U.S. 217, 230–34 (1960).

30. *Abel*, 362 U.S. at 230.

31. *Id.*

32. *Id.* at 230, 233–34 (relying almost entirely on statutes adopted in the early federal immigration system).

33. *Id.* at 233.

34. *Flores ex rel. Galvez-Maldonado v. Meese*, 913 F.2d 1315, 1337 (9th Cir. 1990), *vacated*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

35. See *infra* Part I.B; Nash, *supra* note 5, at 442–43.

36. *Ousman D. v. Decker*, No. 20-cv-2292, 2020 WL 1847704, at \*8 (D.N.J. Apr. 13, 2020) (rejecting a Fourth Amendment challenge to deportation arrest based on description of history set forth in *Abel*); see also *infra* note 87 (collecting cases).

37. *Aguilar v. U.S. Immigr. & Customs Enft Chicago Field Off.*, 346 F. Supp. 3d 1174, 1188 (N.D. Ill. 2018) (relying on “[t]he historical development of immigration proceedings laid out by Justice Frankfurter in *Abel v. United States*” as proof of “the long-standing belief that the Fourth Amendment permits civil immigration detention notwithstanding that administrative officers and not neutral magistrates make the probable cause determinations” in rejecting challenge to deportation arrests); see also, e.g., *Lopez-Lopez v. Cnty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (citing *Abel*, 362 U.S. at 217) (“[I]n the immigration context, federal law enforcement officers have a long history of using administrative warrants and arrests for purposes of deportation, dating back to 1798.”).

public criticism, arguing that its current arrest practices are lawful because “[t]he Fourth Amendment has long permitted civil immigration arrests and detention, regardless of the fact that probable cause determination for such violations are made by Executive Branch officials rather than a magistrate.”<sup>38</sup>

But this account omits aspects of deportation arrests’ history that are critical for evaluating the constitutional validity of the deportation arrest scheme today. I argued in a prior article—*Deportation Arrest Warrants*—that *Abel*’s description of the deportation arrest system at the time of our nation’s founding was flawed because the majority misunderstood the only federal law it analyzed and missed states’ removal laws, which were the most prevalent removal laws in the framing era.<sup>39</sup> This Article turns its focus to the first federal deportation arrest regime, which emerged a century later. It argues that the conventional account ignores key—long seen as crucial—distinctions between the officers conducting investigations and arrests, and those adjudicating whether there was probable cause for the arrest. Specifically, *Abel* failed to distinguish, in the historical evidence on which it relied, between the roles of the executive officers who were permitted to authorize deportation arrests and those who were actively involved in investigation and prosecution.<sup>40</sup> More recent decisions have compounded this error by ignoring the fact that immigration enforcement practices have changed in important ways since *Abel* was decided, including by devolving the power to authorize arrests onto lower- and lower-level enforcement officers.<sup>41</sup>

Despite these distinctions and the weight that the perceived historical legitimacy of deportation arrest practices has carried in contemporary doctrine, this account of how the power to authorize federal deportation arrests developed and who could exercise it remains largely unexamined—and unchallenged as a result. Many scholars have written thoughtfully about flaws of the deportation arrest system based on modern theory and doctrine.<sup>42</sup> And others

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38. Chantal Da Silva, *Police Who Help ICE Detain Undocumented Immigrants Could Be Violating Fourth Amendment, Experts Say*, NEWSWEEK (Feb. 20, 2018, 9:33 AM), <https://www.newsweek.com/what-people-fearing-deportation-need-know-about-ices-administrative-warrants-808205> [<https://perma.cc/27TR-8WP7>].

39. Nash, *supra* note 5, at 444–45.

40. *Abel* noted that the warrant there was issued by an “independent responsible officer” who was not the officer seeking to make the arrest and who occupied a distinct role, 362 U.S. at 236–37, a feature not required for deportation arrest authorizations today. See *infra* Part IV.C. But that warrant was still issued by the district director, who was part of the enforcement component of the immigration agency, and the *Abel* majority did not even purport to consider the role of that officer or the officers authorizing arrests in the historical statutes on which it relied. See *Abel*, 362 U.S. at 236–37.

41. Compare *infra* Part I.B. (describing courts’ continuing reliance on *Abel*), with *infra* Part IV.C. (describing devolution of this authority post-*Abel*).

42. See, e.g., Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794 (2022) [hereinafter *Policing*]; Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1328, 1359 (2021); Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703 (2021) [hereinafter *Jailhouse*]; Mary Holper, *The Fourth Amendment Implications of “U.S. Imitation Judges,”* 104 MINN. L. REV. 1275 (2020) [hereinafter *Imitation Judges*]; Mary Holper, *The Unreasonable Seizures of Shadow*



have discussed specific aspects of arrest procedures and practices in work focused on other facets of the federal immigration system's development.<sup>43</sup> Perhaps the most in-depth prior work has been done by historian S. Deborah Kang, who provides important insights on changes to immigration-related arrest practices and authority from 1925 through the 1940s in her powerful institutional history of early immigration enforcement in the nation's southern borderlands.<sup>44</sup> Yet despite the magnitude of these prior contributions, the larger, longer story of the invention and development of the deportation arrest regime and its connection to the justification for our modern scheme remains untold.

This Article takes on that project. Drawing on a range of sources, it explores the question of how this once "extraordinary" and confined power to authorize deportation arrests became legally trivial and largely unconstrained.<sup>45</sup> It not only provides the first account of the invention and development of federal deportation arrest authority from its inception to the modern day, but also one that differs from and complicates the conception of what was accepted in terms of executive probable cause determinations for deportation arrests. Specifically, it reveals an early system of federal deportation arrest procedures that, even at a time of virulent hostility toward immigrants and overtly racist immigration regulation, was designed to impose significantly greater

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*Deportations*, 86 U. CIN. L. REV. 923 (2018); Kagan, *supra* note 12; Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014); Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 696–98 (2013); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Eagly, *supra* note 12, at 1304–08; Shani Mahiri King & Nicole Silvestri Hall, *Tracing the Roots of a Poisonous Tree: On the Origins and Impact of Criminal Terminology in a Civil Apprehension Scheme*, 53 N.M. L. REV. 255 (2023).

43. See, e.g., *Policing*, *supra* note 42, at 1803–12; S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE U.S.–MEXICO BORDER, 1917–1954*, at 71–86, 119–22 (2017); Shoba Sivaprasad Wadhia, *Business As Usual: Immigration and the National Security Exception*, 114 PENN. ST. L. REV. 1485, 1491–92, 1497–99 (2010); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 9, 149, 152 (2007); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 56, 56 n.3, 77, 83 (2004); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 87–90, 136–37, 185, 232 (1995); D.H. Dinwoodie, *Deportation: The Immigration Service and the Chicano Labor Movement in the 1930s*, 52 N.M. HIST. REV. 193, 195–96, 199 (1977). This Article has benefitted immensely from the valuable context and insights that these scholars have provided.

44. KANG, *supra* note 43.

45. This Article focuses on "deportation arrests," which refers to arrests within the interior of the United States for purposes of prosecuting the person in immigration court to determine whether they should be removed from the country. It does not focus on arrests that occur after the removal order has been issued (i.e., based on a warrant of removal); arrests of "enemy aliens"; or arrests at the border (while recognizing that "the border" itself has not always had a fixed or uncontroversial meaning). For present purposes, the distinct category of arrests at the border includes not only arrests of people actually crossing the border, but also those that occur physically very close to, or in pursuit of, someone just observed crossing the border. These categories of arrests are significant, but beyond the scope of this Article due to factual and legal distinctions. See Nash, *supra* note 5, at 448 n.43.

checks on enforcement officers' arrest authority and provide more robust independent review than does the immigration scheme today. And it shows that, while substantial deportation arrest authority was placed in executive hands in the early federal system, the executive branch was not authorized to implement this authority in any way it saw fit or, as it does today, place this "extraordinary" power in low-level enforcement officers' hands. This Article also explains why that eventually changed and uses new information obtained through Freedom of Information Act litigation to provide fresh insight into who actually authorizes these arrests today. Ultimately, this Article contests the conventional narrative that the modern deportation arrest regime is justified by its past and casts doubt on the near-unanimous case law that has relied on it. In so doing, it provides reason for courts to reconsider the constitutional validity of this scheme and historical support for calls to fundamentally transform the deportation arrest system.

This Article proceeds in five parts. Part I explains who authorizes arrests in our modern immigration enforcement regime and how this process has been justified. Part II begins the inquiry into the history, examining the adoption and implementation of the first federal laws authorizing deportation arrests, a system that, though administered largely within the executive branch, was structured to provide independent probable cause review pre-arrest and reserve the weighty decision of whether an arrest was justified to the highest echelons of government power. Part III examines how nativist legislation transformed the federal immigration bureau's work and created administrability challenges for this regime. It also shows how Congress and the agency long resisted calls to "subdelegate" to lower-level officers the power to authorize deportation arrests in our nation's interior.<sup>46</sup> Part IV describes how—amid a world war and approximately sixty years after the advent of federal deportation arrests—the longstanding deportation arrest procedures ultimately began to change, and it traces the subsequent subdelegation of the power to authorize these arrests. Using this history and previously unreleased information about contemporary arrest practices, this Part sheds new light on how the government currently wields this extraordinary power and shows that, in some respects, our modern deportation arrest scheme is not part of longstanding practice at all, but rather is new—and novel—in significant ways. Part V considers implications, explaining that some of the key practical constraints that shaped the development of our modern scheme are no longer present, but the risks of vesting such extraordinary authority in low-level enforcement officers remain as strong today. It argues that, more fully understood, the history of federal deportation arrests seriously undermines existing case law and justifies not the system in place now, but a dramatically different one in which structurally distinct, detached, and neutral officers determine probable cause for purposes of arrest and detention.

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46. See Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 475 (2017) (defining "subdelegation" as the phenomenon that occurs when agency heads "take authority granted from Congress or the President and further redelegate it to their subordinates").

## I. MODERN DEPORTATION ARREST REGIME

Deportation arrests are typically executed in the shadows, obscured and often unexamined as a result.<sup>47</sup> Consequently, the unique procedures associated with these arrests and the way they differ from other arrest processes are generally ill-understood by the public, fellow law enforcement, and even those taken into custody under this scheme. But, before turning to deportation arrests' history, it is necessary to appreciate how they occur and the ways in which this regime stands virtually alone in law enforcement today. This Part explains who, in our modern system, judges the validity of deportation arrests and how these arrest processes have been justified.

A. *Who Judges the Validity of Deportation Arrests Today*

In our modern immigration system, immigration enforcement authority is vested primarily in the Department of Homeland Security ("DHS"), a relatively new agency responsible for, among other things, the domestic enforcement of the nation's immigration laws.<sup>48</sup> While its immigration enforcement responsibilities are expansive,<sup>49</sup> its removal function often takes center stage in policy debates, messaging, and public conceptions of the agency's agenda.<sup>50</sup> Consistent with this, DHS employs the nation's largest force of law enforcement officers,<sup>51</sup> and ICE—the agency's interior enforcement subcomponent—alone employs the fourth-largest force of officers with arrest and firearm authority.<sup>52</sup> Thus, DHS—and even ICE on its own—plays a major role in arrests and policing today.

DHS's authority to conduct immigration enforcement is provided by statute. This authority is set forth in the Immigration and Nationality Act

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47. See *Deportations Under ICE's Secure Communities Program*, TRAC IMMIGR. (Apr. 25, 2018), <https://trac.syr.edu/immigration/reports/509/> [<https://perma.cc/BHG7-ZYHB>] (reporting that, in FY 2017 (the last year for which data is available), over 80% of removals from the interior of the United States occurred through Secure Communities or a similar program); *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFT, <https://www.ice.gov/secure-communities> [<https://perma.cc/Q5KP-ZLB2>] (explaining that Secure Communities allows ICE to arrest noncitizens "while they are in the custody of another law enforcement or correctional agency," generally in prisons and jails).

48. 8 U.S.C. § 1103(a)(1); *Secretary of Homeland Security*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/secretary> [<https://perma.cc/Q3EY-WRH7>].

49. See *Operational and Support Components*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/operational-and-support-components> [<https://perma.cc/S2ZZ-DUCT>].

50. See Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PENN. L. REV. 1463, 1465, 1469, 1469 n.19 (2019).

51. *Mission Areas*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/homeland-security-careers/mission-areas> [<https://perma.cc/YY2F-6BD9>]; CONNOR BROOKS, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2016 – STATISTICAL TABLES, 3 tbl.1 (2019), <https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/W28F-JVKS>].

52. BROOKS, *supra* note 51, at 3 tbl.2.

(“INA”)—the statutory backbone of the U.S. immigration system—and implemented through agency-issued regulations.<sup>53</sup> This power is also understood to be augmented—at times—by the executive’s “inherent” or “plenary” authority “to implement sovereign prerogatives.”<sup>54</sup>

At present, deportation arrests may be effectuated in one of two ways. The first is under the INA’s provision for warrant-based arrests, which provides that, as a default, deportation arrests should be conducted based on a “warrant.”<sup>55</sup> However, this statutorily prescribed warrant is not a warrant in the ordinary sense, but rather an administrative instrument issued by officers in the enforcement agency within the executive branch.<sup>56</sup> The INA delegates the authority to issue this instrument to the DHS secretary,<sup>57</sup> who has subdelegated her authority to over fifty types of immigration enforcement officers, including those who investigate cases or even make arrests themselves.<sup>58</sup> The secretary has also claimed the power to subdelegate warrant-issuing authority to virtually any federal employee she chooses, and to do so informally and without further formal rulemaking.<sup>59</sup> Consequently, a wide range of DHS enforcement agents (and perhaps others) are now empowered to sign administrative forms labeled “warrant[s] of arrest”<sup>60</sup> and thereby authorize deportation arrests—even of people they identify, investigate, and apprehend themselves.<sup>61</sup> In other words, by signing a form labeled “warrant,” these enforcement officers may authorize their fellow officers or themselves to make deportation arrests.<sup>62</sup>

But even that is only a default. The second mechanism for deportation arrests permits DHS officers to make an arrest without obtaining an administrative warrant beforehand if the officer has “reason to believe”—a standard akin to probable cause<sup>63</sup>—that the suspected noncitizen “in [the] presence or view” of the immigration officer, “is entering or attempting to enter the United States” unlawfully or “is likely to escape before a warrant can be obtained for

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53. See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952); 8 C.F.R. §§ 1.1–1.4 (2021).

54. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466, 474–82 (2009); see also Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 257 (1984).

55. 8 U.S.C. § 1226(a).

56. *Id.*; see also 8 C.F.R. § 236.1(b)(1) (2021).

57. 8 U.S.C. §§ 1103(a)(1), 1226(a); 6 U.S.C. § 557.

58. 8 C.F.R. §§ 236.1(b)(1), 287.5(e)(2) (2021).

59. 8 C.F.R. § 287.5(e)(2)(liii) (2021).

60. 8 C.F.R. § 236.1(b)(1) (2021).

61. See, e.g., *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 275–76 (D. Conn. 2008).

62. See *supra* note 18 and accompanying text.

63. See *Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015) (collecting cases).

his arrest.”<sup>64</sup> When an officer makes such an arrest, that officer must theoretically seek a second opinion of sorts from another DHS officer after the arrest.<sup>65</sup> But that second officer—also charged with enforcement—need not be neutral, detached, or even independent of the investigation itself. Nor is the second officer required to review the propriety of the arrest; she must merely “examine” the arrested individual to determine whether she believes that the person violated U.S. immigration law.<sup>66</sup> And even this second-officer review is not necessarily required, as arresting officers may forgo it “[i]f no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay.”<sup>67</sup> Thus, in the context of warrantless deportation arrests, the arresting officer may be the only person who ever considers whether there was probable cause for the arrest.

An arrested individual may be held in detention for weeks, months, or years.<sup>68</sup> They will at some point, typically weeks or even months later, be brought before an immigration judge—an administrative adjudicator employed by the Department of Justice (“DOJ”)—to respond to the charges against them and litigate the merits of their removal case.<sup>69</sup> But at no point are they entitled to any sort of automatic review of the basis for their arrest, whether promptly after they are taken into custody or otherwise.<sup>70</sup> And even if they manage to raise the issue, it is extremely unlikely to help them avoid detention or removal, as deportation arrests that violate the regulations, the statute, or even the Fourth Amendment often do not entitle the litigant to release, the exclusion of evidence obtained in the arrest, or the termination of removal proceedings.<sup>71</sup>

Of course, in the criminal context, low-level enforcement officers make the *prima facie* determination of probable cause all the time.<sup>72</sup> Police officers have broad authority to make warrantless arrests for suspected crimes,<sup>73</sup> meaning they are empowered to arrest on the basis of their own, perhaps biased assessment of probable cause. But even putting aside the doctrinal and practical distinctions between the civil and criminal contexts in which these

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64. 8 U.S.C. § 1357(a)(2); *see also* 8 C.F.R. § 287.3(b) (2021).

65. 8 U.S.C. § 1357(a)(2); *see also* 8 C.F.R. §§ 287.3(a)–(b) (2021).

66. 8 C.F.R. §§ 287.3(a)–(b) (2021); *see also* 8 U.S.C. § 1357(a)(2).

67. 8 C.F.R. § 287.3(a).

68. *Jennings v. Rodriguez*, 138 S. Ct. 830, 859–60 (2018) (Breyer, J., dissenting).

69. *See, e.g., Vazquez Perez v. Decker*, No. 18-cv-10683, 2020 WL 7028637, at \*2–3 (S.D.N.Y. Nov. 30, 2020).

70. *Imitation Judges*, *supra* note 42, at 1284–85; *Jailhouse*, *supra* note 42, at 1735–37 (describing absence of constraints from the criminal legal system “intended to evaluate whether the arrest was actually supported by probable cause”); *cf. Gerstein v. Pugh*, 420 U.S. 103, 124–25 (1975).

71. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039–40 (1984); *Westover v. Reno*, 202 F.3d 475, 479–80 (1st Cir. 2000).

72. *Kagan*, *supra* note 12, at 161.

73. *Id.*; *see, e.g., Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001); *United States v. Watson*, 423 U.S. 411, 422–24 (1976).

arrests occur,<sup>74</sup> police officers' warrantless arrests differ in a critical way: their initial assessments of probable cause are subject to mandatory judicial review promptly after the arrest; immigration enforcement officers' are not.<sup>75</sup> Put differently, unlike immigration officers effecting deportation arrests, police executing criminal arrests are not generally permitted to subject people to extended detention unless a neutral and detached arbiter reviews and validates the arresting officer's finding of probable cause.

This is not to suggest that the probable cause review procedure in these other contexts—mainly the criminal legal system—lives up to the checking function intended. Scholars have shown that the rigor of initial probable cause review has been limited, the timeline for the initial appearance before a judge has been lengthened, and the deferential probable cause review norm has contributed to overpolicing and baseless arrests.<sup>76</sup> But there are good reasons to believe that the problems in the criminal context would not transfer to the immigration context: the potential for a more rigorous assessment when implementing a new procedure in the civil immigration context; the highly technical analyses often required to determine whether there is a “fair probability” that someone is removable; and the fact that the criminalization of such a wide swath of conduct (which insulates so many criminal arrests)<sup>77</sup> would not function similarly in the immigration context. And although probable cause may be easy to establish in some removal cases,<sup>78</sup> a mandatory judicial checkpoint between the arresting officer's assessment and extended detention could play a powerful role in reducing the nature and volume of dragnet enforcement.

The problems that flow from a regime that exempts virtually all arrest decisions from review are legion. This system permits arrests without adequate

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74. For example, the Supreme Court has found that an officer may generally execute a constitutionally permissible, warrantless arrest for even a “very minor criminal offense” committed in the officer's presence, *Atwater*, 532 U.S. at 354, but has never made any similar finding about warrantless arrests in the civil context.

75. *Gerstein*, 420 U.S. at 124–25; Kagan, *supra* note 12, at 162–64.

76. Pamela R. Metzger & Janet C. Hoefel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 402, 422 (2020); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 959 (2018); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1331 (2012).

77. See Natapoff, *supra* note 76, at 1358–59.

78. For example, this may be true where noncitizens make certain voluntary admissions of facts that show removability. See Kagan, *supra* note 12, at 167; Michael Kagan, *Mass Surrender in Immigration Court*, 14 U.C. IRVINE L. REV. (forthcoming 2023–2024) [<https://perma.cc/MGK8-YX86>] (describing admissions of alienage in the removability determination).

cause,<sup>79</sup> in violation of statutes and rules,<sup>80</sup> and based on impermissible discrimination, animus, and racial stereotypes.<sup>81</sup> Such a regime has also allowed ICE to rely heavily on data from error-prone databases that contain outdated immigration status information for its probable cause determinations.<sup>82</sup> Indeed, ICE has previously relied on evidence of foreign birth and the absence of additional information in these notoriously incomplete databases in making probable cause determinations, which has resulted in ICE arresting people who—as the agency was well-positioned to ascertain—were actually U.S. citizens.<sup>83</sup> These phenomena permeate the deportation arrest system and, in many ways, reflect precisely the concerns about governmental overreach and discretion that animated the neutral-and-detached-review rule in other contexts.<sup>84</sup>

Yet, despite these well-documented problems, this regime remains; the next Section explains why.

### B. *Justifications*

It is not that the lack of a neutral arbiter within the deportation arrest regime has never been questioned. Particularly as the system has increasingly relied on force-multiplying partnerships with state and local law enforcement,<sup>85</sup> litigators have raised new challenges to this arrest scheme, generating a host of lawsuits throughout the nation.<sup>86</sup> But these challenges have almost uniformly failed, largely due to courts' reliance on the conventional view that these procedures can claim historical legitimacy and longstanding public sanction.<sup>87</sup>

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79. See, e.g., *Hernandez v. United States*, 939 F.3d 191, 202 (2d Cir. 2019) (finding that allegations established absence of probable cause).

80. See, e.g., Bob Ortega, *ICE Supervisors Sometimes Skip Required Review of Detention Warrants, Emails Show*, CNN (Mar. 13, 2019, 7:03 AM), <https://www.cnn.com/2019/03/13/us/ice-supervisors-dont-always-review-deportation-warrants-invs> [<https://perma.cc/2VP6-45MG>]; *United States v. Santos-Portillo*, 997 F.3d 159, 159 (4th Cir. 2021).

81. See *supra* note 19.

82. St. John & Rubin, *supra* note 20; *Gonzalez v. Immigr. & Customs Enf't*, 416 F. Supp. 3d 995, 1016–20 (C.D. Cal. 2019) (finding databases that ICE uses for probable cause determinations to be “[i]naccurate, [i]ncomplete, and [e]rror-[f]illed”), *rev'd and vacated in part sub nom.*, *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 800 (9th Cir. 2020).

83. St. John & Rubin, *supra* note 20; see, e.g., *Morales v. Chadbourne*, 793 F.3d 208, 218–19 (1st Cir. 2015).

84. See Nash, *supra* note 5, at 450 nn.50–51 and accompanying text.

85. See, e.g., *Deportations Under ICE's Secure Communities Program*, *supra* note 47.

86. See, e.g., *infra* note 87 (collecting cases).

87. Nash, *supra* note 5, at 442–44; see, e.g., *Ousman D. v. Decker*, No. 20-cv-2292, 2020 WL 1847704, at \*8 (D.N.J. Apr. 13, 2020) (rejecting a Fourth Amendment challenge to a deportation arrest based on the “overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens” set forth in *Abel v. United States*, 362 U.S. 217 (1960) (quotation marks omitted)); *Rios v. Jenkins*, 390 F. Supp. 3d 714, 719 (W.D. Va. 2019) (quoting same); *United States v. Tsung Min Yu*, No. 3:17-CR-180-CRS, 2019 WL 202206, at \*3 (W.D. Ky.

As described at the outset of this Article, the notion that these arrests are validated by their history assumed important weight in the mid-twentieth century when the Supreme Court enshrined it in doctrine in *Abel v. United States*.<sup>88</sup> In its lengthy elaboration of the longstanding historical acceptance of probable cause determinations made by executive officers, the *Abel* Court's strong dictum seemed to sanction a deportation arrest scheme that permitted enforcement officers to serve as the sole arbiters of probable cause for these arrests.<sup>89</sup>

Sixty years and countless regulatory changes to this arrest scheme later, this account of history has remained enormously consequential, justifying and insulating the deportation arrest regime today. Courts continue to reject challenges to both individual deportation arrests and the system writ large based on this version of history.<sup>90</sup> And, due to courts unquestioningly accepting and reflexively reinscribing this account into case law, the perception of historical legitimacy has only gained steam.

But *Abel* and its progeny have made reckless jurisprudential leaps in this analysis of history by treating a wide range of distinct types of executive probable cause determinations as equivalents regardless of the role or position of the officer signing off on the arrest. *Abel*, for example, involved a deportation arrest authorized by an officer charged with enforcement, but the *Abel* majority found that arrest valid by relying almost entirely on laws that, when enacted, permitted arrest authorization *only* to be issued by a structurally distinct officer at the highest echelons of executive power: in one instance, the president and in others, a cabinet secretary.<sup>91</sup> And this problem of eliding the distinctions in executive officers has only worsened in the decades that followed. As regulatory changes have devolved the power to authorize and validate these arrests lower and lower within the agency's structure, virtually every court to

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Jan. 15, 2019) (relying on the "history of administrative warrants in immigration" set forth in *Abel*, 362 U.S. 217, in rejecting a challenge to evidence obtained in a deportation arrest); *Aguilar v. U.S. Immigr. & Customs Off.*, Chi. Field Off., 346 F. Supp. 3d 1174, 1188 (N.D. Ill. 2018); *Lopez-Lopez v. Cnty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018); *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1066 (D. Ariz. 2018); *Limpin v. United States*, No. 17-CV-1729-JLS, 2018 WL 3343791, at \*5 (S.D. Cal. July 9, 2018); *Roy v. Cnty. of L.A.*, No. CV 12-09012-BRO, 2017 WL 2559616, at \*6-8, \*10 (C.D. Cal. June 12, 2017) *rev'd and vacated in part sub nom.*, *Gonzalez v. U.S. Immigr. & Customs Enft.*, 975 F.3d 788 (9th Cir. 2020); *see also City of El Cencizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018); *State v. Rodriguez*, 854 P.2d 399, 408 (Or. 1993) (en banc); *Spinella v. Esperdy*, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960).

88. 362 U.S. at 233-34; *see supra* notes 29-33 and accompanying text.

89. *See Abel*, 362 U.S. at 233-34 (discussing the acceptance of deportation arrests based on executive probable cause determinations "from almost the beginning of the Nation").

90. *See supra* note 87.

91. *Abel*, 362 U.S. at 233, 236-37. Specifically, *Abel* relied on eight laws: one that permitted *only* the president to authorize these arrests; six that, when adopted, permitted *only* the secretary (who was structurally separate from the agency subcomponent that conducted enforcement) to do so; and *only* one that, when adopted, was amenable to subdelegation (which, at that time, meant subdelegation *only* to a small group of high-level officers). *See infra* note 322 and accompanying text.



consider the issue since has made this same mistake, relying on the fact that our nation has accepted *some* types of extremely high-level executive officers authorizing arrests to uphold the validity of arrests made only on the say-so of low-level enforcement agents, including the police and jailors of the immigration system.<sup>92</sup>

The first real fissure in this approach came in *Gonzalez v. U.S. ICE*, a recent Ninth Circuit decision.<sup>93</sup> There, the Ninth Circuit reversed a district court decision that, based on the history presented in *Abel*, had rejected a constitutional challenge to the modern warrantless deportation arrest system. The Ninth Circuit agreed with the cross-appellants that, under modern arrest doctrine, the neutral-and-detached-review rule applied in the deportation context.<sup>94</sup> It harmonized its conclusion with *Abel*, reasoning that, despite what *Abel* may have concluded about probable cause determinations being made by *some* types of executive officers, the specific role of the executive officer who determines probable cause is key: the officer authorizing the arrest—even if within the executive branch—must be neutral and detached.<sup>95</sup> However, the Ninth Circuit left open critical questions, such as which types of executive officers should be permitted to authorize arrests, whether the existence of an enforcement-officer-issued warrant satisfies this requirement, and how historical practice fits into this analysis.<sup>96</sup>

The perceived historical pedigree of executive-authorized deportation arrests has mattered not only because of the import of historical arrest practices in constitutional arrest doctrine, but also for the application of plenary power. The plenary power doctrine refers to the principle that, in some areas, Congress (and at times the executive) exercise virtually unfettered authority, meaning that neither the courts nor substantive constitutional constraints may intrude.<sup>97</sup> The expansive application of this doctrine has been formative in the development of immigration law; it has played a particularly powerful role in allowing immigration enforcement to become exceptional by shielding it from constitutional scrutiny and preventing courts from enforcing the norms that

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92. See, e.g., *Ousman D.*, 2020 WL 1847704, at \*8; *Rios*, 390 F. Supp. 3d at 719; *Aguilar*, 346 F. Supp. 3d at 1188; *Lopez-Lopez*, 321 F. Supp. 3d at 799; *Tenorio-Serrano*, 324 F. Supp. 3d at 1066; *Limpin*, 2018 WL 3343791, at \*5.

93. 975 F.3d 788 (9th Cir. 2020).

94. *Gonzalez*, 975 F3d at 798.

95. *Id.* at 825.

96. *Id.* at 826, 826 n.27. Since then, a district court in the Ninth Circuit has concluded that, given *Gonzalez* and the current regulatory scheme, administrative-warrant-based deportation arrests lack the “independent assurance guaranteed by the Fourth Amendment.” *Kidd v. Mayorkas*, No. 2:20-cv-03512-ODW, 2021 WL 1612087, at \*6 (C.D. Cal. Apr. 26, 2021).

97. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 988 (1998); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626, 1631 (1992); see *supra* note 54.

constrain other regimes.<sup>98</sup> And history plays an important role here too: it helps determine the boundaries of this doctrine, as courts have often looked to historical practice to understand the scope and application of plenary power in a particular domain.<sup>99</sup> Thus, the belief—correct or not—that these arrests are historically sanctioned has had a self-reinforcing effect, persuading courts that deference is warranted and limiting the robustness of judicial review even when presented with colorable constitutional claims.<sup>100</sup>

With this background in mind, the remainder of this Article examines the history of the federal deportation arrest system that purportedly justifies this regime. It explores how this anomalous system developed; considers whether, as the conventional view suggests, this history shows that our nation has always adopted and accepted the type of deportation arrests that undergird our removal system today; and lays the groundwork for this Article's ultimate argument that a fuller understanding of this history supports calls for fundamental change.

## II. INVENTING FEDERAL DEPORTATION ARRESTS

Although federal immigration regulation now seems ever-present, the federal immigration regime was not created until the late 1800s—almost a century after the nation's founding.<sup>101</sup> The federal deportation system came even later, and arrest for purposes of federal deportation proceedings emerged later still. This Part explores the creation of that regime, focusing on the construction of the federal government's early deportation system and the invention and institution of deportation arrests within that scheme. It examines federal deportation arrest practices as they emerged and developed in parallel but decidedly separate tracks—in the context of expulsion under the Chinese exclusion laws and under the early general immigration laws—and then became effectively unified under the early administrative deportation arrest regulations. Ultimately, it shows that, even though the early administrative enforcement structure coalesced at a time of virulent hostility toward immigrants and overtly racist immigration regulation, it relied upon a system of arrest procedures that was designed to impose significantly greater checks on enforcement

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98. See Kagan, *supra* note 12, at 135, 167; Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231, 236 (2010).

99. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (relying on both *stare decisis* and the fact that the exclusive enforcement of deportation policies to Congress has long been “firmly imbedded in the legislative . . . tissues of our body politic”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903); *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

100. See, e.g., *Aguilar v. U.S. Immigr. & Customs Enf't Chi. Field Off.*, 346 F. Supp. 3d 1174, 1187 (N.D. Ill. 2018); *Roy v. Cnty. of L.A.*, No. CV 12-09012-BRO, 2017 WL 2559616, at \*8, \*10 (C.D. Cal. June 12, 2017).

101. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 22 (2006) (“[I]t was not until 1875 that Congress began to enact federal measures that would be immediately recognized today as immigration statutes.”).

officers' arrest authority and more robust independent review than does the deportation arrest regime today.

### A. Authorizing Deportation Arrests

Though Congress had adopted laws barring entry to certain immigrants earlier,<sup>102</sup> it did not create a deportation regime until 1882.<sup>103</sup> With the adoption of the Chinese Exclusion Act, Congress ushered in an era of overtly anti-Asian deportation, enacting a law that provided not only for the exclusion of certain Chinese immigrants seeking entry to the United States, but deportation as well.<sup>104</sup> Substantively, the Act banned the entry of Chinese laborers into the United States for ten years and made it unlawful for Chinese laborers who had entered in violation of the law to remain in the United States.<sup>105</sup> The fact that the Act restricted entry was not especially unusual as Congress had adopted such legislation in the past,<sup>106</sup> but this law went further in authorizing deportation (i.e., removal from the nation's interior) of "any Chinese person found unlawfully within the United States" and setting out the procedure for the nation's first deportation proceedings.<sup>107</sup>

In terms of process, the Chinese Exclusion Act hewed to the longstanding distinction in rights owed to individuals within our community versus those seeking entry.<sup>108</sup> It provided that while certain Chinese immigrants seeking admission could be found inadmissible based only on the judgment of an ad-

102. See, e.g., Act of Mar. 3, 1875, ch. 141, 18 Stat. 477–78.

103. Chinese Exclusion Act, ch. 126, §§ 1, 12, 22 Stat. 58, 59–61 (1882). Two narrower laws of relevance were enacted earlier, in 1798 and 1819. The 1798 act was clearly a deportation law but did not lead to the creation of a deportation regime because it was a two-year, temporary provision that was never implemented or used. Nash, *supra* note 5, at 502. The 1819 law applied exclusively to enslaved people. Gabriel J. Chin & Paul Finkleman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2236 (2021); Act of Mar. 3, 1819, § 1, ch. 101, 3 Stat. 533. Given that and the distinctions this fact creates, see, e.g., Tera W. Hunter, *Slaves Weren't Immigrants. They Were Property.*, WASH. POST. (Mar. 9, 2017, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2017/03/09/slaves-werent-immigrants-they-were-property/> [<https://perma.cc/RU4M-R8QA>] (arguing that "[s]laves were [considered] chattel"), there is a complicated question about whether it should be viewed as a deportation law for the particular purposes of this Article (an inquiry into procedure).

104. Chinese Exclusion Act §§ 1, 12; Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7, 23 (2005) (describing how "Chinese exclusion became Asian exclusion"). The Chinese Exclusion Act of 1882, which expired after ten years, was subsequently extended and modified through at least fifty-eight laws, 1930 CGAR 6, which are collectively referenced as the "Chinese exclusion laws."

105. Chinese Exclusion Act §§ 1, 12.

106. KANSTROOM, *supra* note 43, at 93.

107. *Id.* The 1798 law referenced above provided for executive removal orders issued without antecedent removal proceedings. Nash, *supra* note 5, at 498–502.

108. See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982–83 (2020); Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

ministrative customs officer, Chinese citizens believed to be unlawfully present within the United States were entitled to a hearing before “some justice, judge, or commissioner of a court of the United States.”<sup>109</sup> Only if that judicial officer concluded that the person was “not lawfully entitled to be or remain in the United States,” could that person be ordered deported to the “country from whence he came.”<sup>110</sup> But this law provided no authority to arrest people for deportation proceedings.

It was not until September 1888—a century after the nation’s founding—that Congress adopted the first federal law permitting arrests for deportation proceedings.<sup>111</sup> The newly added provision explicitly spelled out procedures for arresting Chinese individuals believed to be deportable in the interior of the country, providing for their arrest based on “a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States by any justice, judge, or commissioner of a United States court, or before any United States court.”<sup>112</sup> Thus, the earliest authority for federal deportation arrests did not permit executive officers to authorize arrests at all, but rather required judicial warrants.

One month later, Congress adopted the first generally applicable deportation law that the federal government would actually put into practice.<sup>113</sup> This law, known as the “Alien Contract Labor Law,” had been adopted in 1885 as a simple ban on aiding or encouraging the migration of noncitizen laborers.<sup>114</sup> It prohibited any company or individual from bringing noncitizen laborers into the United States to work under contract,<sup>115</sup> and, two years later, was amended to allow the secretary of the Treasury Department to authorize agency employees to formally exclude noncitizens who sought entry in violation of the ban.<sup>116</sup> In October 1888, Congress extended the law’s enforcement provisions into the interior, converting it into a deportation law by authorizing the removal of “an immigrant [who] has been allowed to land contrary to the prohibition of [the Alien Contract Labor Law]” for a year following their landing or entry.<sup>117</sup>

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109. Chinese Exclusion Act § 12. A court commissioner was “a quasi judicial officer, and in these hearings he act[ed] judicially.” *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902).

110. Chinese Exclusion Act § 12.

111. Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479. The 1798 and 1819 laws did not authorize arrests for deportation proceedings, but rather, arrests made after a finding of a violation/removability; in that sense the arrests would have been more akin to arrests that are, in the modern scheme, based on warrants of removal. *See supra* note 45.

112. § 13, 25 Stat. at 479.

113. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566–67.

114. Act of Feb. 26, 1885, § 1, 23 Stat. 332; *United States v. Baltic Mills Co.*, 124 F. 38, 38 (2d Cir. 1903) (explaining that this act was “known as the ‘Alien Contract Labor Law’”).

115. § 1, 23 Stat. at 332.

116. Act of Feb. 23, 1887, ch. 220, § 8, 24 Stat. 414, 415.

117. § 1, 25 Stat. at 566.

Through this 1888 amendment—again, a century into the nation’s existence—Congress created the first general federal authority to arrest for purposes of deportation proceedings. Specifically, it authorized the secretary of the Treasury—then charged with enforcement of federal immigration laws—to “cause” the arrest of noncitizens who were deportable under the Act’s interior enforcement provision.<sup>118</sup> But while the law was silent about how the secretary was to exercise this power, the agency interpreted it to mean that the secretary—and *only* the secretary—could authorize arrests, and he could do so only by issuing an arrest warrant.<sup>119</sup>

Yet, the Alien Contract Labor Law’s deportation provision was extremely narrow, and Congress still had not enacted a law that implemented wide-ranging general immigration restrictions. It did so in 1891, adopting a generally applicable immigration law that imposed a far wider range of restrictions on entry into the United States and provided for interior enforcement as well.<sup>120</sup> It expanded the list of characteristics that make a person inadmissible and provided for the deportation of anyone found in the United States within a year after entering in violation of the 1891 law.<sup>121</sup> But even as the 1891 law made explicit provisions for detaining noncitizens subject to exclusion,<sup>122</sup> it said nothing about the arrest of noncitizens in the interior of the country for prosecution under its deportation provisions.<sup>123</sup> That is to say, while the law clearly provided for the detention of noncitizens in exclusion proceedings, it did not mention arrest or detention for individuals facing deportation. Accordingly, although the agency would later take a different position, it was understood in the years following the adoption of the 1891 law that it conferred no power to arrest or detain noncitizens for deportation proceedings once they were within the United States.<sup>124</sup>

This understanding—and the agency’s attempt to balance the enforcement challenges posed by the dearth of this authority with an awareness that the power should be limited—became evident in the critical system-building years that followed. The 1891 Act not only imposed new restrictions on immigration, but also laid the groundwork for the agency to formalize immigration procedures and create a more robust administrative structure to implement

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118. *Id.*

119. See 1895 CGAR 16; IMMIGR. SERV., TREASURY DEP’T, DOC. NO. 1817, REPORT OF THE IMMIGRATION INVESTIGATING COMMISSION 13 (1895); Treas. Circular 14599 (Jan. 30, 1894); Treas. Circular 15275 (Sept. 17, 1894).

120. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

121. *Id.* §§ 1, 11.

122. *Id.* §§ 8, 10; see also Treas. Circular 14498 (Nov. 29, 1893); Treas. Circular 13929 (Apr. 22, 1893) [hereinafter Apr. 22, 1893 Circular].

123. See generally § 11, 26 Stat. 1084. See also *infra* note 133.

124. 1896 CGAR 18; DOC. NO. 1817, *supra* note 119, at 41; T.D. 14493, SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT FOR THE YEAR ENDING DECEMBER 31, 1893, at 866 (1894).

it.<sup>125</sup> Among other things, it created the Office of the Superintendent of Immigration, a dedicated subcomponent of the Treasury Department, and empowered the superintendent to supervise immigration inspectors—the officers enforcing the general immigration laws on the ground.<sup>126</sup> A few years later, Congress converted the Office of Immigration to bureau status, designating it as the Bureau of Immigration and its head official as the commissioner-general of immigration.<sup>127</sup> And the agency, citing increased responsibilities and authority, began growing its workforce and developing systems for administering and enforcing the new law.<sup>128</sup>

Shortly thereafter, the Bureau of Immigration began making recommendations to Congress to improve the administration of the immigration system and increase its enforcement capabilities. Creating arrest authority to enforce the 1891 law's deportation provisions was high among its early priorities.<sup>129</sup> In particular, the bureau requested legislation that would increase its interior arrest authority in two ways. First, it requested that Congress grant the secretary power to issue arrest warrants for purposes of enforcing the 1891 law against people who had already entered the United States.<sup>130</sup> Second, the bureau sought to expand the number of executive officers who could provide agency sign-off for arrests from one (the secretary) to two.<sup>131</sup> To that end, it requested legislation providing the commissioner-general a "right, *with limitations*, to apply to the United States courts for the arrest of immigrants" within the United States.<sup>132</sup> In other words, the bureau sought legislative authorization to permit the commissioner-general—but no one else—to seek arrest warrants from a judge, but did not request that the commissioner-general be vested with power coextensive with the secretary's that would have allowed him to issue the warrants himself.

The bureau's arrest authority requests both reflected its desire for increased authority and hinted at its basic assumptions about the limits of deportation arrest authority at that time. For example, they indicated that the bureau presumed that any additional administrative warrant-issuing authority would be like that conferred by the 1888 Act—permitting only an arrest warrant issued by the secretary himself. In addition, the explicitly limited nature of the requested legislation granting the commissioner-general authority to even *seek* arrest authorization from a court underscores the degree to which

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125. At this point the federal government, at least as an administrative matter, assumed "full and exclusive control" of the immigration regime. SALYER, *supra* note 43, at 26.

126. §§ 7–8, 26 Stat. 1084; *see also* ORGANIZATION OF THE IMMIGRATION SERVICE, LETTER FROM THE SECRETARY OF TREASURY, H.R. Exec. Doc. No. 206 (1895); Apr. 22, 1893 Circular, *supra* note 122.

127. *See* Act of Mar. 2, 1895, Pub. L. No. 53-177, 28 Stat. 764, 780.

128. *See* H.R. Exec. Doc. No. 206; Apr. 22, 1893 Circular, *supra* note 122.

129. *See, e.g.*, 1896 CGAR 18–19; DOC. NO. 1817, *supra* note 119, at 41, 44.

130. 1896 CGAR 18–19; DOC. NO. 1817, *supra* note 119, at 41.

131. *See* 1896 CGAR 21; DOC. NO. 1817, *supra* note 119, at 44.

132. 1896 CGAR 21 (emphasis added).

deportation arrest authority—in contrast to many of the agency’s other activities—was understood to be specially constrained and reserved for judicial and quasi-judicial, structurally distinct actors. Taken together, these requests suggest that the enforcement agency itself found the notion of inferior officers—even ones as high-ranking as the commissioner-general—authorizing arrests to be undesirable or problematic, intimating concerns similar to those expressed by agency officials in the decades that followed.<sup>133</sup> Despite these entreaties, and even as it adopted other immigration-related legislation,<sup>134</sup> Congress did not act on these requests for another decade.

By 1899, the agency had reversed course and adopted a different view of the 1891 Act. It developed the position that some ambiguous language in the 1891 Act, in combination with the 1888 Act, permitted the secretary to issue warrants for the arrest of noncitizens subject to deportation under the 1891 law.<sup>135</sup> The question of whether the 1891 Act in fact conferred such authority was still apparently one of first impression in 1899—and one on which courts vehemently disagreed given the magnitude of the power at issue and the statute’s failure to confer deportation arrest power in any “explicit terms.”<sup>136</sup> But ultimately, in 1903, the Supreme Court sided with the government, finding that Congress must have intended to essentially bootstrap the arrest power described in the 1888 Act into the 1891 law; it simply could not believe that Congress would have intended to allow noncitizens who were deportable at the time of entry to be insulated from arrest and therefore “entirely beyond the control or authority of the executive officers of the Government.”<sup>137</sup> Ironically, however, the Supreme Court’s decision affirming the secretary’s warrant-issuing authority under the 1891 Act came a month after Congress finally passed legislation that conferred interior deportation arrest authority in clear terms.

A month before the Supreme Court’s decision, Congress enacted a new general immigration law that incorporated a number of the bureau’s requests

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133. See *infra* Part III.

134. See, e.g., Act of June 6, 1900, Pub. L. No. 56-791, 31 Stat. 588, 611; Act of Mar. 2, 1895, Pub. L. No. 53-177, 28 Stat. 764, 780; Act of Aug. 18, 1894, Pub. L. No. 53-301, 28 Stat. 372, 390.

135. See, e.g., *Yamataya v. Fisher*, 189 U.S. 86, 87, 99 (1903); *In re Yamasaka*, 95 F. 652, 652–55 (D. Wash. 1899), *rev’d sub nom.* *United States v. Yamasaka*, 100 F. 404, 406–07 (9th Cir. 1900).

136. *In re Yamasaka*, 95 F. at 655 (finding that “the law does not confer power upon ministerial officers to arrest them, or adjudicate any controverted question respecting their freedom to remain in this country” and noting that the parties had identified no case that “justifies th[is] assumption of power . . . not conferred upon such officers in explicit terms by an act of congress”).

137. *Yamataya*, 189 U.S. at 99. *Yamataya* recognized a right to procedural due process in connection with deportation proceedings and interpreted the Act in that light, but it did not consider the constitutionality of the Act itself. *Id.* at 97, 100–01. Had it considered the validity of the statute in light of other substantive constitutional constraints—such as the ones required in criminal cases, as it did in *Wong Wing v. United States*, 163 U.S. 228 (1896)—the history of our deportation arrest regime might have been quite different. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1897 (2000).

over the prior decade.<sup>138</sup> Substantively, the law dramatically expanded the list of people subject to exclusion and lengthened what was effectively a statute of limitations for deportation for certain newly arrived immigrants.<sup>139</sup> In terms of process, Congress finally granted the bureau's request for legislation conferring authority to make arrests to enforce the general deportation laws, but only in part. With respect to the bureau's request to expand the secretary's warrant-issuing power, Congress acquiesced by adding language virtually identical to the arrest provision of the 1888 Act; it authorized the Secretary to "cause such alien . . . to be taken into custody and returned to the country whence he came."<sup>140</sup> Congress clarified this grant of authority a few years later, amending it to specify how these arrests were to be executed: upon "warrant of the Secretary of Commerce and Labor" (as the bureau had, by then, been moved from Treasury into the newly created Department of Commerce and Labor).<sup>141</sup> But Congress declined the bureau's request to grant the commissioner-general even limited authority to seek warrants from courts and did not vest him or any other administrative officers with the power to authorize arrests themselves.<sup>142</sup>

Though, as Part III describes, Congress continued to expand the nation's deportation laws in the years that followed, it retained this scheme for the next four decades.<sup>143</sup> The next Section describes how the agency created administrative processes and standards to implement its new arrest authority, and, in so doing, designed the United States' first—and long-lasting—general deportation arrest scheme.

### B. *Designing the Deportation Arrest System*

Once Congress granted the secretary power to authorize deportation arrests for general interior enforcement, the agency began working to implement and proceduralize the use of this extraordinary power. The bureau began this process by issuing a formal arrest process directive—Department Circular No. 8—that dictated the procedure through which the agency operationalized

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138. Act of Mar. 3, 1903, Pub. L. No. 57-162, 32 Stat. 1213.

139. *Id.* §§ 2, 20, 21.

140. Compare *id.* § 21, with Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479.

141. Act of Feb. 20, 1907, Pub. L. No. 59-96, § 20, 34 Stat. 898, 904–05; Act of Apr. 28, 1904, Pub. Res. No. 58-34, 33 Stat. 591.

142. See Act of Feb. 20, 1907, Pub. L. No. 59-96, § 20, 34 Stat. 898, 904-05.

143. See U.S. DEP'T OF LAB., COMM. ON ADMIN. PROC., IMMIGR. & NATURALIZATION SERV., REPORT ON IMMIGRATION PRACTICE AND PROCEDURE 26 (1940) [hereinafter 1940 ADMINISTRATIVE PROCEDURE REPORT]; U.S. NAT'L COMM. ON L. OBSERVANCE & ENF'T, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 32, 40–41 (1931) [hereinafter 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS]; see also *infra* Part IV. Congress authorized new categories of deportation arrests during this time but continued to require that they be based on secretary-issued warrants. See, e.g., Act of May 10, 1920, Pub. L. No. 66-197, 41 Stat. 593; Act of Oct. 16, 1918, Pub. L. No. 65-221, 40 Stat. 1012. For a brief discussion of a distinct category of warrantless arrests related to border enforcement authorized in 1925, see *infra* notes 245–256 and accompanying text.



this authority and, shortly thereafter, became an enduring part of the bureau's formal regulations.<sup>144</sup>

Circular 8 set forth a detailed and comparatively robust process that officers were to follow in applying for deportation arrest warrants from the secretary. It provided that applications for these warrants should be in writing, "must" contain "[a] full statement of the facts, supported if practicable by affidavits, which show the presence in the United States of the alien, whose arrest and deportation is sought, to be in violation of law."<sup>145</sup> It required officers to include documentary proof of the details of the noncitizen's entry or explain why that proof could not be obtained.<sup>146</sup> And while it acknowledged that the circumstances of a particular case may require an expedited "request by wire," it clarified that, even then, the request must contain the full statement of facts and an affirmation that the written application and proof had been forwarded to the secretary.<sup>147</sup>

Circular 8 also detailed how the secretary should decide whether arrest was justified in each case. It provided that, if the application "conform[ed] with" the regulations, the Secretary would determine whether "it appear[ed] to [him] that the alien whose arrest and deportation is sought is in the United States unlawfully and that the time within which he can be deported has not expired" and, if so, issue a warrant of arrest.<sup>148</sup> This was understood—echoing the language of the Fourth Amendment—to mean that the secretary was responsible for determining whether the application was "back[ed] up . . . with proof of 'probable cause.'"<sup>149</sup> Taken as a whole, Circular 8 required the immigration officer who sought to make an arrest to conduct a detailed investigation, articulate the factual and legal basis for the arrest, present specific facts and documentary evidence, and apply to the highest-level official in the entire agency—a member of the president's cabinet who was not part of the bureau—who determined whether there was probable cause for the arrest.

By 1907, Circular 8 was formally incorporated into the bureau's binding regulations,<sup>150</sup> cementing the agency's interior arrest scheme that remained in effect until the 1940s. During that period, the bureau made minor changes to the process.<sup>151</sup> It strengthened the evidentiary requirements in certain respects—for example, adding a provision emphasizing that the evidence submitted with the warrant application should be the "best that can be obtained"

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144. BUREAU OF IMMIGR. & NATURALIZATION, U.S. DEP'T OF COM. & LAB., BUREAU CIRCULAR 8 (Feb. 5, 1904).

145. *Id.* at 11.

146. *Id.*

147. *Id.*

148. *Id.*

149. LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY 57 (1923).

150. BUREAU OF IMMIGR. & NATURALIZATION, U.S. DEP'T OF COM. & LAB., IMMIGRATION LAWS AND REGULATIONS OF JULY 1, 1907, at 59–61 (5th ed. 1908).

151. *See, e.g., id.* (amending rule regarding service of telegraphic warrant).

and specifying types of required proof<sup>152</sup>—but it softened them in other aspects as well.<sup>153</sup> And the bureau made clear that it anticipated requiring officers to obtain additional evidence after they applied for an arrest warrant in some cases,<sup>154</sup> indicating that, even if an application was complete, approval would not be automatic. But the major elements remained the same,<sup>155</sup> and these rules established the original regulatory regime for the deportation arrest system—one that would serve as the standard for deportation arrests for approximately four decades.<sup>156</sup>

One lingering question, however, is why the bureau designed this relatively rigorous system as it did. A partial explanation may be the absence of a presumption that, without explicit legislative authorization, such authority could be administratively subdelegated at that time.<sup>157</sup> Given that, the bureau understandably interpreted the statutory text to mean that Congress did not intend for this authority to be wielded by inferior officers<sup>158</sup> and presumably that the secretary should therefore play some meaningful role in this process. But because the statute said little else about how this authority was to be exercised and because there was little threat of rigorous judicial review in that era,<sup>159</sup> the agency remained relatively free to construct the warrant-issuing process unencumbered by statutory direction or judicial intervention.

Bureau guidance provides additional insight into the agency's implementation and system design. It suggests that—even as the bureau embraced the anemic process afforded noncitizens in many aspects of the early immigration system—it viewed the deportation arrest decision as distinct, quasi-judicial, and subject to special constraints. For example, shortly after incorporating this

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152. See, e.g., BUREAU OF IMMIGR. & NATURALIZATION, DEP'T OF COM. & LAB., IMMIGRATION LAWS: RULES OF NOVEMBER 15, 1911, at 37 (1st ed. 1912) [hereinafter 1911 RULES] (requiring proof of medical certificates); BUREAU OF IMMIGR., U.S. DEP'T OF LAB., IMMIGRATION LAWS AND RULES OF JULY 1, 1925, at 126 (1925) (requiring proof of certain criminal convictions).

153. See, e.g., BUREAU OF IMMIGR., U.S. DEP'T OF LAB., IMMIGRATION LAWS AND RULES OF FEBRUARY 1, 1924, at 141 (1924) (requiring "some substantial supporting evidence").

154. 1911 RULES, *supra* note 152, at 37.

155. While some versions of the rules referenced "special regulations regarding arrest and deportation of prostitutes and procurers and anarchists and criminals," *id.* at 36 n.3, those regulations did not change the general procedure described above. See, e.g., Bureau of Immigr. & Naturalization, Dep't of Com.e & Lab., Circular No. 156 (Sep. 26, 1907).

156. See IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF LAB., IMMIGRATION RULES AND REGULATIONS 169–70 (1937); 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 26; 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 60–61.

157. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 (2004); Nathan D. Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144, 160–62 (1945); see, e.g., *Low Kwai v. Backus*, 229 F. 481, 484 (9th Cir. 1916); *Runkle v. United States*, 122 U.S. 543, 557–60 (1887).

158. See 1920 DEP'T OF LAB. ANN. REP. 73–75 (recognizing that the warrant-issuing power could not be delegated, even in effect, to inferior "ministerial" officers); see *infra* note 263.

159. See, e.g., *United States ex rel. Rosen v. Williams*, 200 F. 538, 539–41 (2d Cir. 1912); *Siniscalchi v. Thomas*, 195 F. 701, 705 (6th Cir. 1912).

arrest procedure into formal regulations, the commissioner-general explicitly recognized “the gravity” of the decision to authorize a deportation arrest.<sup>160</sup> And though ministerial bureau officers routinely made decisions as weighty as adjudicating the right of entry and exclusion,<sup>161</sup> the commissioner-general noted that the power to authorize arrests within the nation’s interior was “an extraordinary one” to place in the hands of any administrative officer, and the exercise of this power in particular “require[d] great care and deliberation.”<sup>162</sup> Some years later, the secretary similarly made it plain that he viewed this grant of authority as quasi-judicial and distinct from other decisionmaking authority vested in agency officers.<sup>163</sup> And at least some early agency guidance reflects this same thinking, reaffirming the important constitutional rights at stake and the enduring need to protect against the risk of “arbitrar[y]” apprehensions.<sup>164</sup> Indeed, an assistant secretary of labor during this same period echoed this sentiment, characterizing the power to authorize deportation arrests as an “extensive” one to vest in an administrative officer and worrying that it provided carte blanche to an “executive hand capable of grossly abusing lawful authority.”<sup>165</sup>

Of course, then as now, arresting officers sometimes violated the rules designed to constrain them.<sup>166</sup> This happened perhaps most famously in the “Palmer Raids” of 1919–1920, in which the DOJ engineered the widespread arrests of suspected anarchists and communists for the purpose of deporting them from the United States.<sup>167</sup> The DOJ convinced the acting secretary of labor to issue arrest warrants for some of these individuals, but many more were arrested without warrants.<sup>168</sup> But, while the conventional account would suggest that these arrests would be broadly sanctioned, this widely publicized departure from the statute and rules drew intense criticism from prominent

160. 1909 CGAR 147.

161. 1920 DEP’T OF LAB. ANN. REP. 73.

162. 1909 CGAR 147.

163. 1920 DEP’T OF LAB. ANN. REP. 74.

164. See, e.g., T.D. 24379, TREASURY DECISIONS UNDER TARIFF AND NAVIGATIONS LAWS, ETC. 354–55 (1903) (recognizing the need to ensure due process not only in deportation proceedings, but also in deportation arrests).

165. Louis F. Post, *Administrative Decisions in Connection with Immigration*, 10 AM. POL. SCI. REV. 251, 259 (1916).

166. See, e.g., *supra* note 80.

167. See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 229–31 (rev. ed. 2002); POST, *supra* note 149, at 78–81.

168. WILLIAM PRESTON, JR., ALIENS AND DISSENTERS 168 (2d ed. 1994); POST, *supra* note 149, at 78–81, 85; *Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens: Hearing Before the H. Comm. on Rules*, 66th Cong. 42, 51 (1920); *Administration of Immigration Laws: Hearing Before the H. Comm. on Immigr. & Naturalization*, 66th Cong. 105, 129 (1920); R.G. BROWN, ET AL., REPORT UPON THE ILLEGAL PRACTICES OF THE U.S. DEPARTMENT OF JUSTICE 37–41 ex. 11 (1920) [hereinafter BROWN REPORT]. By this point, the Department of Labor had separated from the Department of Commerce and the Bureau of Immigration and Nationalization was transferred to the Department of Labor. Act of Mar. 4, 1913, ch. 141, 37 Stat. 736.

members of the legal establishment, members of government, and the subsequent acting secretary alike.<sup>169</sup> Thus while this was far from the only time immigration officers made deportation arrests before obtaining the required warrants and in violation of agency rules,<sup>170</sup> the reaction to this unusually public violation reflected significant disapproval. Moreover, the fact that arresting officers sometimes ignored the rules designed to constrain them says more about the lack of oversight or remedies than the design of the deportation arrest scheme itself.

### C. *The Geary Act*

There was, however, a notable early deviation from the structure above: a warrantless arrest provision adopted through an amendment to the Chinese exclusion laws. Amid mounting concerns about difficulties enforcing the Chinese exclusion laws,<sup>171</sup> Congress enacted a law as infamous now as it was controversial then: the Geary Act of 1892.<sup>172</sup> This law not only temporally extended the Chinese exclusion laws then in effect, but also imposed new requirements, procedures, and harsh penalties applicable to Chinese citizens seeking admission to and within the United States.<sup>173</sup>

Of particular note, Section 6 of the Act required Chinese laborers lawfully within the United States on the date of its adoption to register with the government and carry certificates proving their lawful residence, subjecting them to arrest and potentially deportation if found without such certificates.<sup>174</sup> Section 6 also inaugurated an arrest procedure that was wholly new in the federal deportation regime: it permitted deportation arrests without a judicial warrant, authorizing enforcement officers to execute warrantless arrests for Section 6 prosecutions.<sup>175</sup> At the same time, the Geary Act left in place the longstanding requirement of a judicial warrant for deportation arrests under the other provisions of the Chinese exclusion laws.<sup>176</sup> And in at least one important respect, Section 6 arrests still more closely resembled arrests in the modern criminal system than in the modern immigration context: people arrested for such prosecutions were presented to a neutral and detached judicial

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169. See, e.g., PRESTON, *supra* note 168, at 221–22; BROWN REPORT, *supra* note 168, at 4–5, 7; POST, *supra* note 149, at 92–93.

170. The then-assistant secretary of labor commented in 1916 that “[t]his extensive power has seldom if ever been seriously abused,” Post, *supra* note 165, at 259, but that changed in later years given increasing enforcement pressures and the practical constraints of the warrant process. See *infra* Part IV.C.

171. SALYER, *supra* note 43, at 43–45.

172. Geary Act, ch. 60, 27 Stat. 25 (1892) (repealed 1943).

173. *Id.*

174. *Id.* § 6.

175. *Id.*

176. See, e.g., *United States v. Chin Nun Gee*, 45 F.2d 225, 226 (W.D. Wash. 1930); *Hee v. United States*, 19 F.2d 335, 336 (1st Cir. 1927), *rev'd on stipulation of counsel*, *Hee v. United States*, 276 U.S. 638 (1928).

officer.<sup>177</sup> Still, this warrantless arrest provision represented a sharp—if narrow—departure from the otherwise consistent laws and administrative rules requiring judicial or high-level, quasi-judicial authorization pre-arrest.

But the Geary Act was hardly uncontested or broadly sanctioned.<sup>178</sup> Even within a nation that had accepted previous immigration measures directed at Chinese citizens, the Geary Act drew fire for its substantively and procedurally harsh provisions.<sup>179</sup> It engendered “mass resistance” from the Chinese community and criticism from commentators and legislators as well.<sup>180</sup> Indeed, it was believed, by “many in the legal community” and elsewhere, to violate the Constitution.<sup>181</sup> Because of this broad opposition and at the request of the Chinese minister, a test case challenging Section 6 was expedited for review before the U.S. Supreme Court.<sup>182</sup>

The test challenge reached the Supreme Court shortly thereafter, consolidated as the now-well-known *Fong Yue Ting v. United States*.<sup>183</sup> The petitioners briefly raised a Fourth Amendment challenge to the Act’s arrest provision (among a host of other claims).<sup>184</sup> However, they focused on arguing that mandating the deportation of Chinese individuals who had been lawfully residing within the United States was, for a variety of reasons, “beyond the power of

177. This was presumably why *Abel* did not cite the Geary Act among the prior laws on which it relied. See *Abel v. United States*, 362 U.S. 217 (1960); Geary Act § 6; Chinese Exclusion Act, ch. 126, § 12, 22 Stat. 58, 61 (1882).

178. Cf. *Abel*, 362 U.S. at 233–34.

179. For an in-depth and insightful account of the resistance—including through litigation—to the Chinese exclusion laws and the laws’ legacy in the U.S. immigration system, see SALYER, *supra* note 43.

180. Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 L. & SOC. REV. 249, 272 n.13 (2001); SALYER, *supra* note 43, at 54–55 (describing contemporaneous criticisms, including the concern that it violated the United States’ treaty obligations to China); see also, e.g., 53 CONG. REC. 2435–36, 2447, 2451 (1893); 23 CONG. REC. 3878, 3923 (1892); *All for Delay*, S.F. CALL, May 21, 1893; *Chinese Exclusion*, BUFFALO COURIER, July 7, 1893, at 4; *Chinese Exclusion Act. Retaliation Feared if It Be Enforced—Repeal Called for.*, N.Y. TIMES, Jan. 27, 1893, at 2; *The Chinese Exclusion Bill*, 54 AM. ADVOCATE PEACE 67 (1892); *Chinese Exclusion*, RED BLUFF DAILY NEWS, Oct. 11, 1892.

181. KANSTROOM, *supra* note 43, at 118; MAX J. KOHLER, IMMIGRATION AND ALIENS IN THE UNITED STATES 411 (1936); see, e.g., *Testing the Geary Act*, N.Y. TIMES, May 4, 1893; see also *The Geary Act Discussed*, S.F. CALL, July 31, 1893 (reporting that, when President Cleveland used his influence to expedite the Court’s consideration of the test case, it was expected to be resolved in favor of those challenging the Act).

182. George E. Paulsen, *The Gesham-Yang Treaty*, 37 PAC. HIST. REV. 281, 281–84, 286 (1968); see also SALYER, *supra* note 43, at 48.

183. *Fong Yue Ting v. United States*, 149 U.S. 698 (1892). The decision was issued within ten days of the registration period’s end. Chin, *supra* note 104, at 16–18.

184. See Brief on Behalf of the Petitioners, Appellants, on Appeals from Orders Dismissing Writs of Habeas Corpus and Remanding Appellants to the Custody of the United States Marshal at 74–76, *Fong Yue Ting v. United States* 149 U.S. 698 (1893) (No. 1,345) [hereinafter App. Br.]; see also App. Br., *supra*, at 65 (incorporating a version of this point in the due process-based challenge). Despite the relative lack of emphasis, this argument resonated strongly with Justice Field, one of the dissenters in this case. *Fong Yue Ting*, 149 U.S. at 760 (Field, J., dissenting).

Congress” and that Section 6—especially its provision that made deportability essentially hinge on the certification of a nonjudicial officer—deprived the alleged noncitizen of due process.<sup>185</sup> The case divided the Court, but the majority rejected these challenges, relying on the plenary power doctrine developed in the context of exclusion in affirming the government’s broad power to regulate immigration in the interior.<sup>186</sup>

Section 6 thus survived, but implementation of its enforcement provisions remained stalled.<sup>187</sup> For one thing, enforcement was practically difficult due to orchestrated “massive noncompliance” and a “severe shortage of funds.”<sup>188</sup> For another, enforcement would create considerable concerns for relations with China.<sup>189</sup> Given this and the anticipated legislative modification, Section 6 enforcement was put largely on hold.<sup>190</sup> This standstill did not last forever, but it did last long enough for Congress to adopt legislation extending the Act’s registration period and for China to order Chinese citizens to comply.<sup>191</sup>

Yet, the bureau—by then also charged with enforcing the Chinese exclusion laws<sup>192</sup>—soon found itself with new reasons for declining to invoke Section 6’s warrantless arrest provision. First, as the commissioner-general repeatedly explained, interior enforcement of the Chinese exclusion laws was difficult because the bureau continued to encounter widespread opposition by the public and even judges.<sup>193</sup> As a result, by 1905, the bureau had already developed a “general policy” of making arrests under the Chinese exclusion laws in the interior of the United States only in “flagrant cases”<sup>194</sup> and “as gradually and at as infrequent intervals as a proper enforcement of the [Chinese exclusion] law would permit.”<sup>195</sup>

185. App. Br., *supra* note 184, at 13–74; *see also* SALYER, *supra* note 43, at 48–52.

186. *Fong Yue Ting*, 149 U.S. at 714, 723, 728, 732 (rejecting the argument that expulsion from the nation’s interior was punitive and therefore required the constitutional protections applicable in criminal proceedings).

187. SALYER, *supra* note 43, at 55.

188. *Id.*; Paulsen, *supra* note 182, at 282, 288.

189. Paulsen, *supra* note 182, at 283, 286–89.

190. SALYER, *supra* note 43, at 55; Paulsen, *supra* note 182, at 283, 285, 287, 289.

191. *See* Act of Nov. 3, 1893, ch. 14, 28 Stat. 7; Paulsen, *supra* note 182, at 290, 293; *see also* Gabriel J. Chin & Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 *ASIAN AM. L.J.* 39, 45 (2016) (“Instead of mass deportation, . . . Congress agreed to give them another chance to register.”).

192. Act of Feb. 14, 1903, ch. 552, 32 Stat. 825, 828–29; Act of June 6, 1900, ch. 791, 31 Stat. 588, 611; Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882–1924*, *J. AM. ETHNIC HIST.*, Spring 2002, at 53 & 61 n.75.

193. *See, e.g.*, 1906 CGAR 75–76; 1905 CGAR 79–81; 1904 CGAR 137.

194. 1908 CGAR 148.

195. SEC’Y OF COM. & LAB., *COMPILATION FROM THE RECORDS OF THE U.S. BUREAU OF IMMIGRATION OF FACTS CONCERNING THE ENFORCEMENT OF THE CHINESE-EXCLUSION LAWS*, H.R. REP. NO. 59-847, at 76–77 (1906).

Second, by approximately 1906, the bureau had begun arresting and prosecuting Chinese citizens under the deportation-related provisions of the general immigration laws instead of Section 6 (or other Chinese exclusion law provisions).<sup>196</sup> It did so after concluding that Congress, in enacting the 1903 (and subsequently 1907) general immigration laws, granted the bureau authority to prosecute individuals covered by Chinese exclusion laws under the general immigration laws.<sup>197</sup> This shift was considered advantageous because prosecution under the general immigration laws limited the prodigious federal court litigation that occurred in many Chinese exclusion law cases and because providing judicial hearings for deportation proceedings (which offered alleged Chinese citizens certain legal advantages that administrative admission proceedings did not) was thought to incentivize surreptitious entry.<sup>198</sup> As a result of this change, arrests under the Chinese exclusion laws came to comprise a small fraction of immigration enforcement in the years that followed: by 1920, the bureau reported only thirty-one deportation arrests under *any* provision of the Chinese exclusion laws whereas it authorized 9,851 under the general immigration laws.<sup>199</sup>

Moreover, bureau reports strongly suggest that, of the Chinese exclusion law prosecutions that were initiated, few actually involved warrantless arrests. For instance, in 1908–1919 (the only years for which this data was provided), all reported deportation arrests under the Chinese exclusion laws were made pursuant to judicial warrants—and not Section 6’s warrantless arrest provision.<sup>200</sup> While this may seem counterintuitive, it makes some sense, both because the number of people chargeable under Section 6 dwindled as time went

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196. SALYER, *supra* note 43, at 115; 1912 CGAR 19 (explaining that the bureau had been enforcing these laws consistent with this interpretation for “about six years”).

197. See *Ex parte Li*, 174 F. 674, 683 (N.D.N.Y. 1909); *Looe Shee v. North*, 170 F. 566, 572 (9th Cir. 1909); 24 Op. Att’y Gen. 706 (1903); see also DARRELL HEVENOR SMITH & HENRY GUY HERRING, *THE BUREAU OF IMMIGRATION: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 23–34 (1924); DEP’T OF COM. & LAB., *BUREAU OF IMMIGR. & NATURALIZATION, TREATY, LAWS, AND REGULATIONS GOVERNING THE ADMISSION OF CHINESE* 53 (1910). This interpretation was not uncontested, but the Supreme Court upheld it in 1912—though limited its application in 1918—and Congress adopted a law in 1917 that clarified the general immigration laws’ application to those covered by the Chinese exclusion laws. SALYER, *supra* note 43, at 115, 187, 256 n.26.

198. SALYER, *supra* note 43, at 115; H.R. DOC. NO. 59-347, at 8–9 (complaining of the extensive litigation in Chinese exclusion law cases compared to prosecutions under the general immigration laws); see also SEC’Y OF COM. & LAB., *REPORTS OF THE DEPARTMENT OF COMMERCE AND LABOR*, H.R. DOC. NO. 60-1048, at 21–22 (1908); 1908 CGAR 221.

199. 1920 CGAR 274, 308; see also, e.g., 1929 CGAR 20, 22. These figures are drawn from data reported by U.S. marshals, who were not the only government officers authorized to effect such arrests. These reports do not indicate whether the figures include arrests by other officers, but the marshals would have been aware of all arrests through the subsequent court proceedings. See SMITH & HERRING, *supra* note 197, at 96.

200. 1919 CGAR 256; 1918 CGAR 52, 221; 1917 CGAR 11; 1916 CGAR 11; 1915 CGAR 56, 174 (reporting data for 1914 and 1915); 1913 CGAR 24, 145; 1912 CGAR 19, 169 (reporting data for 1912 and 1911); 1910 CGAR 113, 130; 1909 CGAR 109, 126; 1908 CGAR 153, 221.

on<sup>201</sup> and because if prosecutors wanted to lodge other charges under the Chinese exclusion laws, arrests had to be made based on a judicial warrant.<sup>202</sup> Thus, although officers were empowered to make warrantless arrests for a particular subset of Chinese exclusion law cases, such arrests were relatively rare: instead, the agency made the vast majority of arrests under the general immigration laws and the procedure described above,<sup>203</sup> and it appears that many—perhaps most—of the Section 6 cases it prosecuted were initiated through judicial-warrant-based arrests.<sup>204</sup> Accordingly, given the relatively small portion of deportation arrests that involved Section 6’s warrantless provision, the processes for deportation arrests became largely unified as a matter of practice.

This is not to discount the repugnant and enduring impacts of the Chinese exclusion laws. Scholars have extensively and thoughtfully documented the influence of these laws on our immigration system, persuasively arguing that foundational norms undergirding subsequently adopted general immigration laws were initially forged through practices and doctrines established in the context of the Chinese exclusion laws.<sup>205</sup> As Lucy Salyer in particular has demonstrated, the struggle and precedents that emerged from these laws—including the Geary Act—had “radiating effects” on the law and a “powerful effect on the shape and enforcement of immigration laws throughout the nation” that has continued to the present day.<sup>206</sup> And, of course, the existence of this law mattered—after all, the awareness that the government could exercise its power in a particular way can have significant impacts in society even if that power is infrequently used.<sup>207</sup>

Yet, for present purposes, it is worth focusing on Section 6 in particular and recognizing that its legal validity was deeply disputed, the relative use of its arrest provision was quite limited, and those arrested and prosecuted under Chinese exclusion laws were brought before a judicial officer; as such, it offers a poor gauge of broad assent to probable cause determinations made solely by executive officers.<sup>208</sup> Moreover, as the next Part shows, this warrantless arrest provision neither quelled the concerns voiced decades later in debates about

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201. This is because Section 6 only applied to Chinese laborers within the United States on the date of its 1892 adoption. Geary Act, ch. 60, § 6, 27 Stat. 25, 25 (1892).

202. See *supra* note 176.

203. See, e.g., *supra* note 200; 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 33 (explaining that “the great majority of Chinese cases may be treated administratively” under the general deportation laws).

204. See, e.g., *Fong v. United States*, 113 F. 898 (9th Cir. 1902).

205. See, e.g., SALYER, *supra* note 43, at xvii, 245–49; *Policing*, *supra* note 42, at 1803–08; NGAI, *supra* note 43, at 18, 57; Lee, *supra* note 192, at 53–56; Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998).

206. SALYER, *supra* note 43, at xvii.

207. See, e.g., *Policing*, *supra* note 42, at 1804.

208. This law also permitted and relied upon racial constructs of membership within the polity and race-based policing, see *Policing*, *supra* note 42, at 1804–07, 1812—an independent reason for declining to rely on it today.



subdelegating the power to authorize deportation arrests to ministerial enforcement officers nor served as a model for the warrantless arrest processes eventually adopted. In other words, while Section 6 presents a historical example of low-level enforcement officers having authority to authorize initial arrests in a subset of cases, it was an aberration, a highly contested one, and one that, in the early 1900s, was quickly eclipsed by the use of the secretary-issued warrant scheme described above.<sup>209</sup>

In sum, although the early immigration structure was notoriously devoid of process and protections for those within it, the early deportation arrest scheme was different in important ways. With the exception of the contested and comparatively infrequently used process under Section 6, the early deportation arrest scheme was designed to be relatively rigorous and befit the quasi-judicial status it was often ascribed. It included demanding evidentiary requirements, required articulable facts demonstrating the factual and legal basis for the arrest, and imposed a separation between the ministerial enforcement officer seeking the arrest and the structurally distinct, high-level adjudicator determining whether that evidence showed probable cause. Thus, while the conventional account articulated in *Abel* is correct to the extent that it reports that a substantial portion of deportation arrests were authorized by executive officers in the early federal system, it glosses over the very different way that this executive arrest authority was structured. Specifically, it ignores the fact that the system was designed to impose far greater constraints on officers' arrest authority and a mechanism for robust, structurally separate review that is absent in the modern deportation arrest regime. Given these distinctions, it is difficult to conclude—as virtually all courts to consider the issue have—that the acceptance of this early scheme justifies deportation arrest practices today.

### III. CONSIDERING AND RESISTING SUBDELEGATION

But the question of whether to expand the power to authorize deportation arrests beyond the secretary reemerged more strongly in the decades that followed as powerful nativist forces gained sway in Congress. This Part begins by describing how the deportation system transformed as legislators adopted restrictive laws that dramatically changed the bureau's work; it then recounts the decades-long debate about the practical challenges associated with administering an expanding deportation regime with only a single warrant-issuing entity. It demonstrates that, despite these phenomena and even amid intense enforcement pressures, Congress consistently declined to adopt legislation that would have permitted the agency to subdelegate the power to authorize deportation arrests within our nation's interior. Indeed, it shows policymakers' enduring concerns about the risks of putting this extraordinary power into

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209. The Chinese exclusion laws were repealed in 1943. Act of Dec. 17, 1943, Pub. L. No. 78-199, 57 Stat. 600.

low-level officers' hands and—rather than broad sanction—the continued repudiation of a regime like the one in place today.

### A. Nativist Pressures and the Deportation Bureau

Although Congress had, between the 1880s and 1920s, expanded the list of people who were subject to exclusion and deportation, “few people were actually excluded or deported” during that time.<sup>210</sup> But during and after World War I, xenophobia, racism, and anti-immigrant hostility grew in intensity and scope.<sup>211</sup> This—along with increased immigration from certain European countries, lingering wartime nationalism, and a global shift toward rigid, controlled borders—contributed to anti-immigrant nationalism and a perceived need to maintain the ethnic and racial composition of the country’s then-recognized founders.<sup>212</sup> Consequently, immigration policy and immigration itself began to shift, putting new political and practical pressures on the agency charged with enforcement.

This set of forces provided an opportunity for Congress to pass a wave of restrictive legislation.<sup>213</sup> In 1917, Congress passed a new comprehensive immigration law that broadened the categories of people subject to deportation, extended the statute of limitations for certain deportation grounds, and eliminated it in others.<sup>214</sup> But the 1917 law, like prior general immigration laws, did not impose the numerical restrictions the public increasingly demanded, and Congress soon began considering laws that would.<sup>215</sup> In 1921, Congress adopted the first immigration law that numerically restricted European immigration based on country of origin, limiting entry to 3 percent of the foreign-born population for each nationality under the 1910 census.<sup>216</sup> Three years later, it adopted the “Quota Act” of 1924, which limited immigration even further and, to preserve the racial dominance of the white population in the United States before the recent waves of immigration, adopted an even more

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210. NGAI, *supra* note 43, at 59. This was especially true for deportation. See 1920 CGAR 424 (reporting district commissioner’s observation that “[t]he possibility that an alien, after gaining surreptitious entry may be apprehended, is somewhat remote”).

211. See Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1019–20 (2010); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1059–65 (2022); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1924–1965*, 21 LAW & HIST. REV. 69, 75 (2003); HIGHAM, *supra* note 167, at 266–68, 308–09.

212. See Mendelson, *supra* note 211, at 1016, 1019–20; Ngai, *supra* note 211, at 75; CONG. RSCH. SERV., 96TH CONG., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE: A REP. (COMM. PRINT 1980); HIGHAM, *supra* note 167, at 266, 270–81, 289–91, 320.

213. HIGHAM, *supra* note 167, at 307–24.

214. Immigration Act of 1917, ch. 29, §§ 3, 19, 39 Stat. 874 (repealed 1952).

215. Mendelson, *supra* note 211, at 1019–20; HIGHAM, *supra* note 167, at 304–05; see, e.g., H.R. 13669, 65th Cong. (1919).

216. Emergency Quota Act, ch. 8, § 2, 42 Stat. 5, 5 (1921) (repealed 1965).

restrictive national origins quota.<sup>217</sup> In addition to constricting lawful entry, the Act also dramatically increased the pool of people subject to deportation by eliminating the prior statute of limitations on deportability for many who entered in violation of entry restrictions and by rendering deportable those who remained longer than the Act permitted.<sup>218</sup> And, in this same period, Congress continued to expand this regime by enacting new conduct-based grounds to exclude and expel noncitizens.<sup>219</sup>

This belt-and-suspenders legislative agenda transformed the bureau's mission. Following the adoption of these sweeping numerical limitations on entry, the number of people excluded from the United States increased almost three-fold;<sup>220</sup> consequently, "the inducement to enter illegally" increased dramatically as well.<sup>221</sup> This, the retraction of statutes of limitations for major grounds of deportability, and the creation of new grounds of deportability for postentry conduct, meant far more people in the interior who were permanently subject to arrest and deportation.<sup>222</sup> These features, as historian Mae Ngai has shown, "spurred a dramatic increase" in deportations and deportation's rapid ascension to "a central place in immigration policy."<sup>223</sup> Indeed, as the secretary of labor's Committee on Administrative Procedure recognized some years later, "deportation became the chief emphasis" of the bureau, one that "[o]vershadow[ed] all else."<sup>224</sup> And because this intense focus on interior

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217. Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (limiting immigration to 2 percent of the foreign-born population under the 1890 census) (repealed 1952) [hereinafter Quota Act]; HIGHAM, *supra* note 167, at 313, 319–24. For a foundational discussion of how this law was implemented to accomplish this goal and its other impacts, see NGAI, *supra* note 43, at 25–55.

218. Quota Act, §§ 2, 5, 11, 14; *see* Ngai, *supra* note 211, at 76; SMITH & HERRING, *supra* note 197, at 87–89.

219. *See, e.g.*, Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171 (repealed 1976); Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551; Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012.

220. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 32 tbl.11.

221. 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 5; *see also* 1925 CGAR 14.

222. *See* NGAI, *supra* note 43, at 78.

223. Ngai, *supra* note 211, at 70, 72, 76 (arguing that deportation "came of age" during this period due to the Quota Act's impact); *see also* HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 33, 36 tbl.17 (reflecting roughly eight-fold increase between 1918 and 1933); Ngai, *supra* note 211, at 76–77 (identifying even greater increase in "expulsions"—some through voluntary departures—during similar period); HIGHAM, *supra* note 167, at 311.

224. 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 5, 10; *see also* Ngai, *supra* note 211, at 76; 1932 CGAR 11.

enforcement meant bureau personnel “go[ing] out and look[ing] for aliens unlawfully in the country” in a way they previously had not,<sup>225</sup> the bureau was able to justify funds for its long-sought internal expansion.<sup>226</sup>

### B. *Rejecting Subdelegation*

Against this backdrop, the question of expanding deportation arrest authority reemerged. One of the earliest and most enduring calls for this expansion came out of a 1923 meeting of the Interstate Conference on Immigration, a ten-state coalition focused on securing legislation to reduce “the burden of the alien insane.”<sup>227</sup> While the conference had a number of complaints about the federal government’s “laxity” in enforcement, the expansion of warrant-issuing authority—specifically the subdelegation of arrest-warrant-issuing authority to the local commissioner in charge of each district or port—was first on its list of legislative priorities.<sup>228</sup> This push was led primarily by Conference Chair Spencer Dawes (an influential immigration-restrictionist) who sought to increase the number of arrests and deportations by making the arrest-warrant-issuing power more diffuse and local.<sup>229</sup>

Dawes’s proposal for expanding interior arrest authority became a regular feature of the House deportation debates of the 1920s, beginning with the eugenics-laced hearings preceding the enactment of the 1924 Quota Act. During these hearings, Representative Raker raised the idea of expanding warrant-issuing authority by introducing the conference chair’s recommendations as

225. NGAI, *supra* note 211, at 80 (quoting *Lack of Funds for Deportations, Hearings on H.R. 3, H.R. 5673, and H.R. 6069 Before the H. Comm. on Immigr.*, 70th Cong. 20 (1928)).

226. 1931 CGAR 13 (reporting “marked” increase in deportation-related enforcement following additional funds being appropriated by Congress); 1928 CGAR 31 (seeking funds for a “larger [work]force”); 1926 CGAR 21 (“It is quite obvious that there is a vast amount of warrant and deportation work ahead of the bureau, and only an adequate appropriation of funds and suitable legislation are needed to carry it on effectively.”); *see also* 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 5 (describing the “rapid increase of personnel”).

227. N.Y. STATE HOSP. COMM’N ANN. REP. 39–41 (1925); *Interstate Conference on Immigration*, 9 STATE HOSP. Q. 88, 88–89, 102–03 (1923) [hereinafter *Interstate Conference*]. This was not the earliest the idea was ever raised; for example, officers within the bureau suggested devolving the arrest power in their reports on district activities in 1920. 1920 CGAR 425, 450–51 (containing one officer’s recommendation that officers in charge of districts be permitted to issue arrest warrants and another officer’s suggestion for a law permitting warrantless arrests). However, as far as I can tell, the suggestion was not seriously considered by Congress until Dawes, Curran, and others began raising it years later.

228. *Interstate Conference*, *supra* note 227, at 88–90, 93, 102 (focusing on the delegation of warrant-issuing authority in deportation cases on public charge grounds); N.Y. STATE HOSP. COMM’N ANN. REP. 41 (1925).

229. *See Interstate Conference*, *supra* note 227, at 93; *Says Insane Aliens Enter Here Daily: Dr. Spencer L. Dawes Charges Wholesale Violation of Immigration Act at Ellis Island*, N.Y. TIMES, Apr. 22, 1924, at 8.

“worthy of consideration.”<sup>230</sup> Dawes’s testimony highlighted the arrest-warrant recommendation in particular, “most emphatically” advocating for the transfer of arrest-warrant-issuing power to local authorities.<sup>231</sup> Ultimately, Dawes’ warrant proposal received little additional attention then and did not materialize in the Quota Act. But Dawes was a vocal public figure and held particular sway with the nativist-dominated House Committee on Immigration and Naturalization (“House committee”),<sup>232</sup> and some version of this warrant proposal reappeared regularly in House committee hearings (and the press) through the 1920s.<sup>233</sup>

Even after the passage of the Quota Act, restrictionists felt that Congress had not gone far enough,<sup>234</sup> and legislators remained busy considering legislation focused on increasing immigration enforcement for the remainder of the decade.<sup>235</sup> A number of these bills took up the suggestion to expand the agency’s arrest authority. While none passed the Senate and few even passed the House, the debates on the arrest legislation illustrate the concerns with even a limited expansion of such authority: several examples should suffice.

For instance, during a hearing in late 1924, the committee invited various immigration officials to propose “anything that may . . . be helpful” as they considered extending or “stiffening” the deportation laws.<sup>236</sup> Commissioner Curran, who oversaw immigration enforcement at Ellis Island, elevated Dawes’s proposal to expand warrant-issuing authority by identifying the delegation of warrant-issuing authority to commissioners of local districts or ports as a priority.<sup>237</sup> Unlike Dawes, who advocated for the diffusion of warrant-issuing authority to generate more deportations and allow local actors to exert greater influence in the outcome of deportation proceedings, Curran justified his request from an administrative perspective. He explained that, “[i]f it were possible for the wise discretion of the Secretary of Labor to be exercised instantaneously in the issuance of warrants,” there would be no problem, but

230. *Restriction of Immigration: Hearings on H.R. 5, 101, and 561 Before the H. Comm. on Immigr. & Naturalization*, 68th Cong. 149–50 (1924) [hereinafter *Restriction of Immigration Hearings*].

231. *Eg., id.* at 505, 508.

232. *See* Fish, *supra* note 211, at 1060–63, 1067 n.123 (describing House committee).

233. *See, e.g., The Eugenic Aspects of Deportation: Hearings Before the H. Comm. on Immigr. & Naturalization*, 70th Cong. 57, 61 (1928); *Deportation of Alien Criminals, Gunmen, Narcotic Dealers, Defectives, Etc.: Hearings on H.R. 344 and 3774 Before the H. Comm. on Immigr. & Naturalization*, 69th Cong. 152–53 (1926) [hereinafter *Deportation of Alien Criminals, Etc. Hearings*]; *Restriction of Immigration Hearings*, *supra* note 230, at 505, 508; *Flays Officials for Insanity Flow Through Ellis I.*, BROOK. DAILY EAGLE, Nov. 10, 1925; *Says Most Insane Are Foreign Born*, BROOK. TIMES UNION, Feb. 6, 1924, at 16.

234. *See* Fish, *supra* note 211, at 1067.

235. *See* notes 231–261 and accompanying text.

236. *Proposed Deportation Legislation: Hearings before the H. Comm. on Immigr. & Naturalization*, 68th Cong. 1 (1924) [hereinafter *Proposed Deportation Legislation Hearings*].

237. Curran actually went slightly further than Dawes, seeking expanded warrant-issuing authority for all deportation arrests instead of only public-charge-based arrests. *See id.* at 3.

the week-to-ten-day delay between the application and the arrival of the warrant rendered it moot; by then, he explained, “the alien has escaped.”<sup>238</sup> For that reason, he argued, the warrant-issuing power should be exercised by officers “right on the ground.”<sup>239</sup> Notably, however, he only sought it for the higher-level officers in charge of each district and not for low-level officers who investigated cases and effected arrests.<sup>240</sup>

At this point, Dawes interjected, arguing that Congress should make this delegation even broader by vesting warrant-issuing authority in “any immigration official,” rather than only the high-ranking secretary or commissioner in charge of districts and ports.<sup>241</sup> He noted, however, that when he had advocated for such an expansion of warrant-issuing authority before, he had gotten “interference,” and he again found resistance to his suggestion.<sup>242</sup> Representative Vaile and Curran both disagreed, maintaining that this authority ought not be so widely delegated; it should *only* be wielded by “somebody in authority.”<sup>243</sup> Ultimately, a hybrid expansion provision giving warrant-issuing authority to both the commissioner-general and any immigration official to whom he delegated the power made its way into the bill that passed the House, but did not pass the Senate.<sup>244</sup>

The issue of expanding low-level immigration officers’ authority to arrest suspected noncitizens in the interior was also raised—and even more firmly repudiated—in discussions about legislation expanding border enforcement. Yet another major expansion of immigration enforcement initiated in the 1920s was the creation of the U.S. Border Patrol, a dedicated enforcement force with the bureau.<sup>245</sup> This border “police force” was initially comprised of “patrol inspectors” charged with policing the nation’s borders and especially preventing barred individuals from entering unlawfully.<sup>246</sup> Despite this mandate, it was unclear whether patrol inspectors had any arrest authority under the immigration laws.<sup>247</sup> This was a particularly complicated question because patrol inspectors were seen as distinct—the “policem[e]n” on the border—and it was “not desired” that they be vested with the same powers as immigration inspectors.<sup>248</sup>

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238. *Id.* at 3–4.

239. *Id.* at 4.

240. *See id.* at 3–5; *see also* 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 51 (explaining that immigration inspectors generally effected deportation arrests).

241. *Proposed Deportation Legislation Hearings*, *supra* note 236, at 5.

242. *Id.*

243. *Id.*

244. H.R. 11796, 68th Cong. § 19(d) (1925).

245. Act of May 28, 1924, ch. 204, 43 Stat. 205, 240.

246. *See* 1930 CGAR 35; 66 CONG. REC. 4555 (1925).

247. *See* 66 CONG. REC. 4555 (1925); 66 CONG. REC. 3202 (1925); *see also* KANG, *supra* note 43, at 48–49.

248. 66 CONG. REC. 4555 (1925).

Accordingly, Senator Reed offered a “clarifying” amendment during a debate on a broad appropriations bill nearing passage in early 1925: he proposed to create statutory authority for officers policing the border to make warrantless immigration-related arrests in certain circumstances.<sup>249</sup> Specifically, Reed’s amendment would authorize bureau employees to not only execute deportation arrest warrants, but also make warrantless arrests of any noncitizen “who in his presence, or view, is [unlawfully] entering, or attempting to enter, the United States”; however, it required that they take the noncitizen “immediately for examination before an immigration inspector, or other official having authority to examine aliens as to their right to admission to the United States.”<sup>250</sup> As Representative Johnson explained in the House, the focus of the Reed amendment was not on arrests in the interior, but narrowly on the border: its “actual purpose” was “to permit the newly established border patrol to take into custody aliens entering surreptitiously if the border patrol, who is to all intents and purposes a border policeman, sees the act of entry.”<sup>251</sup>

This amendment drew scrutiny because of the concern that it would be applied beyond the border-crossing context—namely, that it would be used to effect deportation arrests against noncitizens already in the interior.<sup>252</sup> But Reed clarified in the Senate (as Johnson did in the House) that this amendment only applied “at the border where they are patrolling,” and granted officers “no right to make arrest[s] except on sight of a violation of the immigration law as to illegal entry” and “no right to go into an interior city” to make deportation arrests.<sup>253</sup> Reed’s reassurances echoed the concerns that the agency itself expressed throughout the early twentieth century, reaffirming that “[w]e are all on the alert against granting too much power to these officials” and explaining that the unlawful entry “must be in sight of the officer himself; otherwise he has to get a warrant” to make the arrest.<sup>254</sup> With these pledges, the provision passed,<sup>255</sup> leaving untouched the default scheme requiring secretary-issued warrants for arrests outside the border-crossing context.<sup>256</sup>

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249. 66 CONG. REC. 3201–02 (1925). This amendment originated in the House committee among members who deemed it “not advisable” to attempt to add that provision to a House appropriations bill that year and “saw to it” that it was added in the Senate. *Border Patrol: Hearing on H.R. 11204 Before the S. Comm. on Com.*, 71st Cong. 2–3 (1930) [hereinafter *Border Patrol Hearings*].

250. 66 CONG. REC. 3202 (1925).

251. 66 CONG. REC. 4555 (1925).

252. 66 CONG. REC. 3202 (1925).

253. 66 CONG. REC. 3202, 4555 (1925); see also KANG, *supra* note 43, at 50–51.

254. 66 CONG. REC. 3202 (1925).

255. Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049–50.

256. See 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 26. Enforcement officers (particularly in border areas) advocated for and at times employed an expansive interpretation that permitted them to effect warrantless arrests in the interior even where it was not connected to pursuit of someone they had observed crossing the border. KANG, *supra* note 43, at 51–53, 61 (explaining that this occurred despite the fact that Congress, in adopting the 1925 Act,

The proposal to expand the power to authorize deportation arrests continued to emerge in the years that followed. These efforts generally gained little traction outside the House committee, but the hearings illustrate the continued, significant, and apparently shared concerns about vesting this authority in inferior—and particularly low-level—officers. For example, in 1926 hearings on a subsequent iteration of the deportation bill that proposed to vest warrant-issuing authority in the commissioner-general and any other officers that he may designate, then-Commissioner-General Hull singled out the provision as “far-reaching” and one of some concern.<sup>257</sup> He explained that there could be some advantage—“solely in the way of saving time”—if the warrant was issued by an officer with sufficient expertise.<sup>258</sup> However, “[i]f the number of applications which the warrant division here has denied is any criterion,” he continued, “we would have found ourselves in very serious difficulties, not only financially but legally” if this authority was vested in even “the average immigration officer in charge.”<sup>259</sup> Others expressed even greater anxiety about this “seriously defective” provision, arguing that it could result in warrant-issuing power being vested in lower-level immigration inspectors and that such a change would be reminiscent of totalitarian regimes.<sup>260</sup> In discussing 1928 legislation with substantially the same provision, the House committee minority objected to the bill’s proposed procedural changes on similar grounds.<sup>261</sup> Specifically, it protested that the arrest-warrant-issuing and other procedural changes would vest “practically all of the powers” related to the initiation and litigation of removal proceedings in immigration inspectors, making them both “complainants [and] judges”—a significant problem given that they were “not ordinarily gifted with a high degree of judicial qualities or with freedom from prejudice and bias.”<sup>262</sup>

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“did not sanction the untrammelled . . . arrests without warrant vis-à-vis immigrants”); NGAI, *supra* note 43, at 56 n.3, 83. However, that view was not supported by the legislative history, and others, including agency counsel, at least one secretary of labor, and the attorney general, disagreed with that interpretation. KANG, *supra* note 43, at 76–78; H.R. REP. NO. 79-186, at 1–2 (1945) (letter from Attorney General Biddle to Representative Dickstein); H.R. REP. NO. 78-1929, at 1–2 (1944) (letter from Attorney General Biddle to the speaker of the House of Representatives); 1931 CGAR 60 (requesting legislation that clearly conferred this authority); 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 74 (describing the broader interpretation of this statute as unsupported and the agency’s position as “variable and ambiguous”).

257. *Deportation of Alien Criminals, Etc. Hearings, supra* note 233, at 3–4. For reference to the proposed bill’s full text, see H.R. 11489, 69th Cong. § 12(d) (1926).

258. *Deportation of Alien Criminals, Etc. Hearings, supra* note 233, at 3–4.

259. *Id.*

260. *Id.* at 31–32 (statement of W.L. Darby, Secretary, Federal Council of Christ in America); see also *id.* at 92 (memorandum of American Civil Liberties Union) (identifying similar concerns). Even Curran recognized “some danger of an abuse of power if this authority is lodged in the immigration field officers,” though he believed the Commissioner-General would prevent that through judicious delegation. *Id.* at 102 (statement of H.H. Curran, Former Comm’r of Im-migr. at Ellis Island).

261. H.R. REP. NO. 70-484, at 7–8, 10 (1928).

262. *Id.* at 7.



In the end, an “abridge[d]” deportation bill was adopted in 1929, but it did not authorize subdelegating the power to authorize interior arrests.<sup>263</sup> Indeed, House Committee Chair Johnson—who had sponsored the 1928 legislation—explained that the absence of any change to the prior arrest and other deportation procedures was “key to the bill,”<sup>264</sup> emphasizing that these longstanding provisions “still stand.”<sup>265</sup> Representative Dickstein agreed, calling this bill a “decided improvement” over the prior legislation, as “[i]t does not make the inspectors of immigration judges and jurors or give them any discretionary powers.”<sup>266</sup>

In sum, despite many immigration-related laws passing during the 1920s,<sup>267</sup> Congress consistently rejected legislation that would have subdelegated arrest-warrant-issuing authority and eschewed the idea of warrantless arrests for general interior enforcement. Thus, even in an era of widespread support for increased enforcement and a high point of congressional action on that front, the legislative history of this period reflects little support for—indeed shows resistance to—a deportation arrest scheme in which low-level officers could alone decide whether to bring an individual residing within our polity into the deportation system.

### C. *Negotiating Expansion and Practical Constraints*

Yet given the practical challenges posed by the rising number of warrant applications the secretary was responsible for deciding,<sup>268</sup> the agency began more affirmatively seeking legislation authorizing a limited, decentralizing subdelegation of warrant-issuing authority. Through the early 1930s, the number of deportations remained at record highs and enforcement pressures

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263. 70 CONG. REC. 3542 (1929); Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551.

264. 70 CONG. REC. 3542–43 (1929).

265. *Id.*

266. *Id.* at 3547.

267. U.S. CITIZENSHIP & IMMIGR. SERVS., LEGISLATION FROM 1901–1940, at 3–4, [https://ilw.com/resources/Immigration\\_Legal\\_History\\_Legislation\\_1901-1940.pdf](https://ilw.com/resources/Immigration_Legal_History_Legislation_1901-1940.pdf) [<https://perma.cc/8AEE-4H9V>]; Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049–1050.

268. 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 81, 159. The secretary was eventually aided in this and other respects by two assistant secretaries and two assistants to the secretary. JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 302–03, 336–37 (1931). This practice was widely challenged, but ultimately upheld. *Werrmann v. Perkins*, 79 F.2d 467, 469 (7th Cir. 1935) (collecting cases). At the same time, bureau officers as highly placed as the commissioner-general or a district commissioner were not permitted to issue such warrants. *Low Kwai v. Backus*, 229 F. 481 (9th Cir. 1916) (finding that such authority “was committed by Congress to the Secretary of Commerce and Labor only”); CLARK, *supra* note 268, at 3020–23.

continued.<sup>269</sup> This meant that requests for secretary-issued arrest warrants remained at record highs as well.<sup>270</sup> Given this and the fact that the demands on the secretary's time increased as enforcement numbers grew, the delay associated with getting such a warrant had by this point become a major issue for the agency. Part of the problem was the lack of modern technology. Without the ability to obtain records from other agencies via email or easily searchable databases, immigration officials often had to obtain the information that formed the basis of the warrant application from the noncitizen herself.<sup>271</sup> Unsurprisingly, this frequently alerted noncitizens to the investigation and sometimes led them to flee.<sup>272</sup> A related problem was the one the bureau had raised "for years": the delay in actually receiving warrants from the secretary allowed subjects of investigations to abscond before officers could lawfully effect arrests.<sup>273</sup>

Accordingly, to "decentralize and expedite" the issuance of arrest warrants, the agency began to more persistently and pointedly ask Congress to give the agency authority to subdelegate the power to issue deportation arrest warrants to high-level executive officers.<sup>274</sup> The commissioner-general's recommendation in 1932, for example, is emblematic of what had become, as he described it, a "perennial" request;<sup>275</sup> he sought legislation "provid[ing] that arrest warrants may be issued by commissioners and district directors," either through a transfer of warrant-issuing authority to them or by giving them "equal power in that regard" with the secretary.<sup>276</sup> However, even in requesting an expansion of warrant-issuing power, the bureau acknowledged the "dan-

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269. KANSTROOM, *supra* note 43, at 161; HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 33 tbl.13, 43 tbl.20; 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 10; *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status: Hearing on S. 2969 Before the S. Comm. on Immigr.*, 74th Cong. 215–16 (1936) (report of D.W. MacCormack, Comm'r of Immigration and Naturalization) ("A record number of deportations was the chief objective and measure of efficiency.").

270. 1932 CGAR 28, 30–31; 1931 CGAR 35, 40.

271. 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 59–61. This was not true for all deportation cases, such as those where deportability could be shown through public records or testimony from others. CLARK, *supra* note 268, at 333–34.

272. 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 65; CLARK, *supra* note 268, at 336. As one commissioner-in-charge described it even in 1920, it was impracticable "to question an alien to the extent necessary to supply the information required" to apply for an arrest warrant "for as soon as the alien learns that he is under investigation he leaves for parts unknown." 1920 CGAR 425; *see also* KANG, *supra* note 43, at 78–79 (describing similar concerns raised by southwestern officials in later years).

273. 1932 CGAR 30, 50; *see, e.g.*, 1931 CGAR 67; CLARK, *supra* note 268, at 336; 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 150 (describing this as a problem of "overcentralization"); Kang, *supra* note 43, at 78–79.

274. *See* 1933 SEC'Y OF LAB. ANN. REP. 55.

275. *Id.*

276. 1932 CGAR 30, 57; *see also* 1933 SEC'Y OF LAB. ANN. REP. 55; 1931 CGAR 67.

gerous” potential for abuse if it was placed in low-level officers’ hands and opposed further subdelegation, particularly if it meant those officers making arrests without “coming to the department” first.<sup>277</sup> Thus, even while advocating for some decentralization and diffusion of warrant-issuing power, the agency continued to recognize the gravity of this power, potential for abuse, and need to constrain its use.

In the absence of a reliable way to get warrants before targets of investigations fled, enforcement officers responded by violating the agency’s rules.<sup>278</sup> Specifically—despite the higher-level concerns about vesting too much arrest authority in ministerial officers—low-level officers regularly arrested suspected deportable noncitizens in the interior before a warrant was issued, detaining them briefly while seeking a warrant and sometimes while still gathering facts to support the application.<sup>279</sup> But the agency acknowledged then—and thereafter—that there was “no legal authority” for the practice.<sup>280</sup> As Professor Kang’s illuminating, in-depth account of internal efforts to end this practice shows, the unlawful arrests became the subject of agency scrutiny in 1933 and 1934 due to mounting criticism, potential legal liability, and the fact that then-Commissioner-General MacCormack considered compliance with the governing warrant procedure important to the constitutionality of the arrest.<sup>281</sup> Ultimately, the bureau—which became the Immigration and Naturalization Service (“Service”) in 1933—issued an internal directive clarifying that officers were prohibited from executing warrantless arrests in the interior except when pursuing noncitizens caught crossing the border,<sup>282</sup> bringing agency practice for deportation arrests back into compliance with the longstanding scheme described in Part II.

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277. *E.g.*, *Border Patrol Hearings*, *supra* note 249, at 48 (responding, when asked whether he “would advise giving the field officers authority to make arrests without coming to the department here,” that it would be “a very dangerous thing to enlarge that power” by giving it to low-level officers in the interior).

278. *See, e.g.*, KANG, *supra* note 43, at 77–78; Ngai, *supra* note 211, at 56, 83; Dinwoodie, *supra* note 43, at 195.

279. *See supra* note 278; 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 65 (describing process); *see also* 1940 ADMINISTRATIVE PROCEDURE REPORT *supra* note 143, at 26; *e.g.*, *Ex parte Eguchi*, 58 F.2d 417, 417 (S.D. Cal. 1932).

280. 1934 SEC’Y OF LAB. ANN. REP. 50, 64; *see* KANG, *supra* note 43, at 77, 77 n.120 (describing the Immigration Naturalization Service’s efforts to end this practice and agency counsel’s conclusion that the practice was unlawful); H.R. REP. NO. 79-186, at 1–2 (1945) (letter from Attorney General Biddle to Representative Dickstein).

281. KANG, *supra* note 43, at 71–72, 76–77 (describing MacCormack’s statement that these arrests were being made “without due regard for our constitutional procedure”).

282. *Id.* at 72, 77, 80; *see* 1934 SEC’Y OF LAB. ANN. REP. 50, 64 (explaining that “this practice . . . was prohibited, and an inspector cannot now make an arrest unless he has a warrant in hand”); *see also* Dinwoodie, *supra* note 43, at 195; Ngai, *supra* note 211, at 83; Exec. Order No. 6166, § 14 (June 10, 1933).

While this directive helped realign enforcement practices with existing law, the practical problems with the warrant regime continued to impede enforcement,<sup>283</sup> and the corresponding reduction in arrests apparently inflamed legislators as well. Indeed, learning that so many noncitizens “escaped deportation because the Service would not resort to illegal procedure”<sup>284</sup> (i.e. warrantless arrests) appeared to galvanize Congress in a way that the agency’s previous requests had not and unleashed a new flurry of legislation proposing to expand arrest authority through the remainder of the 1930s.<sup>285</sup>

By this point, there was broad consensus that the current system of requiring secretarial warrants pre-arrest was not working, so the major percolating question was not whether to change the deportation arrest scheme, but how. Virtually all of the legislation proposing reforms to deportation arrests contained two principal features: first, a provision permitting a limited subdelegation of warrant-issuing authority to high-level officers outside the Service’s central office, and, second, a provision authorizing low-level officers to effect warrantless arrests and briefly detain people while obtaining warrants from a high-level officer.<sup>286</sup>

The proposals to subdelegate warrant-issuing authority to high-level officers encountered little opposition. At least internally, there was some recognition within the Service of drawbacks to these proposals: the risk of being influenced by local pressures, a lack of uniformity, and error, particularly given the inability to quickly access the legal advice from the central office.<sup>287</sup> But the delay in getting warrants made the current system plainly unworkable in the agency’s view.<sup>288</sup> Moreover, agency officials explained to legislators, localizing and expanding the number of warrant-issuing officers would likely lead to better determinations because the sheer volume of arrest-warrant applications and other matters under the secretary’s purview meant that she was

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283. KANG, *supra* note 43, at 79 (observing that the agency reported 2,600 escapes in its 1934 annual report); *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status*, *supra* note 269, at 216 (report of D.W. MacCormack, Comm’r of Immigration and Naturalization); 1935 SEC’Y OF LAB. ANN. REP. 90. While these public statements are somewhat laconic, Professor Kang’s account adds texture and depth, describing some of the internal challenges and criticisms (particularly by officials working in border areas) that undoubtedly influenced the agency’s positions.

284. H.R. REP. NO. 74-1110, at 5 (1935); *see also* *Deportation of Aliens: Hearings on H.R. 6795 Before the H. Comm. on Immigration and Naturalization*, 74th Cong. 30–31 (1935); S. REP. NO. 74-1156, at 3 (1935) [hereinafter *Deportation of Aliens Hearings*].

285. *See, e.g.*, H.R. 4353, 75th Cong. § 3 (1937); S. 1365, 75th Cong. (1937); H.R. 6391, 75th Cong. § 3 (1937); 81 CONG. REC. 883 (1937); H.R. 5573, 75th Cong. §§ 2–3 (1937); S. 2969, 74th Cong. § 8 (1936); H.R. 6795, 74th Cong. §§ 9–10 (1935); H.R. 8163, 74th Cong. §§ 8–9 (1935); H.R. 9725, 73d Cong. §§ 4–5 (1934).

286. *See supra* note 285.

287. KANG, *supra* note 43, at 81. Some outside the Service raised these same concerns about local pressures and overzealousness in relation to legislation proposed in 1930 that would have permitted potentially broader subdelegation. CLARK, *supra* note 268, at 337.

288. *See, e.g.*, *Deportation of Aliens Hearings*, *supra* note 284, at 6, 9, 29–30; *see* 1934 SEC’Y OF LAB. ANN. REP. 50–51.

not able to conduct a searching review of the applications anyway.<sup>289</sup> Accordingly, even while working to rein in officers who violated existing arrest restrictions, the agency continued to support the concept of slightly subdelegating and significantly geographically expanding warrant-issuing authority.<sup>290</sup>

The agency's reasoning resonated more broadly. As one illustrative House report explained, legislators supported the proposed subdelegation because, "if field officers were required to sign themselves the warrants which they now obtain by application to a higher authority they would feel more immediate responsibility and verify more carefully the grounds for arrest."<sup>291</sup> Probably more importantly from their perspective, the proposal would reduce the risk of suspected deportable noncitizens escaping. More progressive contemporaries and scholars appeared to generally agree on the practicality of subdelegating arrest-warrant-issuing authority, with some focusing on administrability challenges in the present system and others on the rubberstamp-like quality that adjudication of arrest warrant applications had assumed.<sup>292</sup>

Yet even this limited expansion of the warrant-issuing power raised some concerns. These apprehensions stemmed in part from the growing appreciation for separating administrative enforcement and adjudication powers in general and within the immigration system in particular.<sup>293</sup> From its early days, the administrative deportation system was designed such that the same enforcement officers who investigated cases also played a judge-like role in the adjudication of deportability, in essence serving as both ICE enforcement officers and a version of today's immigration court judges.<sup>294</sup> But consistent with

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289. *Deportation of Aliens Hearings*, *supra* note 284, at 29–30; *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status*, *supra* note 269, at 215–16.

290. *See, e.g.*, 1935 SEC'Y OF LAB. ANN. REP. 80, 90; 1934 SEC'Y OF LAB. ANN. REP. 50–51; 1933 SEC'Y OF LAB. ANN. REP. 54–55; *see also supra* notes 271–284.

291. H.R. REP. NO. 74-1110, at 5 (1935).

292. *See, e.g.*, 1940 ADMINISTRATIVE PROCEDURE REPORT, *supra* note 143, at 62–63 (recommending that district directors be permitted to issue arrest warrants to avoid problems of overcentralization); *To Authorize the Prompt Deportation of Criminals and Certain Other Aliens: Hearing on H.R. 5573 Before the H. Comm. on Immigration and Naturalization*, 75th Cong. 22. (1937) (statement of Frederick A. Ballard, American Civil Liberties Union) (discussing delay in warrant-issuance); *Deportation of Aliens Hearings*, *supra* note 284, at 93–98 (statement of Dwight C. Morgan, Committee for the Protection of the Foreign Born) (criticizing only the warrantless arrest provision and not the warrant subdelegation provision); *see also* KANG, *supra* note 43, at 81–84 (describing the "pro forma" process for issuing telegraphic warrants and the concerns that reformers raised regarding the warrant process, including that it relied too heavily on "blind faith that the field offices performed their jobs correctly"). *But see, e.g.*, CLARK, *supra* note 268, at 337, 362.

293. *See, e.g.*, KANSTROOM, *supra* note 43, at 170–71, 308 n.60 (discussing the increasing focus on these concerns through the 1930s); Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950) (noting concerns over "administrative impartiality" reflected in legislation as early as 1929).

294. *See e.g.*, U.S. DEP'T OF LAB. IMMIGR. & NATURALIZATION SERV., LECTURE NO. 22: WARRANT AND DEPORTATION PROCEDURE 5 (1934) [hereinafter 1934 LECTURE] ("In the past,

broader trends in the administrative state, the Service was starting to reevaluate that approach and take measures to separate enforcement and adjudicatory functions.<sup>295</sup>

This concept of separating functions emerged in the context of these warrant discussions but was stymied by the limits of the then-administrative structure. For example, one influential government-commissioned study of the immigration system recommended decentralizing arrest warrant-issuing authority and assigning it to independent local adjudicators.<sup>296</sup> Acknowledging the burden that shifting these cases to the Article III judiciary could impose on district courts, the study instead proposed that deportation arrest warrants be issued by local adjudicators within the independent tribunal it recommended creating.<sup>297</sup> Representative Kerr made a similar suggestion in a 1935 House committee hearing: he wondered why the warrant-issuing responsibility couldn't be assigned to U.S. commissioners (who were part of the federal judicial branch) rather than other administrative officers.<sup>298</sup> However, his suggestion also died due to practical constraints: Commissioner-General MacCormack explained that there were simply not enough U.S. commissioners to meet the need, indeed it was already tough to get arrest warrants from them in Chinese exclusion law cases.<sup>299</sup> And a milder version of this concern about officers acting as both investigator and adjudicator was also reflected in virtually all of the subdelegation legislation of that era in provisions that, while expanding warrant-issuing authority, would have prohibited officers from issuing warrants to authorize their own arrests.<sup>300</sup>

These concerns about the potential for abuse were magnified exponentially when it came to the second proposal: authorizing warrantless arrests and detention for a brief period to allow officers to get a warrant. For at least some supporters of such a provision, this was advantageous because it would eliminate the risk of escape while officers obtained warrants and thereby “greatly increase the number of deportations.”<sup>301</sup> Yet these bills included what were

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formal hearings have frequently been conducted by the same officer who conducted the preliminary hearing and investigation.”); *United States ex rel. Bosny v. Williams*, 185 F. 598, 599 (S.D.N.Y. 1911); *In re Lea*, 126 F. 231, 233 (D. Or. 1903). During this period, the secretary was responsible for adjudicating whether someone should be deported and issuing deportation warrants, but inspectors presiding over deportation hearings were functionally like trial judges deciding the outcome in many respects. *See infra* note 344.

295. *See, e.g.*, NGAI, *supra* note 43, at 83 (describing the imposition of a new policy that preliminary and final deportation hearings should not be conducted by the same officer); 1934 LECTURE, *supra* note 294, at 5 (explaining that, despite contrary past practice, a formal hearing to determine deportability should, if possible, be conducted by “some officer other than the investigating officer”).

296. 1931 REPORT ON ENFORCEMENT OF DEPORTATION LAWS, *supra* note 143, at 163–64.

297. *Id.*

298. *Deportation of Aliens Hearings*, *supra* note 284, at 30.

299. *Id.*

300. *See, e.g.*, H.R. 6391, 75th Cong. § 3 (1937) (“[N]o person shall act under a warrant issued by himself.”); H.R. 5573, 75th Cong. § 2 (1937); S. 2969, 74th Cong. § 8 (1936).

301. *See* H.R. REP. NO. 74-1110, at 5, 8 (1935).

seen as important safeguards: a requirement that the noncitizen arrested without warrant be “immediately” presented to another inspector and a prohibition of detention for more than twenty-four hours without a warrant.<sup>302</sup> And even then, supporters raised questions about the propriety of permitting agency employees to effect warrantless arrests, noting that its wisdom was “perhaps something debatable, because it is contrary to our general traditions of personal liberty.”<sup>303</sup>

Others testifying before Congress raised even greater objections, describing the dramatic devolution of this “extraordinary power” as “likely to abuse,”<sup>304</sup> “a dangerous lodgment of power in the hands of an over-zealous official,”<sup>305</sup> and an affront to longstanding traditions and personal liberty.<sup>306</sup> And the agency itself, which initially—if with some reservations—supported the concept of permitting brief warrantless arrests and detention, ultimately opposed it on constitutional grounds, as agency counsel had reportedly concluded that it would violate the Fourth and Fifth Amendments.<sup>307</sup> In fact, the then-secretary of labor’s 1939 statement to Congress reaffirmed the depth and durability of the agency’s position regarding the deportation arrest power; she explained that this power (together with the authority to detain and deport) was “in many respects the most serious and the most drastic administrative power vested in any executive officer in our Government” and, as a result, must be wielded with “a sense of the importance of the judicial duty” that it was.<sup>308</sup> In the end, through the 1930s, none of these proposals to expand deportation arrest authority passed.

Thus, our nation’s deportation laws—and with them the deportation system—expanded enormously through the 1920s and 1930s, due in large part to the nativism-fueled surge of immigration legislation in this period. This transformed the agency’s mission and gave rise to a host of administrability challenges as the agency attempted to satisfy the demand for increased

302. See, e.g., S. 2969, § 9; H.R. 4353, 75th Cong. § 3 (1937) (same, but requiring a warrant within forty-eight hours).

303. See, e.g., *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status*, *supra* note 269, at 160; *id.* at 170 (proposing ways to limit this power); *id.* at 160 (noting complaints about the provision).

304. *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status*, *supra* note 269, at 77, 167.

305. *Hearings on H.R. 4353, H.R. 4354, H.R. 4355, and H.R. 4356 Before the H. Comm. on Immigr. & Naturalization*, 75th Cong. 28 (1937) [hereinafter *Hearings on Four House Bills*].

306. *Id.* at 35, 28; *To Authorize the Prompt Deportation of Criminals and Certain Other Aliens: Hearing on H.R. 5573 Before the H. Comm. on Immigr. & Naturalization*, 75th Cong. 22 (1937) [hereinafter *Hearings to Authorize Prompt Deportation*]; *Deportation of Criminals, Preservation of Family Units, Permit Noncriminal Aliens to Legalize Their Status*, *supra* note 269, at 77, 167 (opposing the provision and noting that experts indicated that it was “open to question” whether it violated the Fourth and Fifth Amendments); *Deportation of Aliens Hearings*, *supra* note 284, at 93.

307. *Hearings on Four House Bills*, *supra* note 305, at 28; see also *Hearings to Authorize Prompt Deportation*, *supra* note 306, at 31 (1937).

308. 1939 SEC’Y OF LABOR ANN. REP. 213–14.

deportations in the absence of modern technology and the type of decentralized, structurally distinct adjudication that exists in the modern immigration scheme. Yet, despite these enforcement pressures and practical constraints, neither legislators nor the agency adopted an arrest system like the one we have today: one that permits low-level officers alone to authorize the arrest and extended detention of people firmly within the nation's interior. On the contrary, through the 1920s and 1930s, Congress and the agency itself rejected the concept of vesting officers with that kind of authority, often citing concerns about precisely the types of problems that have emerged today.

#### IV. ACCEPTING AND EMBRACING SUBDELEGATION

The coming of World War II brought abrupt changes to the Service and thrust it into the role of a national security partner. This Part describes how, amid this war and new mandate, the deportation arrest scheme began to dramatically change. It traces the subdelegation of deportation arrest authority within the immigration enforcement agency from then to the present and describes deportation arrest authority's unusual place within the agency's slow internal separation of powers. It ultimately shows how, despite decades of resistance to placing such extraordinary power in low-level officers' hands, war-era fears played an important role in the deportation arrest regime's fundamental transformation and the creation of an arrest scheme that was not only new and novel when *Abel* was decided, but largely untested in that case. It also describes how the long history of concerns about subdelegating deportation arrest authority to low-level officers was apparently forgotten, unrevived by peacetime rationality or the new opportunities created by modern administrative structures and technology. In so doing, it lays the groundwork for the final Part, which argues that this history has major implications for the debate about these arrests today.

##### A. World War II and the National Security Service

In the lead-up to U.S. involvement in World War II, immigration and immigration policy began to markedly shift.<sup>309</sup> Immigration experienced a significant uptick, with the number of incoming immigrants rising sharply.<sup>310</sup> This, together with the impending war, prompted widespread fear of noncitizens who may be disloyal and an explosion of legislation focused on combating "subversive influences"—especially those who were immigrants.<sup>311</sup> As such,

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309. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 43, 47; Roger Daniels, *Immigration Policy in a Time of War: The United States, 1939–1945*, J. AM. ETHNIC HIST., Winter–Spring 2006, at 107, 107–08.

310. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 43.

311. Ellen Schrecker, *Immigration and Internal Security: Political Deportations During the McCarthy Era*, 60 SCI. & SOC'Y 393, 395 (1996); HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 47; *Recent Federal Legislation Against Subversive Influences*, 41 COLUM. L. REV. 159, 160–62 (1941).



Congress turned its focus to efforts to identify and catalogue immigrants in the United States and penalize those who espoused subversive beliefs.<sup>312</sup>

After war broke out, President Roosevelt undertook a major reorganization of administrative agencies, which included relocating the Service into the DOJ in 1940.<sup>313</sup> Roosevelt moved the Service under the attorney general's purview for national security reasons, on the theory that doing so would allow the DOJ to better control noncitizens and coordinate between the Service and other agency subcomponents prosecuting "alien criminal and subversive elements."<sup>314</sup> Taken together, this organizational realignment and legislation had an immediate and discernible impact on the Service's mission, shifting it even further from mainly regulating admission at borders toward identifying, detaining, and prosecuting individuals deemed a security threat to the state.<sup>315</sup> And, as a result, the Service soon found itself vested with substantially increased enforcement responsibilities, personnel, and power.<sup>316</sup>

At the same time, the DOJ gained extensive authority to administratively subdelegate a broad range of powers previously reserved to the attorney general (and, pre-reorganization, the secretary of the Department of Labor). In 1940, as part of its wartime "Alien Registration Act," Congress explicitly authorized the attorney general to, among other things, subdelegate virtually any of his powers under the immigration laws to "such officers of the . . . Immigration and Naturalization Service . . . as he may designate," including to low-level officers.<sup>317</sup> With this clear congressional authorization, the agency suddenly gained the power to adopt—administratively—the changes it had asked Congress to enact for years. Perhaps unsurprisingly then, the new attorney

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312. See, e.g., Act of Oct. 17, 1940, ch. 897, 54 Stat. 1201; Act of July 1, 1940, ch. 502, 54 Stat. 711; Alien Registration Act, ch. 439, 54 Stat. 670 (1940); see also ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924–1952*, at 163 (1957).

313. Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 4, 1940); Act of June 4, 1940, ch. 231, 54 Stat. 230.

314. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 47; 1940 SEC'Y OF LABOR ANN. REP. 8. For an account of the larger set of considerations affecting this relocation, see Jennifer S. Breen, *Labor, Law Enforcement, and "Normal Times": The Origins of Immigration's Home Within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications*, U. HAW. L. REV., Winter 2019, at 1, 5–12.

315. See HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 47–49; 1942 SPECIAL ASSISTANT TO ATT'Y GEN. IN CHARGE OF THE IMMIGR. & NATURALIZATION SERV. ANN. REP. 16, 12, 24–25.

316. See HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 48–50 (explaining that the Service more than doubled in size by fiscal year 1943 and gained considerable war-related responsibilities); 1941 SPECIAL ASSISTANT TO ATT'Y GEN. IN CHARGE OF THE IMMIGR. & NATURALIZATION SERV. ANN. REP. 29, 33.

317. Alien Registration Act § 37(a).

general—already an active voice in the movement to expand agencies’ discretion in this respect<sup>318</sup>—began subdelegating arrest authority shortly after the Service’s relocation to the DOJ.<sup>319</sup>

The devolution of deportation arrest authority began incrementally, but quickly gained steam. It started with a 1940 regulation effecting a limited subdelegation of arrest-warrant-issuing authority—from the secretary to the (still headquarters-based) chief or assistant chief of the Warrant Branch.<sup>320</sup> Just one year later, the DOJ promulgated a regulation delegating warrant-issuing authority to the officer in charge of each Service district (“district directors”), vesting this power in a group of high-level officers dispersed throughout the country.<sup>321</sup> While the 1941 regulation permitted this relatively small cadre of officers in charge to issue arrest warrants upon the application of investigating officers, their authority remained limited; they could only issue warrants in cases of “recent illegal entrants” who had entered the country within the last sixty days or, for noncitizens who had resided in the country for longer periods of time and were *prima facie* deportable, in emergencies where escape was imminent.<sup>322</sup> Thus, the early expansion of this authority continued to reflect a distinction between the constitutional protections afforded to those on the threshold of entry (or very recent entrants) and the greater ones owed to noncitizens already within the national community.<sup>323</sup>

In the latter half of the 1940s—amid still intense fear about foreign threats to the nation’s security<sup>324</sup>—restrictions on these high-level officers’ warrant-issuing authority were gradually eliminated. By 1947, the agency had broadened the power of districts directors to authorize the arrest of “recent [unlawful] entrants,” empowering them to issue warrants for the arrest of people who had entered the country unlawfully within the preceding year and for certain “alien seamen.”<sup>325</sup> In 1950, it expanded district directors’ power even further,

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318. See ATT’Y GEN.’S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 20–24 (1941).

319. This was part of a larger trend of subdelegating once-centralized immigration-related activities. See, e.g., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 51 (observing subdelegation of certain naturalization-related functions).

320. 5 Fed. Reg. 3504 (Sept. 4, 1940). By 1947, the Warrant Branch was apparently eliminated, and this authority was vested in the Exclusion and Expulsion Section chief. See 8 C.F.R. § 1.45 (1947).

321. 6 Fed. Reg. 5463–64 (1941) (requiring that all evidence in support of the arrest be “immediately” sent to the central office); see also KANG, *supra* note 43, at 81 (discussing the fact that district directors were given some arrest-warrant-issuing authority).

322. 6 Fed. Reg. at 5463–64. These officers in charge of districts were also authorized to issue arrest warrants—which were generally followed by immediate release—in cases of noncitizens who wished to come forward to acknowledge their deportability and seek equities-based relief from deportation. 8 C.F.R. § 150.10 (1941).

323. See *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

324. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 55–56.

325. 8 C.F.R. §§ 150.3, 150.10–11 (1947); see also *id.* § 1.45.

promulgating regulations allowing them to issue arrest warrants against virtually anyone they concluded was *prima facie* deportable, regardless of manner of entry or urgency.<sup>326</sup>

During this period, the agency also briefly experimented with vesting this power in a small number of slightly lower-level officers who were even more geographically dispersed. In 1947 and 1948, it extended this power—with additional limitations—to the officers in charge (and one assistant officer in charge) of nine suboffices that were located far from their district offices.<sup>327</sup> However, the agency reversed course in 1950, rescinding that power, redelegating it to the commissioner-general and the assistant commissioner, and again limiting arrest-warrant-issuing authority outside the central office to district directors.<sup>328</sup>

Thus, by the end of 1950, the agency had administratively implemented the warrant-authority change it unsuccessfully sought from Congress through the 1930s: it decentralized and expedited the issuance of virtually any type of deportation arrest warrant through regulatory changes that granted the authority to issue them to approximately twenty geographically dispersed, high-level officers.<sup>329</sup>

While declining to subdelegate warrant-issuing authority further, the agency also began seeking to expand officers' authority to make warrantless deportation arrests in the nation's interior.<sup>330</sup> In 1944, then-Attorney General Biddle requested that Congress enact legislation authorizing Service officers to make warrantless arrests in the interior even where the officer was not pursuing someone they observed crossing the border.<sup>331</sup> He argued that the existing requirement of a warrant to arrest any suspected noncitizen who was not

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326. 15 Fed. Reg. 1298 (Mar. 10, 1950); *see also* 1950 U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV. ANN. REP. 8-9 (describing this as part of a decentralization effort); *infra* note 329.

327. 13 Fed. Reg. 1991 (Apr. 14, 1948); 13 Fed. Reg. 3225 (June 15, 1948); 8 C.F.R. § 150.3(d) (1947); *see also* KANG, *supra* note 43, at 81 (observing the delegation of arrest-warrant-issuing authority to certain border district officers during this period).

328. 15 Fed. Reg. 8108 (Nov. 28, 1950); 15 Fed. Reg. 2141 (Apr. 15, 1950); 15 Fed. Reg. 1298 (Mar. 10, 1950).

329. The Service had sixteen district directors at that time. 1950 U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV. ANN. REP. 8. This arrest authority was limited only where there was doubt about whether the evidence showed *prima facie* deportability or where the October 16, 1918 Act (related to anarchists and others deemed subversives) was the basis for deportability. 15 Fed. Reg. at 8108.

330. Professor Kang describes the important role that border officials played in supporting the agency's advocacy with respect to this legislation, KANG, *supra* note 43, at 119-22, revealing the ultimate adoption of this proposal as an early example of the connection between war-era policy changes in the name of national security and the expansion of what Daniel Kanstroom has described as "extended border" enforcement authority. KANSTROOM, *supra* note 43, at 5. This connection reemerged sharply in the arrest regime's development in the early 2000s, *see infra* Parts IV.A, C, and continues to drive immigration policy today.

331. H.R. REP. NO. 78-1929, at 1-2 (1944) (letter from Attorney General Biddle to the speaker of the House of Representatives); *see also* H.R. REP. NO. 79-186, at 1-2 (1945) (letter from Attorney General Biddle to Representative Dickstein).

“entering or attempting to enter the United States in the [officer’s] presence or view” was “cumbersome” and “at times results in frustrating the ends of justice.”<sup>332</sup> But Biddle may have appreciated the need for at least some additional review to guard against extended custody on only the arresting officers’ assessment of probable cause, explaining “[t]he power to make arrests in such cases without a warrant should be conferred on personnel of the Immigration and Naturalization Service with a restriction that an alien so taken into custody should be accorded a hearing without unnecessary delay.”<sup>333</sup>

In 1946—a year marked by a record number of unlawful entries and still-fervent fears about noncitizens who may threaten national security<sup>334</sup>—Congress granted this request, passing legislation that, among other things, broadened the limited warrantless arrest authority conferred by the 1925 Act and extended it into the interior.<sup>335</sup> Specifically, this law allowed the Commissioner-General to “prescribe”—with the attorney general’s approval—regulations authorizing “[a]ny employee of the Immigration and Naturalization Service” to make warrantless arrests of any noncitizen in the interior in violation of the nation’s immigration law who was “likely to escape before a warrant can be obtained.”<sup>336</sup> The law reflected only a hint of the timeframe for presentment that had been omnipresent in the legislation proposed in the 1930s;<sup>337</sup> it provided that the noncitizen be presented “without unnecessary delay” to an examining officer, that is, an “officer of the Immigration and Naturalization Service having authority to examine aliens as to their right to enter or remain in the United States.”<sup>338</sup>

The 1946 Act’s express permission to subdelegate—and minimal instruction regarding implementation—left the DOJ substantial latitude, which the agency used to subdelegate warrantless arrest authority broadly, deeply, and largely without constraints. It devolved the power to make warrantless arrests down to patrol inspectors and immigration inspectors—officers at some of the lowest rungs of enforcement.<sup>339</sup> With respect to the law’s requirement that an examining officer conduct a second assessment of the noncitizen’s right to enter or remain, the DOJ delegated this power expansively too: it authorized any immigration inspector (or Service employee designated to act as one) to serve as an examining officer empowered to sign off on whether the alleged noncitizen should be charged, prosecuted, and subjected to extended detention.<sup>340</sup>

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332. H.R. Rep. No. 79-186, at 1–2 (1945) (letter from Attorney General Biddle to Representative Dickstein).

333. *Id.* at 2.

334. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 212, at 54–55.

335. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865.

336. *Id.*

337. *See supra* note 302 and accompanying text.

338. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865.

339. 8 C.F.R. § 60.28 (1946).

340. *Id.* § 60.28(a)(2), (e)–(f).

The regulations did gesture toward some administrative separation of functions, specifying that immigration inspectors should only serve as examining officers in cases in which they effected the arrest if “no other qualified officer [was] readily available and the taking of the alien before another officer would entail unnecessary delay.”<sup>341</sup> But that was not a hard rule and, even if it had been, the officers who decided whether there was a sufficient basis to detain the arrested individual were still the same officers charged with investigation, enforcement, and deportation.<sup>342</sup>

Thus, although the arrest regime continued to reserve the power to authorize deportation arrests based on warrants to high-level officers not so enmeshed in policing and investigation, the longstanding procedures designed to require rigorous investigation and structurally distinct review pre-arrest were eliminated in a significant proportion of cases. In short, this combination of war-era legislation and the DOJ’s far-reaching regulations fundamentally changed the nature and implementation of deportation arrest authority in the span of a decade marked by war.

### B. *Separating Powers*

In one sense, this devolution of the power to authorize arrests was a major departure from the protections that had surrounded it in the past and its historical reservation to the highest echelons of administrative power. In another, however, it was neither surprising—nor comparable to the structure in place today—because of blurred lines between enforcement and adjudication at that time. The 1940s subdelegations vested the power to authorize arrests in officials who then played several roles—including law enforcement officer and judge. For example, warrant-issuing authority was subdelegated to district directors, who both supervised immigration enforcement and played a major (even decisive) role in adjudicating deportation proceedings.<sup>343</sup> Similarly, allowing immigration inspectors to serve as examining officers placed the power to sign off on the validity of a warrantless arrest in the hands of officers who served as law enforcement and in a judge-like role as presiding hearing officers.<sup>344</sup> Accordingly, though these subdelegations represented a major shift

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341. *Id.* § 60.28(e).

342. In 1967, this dynamic changed again: the agency subsequently reserved the power to authorize continued detention to high-level officers with warrant-issuing authority. 32 Fed. Reg. 6260 (1967) (requiring that alleged noncitizens be “presented promptly, and in any event within 24 hours” to a high-level officer with arrest-warrant-issuing authority for a determination of *prima facie* evidence of removability).

343. By this point, district directors supervised officers who conducted enforcement, presided over deportation hearings, and, in certain instances, even issued orders of deportation. Arrest and Deportation, 8 C.F.R. § 150.6 (1941); U.S. DEP’T OF JUST., IMMIGR. & NATURALIZATION SERV., COURSE OF STUDY FOR MEMBERS OF THE SERVICE: LECTURE—DEPORTATION PROCEDURE AND PRACTICE 32, 36 (1943) [hereinafter 1943 LECTURE].

344. See 1943 LECTURE, *supra* note 343, at 12–13, 32–33 (describing presiding officer’s duties as “analogous to those of a judge,” including ruling on motions and evidence and issuing proposed orders); 8 C.F.R. § 150.7(a) (1941); see also *supra* note 294.

from the scheme that treated deportation arrest authority as an “extraordinary” power, it is not clear that there was any consensus—particularly from Congress—that the power to authorize arrests was appropriately placed in enforcement versus judicial hands or whether it simply represented a triumph of a system that prioritized bureaucratic policymaking and practicality over careful attention to constitutional principle.<sup>345</sup>

The increasing attention to separating powers within administrative agencies generally eventually forced structural change within the immigration system.<sup>346</sup> These concerns played a major role in motivating the Administrative Procedure Act of 1946—in particular its provision requiring separation between adjudicatory and investigative functions in administrative hearings.<sup>347</sup> This mandate only briefly governed deportation proceedings,<sup>348</sup> as Congress first legislatively exempted deportation proceedings from it and then displaced the APA hearing scheme in deportation proceedings with one set forth in the 1952 Immigration and Nationality Act (“INA”).<sup>349</sup> But the APA nevertheless influenced the modern deportation adjudication structure, as the INA imposed a version of the APA’s separation-of-functions rule. Specifically, the INA created a distinct corps of “special inquiry officers” (the functional equivalent of today’s immigration judges)<sup>350</sup> to preside over deportation hearings and prohibited them from hearing deportation cases in which they had played an investigative role.<sup>351</sup> And, in 1956, after a separation-of-powers challenge to the still-somewhat commingled functions permitted by the INA,<sup>352</sup> the DOJ promulgated a regulation that further decoupled enforcement and adjudication by removing the supervision of special inquiry officers and hearings from district directors’ purview, leaving district directors solely charged with enforcement.<sup>353</sup>

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345. Administrative Procedure Act, ch. 324, § 10(c), 60 Stat. 237, 240 (1946).

346. See also, e.g., *Imitation Judges*, *supra* note 42, at 1307–12 (describing the shift, but arguing that the resulting separation in the immigration sphere is ultimately “not very meaningful”); KANSTROOM, *supra* note 43, at 170–78.

347. Administrative Procedure Act § 5(c); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36–45 (1950); see also *Imitation Judges*, *supra* note 42, at 1307 (observing that an alternative to administrative reform was to shift these cases to the court system).

348. *Wong Yang Sung*, 339 U.S. at 51–53 (holding that the presiding inspector serving as both prosecutor and judge violated the APA).

349. Immigration and Nationality Act, ch. 477, § 242(b), 66 Stat. 163, 209–10 (1952); *Marcello v. Bonds*, 349 U.S. 302, 305–06, 310 (1955).

350. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372 (2006).

351. Immigration and Nationality Act § 242(b); see also *Imitation Judges*, *supra* note 42, at 1310–11 (explaining that this provision also partially separated prosecutorial from special inquiry officer functions).

352. See *Marcello*, 349 U.S. at 305–06.

353. 21 Fed. Reg. 116 (Jan. 3, 1956); 1956 U.S. DEP’T OF JUST., IMMIGR. & NATURALIZATION SERV. ANN. REP. 15; *Imitation Judges*, *supra* note 42, at 1311; see also Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 458 (1988).

From there, the Service's internal separation of powers proceeded, if less quickly and completely than sister agencies. In 1983, the attorney general moved the immigration court system out of the Service and into a newly created DOJ subcomponent, the Executive Office for Immigration Review.<sup>354</sup> And in 2002, Congress drew an even clearer line, moving enforcement responsibilities into the newly created DHS and leaving the immigration court system in the DOJ.<sup>355</sup>

Yet the adjudication of the validity of arrests did not follow suit. At the outset, retaining warrant-issuing authority as an enforcement function made some sense. After all, the arrest warrant itself played a dual judicial and prosecutorial role: it served both as an adjudication that there was probable cause for an arrest and as the charging document that initiated the deportation prosecution.<sup>356</sup> And even after the agency began using a separate charging document to initiate deportation proceedings,<sup>357</sup> these charging documents were required to be "regarded as a warrant of arrest,"<sup>358</sup> meaning that the agency's decision to charge someone as deportable remained fused with its authorization of the arrest. Consequently, even if there had been administrative officers acting in a purely judicial capacity when arrest authority was initially subdelegated (which there was not), it would have been incongruous to assign them warrant-issuing authority because doing so would have required them to also perform the "quintessential[ly] prosecutorial function" of deciding what charges to bring and when.<sup>359</sup>

Thus, when the power to determine probable cause was subdelegated, it was not initially assigned to specifically enforcement versus judicial officers. Rather, as the Service slowly unbundled enforcement and adjudicatory functions once vested in a single type of officer, the adjudicatory aspect of issuing arrest warrants was left out, perhaps due to the particularities, constraints, and understandings within the administrative apparatus at the time. As a result, even this period's devolution of the deportation arrest authority was not a clear

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354. 48 Fed. Reg. 8038 (Feb. 15, 1983).

355. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 471, 701, 116 Stat. 2135, 2205, 2219; 68 Fed. Reg. 10922 (Mar. 6, 2003) (describing shift as part of "separating DHS enforcement and services functions from Department of Justice adjudication functions as envisioned by the Act").

356. 17 Fed. Reg. 115111, 11512-14 (Dec. 19, 1952). Until 1956, the issuance of an arrest warrant—which doubled as a charging document—was the only way to initiate deportation proceedings. 1956 U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV. ANN. REP. 14-15; Donald L. Horowitz, Note, *Administrative Arrest Pending Deportation Proceedings*, 12 SYRACUSE L. REV. 184, 185 (1960).

357. 21 Fed. Reg. 97, 98-99 (Jan. 3, 1956); 1956 U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV. ANN. REP. 14-15 (attributing change to realization that "only a very few aliens needed to be detained" or subject to agency supervision).

358. 22 Fed. Reg. 9765, 9813 (Dec. 3, 1956).

359. *Ogunkoya v. Monaghan*, 913 F.3d 64, 71 (2d Cir. 2019); see also *Warnick v. Cooley*, 895 F.3d 746, 752 (10th Cir. 2018).

endorsement—particularly not by Congress—of putting the power to authorize arrests in the hands of enforcement as opposed to judicial officers.<sup>360</sup>

### C. *Subdelegating All the Way Down*

The final major development in deportation arrest authority also came in the throes of war. Although the latter half of the twentieth century saw great strides in making immigration law more administrable and in certain respects more humane,<sup>361</sup> immigration policy and practice shifted sharply in the early 2000s. Following the September 11, 2001 attacks committed by noncitizens lawfully in the country, the United States launched a global “war on terror” and a massive effort to detain and expel people deemed suspicious using the immigration laws.<sup>362</sup> Indeed, the nation’s immigration system quickly became “ground zero” in the newly declared war,<sup>363</sup> and policymakers launched a wide-ranging effort to ramp up immigration enforcement and restructure it to play a national security role.<sup>364</sup> Congress, as mentioned, created DHS to carry out this national security mission, charging it with immigration enforcement and dramatically changing the nature of immigration law, policy, and practice.<sup>365</sup>

During this time, the immigration enforcement agency gained enormous power to arrest and detain not only immigrants suspected of posing specific risks to national security, but also noncitizens in run-of-the-mill deportation cases. Less than ten days after the 9/11 attacks and while launching other wide-scale detention efforts “target[ing] noncitizens from Arab, Muslim and South Asian countries,” the agency began expanding officers’ arrest and detention authority.<sup>366</sup> To start, it eliminated the decades-old rule requiring that, twenty-four hours after any warrantless arrest, the agency must determine whether to charge the person as removable and the small set of high-level officers with

360. Then, and during much of the deportation arrest scheme’s formative period, it was generally understood that noncitizens could challenge the admission of evidence obtained in unconstitutional arrests. *See Lopez-Mendoza v. INS*, 705 F.2d 1059, 1064 (9th Cir. 1983), *rev’d sub nom. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Since then, noncitizens’ ability to challenge these arrests has been severely limited by doctrinal and statutory obstacles, *see Lopez-Mendoza*, 468 U.S. at 1050–51; 8 U.S.C. § 1252(b)(9), (g), allowing the agency to operate with relative impunity.

361. *See, e.g., Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Mar. 22, 1999); Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

362. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001); Wadhia, *supra* note 43, at 1491.

363. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370 (2007).

364. *See* Jeffrey Manns, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145, 145–46 (2002).

365. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, Stat. 2135, 2142; Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1, 10–11 (2021); Karen C. Tumlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173, 1177 (2004).

366. Wadhia, *supra* note 43, at 1491, 1497–98; Tumlin, *supra* note 365, at 1186.



arrest-warrant-issuing authority must separately determine whether—in the agency’s view—the noncitizen should, in fact, be detained.<sup>367</sup> Citing the “recent terrorist activities,” the agency replaced the prior rule with an “interim” rule expanding the timeline for this post-arrest process to forty-eight hours or, in cases of “emergency or other extraordinary circumstance[s],” then “within an additional reasonable period of time.”<sup>368</sup> The regulation did not then—and does not now—define the outer limits of “extraordinary circumstances” or the additional time that the agency may take.<sup>369</sup> Accordingly, this regulatory change in the immediate aftermath of 9/11 removed a longstanding limit on extended detention based only on a low-level officer’s say-so, and this “interim” rule remains in place today.<sup>370</sup>

Shortly thereafter, the agency again transformed and radically expanded enforcement officers’ arrest authority. Although the immigration enforcement hierarchy—like much of the administrative state—had proliferated through the twentieth century, it was still the case that only twenty types of enforcement officers—all high-level—could issue deportation arrest warrants when the 9/11 attacks occurred.<sup>371</sup> However, in 2003, DHS promulgated regulations that nearly doubled the types of officers who could exercise this authority, devolving it down to a range of lower-level officers, including those solely charged and intimately engaged with detention and deportation.<sup>372</sup> In 2005,

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367. 66 Fed. Reg. 48334 (Sept. 17, 2001) (generally requiring a determination within forty-eight hours of whether to charge the alleged noncitizen as removable and authorize further detention except in emergency or extraordinary circumstances); 8 C.F.R. § 287.3(d) (2000) (requiring that, within twenty-four hours, an “examining officer” make these determinations and, if the noncitizen is to be held in custody, that an officer with arrest-warrant-issuing authority determine whether to issue a warrant of arrest); 32 Fed. Reg. 6260 (Apr. 14, 1967) (requiring that the alleged noncitizen be “presented” within twenty-four hours to an officer with arrest-warrant-issuing authority to determine whether evidence showed prima facie removability).

368. 66 Fed. Reg. at 48335. According to the OIRA website, despite seeking public comments on the interim rule, the agency did not take further action. View Rule–RIN: 1653-AA14, OFF. OF INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eAgendaViewRule?publId=201110&RIN=1653-AA14> [<https://perma.cc/FXM3-WY8P>]. For an excellent explanation of the way that this regulatory change changed the timeline for the agency’s charging decisions and the impact of that change, see Wadhia, *supra* note 43, at 1497-99.

369. Wadhia, *supra* note 43, at 1497-99.

370. 8 C.F.R. § 287.3.

371. 8 C.F.R. § 287.5(e)(2). Prior to that point, the agency had been reluctant to allow low-level officers to issue arrest warrants. For example, following the INA’s enactment, the DOJ tested the idea of broadening such authority to, inter alia, “district enforcement officers,” but eighteen months later specifically retracted that grant and gradually excised other officers from that list. 21 Fed. Reg. 2969 (Apr. 30, 1956); 21 Fed. Reg. 99 (Jan. 3, 1956); 19 Fed. Reg. 4442 (July 9, 1954); 17 Fed. Reg. 11512 (Dec. 17, 1952). By 1957, it had again limited arrest-warrant-issuing authority to district directors, and it continue to tightly restrict this power in the decades that followed. See, e.g., 8 C.F.R. § 242.2 (1985); 8 C.F.R. § 242.2(a) (1957). Although, in 1957, the agency continued to allow deputy district directors and officers in charge of investigations to issue charging documents (which provided arrest authority), it had largely closed the gap by 1964. 8 C.F.R. § 242.1(a) (1965).

372. 68 Fed. Reg. 35278–79 (June 6, 2003).

DHS devolved warrant-issuing authority even further down the chain, subdelegating it to forty-nine types of enforcement officers and claiming authority to grant it—informally and without further rulemaking—to any other federal employee it chooses.<sup>373</sup>

Thus, amid the war on terror, the agency vested the power to issue deportation arrest warrants in some of the lowest levels of enforcement officers<sup>374</sup> and, in so doing, dramatically expanded the raw number of warrant-issuers.<sup>375</sup> DHS adopted major changes that had been rejected in earlier debates about expanding this arrest power—and resisted through the decades that followed. It also did so without a mechanism for public input<sup>376</sup> and although it could have vested the authority to adjudicate probable cause in what was, by then, a corps of structurally distinct, geographically dispersed administrative adjudicators: immigration judges.<sup>377</sup> And now, twenty years after the attacks, these war-era subdelegations remain—and low-level enforcement officers retain these once-extraordinary powers.<sup>378</sup>

Of course, the question is not just who theoretically *could* authorize deportation arrests, but who actually does. Despite the expansive warrantless arrest authority DHS officers now hold, the vast majority of deportation arrests today are based on these administrative warrants. That is because DHS conducts the bulk of its interior enforcement through partnerships with state and local law enforcement officers, who generally make these arrests based on those administrative warrants.<sup>379</sup> Although these warrants could—as in *Abel* and the statutes on which *Abel* relied—be issued by district directors or high-level, structurally distinct executive officers,<sup>380</sup> new information that I obtained through Freedom of Information Act (FOIA) litigation shows that they are not.

The FOIA records reveal at least three important features of the modern deportation arrest system. First and perhaps most significantly, they show that deportation arrests today are authorized by some of the least-detached and

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373. 70 Fed. Reg. 67089-90 (Oct. 17, 2005). In promulgating the 2003 and 2005 regulations, the agency bypassed its usual administrative notice-and-comment obligations. *Id.* at 67087–88; 68 Fed. Reg. at 35274.

374. For example, the agency subdelegated it to “Immigration Enforcement Agents,” 68 Fed. Reg. at 35274, who “perform[] a variety of enforcement functions related to the investigation, identification, apprehension, prosecution, detention and deportation of aliens and criminal aliens, and apprehension of absconders from removal proceedings.” *Moore v. Beers*, No. 13-6614, 2017 WL 515004, at \*4–5 (D.N.J. Feb. 8, 2017); *see also* 8 C.F.R. §§ 287.5(c)(1)(vi), (e)(2)(lii).

375. *See infra* notes 381–382 and accompanying text.

376. *See supra* notes 368, 373 and accompanying text.

377. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUSTICE, STATISTICAL YEAR BOOK 2001, at A1 (2002).

378. 8 C.F.R. § 287.5(e)(2) (2021).

379. *See supra* note 47; Nash, *supra* note 5, at 437–48; *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788, 825–26, 826 n.27 (9th Cir. 2020).

380. *See Abel v. United States*, 362 U.S. 217, 232, 236–37 (1960).

lowest-level agents within the immigration enforcement system. The government's own admission and a random sample of nearly one thousand warrants show that they are issued mainly by supervisory deportation officers and non-supervisory deportation officers—that is, officers primarily and intimately engaged in enforcement, detention, and deportation.<sup>381</sup> Second, these records show how devolving this power has also made it more diffuse, revealing that it is now regularly exercised by a force of over 7,000 officers.<sup>382</sup> Third, these records reveal that the agency now permits a host of other types of government agents—those not expressly subdelegated such authority under existing regulations—to issue warrants of arrest.<sup>383</sup> Thus, this new information shows the extent to which our current system has transformed from its early design and even since *Abel*, and it raises unsettling questions about the limits of the agency's power to subdelegate, especially through subregulatory changes.

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381. See Dep't of Homeland Sec., Immigr. & Customs Enf't, ICE Response to FOIA Request 2021-ICLI-00047 (unpublished set of warrants received in response to a request submitted pursuant to 5 U.S.C. § 552) (containing 977 unsigned Form I-200 warrants for noncitizens booked into ICE detention from 2014–2020) (on file with author) [hereinafter ICE Dec. 17, 2021 Response]; Email from Zachary Bannon, Asst. U.S. Attorney, to Lindsay Nash, Associate Professor of L., Benjamin N. Cardozo Sch. of L. (Sept. 9, 2021, 12:00 PM) (on file with author); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-186, IMMIGRATION ENFORCEMENT: ICE CAN FURTHER ENHANCE ITS PLANNING AND OVERSIGHT OF STATE AND LOCAL AGREEMENTS 22 n.46 (2021) ("ICE deportation officers conduct immigration enforcement, including the identification and arrest, transportation, detention, case management, and removal of foreign nationals from the United States."); *Supervisory Detention and Deportation Officer Job*, FED. GOV'T JOBS, <https://federalgovernmentjobs.us/jobs/Supervisory-Detention-and-Deportation-Officer-661691900.html> [<https://perma.cc/TW7B-YUG3>].

382. Compare 8 C.F.R. § 287.5(e)(2) (2021) (listing the types of immigration officials authorized to issue arrest warrants), and ICE Dec. 17, 2021 Response, *supra* note 381 (showing additional types of officers that issue arrest warrants), with ICE Aug. 11, 2021 Response, *supra* note 4 (unpublished dataset received in response to a request submitted pursuant to 5 U.S.C. § 552) (showing the total number of people then employed in various occupational positions at ICE, including 6,230 employees within the categories of warrant-issuing officers listed in 8 C.F.R. § 287.5(e)(2), and revealed as warrant-issuers by the ICE Dec. 17, 2021 Response) (on file with author). While 5,062 of the 6,230 warrant-issuing employees listed in ICE's 2021 FOIA response were types of deportation officers, *id.*, the number of deportation officers grew to more than 6,000 by 2022. Camilo Montoya Galvez, *ICE Immigration Arrests and Deportations in the U.S. Interior Increased in Fiscal Year 2022*, CBS NEWS (Dec. 30, 2022, 3:32 PM), <https://www.cbsnews.com/news/ice-immigration-arrests-and-deportations-us-interior-increased-fiscal-year-2022/> [<https://perma.cc/B47Q-JR3M>]. Note that these figures only include officers employed by ICE, so they do not include the warrant-issuing officers who are employed by U.S. Citizenship and Immigration Services and Customs and Border Protection (CBP).

383. Compare 8 C.F.R. § 287.5(e)(2) (2021) (listing the types of immigration officials authorized to issue arrest warrants), with ICE Dec. 17, 2021 Response, *supra* note 382 (listing the types of ICE employees that issued unsigned I-200 warrants between 2014 and 2020); see also Dep't of Homeland Sec., Customs & Border Prot., USBP Nationwide Apprehensions with an I-200 Served Date by Sector and Title of Issuing Agent (unpublished dataset received in response to a request submitted pursuant to 5 U.S.C. § 552) (listing the types of CBP employees that issued I-200 warrants between 2003 and 2019) (on file with author).

The troubling consequences of such an arrest system were predicted decades ago and have, predictably, come to pass. As even early proponents worried, vesting deportation arrest authority in low-level officers has contributed to rights violations, the detention of U.S. citizens, and other abuses of unchecked discretion. It has also allowed officers to arrest and detain based on stereotypes, impermissible bias, and facts far short of probable cause. And the harms that flow from these arrests are compounded by the length and presumption of post-arrest detention,<sup>384</sup> particularly now that some noncitizens are categorically ineligible for release on bond and even those eligible bear the burden of proving entitlement to release.<sup>385</sup> In sum, modern practice has tested—and ultimately borne out—the early and then-prevailing apprehensions about placing such “a dangerous lodgment of power in the hands of an over-zealous official.”<sup>386</sup>

## V. IMPLICATIONS

Understanding the fuller history of deportation arrests provides insights about the modern enforcement system that are critical for evaluating *Abel's* import and the constitutional validity of the deportation arrest regime more broadly. This Part discusses these implications. It describes some of the key insights from this history and argues that, despite courts' near-unanimous conclusions to the contrary, the deportation arrest regime's history does not justify current practices; indeed, it conflicts with the early federal design and longstanding structure. This Part explains that, more fully understood, this history reinforces the need for structurally distinct, detached, and neutral officers to determine probable cause for arrests or detention.

### A. *Reconstructing Deportation Arrests' History*

First, this Article provides important information about the origins of a massive, nationwide civil arrest regime and helps illuminate why the scheme evolved as it did. For instance, it reveals a very different set of background assumptions about the nature and exercise of the power to authorize deportation arrests than the commonly held view suggests. It also underscores the relationship between the subdelegation of deportation arrest authority and wars presenting existential threats to the nation. Of course, the fact these major subdelegations were made in extraordinary circumstances does not necessarily negate the government's power to do so, but understanding the sociopolitical circumstances and longer trajectory places them in context. Here, it dispels

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384. See *supra* notes 25, 66–67 and accompanying text (discussing wait times for an initial appearance before an immigration judge).

385. See Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 81–92 (2016).

386. *Hearings on Four House Bills*, *supra* note 305, at 35.

the pervasive belief that our modern deportation arrest system reflects practices honored “from almost the beginning of our Nation,”<sup>387</sup> and it aligns the major subdelegations of arrest authority with the exercises of governmental power that accompanied them: wars, internment of Japanese and Japanese-American citizens,<sup>388</sup> and pretextual enforcement against men perceived to be from Muslim-majority countries.<sup>389</sup>

Second, this history demonstrates that the arrest system in place today was shaped in significant part by long-gone practical and structural constraints. As this Article describes, subdelegation began occurring when the arrest regime was dramatically expanding and faced with major challenges. At that time, the agency was hamstrung by the inability to convey information to a centralized adjudicator with sufficient speed and the absence of decentralized, independent decisionmakers authorized to quickly adjudicate probable cause.<sup>390</sup> And legislators’ and administrators’ options for expanding the power to authorize deportation arrests were constrained by the limited alternatives within the then-administrative system. But times have changed. Accordingly, this account indicates that, in today’s world of structurally distinct, geographically dispersed immigration judges, a regime focused on arresting people already detained by state or local law enforcement (so unlikely to flee), and the ability to convey information in real-time, we should expect different choices for probable cause adjudication.

In offering this account, this Article contributes to ongoing conversations—in both scholarship and litigation—on the constitutional validity of modern enforcement processes and the role of history in understanding the current regime.<sup>391</sup> It also seeks to contribute to broader discussions of the role that the development of federal administrative practices has played in the construction and conception of modern civil liberties law.<sup>392</sup> While scholars writing in this space have documented the ways that agencies helped establish rights and protections for individuals in different arenas, the immigration agency’s policymaking has often worked—as Professor Kang points out—to

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387. *Abel v. United States*, 362 U.S. 217, 233–34 (1960).

388. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (recognizing this “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race” as “objectively unlawful” and “morally repugnant”).

389. *See Wadhia*, *supra* note 43, at 1495; AMNESTY INT’L, USA: AMNESTY INTERNATIONAL’S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 3 (2001), <https://www.amnesty.org/en/documents/amr51/044/2002/en/> [<https://perma.cc/52PN-FJLY>]; *supra* notes 371–372 and accompanying text.

390. *See generally supra* Part IV.

391. *See supra* notes 42–43.

392. *See, e.g.*, Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Karen M. Tani, *Welfare and Rights Before the Movement: Rights As A Language of the State*, 122 YALE L.J. 314 (2012).

limit these protections, particularly for immigrants.<sup>393</sup> This Article adds to this conversation and complicates the prevailing judicial account of the immigration system's longstanding arrest exceptionalism by showing the very different way that Congress and the agency structured the arrest scheme and how its evolution into the modern regime was neither uncontested nor inevitable. At the same time, it is worth stating the perhaps obvious: this Article offers a fuller account of this scheme's development, but of course not all relevant history. Granular examinations of particular historical moments and phenomena can powerfully illuminate aspects of both origin stories and contemporary practice; indeed, some of the works cited in this Article not only exemplify this, but also offer models for potentially fruitful further exploration of agency deliberations, court battles, and legislators' motivations.<sup>394</sup> In short, this Article neither begins nor ends the conversation on this history or the other conversations it joins.

### B. *Reconstructing Deportation-Arrest Doctrine*

Understanding the history of this regime is valuable in its own right, but it also has significant doctrinal ramifications. As described, courts from *Abel* to the present day have relied heavily on history in rejecting constitutional challenges to the deportation arrest scheme.<sup>395</sup> Indeed, the perception of historical sanction has shaped not only constitutional doctrine about the safeguards these arrests require, but also the degree to which the very decision to make a deportation arrest—in the liminal space between what falls within and without the immigration system—should be shielded from judicial review. But this fuller history shows that this perception is flawed, with at least two major implications for doctrine.

First, this Article—particularly in combination with *Deportation Arrest Warrants*—shows that the factual premise underlying courts' conclusions was flawed, undermining the case law that has relied on it. In *Deportation Arrest Warrants*, I showed that the modern arrest scheme conflicts with founding-era practices—as the most prevalent expulsion laws of that time (those adopted by the states) vested the decision to arrest in magistrates and tribunals with judicial power and the only federal deportation law from that period did not authorize deportation arrests.<sup>396</sup> This Article shows that the history of the federal regime also does not reflect acceptance of or sanction for the modern scheme. This fuller understanding demonstrates that courts have failed to recognize or grapple with the most salient features of this history and the fact that

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393. KANG, *supra* note 43, at 4 n.23 (contrasting her account of the agency playing this role in the immigration context with the “more hopeful view of the role of agencies in expanding constitutional norms” in other contexts).

394. See, e.g., Fish, *supra* note 205; KANG, *supra* note 43; SALYER, *supra* note 43; Paulsen, *supra* note 182.

395. See *supra* Part I.B (collecting cases).

396. Nash, *supra* note 5.

it directly contradicts their ultimate legal conclusions. Independently (and especially taken together), these articles reveal the faulty factual foundations of courts' legal conclusions, offer courts a sound basis for diverging from the case law rejecting constitutional challenges to these arrests, and provide a strong reason for courts to consider the constitutional validity of these arrests anew.<sup>397</sup>

Second, this Article offers first-of-its-kind historical support from the federal system for the contemporary claim that detachment and neutrality are critical for adjudicators authorizing deportation arrests. Scholars and litigators have argued that post-*Abel* case law requiring neutral-probable-cause review for arrests in the criminal context means that the current deportation arrest regime cannot stand. Michael Kagan, for instance, has argued that, given the confluence of precedents recognizing the right to neutral-probable-cause review, the erosion of the civil-criminal divide, and the increased willingness to scrutinize immigration procedures, the government should be compelled to install a neutral administrative decisionmaker—an immigration judge—to review probable cause for deportation arrests.<sup>398</sup> Building on this point, Mary Holper has argued that immigration judges are not sufficiently neutral and offered a suggestion similar to Representative Kerr's, contending that federal magistrate judges should play this role.<sup>399</sup> However, despite the pivotal—often dispositive—role that historical practice plays in Fourth Amendment arrest jurisprudence today,<sup>400</sup> neither they nor the Ninth Circuit, when it considered these issues in *Gonzalez*, have focused on the historical basis for this claim.

This Article helps fill and adds nuance to that gap. It shows that the question of who can constitutionally authorize deportation arrests cannot be answered, as courts have suggested for decades, by the mere fact that this power long reposed in executive hands. Rather, fealty to this history indicates that the inquiry must recognize the extraordinary, anomalous nature of vesting this power in executive officers and ask whether the officers currently authorizing deportation arrests are sufficiently detached and free from the risk of abuse to play this judicial role.<sup>401</sup>

To be clear, this Article does not seek a return to this system's origins: as others have made all too clear, the early deportation regime violated basic tenets of due process and lacked even the minimal protections that the modern system affords.<sup>402</sup> But this Article makes clear that, if this regime is to survive

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397. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (concluding that courts are not “bound by dicta should more complete argument demonstrate that the dicta is not correct”); *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001).

398. Kagan, *supra* note 12, at 167–69.

399. *Imitation Judges*, *supra* note 42, at 1278–82; *Deportation of Aliens Hearings*, *supra* note 284, at 30.

400. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 340–45 (2001); *United States v. Watson*, 423 U.S. 411, 418–23 (1976); *Abel v. United States*, 362 U.S. 217, 233, 236–37 (1960).

401. In this sense, it supports Professor Holper's examination of the extent to which immigration judges are genuinely detached. See *Imitation Judges*, *supra* note 42, at 1278.

402. See, e.g., *KANSTROOM*, *supra* note 43, at 127, 152–53; *SALYER*, *supra* note 43, at 136.

constitutional scrutiny—an issue beyond the scope of this Article—it must do so on some basis other than history. Indeed, courts considering the constitutional validity of this scheme will have to grapple with the ways in which it breaks from the early regime and the fact that there are now far more potential options for neutral, detached adjudicators—including immigration and magistrate judges—who could evaluate probable cause. In short, the history set forth in this Article gives courts a reason to reconsider the constitutional validity of this scheme and to find that it falls far short.

#### CONCLUSION

The long-accepted history of the federal deportation arrest scheme has been essential to its preservation, undergirding and insulating an enforcement regime that diverges dramatically from otherwise foundational arrest constraints. Yet a closer look at this history contradicts the notion that our modern scheme was historically sanctioned, offers important insight as courts confront new challenges to the constitutional validity of these arrests, and provides robust historical support for calls to fundamentally transform the deportation arrest system.