

ARTICLES

SEPARATION OF POWERS BY CONTRACT: HOW COLLECTIVE BARGAINING RESHAPES PRESIDENTIAL POWER

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This Article demonstrates for the first time how civil servants check and restrain presidential power through collective bargaining. The executive branch is typically depicted as a top-down hierarchy. The President, as chief executive, issues policy directives, and the tenured bureaucracy of civil servants below him follow them. This presumed top-down structure shapes many influential critiques of the modern administrative state. Proponents of a strong President decry civil servants as an unelected “deep state” usurping popular will. Skeptics of presidential power fear the growth of an imperial presidency, held in check by an impartial bureaucracy.

Federal sector labor rights, which play an increasingly central role in structuring the modern executive branch, complicate each of these critiques. Under federal law, civil servants have the right to enter into binding contracts with administrative agencies governing the conditions of their employment. These agreements restrain and reshape the President’s power to manage the federal bureaucracy and impact nearly every area of executive branch policymaking, from how administrative law judges decide cases to how immigration agents and prison guards enforce federal law. Bureaucratic power arrangements are neither imposed from above by an “imperial” presidency nor subverted from below by an “unaccountable” bureaucracy. Rather, the President and the civil service bargain over the contours of executive authority and litigate their disputes before arbitrators and courts. Bargaining thus encourages a form of government-wide civil servant “resistance” that is legalistic rather than lawless, and highly structured and transparent rather than opaque and inchoate.

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Despite the increasingly intense judicial and scholarly battles over the administrative state and its legitimacy, civil servant labor rights have gone largely unnoticed and unstudied. This Article shows for the first time how these labor rights restructure and legitimize the modern executive branch. First, using a novel dataset of almost 1,000 contract disputes spanning forty years, as well as in-depth case studies of multiple agencies, it documents the myriad ways in which collective bargaining reshapes bureaucratic relationships within the executive branch. Second, this Article draws on primary source material and academic literature to illuminate the history and theoretical foundations of bargaining as a basis for bureaucratic government. What emerges from this history is a picture of modern bureaucracy that is more mutualistic, legally ordered, and politically responsive than modern observers appreciate.

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INTRODUCTION

Over the past three decades, the President’s power to shape policy through executive action has grown substantially.¹ Scholars have responded by spotlighting how the federal civil service, and the millions of bureaucrats who staff it, restrain presidential power.² Observers agree that Congress and courts are no longer capable of overseeing the full scope of executive activity. The federal bureaucracy, by contrast, has the size, personnel, and expertise to monitor executive action, identify potential abuses, and resist ill-considered or improperly politicized policy. Bureaucrats’ independence and their practical and legal ability to challenge presidential policy therefore have become critical modulators of executive power.³

¹ For the canonical account of presidential management as policymaking, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). See also Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 109 (2021) (describing the growth of presidential administration through the Obama and Trump administrations).

² See, e.g., Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (exploring how bureaucratic structures function as checks and balances on the executive branch); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019) (describing public civil servant disobedience as a form of protest); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015) (noting that civil servants have “broad responsibilities” to resist agency leadership that acts in nakedly partisan ways unmoored from Congressional or scientific guidance); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436 (2009) (explaining that the Supreme Court has repeatedly upheld the constitutionality of the civil service and corresponding international separation of powers mechanisms); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655 (2018) (arguing that American bureaucracy has very little in common with the “deep state[s]” of authoritarian regimes); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 141–46 (2018) (exploring resistance to presidential administrations from the national security bureaucracy).

³ A number of emerging accounts focus on the substantial practical ability of the civil service to check presidential power by leveraging asymmetries of resources and information to pursue programs that might be at odds with the President’s goals, *see, e.g.*, Nou, *supra* note 2, at 363–65, or by maintaining bureaucratic cultures that persistently exercise discretion

To critics, including proponents of the unitary executive theory, the tenured federal bureaucracy constitutes a “deep state,” unelected and illegitimate, that has wrested away power constitutionally vested in the President.⁴ Former President Trump has vowed, if re-elected in 2024, to purge thousands of federal civil servants and replace them with political loyalists, claiming to have a list of fifty thousand civil servants to terminate.⁵ Even bureaucracy’s defenders worry about the civil service’s supposed insulation from interbranch supervision and democratic accountability. The mechanisms bureaucrats use to “check” the President are deemed irregular at best, extralegal at worst. They require acts of “disobedience” or “resistance”—such as deliberate noncompliance with or half-hearted implementation of the President’s directives.⁶

At the heart of this debate over the legitimacy of the federal bureaucracy are basic questions of personnel management—to whom do bureaucrats answer? Who structures their incentives? Who can fire, discipline, or reassign them, and for what reasons? Are bureaucrats truly a “ruling class” of “unaccountable ‘ministers,’” insulated from the control of the coordinate branches and the American public, as critics on the Supreme Court and elsewhere suggest?⁷ Or do they, as defenders argue, serve a pro-constitutional role by curbing presidential excess

in specific ways, *see, e.g.*, Ingber, *supra* note 2, at 169–73. Other accounts have investigated more formal mechanisms for civil servants to challenge the President, including by seeking standing to challenge executive policies on the merits in Article III courts. *See, e.g.*, Jennifer Nou, *Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1191–95 (2019) (discussing Judge Posner’s approach to analyzing the standing of ALJs to challenge agency action); Alex Hemmer, Note, *Civil Servant Suits*, 124 YALE L.J. 758 (2014). Still others focus on the role that internal management of the executive branch plays in lending structure and legitimacy to executive action, importing the norms and structure of traditional law into areas of otherwise unconstrained policy discretion. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249–59 (2017); Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1231–32 (2020).

⁴ The literature contesting the legitimacy of the American administrative state is far too vast to summarize here, but for representative examples, see generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 15–16 (2014) (summarizing and expanding upon common critiques of the administrative state); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 16 (2012) (describing some observers’ “deep concerns about the legitimacy of the modern administrative state” based on its purported deviation from original separation of powers principles).

⁵ Eric Katz, *If Trump Is Reelected, His Aides Are Planning to Purge the Civil Service*, Gov’t EXEC. (July 22, 2022), <https://www.govexec.com/workforce/2022/07/trump-reelected-aides-plan-purge-civil-service/374842> [<https://perma.cc/BXQ6-FHE2>].

⁶ *See, e.g.*, Nou, *supra* note 2, at 381 (noting that “bureaucracy [was] openly challenging decisions” during the Trump administration); Ingber, *supra* note 2, at 139.

⁷ West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

and promoting separation of powers and rule of law?⁸ The answers to these questions have important implications for the legal viability of the administrative state itself, as recent judicial decisions make clear.⁹

But surprisingly, administrative law scholars have ignored a complex system of labor law at the heart of modern personnel administration, which reshapes presidential-bureaucratic relations in profound ways and challenges many of our assumptions about bureaucracy and the administrative state. Federal employees have extensive, statutorily enshrined labor rights. They have the legal right to form labor unions, to negotiate the terms of their employment with presidentially appointed agency heads, and to enter into complex collective bargaining agreements (CBAs) that govern many aspects of their work and shape how the federal government implements public policy.¹⁰ These contractual arrangements can amend the relationship between the President and the civil service in important ways, restructuring how agencies work and constraining what agency heads can direct employees to do in service of an agency’s mission. Hundreds of these CBAs have been adopted, governing millions of federal employees ranging from immigration judges to scientists to prison guards.¹¹ Their provisions are enforced through thousands of adjudications each year, hundreds of which are appealed to the Federal Labor Relations Authority (FLRA) and dozens to circuit courts.¹²

Take the field of immigration as an example. Typically, the story goes that the President imposes policies with profound implications for the immigration system, such as prioritizing the arrest and deportation of certain populations or setting targets to grant or deny certain numbers of asylum applications or removal challenges.¹³ Once those policies are announced, bureaucrats may choose to either sheepishly obey or clandestinely resist their orders. Presidential administration thus produces either an “imperial” presidency or an unaccountable “deep state.”

⁸ See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting).

⁹ See, e.g., *Seila L.*, 140 S. Ct. at 2211 (striking down removal protections for the CFPB Director); *West Virginia*, 142 S. Ct. at 2617 (agreeing with the majority decision to strike down emissions regulation under major questions doctrine, and warning of government by “unaccountable ‘ministers’” (Gorsuch, J., concurring) (quoting THE FEDERALIST No. 11, at 85 (Alexander Hamilton (Clinton Rossiter ed., 1961)))).

¹⁰ See *infra* Part I.

¹¹ U.S. FED. LAB. RELS. AUTH., CONGRESSIONAL BUDGET JUSTIFICATION 3 (2023) (noting that 1.2 million federal civil servants are represented by unions, comprising over 2,200 bargaining units).

¹² *Id.* at 9–12, 24–31 (projecting 3,745 unfair labor practice complaints, more than three hundred alternative dispute resolutions, 257 cases before ALJs, and a total of 375 appeals before the FLRA (247 arbitration, 98 negotiability, 18 ULP, and 12 representation) in 2023).

¹³ See *infra* Section III.B.1.

But in the overlooked field of labor, bureaucrats may check presidential directives not through subterfuge, but through formal and legal challenges resting on breach of contract or labor violation claims. Immigration and Customs Enforcement (ICE) agents can challenge and defeat policies requiring them to deprioritize the arrest of certain populations—such as minors and those without criminal records—or to provide legal information to detained immigrants on the grounds that those policies improperly alter agents’ conditions of employment.¹⁴ Border patrol guards can defeat policies altering what types of border searches they may conduct, what types of weapons they may carry, or what disciplinary processes they may face for misconduct.¹⁵ Immigration judges can defeat productivity quotas or performance evaluation standards designed to force them to process cases more quickly—a process well known to produce lower win rates for immigrants challenging removals.¹⁶ And employees of the United States Customs and Immigration Service (USCIS) may challenge directives pushing them to grant fewer asylum applications.¹⁷ In all these instances, important questions of presidential policy may rise and fall not on deep analyses of Article II or the Administrative Procedure Act, but on disputes over contractual interpretation, bargaining obligations, and unfair labor practices. In short, federal labor provides a forum in which civil servants openly and formally, rather than secretly and illicitly, challenge presidential administration in a wide range of important contexts. What emerges from the study of federal sector labor is a picture of presidential power neither imposed from above nor subverted from below. Rather, the President and the civil service bargain over the contours of executive authority and litigate their disputes before arbitrators and courts.

Federal employees’ labor rights are likely to become more important in coming years. The Trump Administration accelerated a trend towards federal employees leveraging their labor rights to influence executive branch policies.¹⁸ In February 2020, for instance, the union representing ICE employees attempted to negotiate a collective bargaining agreement with Kenneth Cuccinelli, the departing de facto deputy head¹⁹ of the Department of Homeland Security, that would

¹⁴ See *infra* Section III.B.1.

¹⁵ See *infra* Section III.B.1.

¹⁶ See *infra* Section III.B.2.

¹⁷ See *infra* note 138 and accompanying text.

¹⁸ See *infra* Part III (describing the escalating use of labor rights to achieve policy outcomes in this period).

¹⁹ Camilo Montoya-Galvez, *Immigration Hawk Ken Cuccinelli Tapped as No. 2 at Homeland Security*, CBS News (Nov. 13, 2019, 10:15 PM), <https://www.cbsnews.com/news/>

have significantly expanded their power to challenge immigration enforcement directives as violating agents' rights to certain working conditions.²⁰ An EPA employees' union, emboldened by a victory before the FLRA, likewise sought to negotiate a new CBA enshrining certain protections for scientific expertise and neutrality as employment rights.²¹ Presidents, however, are not always on the losing end of such contractual arrangements. A 2004 effort by the Bush Administration to insert non-disclosure requirements into a CBA between the Department of Homeland Security and its employees, for instance, resulted in an employment-based ban on leaking from one of the nation's largest and most politically controversial agencies.²² As the norms promoting bureaucratic expertise weaken,²³ and as other administrative structures designed to protect civil service independence come under sustained attack,²⁴ such efforts will likely multiply.²⁵ Understanding federal sector labor law is thus an urgent task, as it is an increasingly important battlefield for contesting both the practical control and legal legitimacy of the administrative state.

This Article begins that task by making two primary contributions. First, the Article describes and empirically documents how employment-based challenges to top-down management reshape presidential power by reviewing and compiling data on nearly 1,000 FLRA adjudications from the past forty years. It then provides in-depth case studies of agencies in three policy areas—immigration, environmental protection, and tax—to demonstrate how federal labor rights can shape policy outcomes within the executive branch. The Article focuses on these agencies because they have been sites of recurring, high-salience policy changes by presidential directive over the past several decades. And by virtue of the President's focus on these agencies as vehicles for executive policymaking, they have also been at the center of several high-profile disputes over agency policy between tenured staff and

ken-cuccinelli-immigration-hawk-ken-cuccinelli-tapped-as-department-of-homeland-security-no-2 [<https://perma.cc/CK5D-49HR>].

²⁰ See *infra* notes 267–70 and accompanying text.

²¹ See *infra* Section III.D.

²² See *infra* Section III.B.1.

²³ See, e.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 590 (2021) (noting that “structural deregulation . . . contravenes longstanding administrative law norms of procedural regularity, transparency, rationality, and accountability”); Peter L. Strauss, *Eroding “Checks” on Presidential Authority—Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 587–88 (2019).

²⁴ See *infra* Section II.B and Part III.

²⁵ Conservative politicians and legal activists have been searching for new ways to weaken labor protections for disfavored federal employees, including by decertifying unfriendly unions, mandating hardball bargaining tactics, and refusing to staff key positions at the FLRA. See *infra* Part III.

politically appointed heads.²⁶ These case studies show that, at least in these critical areas of presidential policymaking, contractual rights play an important and underappreciated role in shaping presidential discretion over executive branch policy.

Second, this Article illuminates the ideological underpinnings of the modern federal labor regime and its implications for administrative law. It challenges the assumption, prevalent in the academic literature and central to debates about the legitimacy of the administrative state, that executive branch bureaucracy is a top-down hierarchy insulated from political influence. Both bureaucracy's critics and its defenders presume it suffers from a profound democratic deficit. Unitarists believe bureaucracy usurps presidential power, while defenders believe that, despite its salutary role in restraining presidential abuses, bureaucracy sits largely outside the legitimizing force of American law.²⁷ But labor rights complicate these critiques. The federal labor regime is a more mutualistic and legalistic model of presidential-bureaucratic relations than contemporary observers appreciate.

While labor rights restrain the President's managerial authority in some respects, they also enhance presidential power and expand executive branch capacity in other ways, thereby complicating the unitarist critique. One surprising insight from the history of federal sector bargaining reveals that neither Congress nor the courts imposed such bargaining on the President.²⁸ Instead, the President urged its adoption for two reasons. First, bargaining allowed the President to recruit skilled workers to join rapidly expanding executive agencies.²⁹ Although the federal government could not compete with the private sector in terms of salary or perquisites, it could offer workers greater workplace autonomy and enable them to serve the public interest free from political interference.³⁰ Second, bargaining tightened the President's control over the federal workforce. Since the late nineteenth

²⁶ Indeed, because of this dynamic, both immigration and environmental protection are popular subjects for case studies on “bureaucratic resistance” to presidential policymaking. See, e.g., Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 647 (2019) (speculating that bureaucratic dissonance, rather than resistance, may be the real problem in the immigration context); Joel A. Mintz, *Civil Servant Resistance at the EPA—A Response to Jennifer Nou*, 94 CHI.-KENT L. REV. 615 (2019).

²⁷ See e.g., Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 2–5 (2004) (describing evolving arguments in favor of a unitary executive theory); Nou, *supra* note 2, at 363 (noting that acts of disobedience by civil servants “heighten[] administrative law’s already considerable anxieties” about how to justify legal “coercion by unelected actors” in the administrative state).

²⁸ See *infra* Section I.B.

²⁹ See *infra* Section I.B.1.

³⁰ See *infra* Section I.B.1.

century, most federal personnel administration had fallen under the control of the Civil Service Commission (CSC), an immensely powerful independent agency that oversaw everything from employee classification and hiring to disciplinary proceedings.³¹ Collective bargaining allowed the President to bypass the CSC and take a more active role in shaping federal workforce policies through negotiations and contract.³² In short, while worker protections are often cast as improper limits on presidential power, history shows that presidents themselves view labor rights in precisely the opposite terms, as a means of expanding presidential power through strategic concessions.

Labor rights also respond to concerns that bureaucratic resistance, however valuable in other ways, subverts democratic governance by permitting an unelected cohort of civil servants to shape executive policymaking.³³ Labor rights are susceptible to formal, legal resolution and democratic oversight. Many of the disputes over bureaucratic power and managerial control that might otherwise be fought through inchoate “resistance,” or opaque attempts to subvert managerial initiatives, are instead channeled into a highly formalized system of negotiation, contracting, arbitration, and appeal. The power arrangements between the bureaucracy and presidentially appointed agency heads are reduced to writings, and disputes are resolved by contract and statutory law, rather than through the exercise of raw institutional power. This arrangement not only makes bureaucratic power struggles more transparent and legalistic, it also enables each of the coordinate branches to supervise and regulate presidential-bureaucratic relations. By directing negotiations with unions, the President actively shapes workplace policy. Congress can shape civil servants’ legal rights through statutory enactments. And courts can supervise the enforcement of these rights, reviewing important questions of statutory interpretation and ensuring that both labor and management bargain in good faith.

Nonetheless, civil servant labor rights do present a different set of challenges for the administrative state. While collective bargaining imports some of the legitimizing aspects of American political and legal culture into the federal bureaucracy, it may import some of those cultures’ pathologies as well, for instance by providing new avenues to manipulate civil service rights for partisan advantage or to entrench ideological preferences.

³¹ See *infra* Section I.B.2.

³² See *infra* Section I.B.2.

³³ See sources cited *supra* note 2.

This Article proceeds in four Parts. Part I draws on an array of primary and secondary sources to describe the historical origins and ideological underpinnings of federal sector bargaining. Part II sets forth the legal contours of modern federal sector labor rights and analyzes how they reshape presidential power and permit entry points for the coordinate branches to participate in shaping bureaucratic relations. Part III offers case studies on how bargaining can reshape agency dynamics in specific policy areas; it begins with descriptive data on FLRA adjudications, including how frequently labor and management prevail on their contract claims and how that success varies over time. It then provides descriptive accounts of how bargaining has impacted the operation of immigration, environmental, and tax policy. Finally, Part IV concludes with some reflections on the doctrinal and theoretical implications of bargaining's underappreciated influence on the administrative state.

I THE HISTORY OF FEDERAL SECTOR BARGAINING

This Part draws on an array of primary sources and legislative history to document the history of federal sector bargaining and the reasons for its emergence. This story, while critical to understanding the modern executive branch, has never been told in the legal scholarship and has been presented only sparingly in other literatures. The proceeding sections argue that bargaining rights emerged as a way to expand the executive branch and to retain the professional integrity of skilled bureaucrats, while rendering bureaucratic relationships more transparent and susceptible to legal supervision. This made the federal bureaucracy more legitimate to an American political culture that by the 1970s was increasingly skeptical of centralized federal power.³⁴ Unions were seen by both the President and Congress as a way of preserving civil servant independence while also rendering the civil service more responsive to democratic forces.

Section I.A provides an overview of the Civil Service Reform Act (CSRA) and the structural changes it imposed on the modern federal bureaucracy. Sections I.B and I.C document the reasons for the CSRA's passage, detailing the incentives that both the President and Congress, respectively, had for granting civil servants extensive rights to bargain over the contours of agency management.

³⁴ See JOSEPH POSTELL, BUREAUCRACY IN AMERICA 251–53 (2017) (discussing the growing view in the 1970s that the federal bureaucracy was the problem, not the solution, to the issues facing the United States).

A. The Civil Service Reform Act of 1978

In 1978, President Carter signed the Civil Service Reform Act into law.³⁵ Although now largely forgotten, the law was the most significant civil service reform in nearly a century: the “centerpiece” of President Carter’s efforts at government reorganization.³⁶ The Act’s goal was to loosen the power of traditional, Progressive Era merit protections, allowing the President to steer executive branch policy over the resistance of “dug-in establishmentarians” within the federal bureaucracy.³⁷

The CSRA “comprehensively overhauled the civil service system” of the New Deal era.³⁸ As relevant here, the CSRA made two key changes to federal personnel management. One was structural. Prior to the enactment of the CSRA, nearly every aspect of the federal civil service was overseen by the Civil Service Commission (CSC), an enormously powerful independent agency. The CSC had been created by the Pendleton Act of 1883³⁹ and had grown over successive generations from a mostly advisory body to one tasked with administering a wide variety of things, such as hiring and classifying federal workers, adjudicating employment disputes and appeals, and formulating government-wide management policy.⁴⁰ The CSRA abolished the CSC and distributed its functions across an array of new agencies. The Merits Systems Protection Board (MSPB) would oversee employee challenges to adverse personnel actions such as suspensions, demotions, and terminations; the Office of Personnel Management (OPM) would formulate management policy; and the Office of Special Counsel (OSC) would investigate certain violations of federal law, such

³⁵ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Most practitioners refer to Title VII of the CSRA, which covers federal labor rights, as the Federal Labor Management Relations Statute (FLMRS). This Article refers to the entire Act, including its labor provisions, as the CSRA. The intention is both to avoid confusing alternation between two different statutory names, and also to emphasize that federal sector bargaining was an integral part of a larger reconceptualization of American bureaucracy.

³⁶ JIMMY CARTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 95-299, at 1 (1978).

³⁷ James P. Pfiffner, *Government Legitimacy and the Role of the Civil Service*, in THE FUTURE OF MERIT 19 (James P. Pfiffner & Douglas A. Brook, eds., 2000) (quoting The President’s News Conference of February 17, 1971, 1 PUB. PAPERS 167 (Feb. 17, 1971)); see also S. REP. NO. 95-969, at 4 (1978) (declaring that “[t]he public has a right to an efficient and effective Government, which is responsive to their needs as perceived by elected officials”).

³⁸ Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 773 (1985).

³⁹ Pendleton Act, ch. 27, 22 Stat. 403 (1883).

⁴⁰ See ROBERT G. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM 1–7 (1975) (detailing the history of the CSC).

as improper political activities in contravention of the Hatch Act.⁴¹ While still politically independent, these agencies were smaller and more specialized than the CSC, exerting a less concentrated influence over the bureaucratic organization of the executive branch and leaving more space for the President to influence personnel policy.

The second key change was substantive. The CSRA fundamentally altered the array of employment rights available to federal civil servants. Some rights were weakened. For instance, a number of procedural rights that had been developed by the CSC over the middle of the twentieth century and afforded to individual civil servants challenging adverse employment actions were eliminated or significantly curtailed.⁴² At the same time, however, the CSRA also granted federal workers an array of new labor and contractual rights. For the first time, federal workers were given the legal right to join a union, to collectively bargain over nearly any issue affecting the “conditions” of their employment, and to sue their employing agencies for violations of those contractual provisions.⁴³ These contractual rights were to be enforced by a new independent agency, the Federal Labor Relations Authority (FLRA). The FLRA had a number of component parts, but at its core was a system of semi-private arbitration: In the event of an alleged breach of a CBA, the agency and the union would bring their dispute before a mutually selected, third-party arbitrator. Arbitrations could be appealed, or “except[ed]” in labor parlance, to the FLRA itself, which was composed of three bipartisan members serving fixed, five-year terms.⁴⁴

The CSRA’s establishment of labor rights was a dramatic departure from historical practice. Prior to 1978, federal law provided no formal statutory mechanism for employees to shape the ways in which the federal workplace was managed through contract or union organizing.⁴⁵ While civil servants did attempt to unionize and bargain, they were afforded no formal legal status and their agreements were unenforceable against the federal government.⁴⁶ Many commentators

⁴¹ See Civil Service Reform Act of 1978 §§ 201(a) (establishing OPM), 202(a) (establishing MSPB and OSC).

⁴² See S. REP. No. 95-969, at 9–10 (detailing new limitations on procedural rights for challenging adverse employment actions).

⁴³ 5 U.S.C. §§ 7102(2), 7121–23.

⁴⁴ *Id.* §§ 7104, 7122.

⁴⁵ See Charles J. Coleman, *The Civil Service Reform Act of 1978: Its Meaning and Its Roots*, 31 LAB. L.J. 200, 202 (1980) (describing pre-1978 limitations on federal labor rights and changes brought by the CSRA).

⁴⁶ See MURRAY B. NESBITT, *LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE* 98–101 (1976) (describing federal courts’ unwillingness to review agency employment decisions even after executive orders establishing federal employees’ labor rights).

through the early 1970s believed that public sector unionism was fundamentally incompatible with democratic principles.⁴⁷ In a widely cited article, then-professor Ralph K. Winter argued that a unionized public sector would “radically alter[]” the political process through the exercise of its extensive bargaining power.⁴⁸ Indeed, prior to the 1960s, many viewed public sector bargaining as an unconstitutional delegation of executive power to private citizens.⁴⁹

The CSRA’s establishment of muscular federal labor rights thus poses a historical riddle. Why, if greater presidential control of the bureaucracy was the ultimate goal, did the CSRA create for the first time an extensive right for labor to bargain collectively? Why cede so much managerial authority to unions, particularly at a time when private sector labor power was declining precipitously?⁵⁰ And why restructure bureaucratic relationships—a paradigmatic component of public law—through bargaining and contracts, a form of private ordering that historically had played no role in executive branch management?

As described in Sections I.B and I.C, a central claim of this Article is that the private law model of contract and bargaining provided a vehicle for dramatically expanding the scope of public administration from the mid-twentieth century forward, while presenting that expansion as both legally and democratically legitimate. The rise of federal sector collective bargaining can be understood as the product of two concurrent trends. One was internal to the executive branch, driven by the desire of the President to assert greater political control over the terms of federal employment. The other was external, driven by Congress’s desire to exert greater control over executive branch operations and management. Both trends responded to a need to expand state capacity while shoring up its legitimacy, reining in both real and perceived abuses of a bureaucracy insulated from democratic control.

⁴⁷ See Charles M. Rehmus, *Labor Relations in the Public Sector in the United States*, in PUBLIC EMPLOYMENT LABOR RELATIONS: AN OVERVIEW OF ELEVEN NATIONS 22 (Charles M. Rehmus ed., 1975) (noting the traditional view that “government is and should be supreme” and therefore “immune from contravening forces . . . such as collective bargaining”).

⁴⁸ Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1124 (1969). For an overview of academic criticism of public sector bargaining from this era, see Sanford Cohen, *Does Public Employee Unionism Diminish Democracy?*, 32 INDUS. & LAB. RELS. REV. 189, 189–92 (1979).

⁴⁹ See Donald F. Parker, Susan J. Schurman & B. Ruth Montgomery, *Labor-Management Relations Under CSRA: Provisions and Effects*, in LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978, at 162 (Patricia W. Ingraham & Carolyn Ban eds., 1984) (“For many years, the 10th Amendment to the Constitution was interpreted as the source of sovereign governmental power, precluding public employee organization and bargaining.” (citations omitted)).

⁵⁰ See, e.g., GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER 146–47 (2022) (summarizing this decline).

B. Labor Rights as an Enhancement of Presidential Power

President Kennedy first established federal sector bargaining by Executive Order in 1962,⁵¹ and it was subsequently expanded by presidents of both parties.⁵² The move reflected two strategic considerations. One responded to changes in the labor market. The President encouraged collective bargaining to entice skilled labor to join the executive branch. By offering workers autonomy and protection from managerial abuses, the federal bureaucracy could compete with the private sector. Politically, contracting also offered the President an opportunity to sidestep the long-standing managerial power of CSC. In both cases, contrary to depictions of unions and bureaucracies as illegitimate drags on presidential power, the executive branch itself initiated bargaining, primarily as a means of politically empowering the President and building state capacity.

1. Labor Market

Government from the 1950s to the 1970s was a “growth industry.”⁵³ The postwar era saw a major expansion in social service provision and a rapid expansion in the federal government’s regulatory and national security remits.⁵⁴ The growing need for skilled personnel created a recruiting crisis for government. There was a general perception that despite multiplying needs, the quality and efficiency of regulation and federal service provision had declined badly in the decades since the New Deal.⁵⁵

The executive branch identified several recruiting challenges. One was a general inability to keep pace with private sector wages. In a 1953 report, the House Committee on the Post Office and Civil Service identified a number of “common deterrents in obtaining sufficient applicant supply,” including pay “significantly below comparable jobs in industry” and “insecurity of tenure,” which had a “marked adverse influence on the attraction of high caliber scientific and professional personnel, as well as key administrative personnel,” as it was “generally felt that industry offers a better opportunity than Government for

⁵¹ Exec. Order No. 10,988, 27 Fed. Reg. 1211 (Jan. 17, 1962).

⁵² See Exec. Order No. 11,491, 34 Fed. Reg. 17605 (Oct. 29, 1969); Exec. Order No. 11,838, 40 Fed. Reg. 5743 (Feb. 6, 1975); see also *infra* Section I.B (noting the codification of civil servant labor rights at the urging of President Carter).

⁵³ Wellington & Winter, *supra* note 48, at 1115.

⁵⁴ See, e.g., Patricia W. Ingraham, *The Civil Service Reform Act of 1978: The Design and Legislative History*, in *LEGISLATING BUREAUCRATIC CHANGE*, *supra* note 49, at 13–14 (detailing the context and change in perception resulting from this expansion).

⁵⁵ See, e.g., THOMAS K. McCRAW, *PROPHETS OF REGULATION* 218–20 (1984) (summarizing critiques from the federal government and academia in the 1940s and 50s).

advancement in position and salary if an individual merits such advancement.”⁵⁶ The CSC reached similar conclusions about “[t]he problem of attracting highly qualified people—scientists, engineers, [and] administrators” in 1959.⁵⁷

Low wages were exacerbated by widespread managerial abuses in federal employment. Despite extensive formal protections from major adverse actions such as firing and demotion, civil servants were susceptible to an array of lower-grade abuses that, in practice, gave managers wide range to harass or demoralize them. As a comprehensive study of the civil service concluded in 1975, “[t]he work environment may be made friendly or hostile, open or repressive, tolerable or intolerable by the superior, who is equipped with a finely honed and calibrated set of sanctions to be used against subordinates.”⁵⁸ The CSC, which had a close relationship with the management at many agencies, was often accused of looking the other way when abuses occurred. By the 1970s, this reality had become widely known. As *The Washington Post* summarized, under the civil service system managers could “dispatch any civil servant” when their “prerogatives” are “attack[ed].”⁵⁹ The practice was epitomized by the so-called Malek Manual (drafted by Fred Malek, President Nixon’s director of personnel), a memorandum that expansively outlined the strategies managers could employ to sideline or harass disfavored workers without running afoul of civil service laws.⁶⁰ The memo, which became notorious during the Senate’s Watergate investigation, was considered to be “to personnel administration what Machiavelli’s *The Prince* is [to] the broader field of political science.”⁶¹

More generally, there was a growing belief that America, as the world’s most powerful democracy, should subject its own government apparatus to “industrial democracy,” promoting “consultative management by its own good example.”⁶² The 1949 Hoover Commission on government reorganization observed that employees “were ‘not

⁵⁶ COMM. ON POST OFF. & CIV. SERV., PERSONNEL RECRUITMENT AND EMPLOYMENT PRACTICES IN THE FEDERAL GOVERNMENT, S. Doc. No. 83-37, at 9 (1953).

⁵⁷ U.S. CIV. SERV. COMM’N, 76TH ANNUAL REP. 10 (1959).

⁵⁸ VAUGHN, *supra* note 40, at 14.

⁵⁹ David W. Ewing, *How Bureaucrats Deal with Dissidents*, WASH. POST, Aug. 19, 1979, at E3.

⁶⁰ See Executive Session Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate, Watergate and Related Activities: Use of Incumbency—Responsiveness Programs (Additional Documents), 93rd Cong. 8903 (1974) (Ex. 35, Federal Political Personnel Manual).

⁶¹ JAY M. SHAFRITZ, DAVID H. ROSENBLoom, NORMA M. RICCUCCI, KATHERINE C. NAFF & ALBERT C. HYDE, PERSONNEL MANAGEMENT IN GOVERNMENT 38 (5th ed. 2001) (quoting CLASSICS OF PUBLIC PERSONNEL POLICY 113 (Frank J. Thompson ed., 1979)).

⁶² Wilson R. Hart, *The U.S. Civil Service Learns to Live with Executive Order 10,988: An Interim Appraisal*, 17 INDUS. & LAB. RELS. REV. 203, 210 (1964).

provided a positive opportunity to participate in the formulation of policies and practices which affect their welfare” and “that ‘the President should require the heads of departments and agencies to provide for employee participation in the formulation and improvement of Federal personnel policies and practices.’”⁶³ By the 1950s, many labor organizers and public administrators questioned why robust unionization was permitted in the private sector but forbidden for similar roles in the public sector. The Second Hoover Commission concluded in 1955 that “[t]he Federal Government ha[d] lagged behind other organizations in recognizing the value of providing formal means for employee-management consultation.”⁶⁴

These challenges—the growing need for federal manpower, competition from the private sector, and the executive branch’s particular need for skilled knowledge workers—required new models for recruitment and management. In exchange for lower wages than those in the private sector, collective bargaining could offer workers greater autonomy and a sense of professional purpose.⁶⁵ As one expert in public administration testified in 1978, the “increasing professionalization of skills and bodies of knowledge” in social science and technical fields required management strategies for attracting skilled labor and for maximizing its creative output.⁶⁶ This led to “an increasing reliance on public sector collective bargaining,” a “decreasing reliance on authority/control strategies,” and “a greater reliance on rational analysis, negotiation, and incentives.”⁶⁷

As early as the 1940s, the CSC and other commissions studying the civil service began insisting that federal employees’ labor rights should be in parity with private sector ones.⁶⁸ Others, including the Hoover Commission and National Civil Service League, similarly encouraged

⁶³ NESBITT, *supra* note 46, at 14 (quoting THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 125–27 (1949)).

⁶⁴ *Id.* at 15 (quoting COMM’N ON ORG. OF THE EXEC. BRANCH OF THE GOV’T: TASK FORCE ON PERS. AND CIV. SERV., REPORT ON PERSONNEL AND CIVIL SERVICE 110 (1955)).

⁶⁵ See Rehmus, *supra* note 47, at 23 (noting that while their wages were lower, government workers enjoyed “greater fringe benefits and job security”).

⁶⁶ *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearing on S. 2640, S. 2707, and S. 2830 Before the S. Comm. on Governmental Affs.*, 95th Cong. 475 app. (1978) [hereinafter 1978 Senate CSRA Hearings] (statement of Professor Edward S. Flash, Jr.).

⁶⁷ *Id.*

⁶⁸ See, e.g., PRESIDENT’S TASK FORCE ON EMP-MGMT. RELS. IN THE FED. SERV., A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE 1189 (1961) [hereinafter PRESIDENT’S 1961 TASK FORCE], <https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/50th%20Anniversary%20EO%2010988/Report%20of%20President%20Kennedy's%20Task%20Force.pdf> [https://perma.cc/8ULJ-GTUD] (advocating that the government pace ahead of private sector in terms of labor relations).

dealing.⁶⁹ Increasingly, major private sector unions began to organize public sector workers.⁷⁰ The executive branch began responding to these pressures even before any formal legal authorization.⁷¹ Informal bargaining with growing unions and trade associations in the executive branch expanded throughout the 1940s and 1950s.⁷² A 1961 Task Force commissioned by President Kennedy recognized that “[f]ederal employees very much want to participate in the formulation and implementation of personnel policies and have established large and stable organizations for this specific purpose.”⁷³ Executive Order 11,491 formalized this understanding, creating a centralized process for civil servants to bargain over employment conditions with agency heads.⁷⁴

2. Disputes Over Presidential Administration

In addition to recruiting and labor pressures, the President also had a concrete political interest in pursuing more expansive bargaining. The CSC, as an independent Progressive Era agency, was highly insulated from presidential influence.⁷⁵ Bargaining between unions and presidentially appointed agency heads gave the President greater direct control over the contours of bureaucratic power and cut a powerful intermediary out of his relationship with the federal workforce.

Moreover, presidents had long been hostile to the CSC. Since the Wilson administration, presidents had sought to exercise greater control over executive branch operations.⁷⁶ The Brownlow and Hoover commissions on government reorganization had both wanted to bring personnel management under direct presidential control but had failed, even as they had succeeded in restructuring other previously independent branches of the executive branch such as the Budget Bureau.⁷⁷ The independent CSC proved sticky: It had extensive formal legal power, management expertise, and was adept at building both

⁶⁹ *Id.*

⁷⁰ Rehman, *supra* note 47, at 23.

⁷¹ See PRESIDENT’S 1961 TASK FORCE, *supra* note 68, at 1186–87 (describing pre-1962 policies encouraging informal bargaining and consultation with employee groups and unions).

⁷² *Id.* at 1190.

⁷³ *Id.*

⁷⁴ Exec. Order No. 11,491, 34 Fed. Reg. 1760 (Oct. 29, 1969).

⁷⁵ For a description of this insulation, see generally VAUGHN, *supra* note 40, at 1–7.

⁷⁶ See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 22–31 (2022) (describing President Wilson’s views on how to keep unelected bureaucrats in check).

⁷⁷ See MORDECAI LEE, A PRESIDENTIAL CIVIL SERVICE 55 (2016) (describing a plan to remodel the CSC after the Bureau of the Budget, whose director served “at the pleasure of the president”).

bureaucratic and legislative constituencies.⁷⁸ It managed everything from hiring and classification of employees, to investigating and adjudicating disciplinary disputes, to generating high-level management policy. Serving “simultaneously both as the protector of employee rights and as the promoter of efficient personnel management policy,” it had become “manager, rulemaker, prosecutor and judge” of personnel matters.⁷⁹ The CSC’s extraordinary and very opaque power led to concern that the “federal personnel system” had become “too immune from political directives of any kind,” and thus was “isolated, and resistant to carrying out new policy directives.”⁸⁰ This “lack of responsiveness to elected political leaders,” in turn, revived longstanding concerns about the democratic legitimacy of the tenured civil service, as it “indicated a general lack of bureaucratic responsiveness to the citizenry.”⁸¹

Labor agreements offered the President an opportunity to bypass the CSC, and thus the contours of bureaucratic power, and to negotiate terms of employment directly with the federal workforce. Moreover, these arrangements could be reduced to written and legally enforceable contracts, rather than entrusted to the rulemaking and enforcement discretion of the CSC. Bernard Rosen, chair of the CSC, expressed his view in 1975 that the CSC’s position as sole arbiter of personnel disputes had become untenable: “With the growing power of Federal employee unions, and as general government-wide personnel policies have become a matter of increasing concern to them and to other organizations in our society,” Rosen wrote, the “complexity of Federal personnel administration” and the “increasingly adversary relations developing between unions and agency management” necessitated “a central personnel agency that enjoys the confidence of the Congress, the President, and the unions”⁸²

With the neoliberal policy turn of the late 1970s,⁸³ President Carter had the opportunity to codify federal bargaining rights into law. Several factors produced the conditions for bureaucratic reform, including a loss of political support for bureaucracy, an economic slowdown, and

⁷⁸ See, e.g., Hart, *supra* note 62, at 206–07 (1964) (describing the CSC’s historical success in frustrating efforts for reform).

⁷⁹ JIMMY CARTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 95-299, at 2 (1978).

⁸⁰ Ingraham, *supra* note 54, at 14–15.

⁸¹ *Id.*

⁸² BERNARD ROSEN, THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE, H.R. Doc. No. 94-10, at 46 (1975).

⁸³ See e.g., GERSTLE, *supra* note 50, at 2 (describing the “neoliberal order” of American politics, which arose in the 1970s and 80s, as “grounded in the belief that market forces had to be liberated from government regulatory controls that were stymieing growth, innovation, and freedom”).

resulting fiscal constraints. In the 1950s and 1960s, there had been an emphasis on expanding services, with less concern for fiscal discipline. By the 1970s, however, large outlays for bureaucratic programs, and the tenured civil servants that administered them, were increasingly seen as fiscally irresponsible and wasteful of taxpayer dollars.⁸⁴ Carter had campaigned on the promise to clean up the “horrible bureaucratic mess in Washington” and to institute “tight, businesslike management and planning techniques” in government.⁸⁵ But beyond cost-cutting, the CSRA also reflected a deeper ideological evolution in public administration. Throughout the 1960s and 1970s, economists and policy consultants had been reframing public policy in terms of economic efficiency, arguing that government programs modeled on private enterprise would be not only more socially productive but also, like private enterprises, more responsive to the demands of the public and the market and thus more legitimate.⁸⁶ The CSRA extended this logic to the management of the civil service itself. While the bureaucracy of the New Deal legitimized its power through subject matter expertise and insulation from politics, the bureaucracy of the post-New Deal era would legitimize its power by bargaining for it. Contracts would reflect the social and economic value of civil servants by granting them only those labor rights to which the President and his appointees, under electoral pressure to deliver useful services, would agree.

C. Labor Rights as a Restraint on Presidential Power

The President thus leveraged bargaining rights to recruit talent to the executive branch and to consolidate presidential control over the bureaucracy. Congress, by contrast, viewed those same labor rights as tools for exercising greater supervision over presidential administration. The same attributes that made contract and bargaining effective tools for recruiting and negotiating with labor—their transparency, their enforceability against the President, their capacity to change in response to shifting political and economic conditions, and their ability to cover conditions of employment not captured by civil service laws—also made them effective tools for supervising presidential control of the executive branch.

⁸⁴ See Ingraham, *supra* note 54, at 13–14 (observing that “declining economic conditions” in the 1970s “forced reconsideration” of the “inefficiencies” of the administrative state, leading much of the public to “scapegoat” the federal bureaucracy).

⁸⁵ David L. Dillman, *Civil Service Reform in Comparative Perspective: The United States and Great Britain*, in LEGISLATING BUREAUCRATIC CHANGE, *supra* note 49, at 207.

⁸⁶ See ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST 6 (2022) (observing that economic reasoning, which came to dominate policy analysis in the 1960s and 1970s, viewed “policy domains through a market lens,” favoring market-like structures as the “most cost-effective means” of achieving “democratically chosen” ends).

In the 1970s, Congress and the judiciary established new checks on presidential power in response to the Watergate and Vietnam crises, as well as the revelation of longstanding abuses by the FBI, CIA, and other executive agencies.⁸⁷ These checks included statutory reforms and commissions, such as the Freedom of Information Act (FOIA), the Foreign Intelligence Surveillance Act (FISA), and the Church Commission, to limit executive discretion in law enforcement.⁸⁸ They also included more general limitations on the power of the administrative state to make and enforce regulations, through judicial innovations such as “hard look” review of agency action.⁸⁹ The CSRA presented a vehicle for extending similar interbranch checks to executive branch personnel management and was supported enthusiastically by congressional Democrats. In a 1977 report, the House Committee on the Post Office and Civil Service emphasized the need for a labor rights “system based on . . . statute,” rather than executive order, and with meaningful access to judicial review.⁹⁰ The American Bar Association likewise testified that “[c]onsistent with a fundamental precept of our constitutional law system,” statutory labor rights would provide civil service with “a source of authority outside the executive branch and beyond the control of the executive as the primary employer of Federal civil servants,” allowing for “access to the judicial branch for redress of grievances with the executive branch” and “meaningful bilateralism in the collective bargaining relationship.”⁹¹

Like the President, Congress relied on the language of efficiency to justify the enlargement of labor rights. Here, it was the efficiency of management, rather than the bureaucracy, that Congress claimed to be advancing. In a committee report in support of draft labor legislation from 1977, the House Committee on the Post Office and Civil Service opined that “collective bargaining rights for Federal employees,” including “[e]ffective labor unions,” would “play a positive role in improving productivity in public service.”⁹²

⁸⁷ See, e.g., KATHERINE A. SCOTT, REINING IN THE STATE: CIVIL SOCIETY AND CONGRESS IN THE VIETNAM AND WATERGATE ERAS 1–7 (2013) (describing judicial and legislative attempts to limit presidential power in response to Vietnam and Watergate).

⁸⁸ See *id.* at 6–7 (describing the emergence of FOIA, FISA, and other restrictions on domestic intelligence-gathering in response to executive branch abuses).

⁸⁹ See *id.* at 256–59 (discussing the DC Circuit’s strengthening of the procedural requirements imposed by the APA during the 1960s and 1970s).

⁹⁰ FED. PERS. MGMT. PROJECT, OPTION PAPER NO. FOUR (1977), reprinted in SUBCOMM. ON POSTAL PERS. & MODERNIZATION OF THE HOUSE COMM. ON POST OFF. & CIV. SERV., 96TH CONG., 1ST SESS., LEGIS. HIST. OF THE FED. SERV. LAB.-MGMT. RELS. STATUTE, TITLE VII OF THE CIV. SERV. REFORM ACT OF 1978, at 1362 (1979) [hereinafter FLMRS LEGISLATIVE HISTORY].

⁹¹ 1978 Senate CSRA Hearings, *supra* note 66, at 261 (report of Jerre S. Williams, Chairman, Am. Bar Ass’n).

⁹² SUPPLEMENTAL VIEWS TO H.R. 11280, at 378–79 (1977), reprinted in FLMRS LEGISLATIVE HISTORY, *supra* note 90, at 722–23 (1979).

Federal workers also lobbied for collective bargaining to play a greater role in civil service independence. Labor had historically been suspicious of the CSC and viewed it as hostile to their interests. A comprehensive 1975 study of civil service and the CSC observed that, despite statutory protections against firing and other major adverse actions, civil servants found themselves with “a lack of substantive rights” in a relationship “in which the superior has many opportunities to make discretionary judgments of considerable importance to the subordinate.”⁹³ Workers’ “exercise of legal rights in such a relationship” was “often difficult and restrained.”⁹⁴ By the 1960s and 1970s, federal workers had come to view the merit system as a “euphemism for favoritism” and saw collective bargaining as an alternative that advanced stricter application of employment rules, based on uniform application of CBAs rather than managerial discretion.⁹⁵

For labor and its allies in Congress, however, a weakening of the CSC’s traditional power over federal personnel (which, however flawed, did restrain at least some managerial abuses by the President and his appointees) had to be accompanied by more robust labor and bargaining rights. As a legislative representative for AFL-CIO, which represented many federal workers, put it, labor’s “support for the President’s civil service reform plan is not unconditional,” but was contingent on a robust “system of labor-management relations” codified “into statutory law.”⁹⁶ Labor’s goal was not just to codify specific substantive labor rights, but to establish a statutory framework for collective organizing, bargaining, and adjudication to ensure that those rights were meaningfully enforced in practice. As a chapter president of the National Treasury Employees Union (NTEU) testified, “[i]f this reorganization effort is to improve the efficiency of government, and to protect the public interest in a merit-based civil service system, expanded collective bargaining must be a central factor.”⁹⁷ The CSRA would invest large, well-resourced unions, not individual employees or an independent agency with doubtful allegiances, with the legal power to bargain, litigate, and lobby on behalf of workers, granting labor’s “countervailing power” against the President a foothold in law.⁹⁸ The weaker position of the labor movement in the 1970s helped supporters of the CSRA frame unions as cooperative partners in government,

⁹³ VAUGHN, *supra* note 40, at 13.

⁹⁴ *Id.*

⁹⁵ Rehmu, *supra* note 47, at 35.

⁹⁶ 1978 Senate CSRA Hearings, *supra* note 66, at 991 (statement of Kenneth A. Meiklejohn, Legis. Rep., AFL-CIO).

⁹⁷ *Id.* at 812 (statement of Edward E. McCarthy, Chapter President, NTEU).

⁹⁸ Wellington & Winter, *supra* note 48, at 1108.

rather than an adversarial interest group.⁹⁹ Historical concerns that federal worker unions would be too powerful to be held democratically accountable—concerns prevalent through the bullish labor markets of the 1960s—had significantly diminished.

As enacted, the CSRA formalized and expanded existing bargaining relationships and provided for independent agency enforcement and judicial review of labor disputes. In addition to abolishing the CSC, the CSRA moved many traditional civil service functions into separate, presidentially controlled agencies, shifting the center of bureaucratic power from statutory to contractual protections.¹⁰⁰ In doing so, the Act adopted the rationales of efficiency and amicable labor relations deployed by both labor and the President. As articulated in its statutory purpose, the Act’s goal was to protect “the right of employees to organize” and “bargain collectively,” which would “safeguard[] the public interest,” by promoting “the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.”¹⁰¹

II

HOW BARGAINING RIGHTS SHAPE BUREAUCRATIC POWER

The goal of the CSRA was to provide a framework that could mediate employment disputes, empowering both labor and the President to reshape bureaucratic relationships, while at the same time allowing for legal and democratic supervision by the coordinate branches. This Part provides a typology of the methods by which unionized labor reshapes presidential administration in contemporary practice.

Descriptively, this Part aims to show how labor rights, while largely unnoticed and unstudied, reshape executive branch relations in profound ways. Across a wide variety of policy areas—from federal prisons to the adjudication of asylum applications—collective bargaining changes how agencies (and the millions of bureaucrats who staff them) carry out their missions. What enforcement guidelines border patrol agents follow, how claims processors assess benefits applications, how guards staff prisons—all of these decisions are shaped by labor agreements, with profound consequences for federal policy.

⁹⁹ See KATHERINE C. NAFF, NORMA M. RICCUCCI & SIEGRUN FOX FREYSS, PERSONNEL MANAGEMENT IN GOVERNMENT 436–37 (7th ed., 2014) (describing fiscal constraints on federal unions in the 1970s, and public support for breaking the PATCO strike).

¹⁰⁰ See *supra* Section I.A.

¹⁰¹ 5 U.S.C. § 7101(a).

Normatively, this Part aims to upend a core assumption about bureaucratic power in the contemporary executive branch. There are many tools that the President uses to structure the incentives and behavior of civil servants, and thereby to influence how they implement federal policy: the power to discipline employees for disobedience; the power to allocate an agency's budget and resources, thereby setting the agency's enforcement priorities; the power to set performance standards and productivity quotas, determining what types of bureaucratic decisions merit reward or punishment; and many more. Most scholarship on administrative law and presidential power presume these tools to operate in a top-down manner: The President implements new management directives, and bureaucrats either obediently follow or illicitly resist them.¹⁰²

But, as set forth below, this model of top-down implementation and bottom-up resistance is critically incomplete. More often, the President and the unionized civil service bargain over questions of management, rather than fight out their differences through the exercise of raw institutional power. Indeed, in a sharp deviation from the Progressive Era model of a politically insulated civil service, the CSRA explicitly empowered unions to act in a political capacity, including by lobbying Congress, litigating management disputes before Article III courts, endorsing political candidates, and speaking out publicly on questions of executive branch management and policy. Unions thus engage directly in democratic politics and serve as a key mechanism for bringing other democratic stakeholders, such as Congress and the judiciary, into disputes over the President's managerial power. In short, modern bureaucratic management is far more mutualistic, legalistic, and democratically engaged than administrative law scholarship generally presumes.

Section II.A below examines the substantive rights that labor law confers on civil servants, and the ways in which those rights can reshape presidential administration. Section II.B discusses unionization rights, including the boundaries and limitations of civil servant unionization and the role that federal sector unions play in promoting democratic oversight of the executive branch.

A. How Substantive Rights Mediate Bureaucratic Relations

Substantive labor rights, particularly those memorialized in collective bargaining agreements, are at the heart of how labor rebalances executive branch power. The CSRA grants extensive rights to labor. With certain important exceptions, particularly for salary and

¹⁰² See sources cited *supra* note 2.

benefits which cannot be altered by contract,¹⁰³ unions are permitted to bargain over nearly any issue affecting “conditions of employment.”¹⁰⁴ The main limitation on civil servant bargaining, and thus the primary battleground in litigation between agencies and labor, are certain statutorily defined “management rights,” which are enumerated in sub-provisions of 5 U.S.C. § 7106.¹⁰⁵

Through contractual provisions, the President and the civil service can agree to modify any number of key management tools, from employee discipline to performance evaluation metrics to merit pay. For the purpose of analyzing their impact on presidential power, contractual rights can be sorted into three categories. First are rights that act as a check on structural deregulation, or the use of abusive working conditions to demoralize or sideline bureaucrats in order to undermine an agency’s substantive policy mission. Second, labor rights can act as indirect constraints on policy by shaping management tools, such as performance reviews and productivity requirements, that are well known to nudge civil servants’ decisionmaking in certain ways. Finally, in certain circumstances labor can act as a direct constraint on policy by seriously limiting the types of enforcement directives management can issue to employees.

1. Check on Structural Deregulation

A major method of undermining regulatory effectiveness is to defund agencies, undermine the morale of agency personnel, and obstruct agency operations. Jody Freeman and Sharon Jacobs have identified many of the strategies that the President may use to cripple agencies while evading civil service protections, including imposing burdensome working conditions, reassigning staff to undesirable roles,

¹⁰³ See 5 U.S.C. § 7311(3) (prohibiting strikes); 5 U.S.C. § 7103(a)(14)(C) (prohibiting bargaining over issues provided for by law); 5 U.S.C. § 5332 (providing for general pay schedules).

¹⁰⁴ 5 U.S.C. §§ 7102, 7103(a)(14).

¹⁰⁵ Management rights fall into three categories: (1) “prohibited” subjects, 5 U.S.C. § 7106(a), which agencies may not bargain over, including determination of the agency’s “mission, budget, organization, number of employees, and internal security practices”; (2) “permissive” subjects, 5 U.S.C. § 7106(b)(1), on which the agency may, at its own election, bargain, including the “numbers, types, and grades of employees” assigned to specific work, and “the technology, methods, and means of performing work”; and (3) “mandatory” subjects, on which agencies must bargain, including the “procedures” the agency “will observe” in exercising its management rights, 5 U.S.C. § 7106(b)(2), and any “appropriate arrangements” the agency must make to accommodate employees “adversely affected” by the exercise of those rights, 5 U.S.C. § 7106(b)(3). Examples of “mandatory” subjects include the order of separation pay for employees terminated through a reduction in force. Nat'l Ass'n for Indep. Lab., 67 F.L.R.A. 85, 88–91 (Dec. 20, 2012).

“demoralizing” staff through denigration and abuse, and cutting funding, resources, and pay.¹⁰⁶ These are not direct attacks on an agency’s legal authority, but a “structural” attack on an agency’s ability to function.¹⁰⁷ President Trump’s unusually aggressive posture towards administrative agencies has put structural deregulation back in public focus, but it has long been a feature of presidential management, as the controversy surrounding the Malek memo in the 1970s illustrates.¹⁰⁸

Here, many of the seemingly prosaic aspects of federal labor law are important. The terms and conditions of employment that govern the quotidian existence of civil servants are precisely the sorts of areas that structural deregulation targets. Changes to remote work policies, scheduling, and other routine workplace concerns can be used to demoralize or undermine an agency’s staff.¹⁰⁹ Unions routinely leverage contract rights to prevent deterioration in working conditions, litigating issues such as increases in workloads,¹¹⁰ compensation for travel and other overtime expenses,¹¹¹ backpay for wrongful personnel actions,¹¹² and how and when to award bonuses or special compensation required by contract or statute.¹¹³ Agencies can also be required to bargain over reductions in staffing levels or reorganization of duties.¹¹⁴

There are numerous examples in which fights over working conditions reflect larger political struggles over the ability of an agency to properly carry out its statutory mission. The infamous nationwide

¹⁰⁶ Freeman & Jacobs, *supra* note 23, at 595–600.

¹⁰⁷ *Id.* at 595.

¹⁰⁸ See *supra* Section I.B.

¹⁰⁹ See Freeman & Jacobs, *supra* note 23, at 597–99 (citing strategies such as abusive treatment, office relocation, and improper withholding of promotions).

¹¹⁰ See, e.g., IRS, 66 F.L.R.A. 235 (Sept. 30, 2011) (finding that an increase in workflow by reducing days for administrative housekeeping at IRS must be bargained over).

¹¹¹ See, e.g., Nat’l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 942 F.3d 1154 (D.C. Cir. 2019) (requiring agency to bargain over travel and overtime expenses incurred by border patrol employees).

¹¹² See, e.g., U.S. Dep’t of Homeland Sec. v. Fed. Lab. Rels. Auth., 784 F.3d 821 (D.C. Cir. 2015) (holding that sovereign immunity did not prohibit award of backpay to an employee wrongfully denied overtime and that the FLRA did not owe deference to CBP’s interpretation of its own overtime provisions).

¹¹³ See, e.g., U.S. Dep’t of Com., Pat. & Trademark Off. v. Fed. Lab. Rels. Auth., 672 F.3d 1095, 1098–99 (D.C. Cir. 2012) (requiring agency to negotiate with OPM over additional compensation for PTO officers, or to negotiate over substantial equivalents); IRS, 70 F.L.R.A. 806 (Aug. 31, 2018) (reversing arbitrator’s order to award discretionary performance bonuses).

¹¹⁴ See, e.g., Am. Fed’n Gov’t Emps., 68 F.L.R.A. 757 (2015) (finding that BOP did not violate parties’ agreement by failing to negotiate over reductions in force); Nat’l Ass’n for Indep. Lab., 67 F.L.R.A. 85, 88–90 (2012) (requiring DOD to offer separation agreements to high-performing employees as part of RIF, despite claim that doing so would interfere with ability to retain employees); Broad. Bd. of Governors, 66 F.L.R.A. 1012, 1019 (Sept. 25, 2012) (invalidating RIF for agency’s failure to negotiate over implementation).

strike in 1981 by the Professional Air Traffic Controllers Organization (PATCO), representing federal air traffic controllers, is a useful example. The PATCO strike flouted the federal prohibition on civil servant strikes, in a bid by the union for higher pay and improved working conditions.¹¹⁵ Instead of negotiating, President Reagan broke the strike by calling up military service members and retired controllers to manage the nation's air traffic and firing the strikers (who made up nearly seventy-five percent of federal controllers).¹¹⁶ While PATCO is remembered today for its catastrophic collapse, the union's founding in the 1960s was driven by a decline in conditions of employment that related directly to the substantive mission of the Federal Aviation Administration: Flight speeds for jet planes reduced the margin of error for air traffic controllers, while understaffing and aging equipment made working conditions for controllers increasingly difficult and airport conditions less safe, leading to crashes. It was the FAA's failure to respond to these worker complaints, and its attempt to cover up safety risks, that first inspired the formation of the PATCO union.¹¹⁷

Contemporary examples abound as well. During the Trump Administration, the Department of Education was a frequent target of structural deregulation. In 2018, the agency purported to impose a new labor contract on employees without bargaining that, among other things, removed protections regarding pay raises, altered performance evaluations, and reduced rights regarding overtime, childcare, and work schedules.¹¹⁸ The FLRA subsequently ruled the unilateral contract illegal, forcing the agency to enter into an extensive settlement covering disputed labor issues.¹¹⁹ Federal prisons were another key site of disputes over labor rights. The Trump Administration sought to cut budgets, weaken unions, and worsen conditions at federal facilities at the Bureau of Prisons (BOP), as a prelude to privatization of many key functions. The agency would, for instance, cut shifts for guards

¹¹⁵ NAFF ET AL., *supra* note 99, at 436–37.

¹¹⁶ Joseph A. McCartin, *The PATCO Strike and the Decline of Labor*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (Aug. 31, 2021), <https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-867?print=pdf> [https://perma.cc/62BX-C22M].

¹¹⁷ *Id.*

¹¹⁸ Erica L. Green, *Education Dept. Illegally Curbed Workers' Union Protections, Mediators Suggest*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/politics/labor-rules-education-department-betsy-devos.html?searchResultPosition=3> [https://perma.cc/T2BJ-DQCU].

¹¹⁹ Huge AFGE Victory: Education Department to Refund Lost Union Dues, Ditch Imposed Contract, Restore Payroll Dues Deduction, AFGE (Nov. 21, 2022), <https://www.afge.org/article/huge-afge-victory-education-department-to-refund-lost-union-dues-ditch-imposed-contract-restore-payroll-dues-deduction> [https://perma.cc/QP4X-TFAK].

and replace them with untrained, non-custody employees to guard prisons.¹²⁰ These policies were enacted despite Congress allocating money for staffing, which the Administration refused to spend.¹²¹ At the same time, federal facilities experienced a significant influx of prisoners, including very large numbers of immigrants detained by ICE.¹²² BOP saw a major decline in prison conditions, leading to increases in assaults, health risks,¹²³ overcrowding,¹²⁴ and declining staff morale.¹²⁵ The primary means for resisting these deregulatory policies was labor litigation. Many of these labor disputes concerned the precise tactics—shifting schedules, using untrained and unauthorized workers to staff dangerous prisons, understaffing, overcrowding, removing posts from union positions—that the Administration was deploying to defy Congress and pave the way for privatization.¹²⁶ Workplace disputes thus dovetailed closely with a broader agenda of weakening prison standards and asserting greater political control over prisons.

2. *Indirect Constraints on Policy*

Labor can also serve to constrain substantive executive branch policy in many indirect but significant ways. It has long been recognized that certain presidential management techniques, while they putatively concern the internal business of overseeing executive branch resources and personnel, can impact substantive enforcement outcomes. As Jerry

¹²⁰ Ryan J. Reilly, *Demoralized Federal Prison Officers Feel Left Behind by ‘Law And Order’ Trump*, HUFFINGTON POST (July 4, 2018), https://www.huffpost.com/entry/federal-prison-bureau-Trump_n_5b2bf738e4b00295f15a990a [https://perma.cc/87RY-LEZC].

¹²¹ See Eric Katz, *Trump Administration Draws Bipartisan Concerns for Flouting Congress on Federal Prisons Staffing*, Gov’t EXEC. (Apr. 16, 2018), <https://www.govexec.com/management/2018/04/trump-administration-draws-bipartisan-concerns-flouting-congress-federal-prisons-staffing/147460> [https://perma.cc/4NK4-8LND] (noting that BOP continued an extended hiring freeze despite being provided \$106 million in funding to improve staffing levels).

¹²² See, e.g., Paloma Esquivel, *Federal Prison Workers Protest in Victorville, Saying the Transfer of Detainees Creates a Dangerous Situation*, L.A. TIMES (June 15, 2018), <https://www.latimes.com/local/lanow/la-me-ln-victorville-immigration-20180615-story.html> [https://perma.cc/UV68-RRHY] (reporting that dangerous prison conditions had been “exacerbated by the recent transfer of hundreds of immigration detainees to the facility”).

¹²³ See, e.g., *id.*

¹²⁴ Lauren Weber, *As Health Conditions Worsen at Prison Holding 1,000 Detainees, Staff Fears a Riot*, HUFFINGTON POST (July 2, 2018), https://www.huffpost.com/entry/victorville-prison-detainees-medical-crisis_n_5b3abde8e4b07b827cb9ed38 [https://perma.cc/48GD-24QX].

¹²⁵ Reilly, *supra* note 120.

¹²⁶ E.g., U.S. Dep’t of Just., Bureau of Prisons, 70 F.L.R.A. 342, 342–44 (Nov. 28, 2017) (agency violated master agreement by “improperly augmenting” prison staffing with non-correctional employees, thus “placing non-correctional staff in unfamiliar and dangerous positions on short notice”); U.S. Dep’t of Just., Bureau of Prisons, 73 F.L.R.A. 26, 26 (May 26, 2022) (requiring prison to assign female guards to critical functions, like suicide watch, pursuant to CBA).

Mashaw canonically articulated, the administration of many large-scale federal welfare and regulatory programs requires a species of “bureaucratic justice,” where fairness and efficiency are achieved through quality assurance, performance metrics, productivity quotas and other general, organization-wide management tools.¹²⁷ Labor can reshape how many of these tools are used, in turn reshaping agency outcomes.

One important example is productivity requirements. Determining how much work employees are required to perform, and how they are to perform it, is a well-recognized management tool. These management tools have particularly important impacts on adjudicatory bodies and other discretionary decision-makers: Rules governing decisionmaking processes limit adjudicators’ flexibility, while increased productivity requirements reduce the amount of time and effort adjudicators can spend on any one case, making it difficult to rule in favor of poorly represented or under-resourced parties.¹²⁸ The FLRA routinely enforces contractual limitations on the types of productivity quotas agency management imposes, intervening for instance in disputes over quotas for claims processing for veterans’ benefits,¹²⁹ screening of passport applications by the Department of State,¹³⁰ and caseload requirements for Taxpayer Advocates employed by the IRS.¹³¹

The Trump Administration engaged in particularly hard-fought disputes over productivity and process rules. The Social Security Administration (SSA) extensively litigated proposed productivity requirements for its unionized administrative law judges (ALJs), which would have sped up case timelines, potentially impacting the quality of decisionmaking and the amount of benefits awarded. An arbitrator repeatedly found that the agency’s requirements violated the parties’ CBA. A two-member majority on the FLRA, appointed by President Trump, however, consistently reversed these rulings,¹³² over the dissent of Member DuBester, the sole Democratic appointee, who found the policy to be a “straightforward” violation of the parties’ agreement.¹³³ Immigration law judges (IJs), likewise, have used bargaining and

¹²⁷ See JERRY MASHAW, BUREAUCRATIC JUSTICE 145–63 (1983) (discussing specific examples of how agencies achieve these goals through their management tools).

¹²⁸ *See id.* at 174–80 (noting how larger caseloads, increased supervision of the adjudication process and objective evidentiary requirements led to declining award rates for disability benefits applicants).

¹²⁹ U.S. Dep’t of Veterans Affs., 68 F.L.R.A. 170 (Jan. 8, 2015).

¹³⁰ NFFE, 69 F.L.R.A. 626 (Sept. 28, 2016).

¹³¹ Nat’l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 745 F.3d 1219, 1222 (D.C. Cir. 2014) (affirming FLRA decision that parties’ CBA required IRS to bargain over policies to mitigate increased caseloads for IRS taxpayer advocates).

¹³² U.S. Soc. Sec. Admin., 72 F.L.R.A. 108, 111 n.39 (Mar. 1, 2021) (providing an overview of these reversals).

¹³³ *Id.* at 113 (DuBester, J., dissenting).

litigation to resist increased efficiency requirements during the Trump Administration, which would have limited IJs' ability to assist asylum seekers during removal hearings.¹³⁴ Similarly, the United States Customs and Immigration Service (USCIS), under de facto head Ken Cuccinelli,¹³⁵ pressured asylum officers to reduce grants of asylum, citing statistics showing high grant rates, urging officers to use tools to combat "frivolous claims" and make only "positive credible fear determinations."¹³⁶ The union resisted these initiatives, which it characterized as pressure to "misapply laws" and "politicize" the asylum process.¹³⁷ The USCIS union likewise challenged administration guidance to exclude large categories of migrants from asylum consideration and to divert considerable numbers to Honduras and Guatemala, calling the policies "unlawful" and even filing an amicus brief in support of a lawsuit challenging them.¹³⁸

Negotiated provisions governing selection and promotion likewise can yield "significant" divergences from management's preferences.¹³⁹ Federally unionized technicians with the Ohio National Guard, for instance, negotiated extensive contractual requirements for promotions, including criteria used to evaluate candidates and differences in merit promotion procedures.¹⁴⁰ Agencies can be required to honor promotions dictated by contract.¹⁴¹ The FLRA has required the SSA to bargain over promotion plans for adjudicatory employees.¹⁴² Union contracts can also

¹³⁴ See *infra* Section III.B.

¹³⁵ The legality of Cuccinelli's tenure at USCIS was legally contested. See Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 677–79 (2020) (arguing that because Cuccinelli did not hold the office of First Assistant when the vacancy occurred (a requirement of the FVRA's automatic appointment mechanism) and was only appointed afterwards, his appointment as Director of USCIS would allow for unbounded presidential appointment authority, threaten the Senate's advice and consent power, and ignore congressional intent in drafting the FVRA).

¹³⁶ Hamed Aleaziz, *A Top Immigration Official Appears to Be Warning Asylum Officers About Border Screenings*, BUZZFEED NEWS (June 18, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-director-asylum-officers-email> [https://perma.cc/E27B-JYZB].

¹³⁷ AFGE Blasts USCIS Director for Pressuring Employees to Misapply Laws, AM. FED'N Gov't EMPS. (June 24, 2019), <https://www.afge.org/article/afge-blasts-uscis-director-forpressuring-employees-to-misapply-laws> [https://perma.cc/V7EX-2Z6U].

¹³⁸ See, e.g., Zolan Kanno-Youngs, *Immigration Officers Say Asylum Deal with Guatemala Is Unlawful*, N.Y. TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/us/politics/trump-pacts-guatemala.html> [https://perma.cc/BLC4-P9AH]; AFGE Blasts USCIS Director for Pressuring Employees to Misapply Laws, *supra* note 137.

¹³⁹ See, e.g., Petitioners' Appendix at 28a, *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rel. Auth.*, 21 F.4th 401 (6th Cir. 2020) (No. 20-3908) (outlining "significant" differences between staff promotions and performance evaluation standards outlined in the collective bargaining agreement and those preferred by management).

¹⁴⁰ *Id.* at 27a–28a.

¹⁴¹ See, e.g., EPA, 61 F.L.R.A. 247, 250 (Sept. 16, 2005) (requiring EPA to promote an employee after working a set number of hours, as required under the parties' CBA).

¹⁴² U.S. Soc. Sec. Admin., 70 F.L.R.A. 106 (Dec. 21, 2016).

prevent discrimination. Unions included clauses in contracts protecting gay employees in the 1990s, well before federal antidiscrimination protections for LGBTQ+ people existed.¹⁴³

Labor can also substantially reshape employment-based discipline and the hierarchies and incentives that disciplinary power creates. While agencies are subject to formal disciplinary procedures under civil service statutes, they often discipline workers through negotiated grievance procedures, resulting in sanctions that can differ substantially from those that might otherwise apply.¹⁴⁴ A prominent example of this phenomenon involved a group of CBP officers who were discovered to have exchanged racist and threatening messages through a private Facebook group in 2019. Even though the incident aroused public outrage and the CBP Discipline Review Board recommended harsh punishments—including termination for eighteen agents—following a negotiated grievance process, some of the officers received substantially lighter punishments, including letters of reprimand, paid suspensions, and only two terminations.¹⁴⁵ Indeed, according to data recently released by the Office of Personnel Management, arbitrators who hear cases under labor grievance reinstate three-fifths of all dismissed employees, as compared with only one quarter of all MSPB appeals.¹⁴⁶ These obstacles to firing and other forms of discipline are some of labor's most powerful tools, and are also among its most controversial: Many critics accuse union-backed limits on employee discipline of rendering government service less efficient, though the evidence on this question is hotly contested.¹⁴⁷

¹⁴³ See Elizabeth Kastor, *Contract Clauses Protecting Rights Gain Ground*, WASH. POST, Aug. 8, 1992, at A7 (describing such provisions).

¹⁴⁴ See, e.g., HUD, 73 F.L.R.A. 342, 342 (Nov. 14, 2022) (upholding an arbitrator award overturning the suspension of HUD employee for deliberately disobeying a management directive).

¹⁴⁵ STAFF OF H.R. COMM. ON OVERSIGHT & REFORM, BORDER PATROL AGENTS IN SECRET FACEBOOK GROUP FACED FEW CONSEQUENCES FOR MISCONDUCT 1–2 (2021), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/COR%20CBP%20Facebook%20Group%20Report%20-%20October%202021.pdf> [https://perma.cc/4U39-U87U]; see also Eileen Sullivan, *Border Patrol Repeatedly Gave Agents Light Punishments, Report Finds*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/us/politics/border-patrol-discipline.html> [https://perma.cc/BCZ3-YH9Q].

¹⁴⁶ JAMES SHERK, UNION ARBITRATORS OVERTURN MOST FEDERAL EMPLOYEE DISMISSALS 1 (2022), https://assets.americafirstpolicy.com/assets/uploads/files/Research_Report_-_Union_Arbitrators_overturn_Most_Federal_Employee_Dismissals_1.pdf [https://perma.cc/BJ3Q-V365].

¹⁴⁷ See *id.* at 1 (arguing that the grievance arbitration “makes removing unionized federal employees very difficult”); see also PHILLIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 18 (2023) (arguing that, due to public sector unionization, “[e]lected executives,” including the President, “no longer have effective authority over the operations of government”).

Finally, labor rights condition the ability of civil servants to leak, criticize, or otherwise speak out publicly about agency policy. David Pozen and Jennifer Nou, among others, have described how unauthorized disclosures of critical information by civil servants can check agency abuses, inform policy debates, and shape agencies' agendas by shifting public opinion.¹⁴⁸ Labor rights are a key guarantor of civil servants' ability to speak publicly about agency policy through testimony, statements to the press, and other means. The CSRA protects the right of employees, when speaking in their capacity as union representatives, to present the "views of the labor organization" to "appropriate authorities," which the FLRA interprets, in many circumstances, to include the press.¹⁴⁹ Union officials can thus speak publicly about agency policy and management, even when line employees cannot. Union officials have leveraged their protected status to criticize executive branch policy in environmental regulation, education, immigration, and labor, among other policy areas.¹⁵⁰ Unions also advocate for the right of other employees to speak out through litigation and labor agreements. Immigration judges, for example, have historically been protected by labor agreements in their right to critique removal policies, even if they are not union officials.¹⁵¹

3. Direct Constraints on Policy

Labor provisions may also directly constrain policy choices. Theoretically, many such provisions are limited by management rights.¹⁵² But labor has been pushing for such contractual provisions more aggressively in recent years, sometimes with the encouragement of sympathetic presidents looking to lock in policy preferences.

By way of disputes over conditions of employment, labor can resist substantive policy directives to which line employees are opposed for professional, ideological, or other reasons. As discussed in greater detail in Part III, law enforcement functions, particularly in the immigration context, are perhaps the most prominent example. Unions representing

¹⁴⁸ See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 528–34 (2013); see also Nou, *supra* note 2, at 358–59 (describing leaks as another potential form of bureaucratic disobedience).

¹⁴⁹ 5 U.S.C. § 7102(1); *accord* U.S. Dep't of Just., Bureau of Prisons, 17 F.L.R.A. 696697–98 (Apr. 24, 1985) (holding "appropriate authorities" to, in the instant case, cover a union representative's newspaper interview).

¹⁵⁰ See *infra* Sections III.B–D (describing civil servants' use of public statements to criticize agency policies).

¹⁵¹ See *infra* Section III.B.2.

¹⁵² As is discussed in greater detail *supra* note 105, management rights are agency management's statutory rights to make certain determinations without bargaining, including the right to make certain policy determinations.

CBP and ICE agents have successfully used labor rights to challenge many substantive management policies touching core questions of immigration enforcement tactics and priorities, often over the objection that such challenges infringe on protected management rights. These include what weapons agents are issued,¹⁵³ what types of searches they must perform and how,¹⁵⁴ and what information officers must provide to detained immigrants, including identifying information about officers and information about potential legal remedies,¹⁵⁵ among many other issues. Complaints about conditions of employment have been used, among other things, to delay the implementation of agency policies directing agents to prioritize detentions of violent criminals and to deprioritize arrests of minors and other nonviolent immigrants.¹⁵⁶

Under President Trump, both CBP and ICE negotiated, with the encouragement of the administration, for even more expansive rights to challenge any enforcement guidance affecting the conditions of their employment and to delay the implementation of those policies until any labor disputes have been resolved, a process potentially lasting years.¹⁵⁷ Under the Biden Administration, unionized employees at the EPA are now attempting to bargain for similar protections that would preclude the agency from adopting any policies that violate certain principles of “scientific integrity.”¹⁵⁸ These developments demonstrate the capacity for labor to become not only an influence on policy but, through the deliberate use of conditions of employment as a restraint on managerial discretion, a primary driver of it.

B. How Unionization Rights Mediate Bureaucratic Relations

This Section sets forth the special rights that unions enjoy under the CSRA, and the ways in which union rights advance the separation-of-powers goals of the CSRA. Unions are the bedrock of legalized resistance to presidential management. The CSRA did not individualize labor rights, but instead provided for collective organization in

¹⁵³ See INS, 21 F.L.R.A. 359 (Apr. 21, 1986) (requiring agency to continue issuing blackjacks to detention officers).

¹⁵⁴ See Dep’t of Homeland Sec., Customs & Border Prot., 72 F.L.R.A. 7, 7 (Jan. 7, 2021) (requiring DHS to bargain with union over procedures for inspecting vehicles at the border, including whether searches could be based only on agents’ “suspicions,” what duties inspection agents performed, and where inspection tasks were performed).

¹⁵⁵ See *Accord* Dep’t of Homeland Sec., Customs & Border Prot., 69 F.L.R.A. 72, 75 (Nov. 13, 2015); Am. Fed’n Gov’t Emps., 69 F.L.R.A. 183, 183 (Jan. 29, 2016) (requiring bargaining over content of detainer forms requiring officers to provide details of detention and providing ICE detainees with phone numbers to report civil rights abuses).

¹⁵⁶ See *infra* Section III.B.1.

¹⁵⁷ See *infra* Section III.B.1.

¹⁵⁸ See *infra* Section III.D.

institutions that are capable of bargaining, litigating, and lobbying.¹⁵⁹ Battles between the civil service and the President over the scope of unionization rights, the proper bargaining units to be represented by unions, and the resources and legal rights available to unions reflect the growing centrality of collective bargaining to disputes over bureaucracy and the importance of unions in determining the balance of power between the President and the tenured workforce. The following sections set forth: (1) the value of unions to the civil service and the internal separation of powers, (2) the ways in which the President and the civil servants contest the scope of union power, and (3) the ways in which unions serve to further democratic and interbranch supervision of the President.

1. *The Value of Unions*

The civil service's move toward unionization reflects a broader recognition of the value of organized groups in protecting rights and pursuing key political objectives.¹⁶⁰ Unions accumulate resources and expertise, allowing civil servants to mount sophisticated and well-financed defenses in labor disputes and to lobby effectively on key issues.¹⁶¹ Unions, for instance, are more effective at litigating employment disputes, a key tool in resisting the disciplinary efforts of management.¹⁶² They achieve higher win rates than unrepresented employees before arbitrators, a key strategic consideration for union-side counsel, as well as a key source of criticism from opponents of unionization rights.¹⁶³ Unions also bolster the ability of civil servants

¹⁵⁹ The CSRA contains several provisions governing who may bargain, what activities unions may engage in, and what rights unions enjoy against management interference. *See, e.g.*, 5 U.S.C. §§ 7111–12 (governing the right to form unions); *id.* § 7116(b) (governing standards of conduct for unions); *id.* § 7131 (granting union representatives right to paid “official time” to conduct union business); *id.* § 7114 (governing the right of unions to represent bargaining units); *id.* § 7116(a) (prohibiting “unfair labor practice[s]” by management that interfere with union business); *id.* § 7323(a)(2)(A)–(C) (exempting unions from certain Hatch Act requirements and granting unions rights to lobby).

¹⁶⁰ *See, e.g.*, ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 7–9 (2020) (explaining the power of “organizational” rights due to their self-enforcing nature).

¹⁶¹ *See, e.g.*, *About Us*, AM. FED’N GOV’T EMP’S., <https://www.afge.org/about-us/afge-at-a-glance> [<https://perma.cc/9BYK-H3AD>] (noting that AFGE, one of the country’s largest federal unions, provides “legal representation, technical expertise, and informational services,” as well as support in activism and lobbying, for over 750 thousand members across nine hundred locals).

¹⁶² *See infra* note 209 and accompanying text (noting that civil servants represented by unions win disputes with agencies at significantly higher rates than employees without union representation before the MSPB).

¹⁶³ *See* Brief of America First Policy Institute as Amicus Curiae Supporting Petitioners at 10–11, Ohio Adjutant Gen.’s Off. v. Fed. Lab. Rels. Auth., 143 S. Ct. 1193 (2023) (No. 21-1454)

to successfully litigate employment disputes against agencies in other ways. Through FLRA litigation, unions have secured civil servants *Weingarten* rights: the right to have a union representative present during a disciplinary investigation.¹⁶⁴ Unions have likewise fought, with mixed success, to bargain for specific substantive rights for civil servants during interviews by agency inspectors general.¹⁶⁵ Unions also provide extensive financial and logistical support to individual employees. The National Border Patrol Council, for instance, has established legal defense funds for CBP officers who are under investigation for their involvement in “critical incidents,” such as the use of force.¹⁶⁶

Even when unions do not litigate labor disputes directly, the threat of litigation—the possibility of losing, the need to delay policy implementation, the drain on budgets, and the attendant uncertainty— incentivizes agencies to cooperate with unions, and to take their preferences into account when staffing political positions and formulating policy. For instance, powerful unions, including those representing ICE and the EPA, can and do express their opposition to certain agency heads, dissuading the President from appointing them for fear of souring labor relations and inciting costly litigation battles.¹⁶⁷

Perhaps the best example of labor’s deterrent power is President Clinton’s National Performance Review (NPR) program, launched in 1993. NPR’s goal was to “reinvent[]” government by streamlining agency operations, reducing the size of the federal workforce, and reducing labor-management litigation.¹⁶⁸ In exchange for union support for a variety of cost- and personnel-cutting measures, President Clinton granted unions substantial new powers.¹⁶⁹ The National Partnership Council, which shaped agency reorganization policy, was given four union representatives (one from AFL-CIO, and one each from the

(arguing that high union win rates before grievance arbitrators undermine agencies’ ability to “remove, suspend, and discipline” employees).

¹⁶⁴ See, e.g., Nat'l Aeronautics & Space Admin. v. Fed. Lab. Rels. Auth., 527 U.S. 229, 230 (1999) (holding that federal employees are entitled access to union representatives when being questioned by Office of Inspector General).

¹⁶⁵ See, e.g., U.S. Dep’t of Homeland Sec. v. Fed. Lab. Rels. Auth., 751 F.3d 665, 666–67, 673 (D.C. Cir. 2014) (reversing FLRA decision that had granted border patrol guards certain procedural rights during interviews with agency’s inspector general).

¹⁶⁶ Union’s PORAC Legal Defense Fund Critical Incidents, NAT'L BORDER PATROL COUNCIL Loc. 2455 (May 9, 2021), <https://bpunion.org/2455/unions-porac-legal-defense-fund-critical-incidents> [<https://perma.cc/PTK7-HVZR>].

¹⁶⁷ See *infra* Sections III.B, III.D.

¹⁶⁸ James R. Thompson, *The Clinton Reforms and the Administrative Ascendancy of Congress*, 31 AM. REV. PUB. ADMIN. 249, 262 (2001).

¹⁶⁹ See *id.* at 265.

largest federal unions—NTEU, AFGE, and NFFE).¹⁷⁰ Further, in exchange for union cooperation, President Clinton issued Executive Order 12,871 requiring agencies to bargain over formerly optional subjects, effectively waiving a broad range of management rights and significantly expanding union bargaining power.¹⁷¹ Unions also took a substantial role in shaping the federal government's downsizing to ensure union positions received protection during workforce reduction.¹⁷²

In addition to litigation, unions also have extensive statutory power to lobby Congress, often acting as one of the only sophisticated, proregulation advocacy groups in a competition of political influence dominated by private interests and well-funded nonprofit groups. The CSRA created unions that are, in effect, federally subsidized by dues, "official time" (time during which union officials are paid to engage in organizing and bargaining work), and protections against unfair labor practices.¹⁷³ To facilitate union lobbying, Congress also created numerous exceptions to rules governing political engagement by civil servants, including the right to lobby on behalf of a labor organization and Hatch Act exemptions to participate in politics.¹⁷⁴

Unionized federal employees have been politically engaged since the enactment of the CSRA, lobbying on a range of budgetary and regulatory reform issues.¹⁷⁵ Unions lobby on issues ranging from regulatory enforcement policy, to the selection of agency leadership, to questions of funding—and their efforts have had substantial influence in Congress.¹⁷⁶ Unions representing the employees of the NLRB, Department of Education, and IRS have all, for instance, lobbied for increases in appropriations for regulatory efforts that have been regular targets of under-funding.¹⁷⁷ Labor also endorses political candidates,

¹⁷⁰ Exec. Order No. 12,871, 58 Fed. Reg. 52201 (Oct. 1, 1993) (establishing and appointing union representatives to this council).

¹⁷¹ *Id.*; Thompson, *supra* note 168, at 262.

¹⁷² See, e.g., NAFF ET AL., *supra* note 99, at 453 (describing the promises unions secured from agencies regarding RIFs).

¹⁷³ 5 U.S.C. §§ 7116, 7131.

¹⁷⁴ 5 U.S.C. § 7102(1) (granting federal employees the right to "present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities"); 5 U.S.C. § 7323(a)(2)(A), (C) (exempting, under some circumstances, federal employees from Hatch Act prohibitions on soliciting, accepting, or receiving political contributions if they belong to a "federal labor organization").

¹⁷⁵ See, e.g., Marick F. Masters, *Federal-Employee Unions and Political Action*, 38 INDUS. & LAB. RELS. REV. 612 (1985) (discussing union lobbying from 1977 to 1981).

¹⁷⁶ For examples, see *infra* Sections III.B–III.D. See also RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 127 (1994) (discussing "effective lobbying by federal employee unions" to advance civil servants' interests).

¹⁷⁷ Press Release, NAT'L TREASURY EMPS. UNION (Feb. 3, 2013), Hundreds of NTEU Members to Engage with Congress During NTEU's 2015 Legislative Conference, <https://>

testifies routinely before Congress, and speaks to the press on high-visibility policy issues, often expressing views contrary to the views of agency leadership.¹⁷⁸

2. *Recognition Disputes: The Boundaries of Union Rights*

One of the strongest indicators of union influence is the effort that both presidents and labor invest in litigating the question of which employees are entitled to unionize, and which unions are entitled to represent them. Given the potential for labor rights to reorder management relationships, these disputes often focus on personnel in key policy areas or personnel who exercise discretionary judgment in impactful ways. Some areas of federal policy are deemed too sensitive to allow unionization at all, in the interest of remaining apolitical. The CSRA specifically exempts certain agencies from coverage, including the CIA, NSA, FBI, Secret Service, and the Tennessee Valley Authority.¹⁷⁹ The Act also does not extend labor rights to anyone employed in “intelligence, counterintelligence, investigative, or security work which directly affects national security,”¹⁸⁰ and permits the President to designate such agencies by executive order.¹⁸¹ In the wake of the September 11, 2001 terrorist attacks, President George W. Bush took a particularly aggressive approach toward security-related employees, designating five units of DOJ ineligible to bargain and seeking vast new statutory exemptions from Congress that would have precluded, among others, any DHS or DOD civilian employee from unionizing.¹⁸²

Likewise, the CSRA exempts “management” personnel from unionization rights, except in certain specified circumstances.¹⁸³ This carveout allows agencies to contest union rights for personnel that make key policy-related decisions, such as lawyers, ALJs, scientists, and technicians, and thus has become a particularly heated area of labor litigation. Presidents and labor have frequently clashed over union recognition, particularly when the employees are in politically sensitive posts or exercise considerable discretion. Agencies have challenged

www.nteu.org/media-center/news-releases/2016/04/13/hundreds-of-nteu-members-to-engage-with [https://perma.cc/C8HN-8WY3].

¹⁷⁸ See *infra* Sections III.B–III.D.

¹⁷⁹ 5 U.S.C. § 7103(a)(3).

¹⁸⁰ *Id.* § 7112(b)(6).

¹⁸¹ *Id.* § 7103(b)(1).

¹⁸² Exec. Order No. 13,252, 67 Fed. Reg. 1601 (Jan. 7, 2002); see also *infra* note 232 and accompanying text.

¹⁸³ 5 U.S.C. § 7112(b)(1).

the unionization of, among others, certain scientists at the EPA¹⁸⁴ and attorneys at the Department of Energy.¹⁸⁵ As discussed below, President Trump engaged in a bitter fight to decertify the union representing federal immigration judges.¹⁸⁶ Decertification attempts can also be less targeted, and more bluntly anti-labor. Recently, for instance, House Republicans have attempted to ban or harshly penalize federal unions, including by stripping benefits and pensions from any civil servants who serve as shop stewards and by strictly limiting the availability of official time.¹⁸⁷

In a recent opinion, the Supreme Court upheld the applicability of CSRA unionization rights to technicians employed by state national guards against a challenge by Ohio, which was joined by eleven other states¹⁸⁸ as amici.¹⁸⁹ The states contended, among other things, that permitting the FLRA to supervise labor-management relations within state guard units contravenes the Constitution's Militia Clause,¹⁹⁰ and would "erod[e] the constitutional design for checking and balancing national military power."¹⁹¹ Federal labor rights, enforced through third-party arbitration, provide substantially more protection for national guardsmen than state command structures would prefer, both because of the extensive right to bargain and because of the likelihood of prevailing in subsequent labor disputes.¹⁹² The states, and their amici, argued that for precisely those reasons, extending the CSRA's coverage to national guard employees unduly interferes with state management prerogatives.¹⁹³ The dispute arose against the backdrop of states'

¹⁸⁴ See, e.g., Nat'l Ass'n of Public Labor Loc. 9, 71 F.L.R.A. 1199, 1199 (Dec. 21, 2020) (adjudicating the bargaining-unit status of an ecological-toxicologist position at the EPA).

¹⁸⁵ See, e.g., Nat'l Treasury Emps. Union, 40 F.L.R.A. 264 (Apr. 19, 1991) (adjudicating the bargaining-unit status of GM-15 level attorney positions in the Office of the General Counsel).

¹⁸⁶ See *infra* Section III.B.2.

¹⁸⁷ See Official Time Reform Act of 2017, H.R. 1364, 115th Cong. (2017); see also Press Release, Comm. on Oversight & Accountability Democrats, *Oversight Committee Republicans Take First Steps to Harm Workers and Eliminate Federal Labor Unions* (Mar. 10, 2017), <https://oversightdemocrats.house.gov/news/press-releases/oversight-committee-republicans-take-first-steps-to-harm-workers-and-eliminate> [https://perma.cc/KLA9-CF6E].

¹⁸⁸ Brief for the State of Mississippi, et al. as Amici Curiae Supporting Petitioners, Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth., 143 S. Ct. 1193 (2023) (No. 21-1454).

¹⁸⁹ *Ohio Adjutant Gen.'s Dep't*, 143 S. Ct. 1193, 1196 (2023).

¹⁹⁰ U.S. CONST. art. I, § 8, cl. 15–16.

¹⁹¹ Brief for the State of Mississippi, et al. as Amici Curiae Supporting Petitioners, Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth., 143 S. Ct. 1193 (2023) (No. 21-1454).

¹⁹² See Petitioners' Appendix at 28a, *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 21 F.4th 401 (6th Cir. 2020) (No. 20-3908) (noting extensive contractual protections for national guard technicians).

¹⁹³ Brief for the State of Mississippi, et al. as Amici Curiae Supporting Petitioners at 1–2, *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 143 S. Ct. 1193 (2023) (No. 21-1454).

increasingly politicized use of national guard deployments, including to enforce state-level immigration policies that diverge from federal priorities and to manage politically charged civil unrest.¹⁹⁴ Perhaps the most interesting aspect of the Court's opinion is how uninteresting it appears on first reading. Justice Thomas, writing for a seven-justice majority, resolved the dispute through a straightforward reading of the CSRA and the Technicians Act of 1968, holding that national guard technicians are employees of the Department of Defense and that the FLRA therefore has jurisdiction over their labor disputes.¹⁹⁵ While the Court has made dramatic changes to both administrative and labor law in recent years, it showed no apparent interest in disrupting federal sector labor relations—even in dicta, the majority, which included four conservative justices, paid little heed to the anti-labor theories advanced by eleven states, their amici, or the dissent authored by Justice Alito and joined by Justice Gorsuch.¹⁹⁶ At least for now, the holding reflects the remarkable durability of federal bargaining relative to other contested areas of administrative law.

3. *Unions as Democratic Actors*

As powerful interest groups representing tenured bureaucrats, public sector unions are often criticized as the least democratic participants in the labor regime. But while civil servants undoubtedly have their own unique interests—and as will be seen in Part III, their own ideologies—their power as political actors is a feature, not a bug, of modern executive branch organization. Both the President and Congress understood when they enacted civil service reform that they were empowering federal workers to reshape the executive branch. But in at least two critical ways, the political branches understood unions to further, rather than to subvert, democratic oversight of the federal bureaucracy.

First, the federal labor regime is designed to make bureaucracy more sensitive to political realities and public opinion. In contrast to the political insulation of the Progressive-era civil service, the CSRA incentivizes open political engagement by bureaucrats: Federal workers can organize, make political donations, lobby, and speak publicly on

¹⁹⁴ See Steve Beynon, *The National Guard Is Stuck in the Middle of Political Infighting, and It's Getting Worse*, MILITARY.COM (Dec. 7, 2021), <https://www.military.com/daily-news/2021/12/07/national-guard-stuck-middle-of-political-infighting-and-its-getting-worse.html> [https://perma.cc/5LM8-P3VM].

¹⁹⁵ *Ohio Adjutant Gen.'s Dep't*, 143 S. Ct. at 1200–01.

¹⁹⁶ *Id.* at 1201 (Alito, J., dissenting); Brief for the State of Mississippi et al. as Amici Curiae Supporting Petitioners at 1–2, *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 143 S. Ct. 1193 (2023) (No. 21-1454).

political questions touching on an agency's mission without fear of retaliation.¹⁹⁷ Labor also relies, far more than the traditional civil service, on support from the political branches for its power. Many of the most valuable contractual protections, such as those concerning quotas or performance evaluations, are permissive subjects of bargaining.¹⁹⁸ The President may, but need not, agree to terms controlling those issues.¹⁹⁹ And even for mandatory subjects, the President can choose how intransigent to be at the negotiating table.²⁰⁰ Contract protections are binding once finalized, but whether to consent to them is a political calculation. The President's negotiating posture depends in part on public opinion and potential retaliation by Congress. Presidents Biden and Clinton, for instance, were eager to court labor's support.²⁰¹ President Reagan was hostile to labor but was compelled to rein in his attacks after pushback from a hostile Congress.²⁰² As a result, labor understands that broad-based political support is key to securing strong, protective collective bargaining agreements. Indeed, one of the primary lessons of the PATCO collapse was the risk of taking an aggressive bargaining position without first shoring up broad support from the public and other unions, both of which had opposed the air traffic controllers' strike.²⁰³ Today, prominent federal unions maintain extensive lobbying and communications operations for the purpose of mobilizing democratic support for their agenda as a means of influencing executive bargaining posture.²⁰⁴

¹⁹⁷ See *supra* Section II.B.

¹⁹⁸ U.S. FED. LAB. RELS. AUTH., GUIDE TO NEGOTIABILITY UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE 47–51 (2013), <https://www.flra.gov/system/files/webfm/Authority/NG%20Forms,%20Guide,%20Other/Negotiability%20Guide%206-17-13.pdf> [<https://perma.cc/DKC3-HBTM>].

¹⁹⁹ See *id.* at 47 (explaining permissive bargaining without reference to input from the President).

²⁰⁰ See, e.g., U.S. Dep't of Def., 73 F.L.R.A. 331, 331 (Oct. 25, 2022) (detailing agency's refusal to bargain over mandatory subjects, pursuant to executive orders issued by President Trump).

²⁰¹ See Erich Wagner, *Biden Signs Executive Order Killing Schedule F, Restoring Collective Bargaining Rights*, Gov't EXEC. (Jan. 22, 2021), <https://www.govexec.com/management/2021/01/biden-sign-executive-order-killing-schedule-f-restoring-collective-bargaining-rights/171569> [<https://perma.cc/3FJ5-VLTD>] (noting the Biden Administration's self-described "critical steps to protect and empower federal employees"); Exec. Order No. 12,871, 58 Fed. Reg. 52201 (Oct. 1, 1993) (establishing, under President Clinton, a labor-management council to facilitate union and civil servant participation in agency management).

²⁰² See McCartin, *supra* note 116 (detailing President Reagan's hostile posture towards unionized labor, including in the public sector).

²⁰³ See *id.*

²⁰⁴ See, e.g., Press Release, NAT'L TREASURY EMPS. UNION (Feb. 3, 2013), Hundreds of NTEU Members to Engage with Congress During NTEU's 2015 Legislative Conference,

Second, unions are key to activating other constitutional stakeholders in labor disputes. Where unions cannot achieve a key element of their agenda, such as an increase in agency enforcement budgets, they often, consistent with the extensive political rights granted by the CSRA, lobby Congress. Likewise, when the President interferes with the operation of the civil service in ways that arguably subvert the will of Congress, litigation by unions allows courts to intervene. Unions thus serve as a more formalized vehicle for what have been called “civil servant alarms,” or methods by which line workers with specialized knowledge of government operations surface issues that might otherwise escape the notice of the political branches, thereby facilitating intervention and democratic churn.²⁰⁵

III BARGAINING AS BUREAUCRATIC POWER IN CONTEMPORARY PRACTICE

Part II provided a typology of federal labor rights and examined how different rights can constrain presidential power. This Part provides data and real-world examples from three policy areas—immigration, tax, and environmental regulation—to show how these different forces can work in tandem to shape bureaucratic culture and affect policy outcomes throughout very different areas of federal law. These case studies are critical to understanding the true power of labor rights to reshape the executive branch. In isolation, the different contractual rights outlined above can hinder or redirect certain managerial initiatives. But when many of these contractual rights are deployed simultaneously, over years and decades, by sophisticated and well-organized unions, they can profoundly change an organization’s culture, its institutional practices, and its mission.

These rights have been used differently in the different policy areas surveyed below. In immigration, labor rights have been increasingly weaponized by bureaucrats and their political allies to pursue certain ideological objectives. In the tax and environmental areas, they have been used more defensively, as a shield against structural deregulation. But each study demonstrates the role that labor can play in pushing back against presidential administration.

This Part consists of four subparts. Section III.A examines a novel dataset of 986 FLRA cases involving immigration, tax, and

<https://www.nteu.org/media-center/news-releases/2016/04/13/hundreds-of-nteu-members-to-engage-with> [https://perma.cc/C8HN-8WY3].

²⁰⁵ Shah, *supra* note 26, at 656.

environmental regulation over the past 40 years. A central claim of this Article is that labor rights exert an important influence on the executive branch. The data confirms that hypothesis: Labor often prevails in contract disputes with agency management, including under hostile presidential administrations and hostile FLRA majorities. Many of these cases carry important implications for presidential control of specific agencies. The data also demonstrate that as labor is increasingly weaponized to contend with more aggressive versions of presidential administration, it is becoming more controversial. As measured by the number of dissents filed in FLRA cases and the rate of reversals of putatively neutral arbitration awards, labor litigation has become more divisive and harder fought over the last decade. Sections III.B, III.C, and III.D then provide case studies of how labor rights have reshaped bureaucratic-presidential relations and policy outcomes in immigration, tax, and environmental regulation.

A. Data

This Section presents an analysis of 986 FLRA adjudications spanning more than forty years, from 1979 to 2022, across seven agencies in three policy areas. Despite the importance of bargaining to modern bureaucracy, there exists very little empirical research on its implementation, including on fundamental questions such as how frequently labor and management prevail in labor disputes, how frequently litigations implicate particularly contested questions of managerial control, and how frequently disputes generate controversy. This Section seeks to fill that gap by providing a broad overview of how labor disputes play out over time across the immigration, tax, and environmental policy spaces. It first examines how frequently labor and management prevail in disputes to determine whether the CSRA serves its original purpose of promoting a relatively stable balance of power between the President and the bureaucracy. It then seeks to determine the degree to which labor disputes have generated controversy or become sites of legal or political contestation.

A caveat is necessary at the outset. The three-person FLRA is, in most instances, an appellate body. Most contractual disputes are resolved in the first instance by internal grievance processes or third-party arbitrators. Disputes over unfair labor practices are generally adjudicated first by administrative law judges.²⁰⁶ Disputes over bargaining unit recognition are heard first by FLRA Regional Directors; and negotiating impasses are typically resolved by the

²⁰⁶ 5 U.S.C. § 7105(e)(2).

Federal Service Impasses Panel (FSIP).²⁰⁷ But the FLRA plays a formative role in setting federal labor policy, issuing authoritative constructions of the CSRA, and determining appeals from the hardest fought labor disputes. I therefore treat it as a reasonable proxy for which party the labor regime favors, and the controversy attending its decisions.

1. Wins and Losses

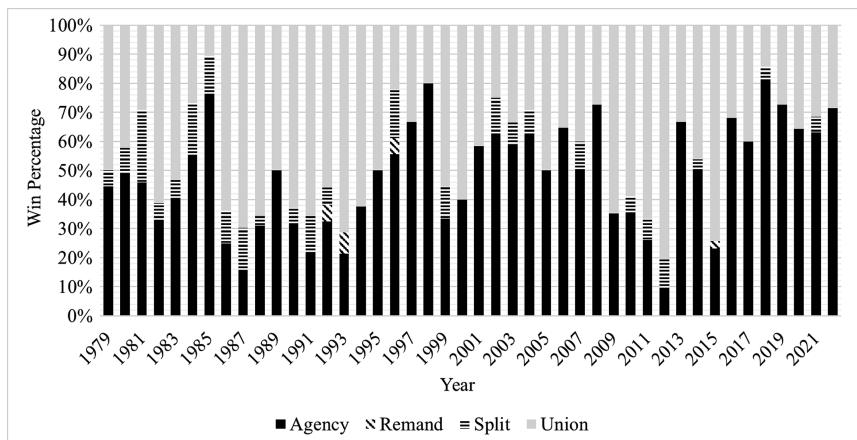
Key to understanding the effect of labor rights on bureaucratic relations is understanding which parties benefit from its provisions. Federal sector labor rights were designed to secure industrial peace within the executive branch. As described above, federal sector labor rights were the product of compromise between a presidency seeking greater freedom to structure the executive branch and a labor movement, supported by congressional Democrats, seeking more robust protections for federal employees. If they are serving that purpose, one would expect both labor and the President to prevail a meaningful percentage of the time. Guarantees of moderating power would be useless if one side gains a decisive or permanent advantage.

The data indicates that both labor and management do win a meaningful percentage of the time.²⁰⁸ As shown in Figures 1 and 2, this is true across presidential administrations, from 1979 to the present. It is true in periods of labor turmoil, such as the Reagan Administration, as well as times of relative rapprochement, such as the Clinton era.

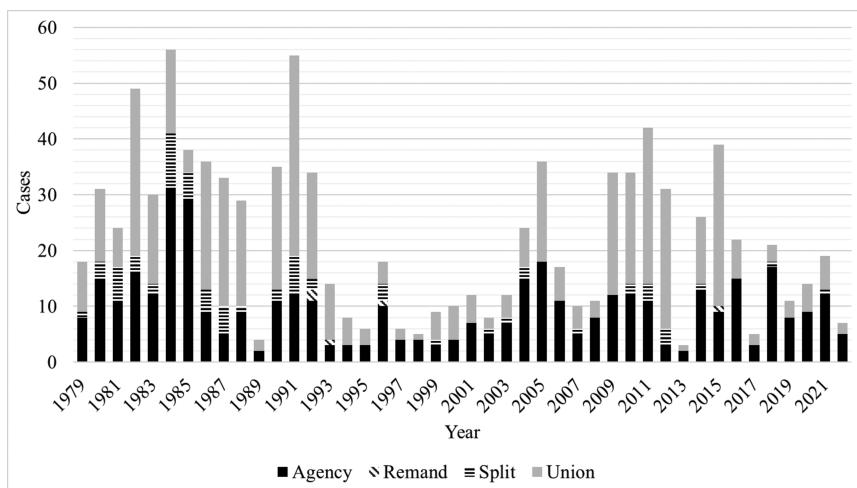
²⁰⁷ 5 U.S.C. §§ 7105(e)(1) (setting forth the responsibilities of regional directors), 7119(c)(1) (doing the same for the FSIP).

²⁰⁸ These cases were identified by the author and a team of research assistants. They were collected from the FLRA's website, which includes a comprehensive database of authority decisions. See *Authority Decisions*, FED. LAB. RELS. AUTH., <https://www.flra.gov/decisions/authority-decisions> [<https://perma.cc/YB9Q-PLJ5>]. These counts include all cases we could identify in which the employing agency was listed as a party to the dispute. For immigration cases, the count includes cases involving EOIR and the INS prior to 2003, and cases involving the CBP, ICE, USCIS and EOIR after 2003, when INS was disbanded, and many immigration and domestic security functions were combined under DHS. For purposes of calculating success, a case is coded as a "union" or "agency" victory when that party prevailed on all of its substantive claims. A "split" decision is one in which each party prevailed on at least one substantive issue. We did not consider a party to have prevailed on an issue if the FLRA merely made a clerical correction to an underlying award, such as the recalculation of a certain amount of backpay or the deadline to take a specific action. A "remand" is a decision remanded to the arbitrator or ALJ for further factfinding, without a decision on the merits by the FLRA.

**FIGURE 1. AGENCY AND LABOR WINS OVER TIME,
BY PERCENTAGE**



**FIGURE 2. AGENCY AND LABOR WINS OVER TIME, ABSOLUTE
NUMBERS**



As shown in Figures 3 and 4, while labor wins slightly more frequently when the FLRA has a Democratic majority (51.7% versus 48.0% during Republican majorities), the difference is relatively modest. Indeed, win rates for labor are much higher than for equivalent disputes before the MSPB, where surveys have consistently shown that

agencies win over 75%, and perhaps as much as 90%, of the time.²⁰⁹ This data supports labor and Congress's assumption that unionized representation could serve as a more effective check on managerial authority than traditional civil service protections.

FIGURE 3. PREVAILING PARTY, DEMOCRATIC MAJORITY

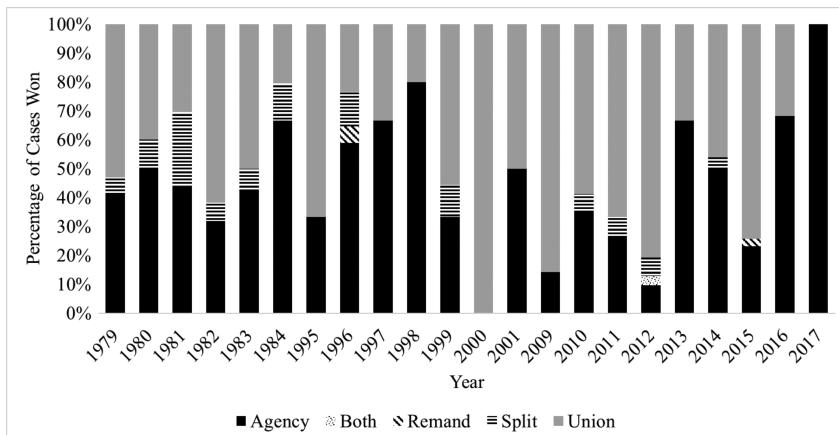
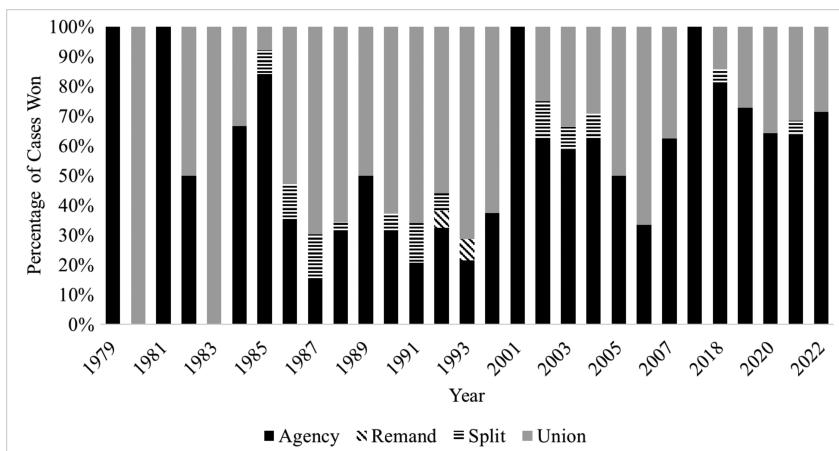


FIGURE 4. PREVAILING PARTY, REPUBLICAN MAJORITY



²⁰⁹ See SHERK, *supra* note 146, at 5 (noting that dismissals of employee challenges are upheld in seventy-two percent of cases before the MSPB from 2011–16); see also Eric Katz, *Feds Rarely Win Before MSPB. Board Says That's Not a Problem.*, Gov't Exec. (May 16, 2019), <https://www.govexec.com/management/2019/05/feds-rarely-win-mspb-board-says-not-problem/157021> [https://perma.cc/2AWQ-YJHV] (reporting that cases before the MSPB actually decided on the merits (i.e., not settled or dismissed) result in victory for employees in only eighteen percent of the time).

One other aspect of this data is worth noting. The total number of cases declined dramatically from the 1980s to 2020s. This is not a quirk of the specific agencies studied here. The total number of FLRA decisions has declined over the past four decades. From January 1, 1979 to December 31, 1989 the FLRA issued 4,196 opinions; from January 1, 1990 to December 31, 2000, it issued 3,147; from January 1, 2001 to December 31, 2010, it issued 1,514; and from January 1, 2011 to December 31, 2020, it issued 1,176.²¹⁰ The decline of the total number of FLRA cases does not mean that the federal labor regime has declined in importance. First, many disputes that were litigated in the CSRA's first decade are now settled informally through grievance procedures and labor-management programs such as those established under President Clinton's NPR program.²¹¹ These efforts reflect the bargaining power of federal workers. FLRA litigation is costly and disruptive. While there is no clear data on management council outcomes, anecdotes suggest that labor has a meaningful role in shaping management policy, and the councils are responsive to unions' concerns.²¹² Likewise, many disputes that might otherwise be litigated are instead now resolved through negotiated grievance procedures. Here again, anecdotal evidence suggest that these procedures can be more favorable to labor than the alternative.²¹³

2. Controversy

The data also appear to show relative stability through the Trump Administration. This is significant, given President Trump's overt hostility to labor and the many ways in which his administration departed from traditional norms of labor relations.²¹⁴ Observers have presumed that the FLRA majority appointed by President Trump was more hostile to labor than previous boards, including those with Republican-appointed

²¹⁰ These totals were calculated using data available on the FLRA's website. See *Authority Decisions*, FED. LAB. RELS. AUTH., <https://www.flra.gov/decisions/authority-decisions> [https://perma.cc/YB9Q-PLJ5] (providing a comprehensive list of FLRA Authority decisions, searchable by date of decision). The numbers referenced here refer to the total number of cases decided by the FLRA. The dataset referenced by this Article only includes cases involving the agencies studied: ICE, CBP, USCIS, INS, EOIR, EPA, and IRS.

²¹¹ See *supra* Section II.B; see also Stephen Barr, *Funny Thing Happened on Way to This Forum*, WASH. POST, Dec. 26, 1996, at A25 (noting the Clinton Administration's effort to reduce labor disputes).

²¹² See *supra* Section II.B; *infra* Section III.C.

²¹³ See *supra* Section II.A.

²¹⁴ For examples of the Trump Administration's conflicts with federal unions, including those representing workers at the EPA and Social Security Administration, see *supra* Section II.A.2 and *infra* Section III.D.

majorities.²¹⁵ Indeed, these accusations were so frequent that the FLRA's Chairman was questioned by the House Oversight and Reform Government Operations Subcommittee over her alleged “anti-union modus operandi.”²¹⁶ In terms of raw numbers on wins and losses, there is no clear indication of a strong anti-union bias. However, I reviewed additional metrics to examine whether there was any empirical support for the claim that the Trump-appointed FLRA was uniquely hostile to labor. Consistent with observations of labor hostility, and consistent with the general trend toward greater politicization of democratic institutions,²¹⁷ these data do provide some indication that labor has become more politically divisive in the past decade.

First, I examined the number of dissenting opinions generated by FLRA decisions over time. More dissents would suggest greater controversy over outcomes. Here, the results are quite striking, and show a dramatic uptick in controversy. During the Carter and Reagan administrations, dissents were exceedingly rare, typically appearing in less than two percent of decisions, even as the FLRA handled many more cases per year. Beginning in the Obama Administration, dissents increased substantially, appearing in almost fifteen percent of all decisions between 2008 and 2016. By the Trump and Biden Administrations, in most years a *majority* of cases produced dissents, totaling sixty-five percent between the start of 2017 and the end of 2021. And these dissents could be dramatic in highlighting the political differences of board members. Member DuBester, the sole Democratic appointee, denounced majority opinions as “ill-conceived” and “fundamentally flawed,”²¹⁸ “impulsive,”²¹⁹ and “sophistry,”²²⁰ among other strong descriptors.

²¹⁵ See, e.g., Richard J. Hirn, *Defining Deference Downward: How the Federal Labor Relations Authority Undermines Arbitration for Unionized Federal Employees*, 2020 U. ILL. L. REV. ONLINE 245, 246.

²¹⁶ Nicole Ogrysko, *Despite Recent Decisions, FLRA Chairman Insists No ‘Anti-Union Bias’*, FED. NEWS NETWORK (June 5, 2019), <https://federalnewsnetwork.com/workforce/2019/06/despite-recent-decisions-flra-chairman-insists-no-anti-union-bias> [https://perma.cc/77LP-C8WP].

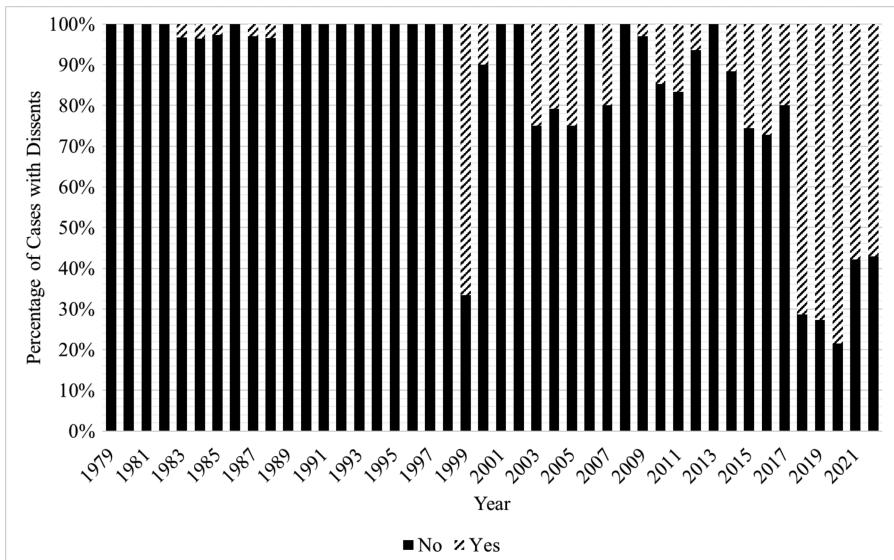
²¹⁷ See, e.g., Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 90–118 (2022) (examining how political parties can exploit “structural constitutional arrangements” to take advantage of biases in legislatures, executive offices, and courts).

²¹⁸ U.S. Soc. Sec. Admin., 72 F.L.R.A. 108, 113 (2021) (DuBester, dissenting).

²¹⁹ HUD, 70 F.L.R.A. 605, 609 (2018) (DuBester, dissenting).

²²⁰ U.S. Dep’t of Just., 71 F.L.R.A. 1046, 1049 (2020) (DuBester, dissenting).

FIGURE 5. DISSENTS OVER TIME

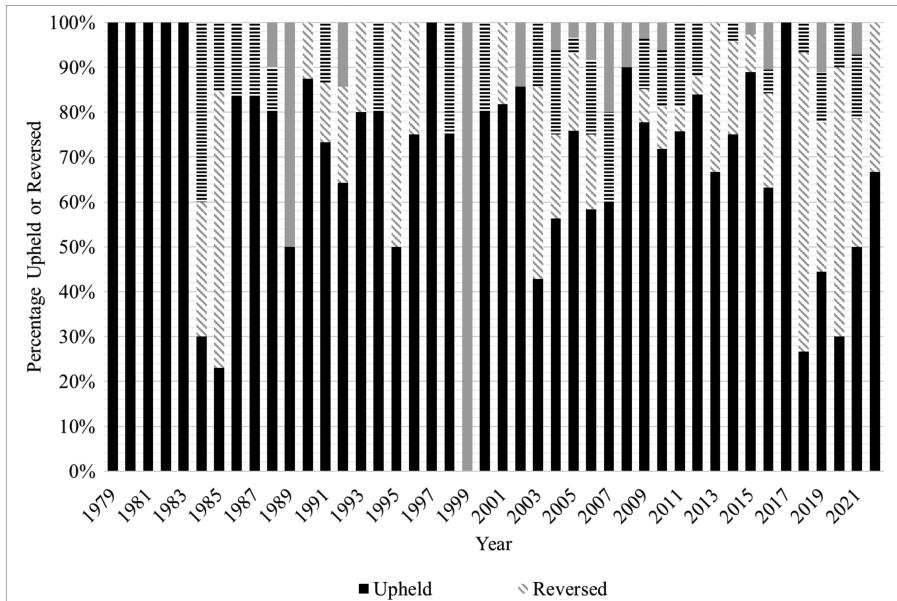


Second, I also examined the rate at which decisions by arbitrators are reversed. Disputes over contract construction are heard, in the first instance, by third-party arbitrators selected mutually by the parties. As described above, the availability of neutral arbitration was a key demand of labor in exchange for supporting the CSRA, and a recent study indicates that labor arbitrators rule for labor far more frequently than do ALJs within the MSPB in adjudications concerning civil service protections.²²¹ Recent doctrinal changes by the Trump-era FLRA have made arbitration decisions easier to reverse, and practitioners have suggested that the FLRA has been unusually willing to overturn arbitrations, especially those favoring labor.²²² If true, a trend toward more aggressively reversing arbitration would represent a deviation from one of the CSRA's core goals of preserving industrial peace by ensuring relatively equitable outcomes in labor disputes. Here, too, the data suggest a significant break with past FLRA practice. As shown in Figure 6, between 1979 and 2017, the FLRA reversed only twenty-two percent of decisions by arbitrators, but between 2018 and 2021, it reversed fifty-four percent.

²²¹ SHERK, *supra* note 146, at 5.

²²² See, e.g., Hirn, *supra* note 215, at 246 (noting that in the Spring of 2020, the FLRA held that arbitrators' awards were merely "guidance" and were owed no deference when the FLRA disagreed with arbitrators' interpretation).

FIGURE 6. ARBITRATION APPEAL OUTCOMES OVER TIME



The trend is starker when broken down based on appellant. As seen in Figure 7 below, when agencies appeal labor-friendly arbitrations, the rate of reversal, in whole or in part, has increased from eighteen percent from 1979 to 2017 to sixty-two percent from 2018 to 2021, suggesting a strong recent tilt toward management under the majority appointed by President Trump. By contrast, as shown in Figure 8, where labor was the appellant, the rate of reversal was four percent from 1979 to 2017. However, between 2017 and 2021 labor did not successfully secure a single reversal on appeal. One study suggests similar disparities in outcomes under the FLRA since 2018.²²³

²²³ See *id.* at 246 & app. A & B (observing that the Trump-appointed majority at the FLRA had reversed the “overwhelming majority” of arbitration decisions in favor employees since 2018).

FIGURE 7. ARBITRATION APPEALS—AGENCY APPELLANT

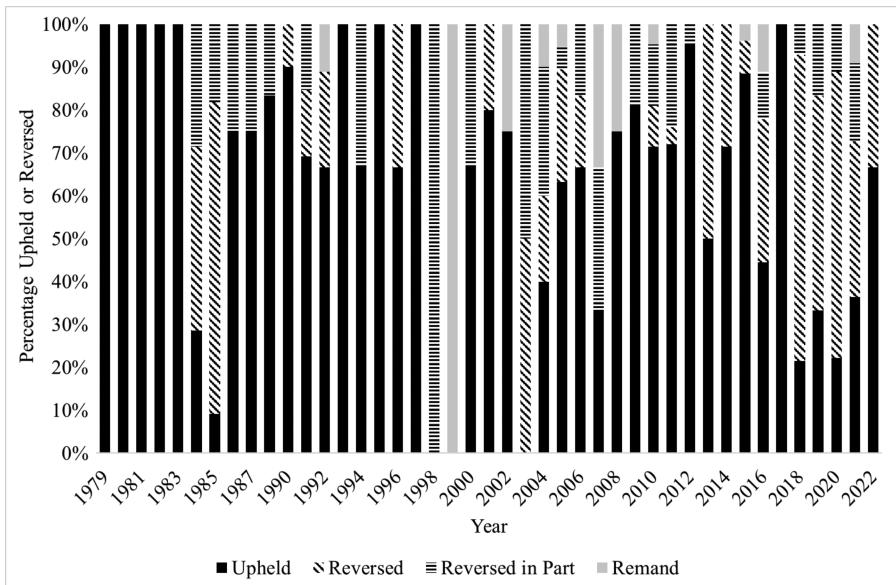
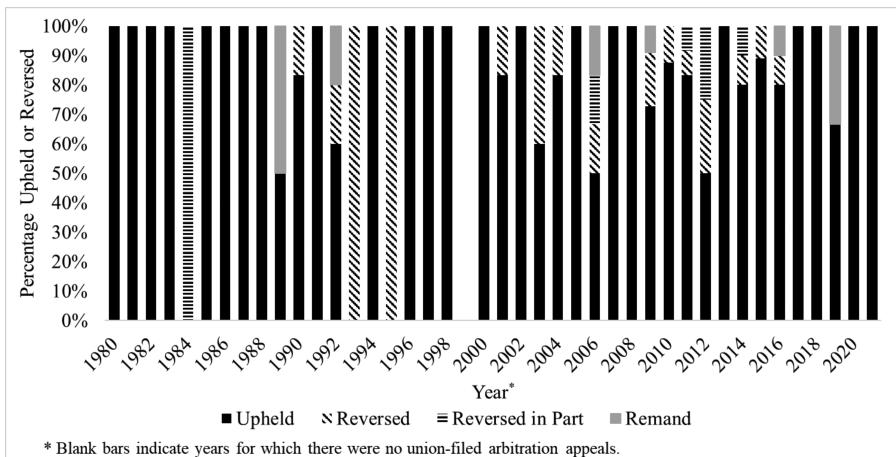


FIGURE 8. ARBITRATION APPEALS—UNION APPELLANT



* Blank bars indicate years for which there were no union-filed arbitration appeals.

In short, the data confirms that the CSRA has historically empowered labor to reshape bureaucratic relations through the successful litigation of labor disputes. But the data also confirm anecdotal observations that, in recent years, FLRA litigation has become increasingly polarized, in line with developments in other democratic institutions.

B. Immigration

Labor dynamics in immigration policy have evolved along two separate dimensions: enforcement, primarily through Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), and adjudication through the Executive Office of Immigration Review (EOIR) and U.S. Customs and Immigration Services (USCIS). Civil servants in each of these agencies have different political preferences, and labor disputes raise different questions in different areas. But across each, labor has been a significant force in shaping bureaucratic power and driving policy outcomes.

1. Enforcement

Immigration enforcement is one area where conditions of employment, and limits on them, directly impact immigration policy. ICE and CBP, which are housed within the Department of Homeland Security, together perform most of the key enforcement functions in federal immigration policy.²²⁴ Unusually for federal agencies, employee unions at both are strongly Republican. Indeed, both the National ICE Council, representing ICE agents, and the National Border Patrol Council, the union representing CBP agents, supported Donald J. Trump in his 2016 run for the presidency, and the NBPC has since supported other Republican candidates for public office.²²⁵

Immigration enforcement was originally housed in the Immigration and Naturalization Service (INS), under the Department of Justice. In immigration enforcement, managerial initiatives frequently intersected with broader policy objectives. A political desire to avoid detaining and deporting large numbers of women and children, for instance, was expressed as a series of managerial directives to border agents about how and where to focus their daily enforcement activity.²²⁶ These enforcement directives could generate resentment among agents. As one INS field manager commented in response to a Clinton-era enforcement policy that instructed agents to prioritize arrests of “criminal” migrants, and to

²²⁴ CBP regulates customs and international trade, including by policing entry along the nation’s border; ICE enforces customs and immigration laws, including in the country’s interior.

²²⁵ See Ellen M. Gilmer, *Border Agency Head Clashes with Union in Bid to Shift Culture*, BLOOMBERG Gov’t (Oct. 20, 2022), <https://about.bggov.com/news/border-agency-head-clashes-with-union-in-bid-to-shift-culture> [<https://perma.cc/79ET-45B7>]; Tony Ware, *Immigration Officer Unions Endorse Trump*, FED. TIMES (Sept. 28, 2016), <https://www.federaltimes.com/management/2016/09/28/immigration-officer-unions-endorse-trump> [<https://perma.cc/Q8HL-8AZ8>].

²²⁶ See KELLY LYTHE HERNANDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* 202–03 (2010) (noting that in this period “Border Patrol officials actively discouraged officers from apprehending women and children . . . ”).

deprioritize inspections and arrests at work sites, “[t]here is resistance . . . because, basically, if you get through the border, you’re home free . . . We’re extremely frustrated. Morale is low.”²²⁷

Since the enactment of the CSRA, labor rights have placed immigration enforcement agents in conflict with agency management. Unions representing immigration and border patrol agents have resisted rules and guidance governing issues that impacted enforcement policy, including use-of-force policies,²²⁸ the staffing of specialized units,²²⁹ the identification of officers to detainees, and policies governing internal affairs investigations.²³⁰

Labor’s ability to frustrate enforcement guidance became a subject of controversy after the September 11, 2001 terrorist attacks. The George W. Bush Administration undertook a dramatic reorganization of immigration, customs, and antiterrorism enforcement.²³¹ The traditional immigration functions of the INS, along with an array of new anti-terrorism and law enforcement initiatives, were consolidated into CBP, ICE, and USCIS under the newly formed Department of Homeland Security (DHS). One of the primary objectives of the proposed reforms was to allow the President to exercise greater direct control over personnel, including by exempting DHS employees from labor and civil service protections.²³² As Dan Blair, the head of the Office of Personnel Management (OPM) testified before a House Appropriations committee in support of the proposed bill, union rights improperly skewed “the balance between workplace rights for public employees and the government’s basic responsibility to protect its citizens from threats and harms.”²³³ Indeed, the Bush Administration planned to subsequently expand the personnel reform to the Department of

²²⁷ *INS Realigns Sights on Criminal Aliens, Drops Workplace Inspections*, WATERTOWN DAILY TIMES, Mar. 23, 1999, at 8.

²²⁸ E.g., INS, 55 F.L.R.A. 93, 93 (Jan. 12, 1999) (reviewing bargaining over agency-implemented use of force guidelines).

²²⁹ E.g., INS, 51 F.L.R.A. 768, 769 (Jan. 31, 1996) (disputing which agents are selected for specialized units, including plainclothes and war on drugs).

²³⁰ E.g., Am. Fed’n Gov’t Emps., 8 F.L.R.A. 347, 347, 349 (Apr. 6, 1982) (challenging negotiability in multiple disputes affecting working conditions for immigration enforcement including agent access to internal investigation files and requirements governing identifying badges for officers).

²³¹ See Stephen Barr, *Union Rights Are a Sticking Point in Homeland Security Reorganization*, WASH. POST, July 30, 2002, at B2 (noting that twenty-two agencies will be consolidated into DHS under the proposed plan).

²³² See Stephen Barr, *Hearing on Personnel Rules Puts Labor Relations Agency in the Picture*, WASH. POST, July 15, 2005, at B2 (describing one of the goals of the reforms as allowing agency managers more flexibility in responding to terrorist threats).

²³³ Barr, *supra* note 231, at B2.

Defense, the most heavily unionized agency in the federal government, followed eventually by the entire civil service.²³⁴

Labor, however, mobilized to successfully defeat the anti-union and anti-civil service provisions of the bill.²³⁵ Despite the strong conservative political leanings of both the ICE and CBP unions,²³⁶ it was the Republican Bush Administration that sought to strip enforcement agents of their considerable bargaining power. By contrast, it was congressional Democrats, who were both more protective of labor rights and more wary of the potentially vast expansion of presidential power entailed by the DHS bill, that united with the unions to strip out the strongest anti-labor provisions.²³⁷ The movement also relied on the support of the broader unionized federal workforce, led by the Democratic-leaning AFGE and NTEU.²³⁸

Similar configurations emerged in response to other attempts by the Bush Administration to leverage employment relationships in order to assert greater political control over DHS personnel. For instance, in 2004 DHS issued a memorandum requiring employees to sign nondisclosure agreements prohibiting them from releasing “sensitive,” but not classified, information—as the unions put it, a “virtually unlimited universe of information that is relevant to important matters of public concern”²³⁹—effectively instituting a department-wide prohibition on leaking as a condition of employment. Employee unions, along with allies in Congress and civil liberties groups, opposed disclosure limits,

²³⁴ See Christopher Lee, *Overhaul of Federal Workforce Is Sought*, WASH. POST, June 8, 2003, at A1A.

²³⁵ See, e.g., Stephen Barr, *AFGE Chief Plans to Do Battle with Bush Administration*, WASH. POST, Dec. 19, 2003, at B2 (describing the union’s preparations to defeat the proposed bill).

²³⁶ See Julia Preston, *Single-Minded Mission to Block an Immigration Bill*, N.Y. TIMES (June 1, 2013), <https://www.nytimes.com/2013/06/02/us/for-chris-crane-a-quest-to-block-an-immigration-bill.html> [https://perma.cc/AV59-V6A4] (reflecting criticism of Obama administration immigration policies by Chris Crane, head of the National ICE Council, a large union of ICE employees); Katie Rogers & Ron Nixon, *A Border Patrol Agent (and Frequent Fox News Guest) Has Trump’s Ear on Immigration*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/us/politics/border-patrol-trump-brandon-judd-fox.html> [https://perma.cc/7NGM-MRHP] (describing conservative political positions of National Border Patrol Council President Brandon Judd during the Trump administration); *Border Patrol Conflict Widens*, WASH. TIMES (May 14, 2007), <https://www.washingtontimes.com/news/2007/may/14/20070514-124549-1178r> [https://perma.cc/YN4P-VXLB] (noting the NBPC’s opposition to “misguided” Bush-era DHS on the grounds that it “shamelessly promot[ed] guest worker policies that “reward[ed] illegal aliens”).

²³⁷ See Barr, *supra* note 231 (noting that Democratic Representative Steny Hoyer questioned the Bush Administration’s justifications for removing union protections for DHS employees).

²³⁸ See *id.* (noting the support of these unions).

²³⁹ Spencer S. Hsu, *Unions Protest DHS Secrecy Pledge*, WASH. POST, Nov. 30, 2004, at A17.

threatened litigation, and successfully lobbied to have the requirement repealed the following year.²⁴⁰

By the 2010s, labor became an increasingly powerful weapon in the struggle between the President and the bureaucracy for control of the agency's immigration agenda. As the rank and file of CBP and ICE became more politically active, they began to aggressively push their own policy objectives within DHS, including stricter enforcement of immigration laws. Initially these efforts took the form of lobbying, advocacy, and impact litigation. The most prominent and instructive example of this new turn was the ICE Council's opposition to President Obama's Deferred Action for Childhood Arrival (DACA) program.²⁴¹ Under that program, DHS Secretary Janet Napolitano and ICE Director John Morton issued memoranda directing DHS personnel, including ICE agents, to exercise their "prosecutorial discretion" when detaining and deporting undocumented immigrants to focus on those with criminal records, and to deprioritize, among others, those who had arrived in the country as minors.²⁴² The union, led by president Chris Crane, lobbied intensively against the DREAM Act, which would have codified DACA's objectives into law. In congressional testimony, Crane argued that the Obama Administration was "asking law enforcement officers to basically ignore their law books For officers out in the field, we can't function like that. We have to have laws that are very clear, that aren't ambiguous, that we can confidently go out into the street and enforce." When DHS announced the DACA initiative, the National ICE Council prominently (and, ultimately, unsuccessfully) challenged the program as unlawful in federal court, asserting a novel theory of standing that claimed ICE agents were injured by being required to enforce a presidential mandate in violation of a federal statute, thus risking "adverse employment action."²⁴³ In most accounts, the dismissal of plaintiffs' complaint for lack of Article III standing in *Crane v. Napolitano* ends there.²⁴⁴

But while the union failed in its direct challenge to DACA, the National ICE Council adopted the same logic—that the program was

²⁴⁰ See Eileen Sullivan, *Homeland Security Scales Back Nondisclosure Policy*, FED. TIMES, Jan. 17, 2005, at 1.

²⁴¹ For a summary of the program, see Hemmer, *supra* note 3, at 773–76.

²⁴² See, e.g., *Crane v. Napolitano*, 920 F. Supp. 2d 724, 729–30 (N.D. Tex. 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

²⁴³ *Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015); see also Julia Preston, *Agents Sue Over Deportation Suspensions*, N.Y. TIMES (Aug. 23, 2012), <https://www.nytimes.com/2012/08/24/us/agents-sue-over-deportation-susensions.html?searchResultPosition=2> [https://perma.cc/D3EW-W9AA].

²⁴⁴ See Hemmer, *supra* note 3, at 776–77 (articulating that most analyses end with the dismissal of the suit).

unlawful, and that the agency was imposing improper conditions of employment on agents by requiring them to enforce it—and applied it, more successfully, in labor advocacy. The union repeatedly delayed implementation of DACA by insisting on the right to bargain about its impact on conditions of employment, including the impact of required enforcement trainings.²⁴⁵ In congressional testimony, union leadership continued criticizing the program by framing it as an infringement on labor rights. Crane testified, for instance, that the union had repeatedly tried to participate in discussions leading to the adoption of this policy but had been excluded from internal deliberations, and accused Napolitano and Morton of negotiating in bad faith, and of waging “the most anti-union and anti-federal law enforcement campaign we have witnessed.”²⁴⁶ Subsequent studies suggested that ICE’s deportation decisions remained largely unchanged by the Napolitano and Morton memos.²⁴⁷ Rather, following a vote of no confidence by the National ICE Council and attacks by conservative senators, it was Morton who was forced to resign.²⁴⁸

Resistance to DACA was not an anomaly. Since the Obama presidency, both ICE and CBP agents have used labor rights with increasing assertiveness to challenge managerial directives over a wide range of enforcement policies. CBP employees aggressively negotiated over, among other topics, agents rights during Inspector General investigations,²⁴⁹ policies governing the conduct of vehicle

²⁴⁵ See Julia Preston, *Agents’ Union Stalls Training on Deportation Rules*, N.Y. TIMES (Jan. 7, 2012), <https://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html?searchResultPosition=3> [https://perma.cc/GZR7-YPH4].

²⁴⁶ Julia Preston, *Union Chief Says New U.S. Rules for Immigration Detention Are Flawed*, N.Y. TIMES (Mar. 28, 2012), <https://www.nytimes.com/2012/03/29/us/union-head-assails-new-us-rules-for-immigration-detention.html?searchResultPosition=1> [https://perma.cc/6CRQ-35JQ].

²⁴⁷ See, e.g., Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 REV. L. & SOC. JUST. 195, 234–35 (2014).

²⁴⁸ See Alan Gomez, *Obama’s Immigration Enforcement Director to Resign*, USA TODAY (June 17, 2013), <https://www.usatoday.com/story/news/politics/2013/06/17/immigration-enforcement-chief-resigns/2431109> [https://perma.cc/Z65Z-67Z4]. In another example of labor resistance, when a group of state governments, led by Texas, successfully sued to enjoin the implementation of DAPA and expansion of DACA in 2015, the district court and the Fifth Circuit relied in part on a declaration from the president of the union representing USCIS employees, who testified that agency officials had ordered that asylum applications be “simply rubberstamped” consistent with the administration’s policies. *Texas v. United States*, 809 F.3d 134, 146, 171–73 (5th Cir. 2015).

²⁴⁹ The contract provision at issue was upheld by both the arbitrator and the FLRA, but ultimately invalidated by the D.C. Circuit as violating management rights. *U.S. Dep’t of Homeland Sec. v. Fed. Lab. Rels. Auth.*, 751 F.3d 665, 666, 672–73 (D.C. Cir. 2014).

searches at the border,²⁵⁰ and disciplinary procedures for agents.²⁵¹ ICE employees likewise negotiated over issues such as the agency's required distribution of detainer forms,²⁵² which were revised during the Obama Administration to more effectively apprise detainees of their due process rights.²⁵³ The negotiated grievance process also contributed to more limited discipline for agents, including the light punishments imposed in response to CBP's 2019 racism scandal.²⁵⁴ The president of the Border Patrol Council, Brandon Judd, had been an outspoken supporter of the agents, actively resisting the recommendations of the agency's inspector general.²⁵⁵ These aggressive challenges to certain managerial initiatives are also worth considering in light of other challenges apparently not made. For instance, during racial justice protests in summer 2020, CBP and other DHS personnel were deployed to Portland, Oregon and other cities to quell unrest, occasionally in unmarked vehicles and non-standard uniforms.²⁵⁶ Despite the dramatic deviations from CBP's usual mission and operating procedures, the union does not appear to have mounted any serious challenge to its deployment, illustrating how labor rights can allow unions to selectively disincentivize certain changes to policy while tacitly accepting others.

The Trump Administration saw the full reversal of labor's position from insurgent outsider to privileged insider in immigration policymaking, and of labor law from a stumbling block of enforcement policy to a primary driver of it. As a candidate, Donald Trump had actively sought the support of immigration enforcement unions, which took the unprecedented step of endorsing him.²⁵⁷ Brandon Judd became a prominent advisor of the Trump campaign, and later of the transition team, and Trump actively campaigned to earn the support of rank-and-file agents, for instance by appearing on a Border Patrol Council

²⁵⁰ U.S. Dep't of Homeland Sec., Customs & Border Prot., 72 F.L.R.A. 7, 7 (Jan. 7, 2021).

²⁵¹ U.S. Dep't of Homeland Sec., Customs & Border Prot., 73 F.L.R.A. 293, 293 (Sept. 30, 2022) (overturning agent's suspension).

²⁵² U.S. Dep't of Homeland Sec., Immigr. & Customs Enf't, 69 F.L.R.A. 72, 72, 75–76 (Nov. 13, 2015) (finding DHS was required to arbitrate dispute over changes to detainer form).

²⁵³ See Janet R. Jackman, *ICE Announces New Rules for Immigrant Detainees*, TUCSON SENTINEL (Dec. 30, 2011), https://www.tucsonsentinel.com/local/report/123011_ice_detainers_forms/ice-announces-new-rules-immigrant-detainees [https://perma.cc RXC5-LKK8].

²⁵⁴ See *supra* note 145 and accompanying text.

²⁵⁵ *Id.*

²⁵⁶ Karl Jacoby, *Op-Ed: The Border Patrol's Brute Power in Portland Is the Norm at the Border*, L.A. TIMES (July 22, 2020), <https://www.latimes.com/opinion/story/2020-07-22/border-patrol-portland-protests-trump> [https://perma.cc/K538-N5WM].

²⁵⁷ Rogers & Nixon, *supra* note 236.

podcast sponsored by Breitbart News.²⁵⁸ With his election, President Trump granted the unions extensive access to the White House and allowed them to exert considerable influence on agency management. The administration took a number of policy cues from the unions on key issues, for example, by deciding to oppose so-called “catch-and-release” policies directing CBP agents to release many detained immigrants without criminal records.²⁵⁹ President Trump also appeared to defer to them in regards to CBP leadership, replacing Mark Morgan, an agency outsider who had been criticized by the unions, with an insider favored by labor.²⁶⁰ The ICE Council likewise successfully pressured the Trump Administration to withdraw his nominee for ICE Director, Ron Vitiello, in favor of a “tougher” candidate.²⁶¹

Most dramatically, the Trump Administration sought to entrench the political power of unions with expansive new contracts. When CBP negotiated a new contract in 2019, Brandon Judd negotiated the agreement directly with President Trump, bypassing the CBP Director.²⁶² The contract granted the union extensive new rights, including expansive rights to challenge and negotiate changes to staffing and enforcement policy.²⁶³ It also expanded the union’s power through an extraordinarily generous grant of official time.²⁶⁴ While most federal unions lost considerable official time under President Trump’s Executive Order 13,837, the National Border Patrol Council received a three-fold increase to 150,000 hours, far exceeding the 18,000 hours to which it would have been entitled under the Administration’s standard formula.²⁶⁵

²⁵⁸ Fernanda Santos, *Border Agents: ‘We’re Not Going to Apologize for What We Believe In’*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/us/border-patrol-agents-trump-green-line-podcast.html?searchResultPosition=10> [https://perma.cc/V5UU-MJF7].

²⁵⁹ Rogers & Nixon, *supra* note 236 (noting the Trump Administration’s public agreement with the union on these issues).

²⁶⁰ Ron Nixon, *Border Patrol Chief, An Agency Outsider, Is Stepping Down*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/politics/border-patrol-mark-morgan.html> [https://perma.cc/FAP5-8REN]; Ron Nixon, *Carla Provost Becomes the First Woman to Lead the Border Patrol*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/politics/carla-provost-border-patrol.html> [https://perma.cc/8Z6K-9K6B].

²⁶¹ Eileen Sullivan, Zolan Kanno-Youngs & Maggie Haberman, *Seeking ‘Tougher’ Direction for ICE, Trump Withdraws His Nominee*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/us/politics/ronald-vitiello-ice.html> [https://perma.cc/9K3U-U7WR].

²⁶² See Nick Miroff, Josh Dawsey & Arelis R. Hernández, *With Trump Backing, Border Patrol Contract Significantly Increases Union Staffing*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/national/with-trump-backing-border-patrol-contract-significantly-increases-union-staffing/2019/12/10/77025414-16da-11ea-a659-7d69641c6ff7_story.html [https://perma.cc/73BK-8V36] (noting that negotiations over the contract occurred directly between Brandon Judd and President Trump, with the agency head only joining by phone).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

The contract awarded to the ICE Council in 2020 follows a similar pattern but reflects an even more explicit attempt by the President to entrench the power of loyal unions. The agreement authorized over 85,000 hours of official time, nearly twice what is granted to the union representing USCIS, despite ICE having half the staff.²⁶⁶ The contract also paid per diems for union-related travel expenses, despite such concessions being prohibited by Trump's own EO 13,837. More unusual still, under the agreement, ICE expressly waived its management rights to alter employees' working conditions at will when necessary for agency operations; instead, the new contract required ICE to bargain with the union before implementing any change to working conditions, effectively giving the union a veto over any meaningful changes in enforcement policy.²⁶⁷ The extraordinary nature of the contract is reflected in the chaotic process by which it was signed. The agreement was signed by Ken Cuccinelli, then serving as the de facto deputy head of DHS on January 19, 2021, the day before President Biden's inauguration.²⁶⁸ Cuccinelli signed in lieu of Jonathan Fahey, the former Director of ICE, who resigned after "being pressured" to sign the agreement and refusing.²⁶⁹ After the agreement was leaked by an agency whistleblower, President Biden rescinded it within the thirty day window for disapproval authorized by the CSRA.²⁷⁰ But the contract, which would otherwise have taken effect, provides an example of the extremes to which labor rights can be stretched to influence and constrain agency policy when the parties are sufficiently motivated.

2. *Adjudication*

Immigration adjudication, like enforcement, presents a story of a strong union that exerts influence on policy outcomes. But the trajectory of adjudication-related labor disputes under the Trump administration is radically different, and sheds light on the way that labor can pull in different directions, exerting a significant overall effect on policy. The enforcement story is one of labor first resisting abolition, then

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Letter from David Z. Seide, Gov't Accountability Project, to U.S. House of Representatives, Comm. on Homeland Sec. 1–2 (Feb. 1, 2021), <https://immpolicytracking.org/policies/dhs-signs-labor-agreement-afge-national-ice-council-118-ceding-unprecedented-policy-power-union> [<https://perma.cc/NWR8-JLY2>].

²⁶⁹ *Id.* at 3.

²⁷⁰ Rebecca Beitsch, *Biden Administration Nixes Last-Minute Trump Deal Giving ICE Union 'Veto Power' over Policy*, HILL (Feb. 16, 2021), <https://thehill.com/policy/national-security/539115-biden-administration-nixes-last-minute-trump-deal-giving-ice-veto> [<https://perma.cc/SSX8-4453>].

transitioning into policy resistance under Obama, before sliding into something resembling cooperation or mutual support under Trump. By contrast, adjudication presents a longstanding model of labor resistance to executive power, which accelerated dramatically under the Trump Administration.

Immigration law judges (IJs), under the Executive Office of Immigration Review (EOIR) within the Department of Justice, adjudicate immigration removal proceedings. A key political dispute in immigration adjudication, and the one which frames many subsidiary labor-management disputes, is whether IJs should serve a role similar to that of judges or administrators. Presidents view them as administrators whose role is to implement presidential policy on asylum and immigration.²⁷¹ The union, by contrast, has historically advocated for greater due process in removal proceedings, including by supporting the separation of IJs from the supervision of EOIR, which also oversees the agency's prosecutorial functions.²⁷² IJs have explicitly defined themselves as a check on political influence on removal hearings.²⁷³ As the then-president of the National Association of Immigration Judges (NAIJ), the union for IJs, summarized in 2020:

Imagine going to a court where you've been charged by a prosecutor, and when you come to court you find out that the judge is hired by the prosecutor and can be fired by the prosecutor and then ultimately the prosecutor can come in and overrule the judge if he is not satisfied by the process.²⁷⁴

Labor rights play a key role in IJs' pursuit of administrative independence. For instance, IJs can use proceedings to pursue independent lines of questioning with asylum seekers, giving unrepresented parties an opportunity to present their case more fully.²⁷⁵ By increasing caseloads without increasing personnel, management can limit this role by restricting the amount of time IJs can spend on

²⁷¹ Stephen Franklin, *The Revolt of the Judges*, AM. PROSPECT (June 23, 2020), <https://prospect.org/justice/revolt-of-the-immigration-judges> [https://perma.cc/88VY-KPHK] (noting that the Trump Administration has imposed significant constraints on immigration judges to achieve its policy goals).

²⁷² *Id.*

²⁷³ Jared Facundo, *Immigration Judges File Petition to Recertify Union*, AM. PROSPECT (July 26, 2022), <https://prospect.org/justice/immigration-judges-file-petition-to-recertify-union> [https://perma.cc/5HVL-LC94].

²⁷⁴ Franklin, *supra* note 272.

²⁷⁵ Yeganeh Torbati, *Head of U.S. Immigration Judges' Union Denounces Trump Quota Plan*, REUTERS (Sept. 21, 2018), <https://www.reuters.com/article/us-usa-immigration-judges-head-of-u-s-immigration-judges-union-denounces-trump-quota-plan-idUSKCN1M12LZ> [https://perma.cc/QG8X-JU4L].

a given case. Management can further hamstring active IJ engagement in cases by imposing productivity quotas, penalizing IJs for delays, and scheduling alterations.²⁷⁶ Likewise, performance evaluations can tie advancement and compensation to the “efficiency” of IJs, and have even sought to require IJs to meet certain target quotas for asylum denials or other case outcomes.²⁷⁷ Finally, demanding productivity requirements and other poor working conditions can erode IJs’ ability to work on cases effectively, and has contributed to attrition within the EOIR, further weakening protections for asylum-seekers.²⁷⁸

Historically, NAIJ has leveraged bargaining rights to resist the aggressive use of management tools to affect case outcomes. For instance, quotas and performance metrics are governed by Article 22 of the union’s CBA, which contains a number of provisions that restrict how the agency can evaluate judges. For example, a judge’s partisan affiliation or perceived ideology cannot be factored in, and measures of a judge’s performance and efficiency must account for, among other things, the “availability of resources” and “other factors not in the control of the [Judge],” effectively preventing the agency from punishing judges by imposing unmanageable caseloads.²⁷⁹ The union has successfully litigated contractual limitations on EOIR’s ability to enforce performance appraisals,²⁸⁰ to discipline employees,²⁸¹ and to impose burdensome changes in working conditions.²⁸²

NAIJ’s outspoken positions on removal policy, and its open hostility to DOJ supervision, have led to historical tensions with

²⁷⁶ See Liz Robbins, *In Immigration Courts, It Is Judges vs. Justice Department*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html> [https://perma.cc/MUG2-VY53] (describing a DOJ requirement that IJs meet a quota of 700 cases per year or face dismissal).

²⁷⁷ See *id.* (noting that IJs can receive negative performance reviews if fifteen percent of their decisions are overturned on appeal).

²⁷⁸ See, e.g., Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, FED. LAW., Oct.–Nov. 2016, at 67, <https://www.fedbar.org/wp-content/uploads/2016/10/Bench-pdf-1.pdf> [https://perma.cc/YV8S-JRXZ]; see also Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES (Dec. 26, 2005), <https://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html> [https://perma.cc/WXU8-GZEZ].

²⁷⁹ LABOR AGREEMENT BETWEEN THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES AND USDOJ, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW No. 18040300, at 25–35 (Apr. 3, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_labor_agreement.pdf [https://perma.cc/F5SF-7WK8].

²⁸⁰ U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., 65 F.L.R.A. 657, 658 (Mar. 30, 2011) (requiring the agency to assess employee’s performance pursuant to terms of CBA).

²⁸¹ U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., 66 F.L.R.A. 221, 222 (Sept. 30, 2011) (reversing suspension for misconduct).

²⁸² U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., 55 F.L.R.A. 454, 455 (May 7, 1999) (finding agency violated contract provision on flexible workplace arrangements).

presidents of both parties. The Clinton Administration moved to decertify the union on the grounds that the IJs were managers because of their highly discretionary implementation of policy and were thus ineligible for labor protections.²⁸³ The FLRA rejected that position, holding that immigration judges are employees rather than managers because they do not hire, fire, or supervise, despite their discretionary role.²⁸⁴ The Trump Administration took a particularly hostile approach to immigration adjudication, ushering in what the union characterized as a “new and dark era” of labor relations.²⁸⁵ Occasionally, labor tensions were overt, as when Justice Department officials distributed a newsletter citing white nationalist critiques of prominent immigration judges throughout EOIR, sparking union grievances.²⁸⁶ More often, however, these tensions manifested as changes in management and labor policy. Management sought to control or demoralize recalcitrant judges through the imposition of heavy case quotas²⁸⁷ and aggressive performance reviews.²⁸⁸ Attorney General Sessions imposed harsh quotas of 700 cases per year, tied to performance reviews; 378 of 380 judges failed to meet either certain targets or other deadlines.²⁸⁹ Dockets were further burdened by the Trump Administration’s increases in immigration detentions and its stricter prosecution policy.²⁹⁰ From 2016 to 2020, EOIR’s backlog of cases doubled to 1.1 million, a combination of rapidly rising arrests and cuts in funding.²⁹¹ By 2019, the DOJ had eliminated judges’ option to administratively suspend cases, and had reopened 300,000 pending cases, flooding IJs’ dockets.²⁹²

EOIR also sought to limit IJs’ public statements about removal proceedings, sparking a labor dispute that continues to generate extensive litigation. NAIJ has historically protected IJs’ ability to discuss and criticize the president’s removal policies. Judges’ right to speak publicly

²⁸³ Franklin, *supra* note 271.

²⁸⁴ U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., 56 F.L.R.A. 616 (Sept. 1, 2000).

²⁸⁵ Torbati, *supra* note 275.

²⁸⁶ Christine Hauser, *Justice Department Newsletter Included Extremist Blog Post*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/justice-department-vdare-anti-semitic.html> [https://perma.cc/JHJ9-AH25].

²⁸⁷ Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), <https://www.npr.org/2018/04/03/59915823/justice-department-rolls-out-quotas-for-immigration-judges> [https://perma.cc/M6KM-E7WC].

²⁸⁸ Franklin, *supra* note 271.

²⁸⁹ Torbati, *supra* note 275; Franklin, *supra* note 271.

²⁹⁰ Franklin, *supra* note 271 (noting that the immigration courts have been “overwhelmed by a massive increase in arrests” under the Trump Administration).

²⁹¹ *Id.*

²⁹² Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html> [https://perma.cc/9MUM-3SDB].

was guaranteed in a memorandum of understanding between NAIJ and EOIR.²⁹³ However, the DOJ issued updated ethics manuals in 2017 and 2020 that made it much more onerous for IJs to receive approval to speak publicly about their work. The 2020 update, which was implemented without bargaining in the form of a memorandum of understanding, banned most speaking engagements by IJs and spawned extensive litigation before both the FLRA and the Fourth Circuit challenging the order on both employment and First Amendment grounds.²⁹⁴

These escalating tensions culminated in 2018, when the Trump Administration attempted to decertify NAIJ, reviving the Clinton Administration's rejected argument that IJs are managers and thus ineligible to unionize under 5 U.S.C. § 7112. EOIR argued that because IJs' decisions were given more deference by the Board of Immigration Appeals than they had been twenty years ago, they were now functionally "management officials."²⁹⁵ The FLRA's Washington D.C. Regional Director rejected EOIR's argument, but in a split opinion the two Trump-appointed members of the FLRA accepted it, in an opinion characterized by dissenting Member DuBester as "sophistry."²⁹⁶ Highlighting the fraught politics of the IJs' unionization, the FLRA's opinion did not end the matter. In an act of apparent "defiance" that the FLRA called "troubling," the Regional Director refused to finalize the decertification despite a second FLRA order.²⁹⁷ Under the Biden Administration, NAIJ has again sought re-certification.²⁹⁸ While President Biden has signaled a desire to recognize and bargain with NAIJ, because certification can only be granted by the FLRA, NAIJ cannot resume bargaining unless the Authority reverses its own recent precedent.²⁹⁹ The continuing struggle over NAIJ's certification thus illustrates both the ways in which changes in presidential administrations can lead to dramatic shifts in attitudes toward labor, and also the role that the independent FLRA can play in resisting or moderating those changes.³⁰⁰

²⁹³ See Declaration of Ashley Tabaddor at 2, Nat'l Ass'n of Immigr. Judges v. McHenry, 477 F. Supp. 3d 466 (E.D. Va. 2020) (No. 29) (noting that the old Ethics Guide did not prohibit immigration judges from speaking about immigration or EOIR in their personal capacities).

²⁹⁴ *Id.*

²⁹⁵ U.S. Dep't of Just., Exec. Off. for Immigr. Rev., 71 F.L.R.A. 1046, 1046 (Nov. 2, 2020).

²⁹⁶ *Id.* at 1049 (DuBester, dissenting).

²⁹⁷ U.S. Dep't of Just., Exec. Off. for Immigr. Rev., 72 F.L.R.A. 622, 627 (Jan. 21, 2022).

²⁹⁸ Facundo, *supra* note 273.

²⁹⁹ *FLRA Refuses to Throw Out Decision Decertifying Immigration Judge Union*, AM. IMMIGR. LAWS. ASS'N (July 25, 2022), <https://www.aila.org/advo-media/issues/doj-moves-decertify-immigration-judge-union> [https://perma.cc/3G7G-C3KT].

³⁰⁰ The battle over the decertification of the IJs' union has coincided with other disputes over the permissible independence of ALJs. The Supreme Court has recently held that the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, which requires Senate confirmation for "officers" of the United States, applies to several important administrative adjudicators,

C. Tax

Immigration-related labor disputes reflect the rapid expansion of executive power. In the immigration field, labor plays a central role in an area where executive branch officials are exercising their policymaking power in increasingly aggressive ways. Tax presents a different narrative. Since the 1980s, the IRS has been the target of political attacks from policymakers who view taxation, and the redistributive politics it facilitates, as an impediment to economic growth.³⁰¹ Congress has for decades degraded the IRS's enforcement capacity through budget cuts and other restrictions on personnel.³⁰² As a result, labor rights play a primarily defensive role. In the tax field, labor does not guide the expansion of administrative power, but rather acts as a backstop against efforts at structural deregulation.

Labor has played an important role in the institutional politics of the IRS. Labor provides numerous routes to resist presidential efforts at weakening tax enforcement or structurally destabilizing the agency. The IRS has a very large unionized workforce, constituting half of the NTEU's membership.³⁰³ With an agency so large, and where so much of policy depends on questions of how thoroughly and aggressively to enforce existing law, questions over how to allocate personnel, how to staff them, and how to evaluate their performance can have important policy impacts. Early labor disputes within the IRS in the 1980s generated significant FLRA precedents regarding how extensively labor could bargain over the agency's management tools. These early cases favored labor, granting unions broad power to bargain over tools

including those at the SEC, *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and the U.S. Patent and Trademark Office, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). While union and labor rights have received less public attention, they are another important front in this conflict over the permissible boundaries of ALJ independence.

³⁰¹ See, e.g., Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018), <https://www.propublica.org/article/how-the-irs-was-gutted> [https://perma.cc/UB2D-LFVL].

³⁰² *Id.* The Inflation Reduction Act (IRA) of 2022 sought to reverse this trend of disinvestment by allocating an additional \$80 billion to bolster IRS enforcement capacity. While this funding indicates a renewed interest in bolstering tax enforcement, the politics of funding the IRS remain fraught. Less than a year after the IRA's enactment, the Biden Administration was forced to agree to a \$21 billion budget cut for the IRS in exchange for a commitment by House Republicans to raise the federal debt ceiling. See Janet Holtzblatt, *What the Debt Ceiling Agreement Means for the IRS*, TAX POL'Y CTR. (June 1, 2023), <https://www.taxpolicycenter.org/taxvox/what-debt-ceiling-agreement-means-irs> [https://perma.cc/4P6S-4QHV]. It remains to be seen whether enhanced IRS enforcement will be politically viable over the long term.

³⁰³ Joe Davidson, *Republican Plan to Eliminate IRS Union, as It Elects New Leadership, Could Threaten Federal Unions Generally*, WASH. POST (Aug. 11, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/08/11/republican-plan-to-eliminate-irs-union-as-it-elects-new-leadership-could-threaten-federal-unions-generally> [https://perma.cc/P2CJ-MP97].

governing, among other things, performance evaluation systems,³⁰⁴ hiring and promotion,³⁰⁵ pay structures,³⁰⁶ and the scope of mid-term bargaining.³⁰⁷ Union contracts also restricted the IRS's ability to conduct large-scale reorganizations of the agency. Contracts limited, for instance, changes in the assignment of auditors and other enforcement workers in the 1980s, impacting the conduct of important audits.³⁰⁸ The union also negotiated to curb the impact of reductions in force (RIFs), limiting how and when the agency could lay off personnel, leading to tension and extended litigation with management.³⁰⁹ Unionization of IRS employees, including most tax attorneys, continued throughout the 1990s in response to fears of continuing cutbacks.³¹⁰

Presidents and legislators have recognized the potential for labor to check control of the agency and have sought to limit it. President Clinton reduced labor litigation through the aggressive implementation of his NPR program at the IRS.³¹¹ Since the Reagan Administration, Republican presidents and legislators have made more aggressive efforts to curb tax enforcement by underfunding the IRS and restricting tax enforcement policies. Here, Congress intervened not to curb the President but primarily to restrict the power of labor, enacting specific laws or budget riders for the purpose of limiting personnel discretion to enforce tax laws. In a series of structural reforms in the 1990s, Congress revised IRS personnel performance ratings to be based upon "customer service," as measured by taxpayer satisfaction, rather than enforcement metrics; created citizen oversight boards to monitor the IRS for excessive enforcement; reduced IRS staffing levels, and outsourced agency functions to private contractors.³¹² In 2014, a Republican-controlled Congress enacted limits on IRS compensation, requiring that employees not be found to have violated any personnel

³⁰⁴ IRS, 16 F.L.R.A. 98 (Sept. 28, 1984).

³⁰⁵ IRS, 16 F.L.R.A. 904, 919 (Dec. 18, 1984).

³⁰⁶ Nat'l Treasury Emps. Union, 27 F.L.R.A. 132 (May 29, 1987).

³⁰⁷ IRS, 29 F.L.R.A. 162 (Sept. 28, 1987).

³⁰⁸ See Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 810 F.2d 1224, 1229 (D.C. Cir. 1987) (holding that a bargaining proposal regarding the selection of employees to perform office audits was negotiable and did not deprive the IRS of its right to assign work).

³⁰⁹ Barr, *supra* note 211.

³¹⁰ See Stephen Barr & Albert B. Crenshaw, *Tax Lawyers Like the Union Label*, WASH. POST (Mar. 18, 1999), <https://www.washingtonpost.com/archive/politics/1999/03/18/tax-lawyers-like-the-union-label/2d95d68a-0613-4da3-b40e-f345097fdb3c> [https://perma.cc/2ZY7-782X] (noting a significant vote in favor of unionization by attorneys after the announcement of a plan by the IRS to restructure its district offices).

³¹¹ See *supra* Section II.B.1.

³¹² James R. Thompson & Shelley L. Fulla, *Effecting Change in a Reform Context: The National Performance Review and the Contingencies of "Microlevel" Reform Implementation*, 25 PUB. PERFORMANCE & MGMT. REV. 155, 162–63 (2001).

rules or committed other offenses to be eligible for bonuses.³¹³ Indeed, in recent years Congress has gone so far as to seek the abolition of IRS labor rights in an effort to weaken the enforcement efforts of line staff. Republican members of Senate Finance Committee wrote in 2015 that it was “virtually impossible for the IRS to maintain the reality, much less the appearance, of neutrality and fairness to all taxpayers, when a substantial number of IRS employees are members of the highly partisan and left-leaning National Treasury Employees Union.”³¹⁴

The union has resisted attempts at structural deregulation. Through lobbying, the NTEU “fiercely” resisted a large-scale reduction in staff and budget and a reorientation away from aggressive enforcement during the Clinton Administration, leveraging the threat of litigation and its position on the agency’s labor-management council to scale back reform.³¹⁵ Its contractually imposed limitations on RIFs were one tool in slowing privatization, requiring extensive accommodations for employees replaced with outside contractors during a government-wide shift toward privatization under the George W. Bush Administration.³¹⁶ Union contracts have likewise required accommodations for increased workloads as a result of understaffing.³¹⁷ The union has also pushed back on specific personnel rules designed to shift enforcement incentives, for example by negotiating for specific performance evaluation rules that replace customer-facing assessments of employees with more nuanced metrics.³¹⁸

Compensation rules have been another means of resisting structural attacks. For instance, the CSRA provides for cash bonuses in addition to regular salary in order to incentivize “high-performing” employees, one of the many ways in which the Act seeks to replicate the incentive structure of the private market.³¹⁹ But the CBA negotiated by the IRS union provides additional employee protections, making

³¹³ IRS, 71 F.L.R.A. 527, 527 (Jan. 24, 2020).

³¹⁴ Davidson, *supra* note 303.

³¹⁵ See Barr, *supra* note 211 (describing tactics including lobbying, bringing suit to prevent RIFs, and seeking impasse arbitration).

³¹⁶ See William Lucyshyn & Sandra Young, *Case Study 2: Competitive Sourcing—the IRS Improves Performance and Modernizes Operations, in COMPETITION, CHOICE, AND INCENTIVES IN GOVERNMENT PROGRAMS* 239, 259 (John M. Kamensky & Albert Morales eds., 2006) (describing the various steps the IRS had to take to comply with its CBA obligations when implementing RIFs).

³¹⁷ Nat'l Treasury Emps. Union, 66 F.L.R.A. 577 (Mar. 30, 2012) (finding that the IRS breached the CBA by increasing the workload of taxpayer advocates in response to increased taxpayer requests without providing notice or an opportunity to bargain).

³¹⁸ Nat'l Treasury Emps. Union, 68 F.L.R.A. 945, 946 (Sept. 16, 2015).

³¹⁹ NAT'L COMM'N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 10 (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf> [https://perma.cc/HTX7-ZNTD].

it more difficult for managers to withhold scheduled bonuses. These protections have proved critical as a means of supplementing IRS salaries, which have failed to keep pace with inflation or the private sector and have often been delayed during furloughs and government shutdowns. For instance, in 2013 the IRS agreed to pay \$70 million in technically discretionary bonuses after a threat of labor litigation, despite being directed to withhold the pay by the Office of Management and Budget.³²⁰ However, similar strategies have been less successful under more conservative FLRA majorities. For example, an attempt to pay bonuses to enforcement staff specifically barred from incentive pay by Congress was upheld by an arbitrator, but ultimately struck down by the FLRA in 2020.³²¹

In addition to litigating, labor has also lobbied in response to structural attacks. Congress's overarching method for degrading IRS enforcement is congressional budget cuts. While unions can slow or offset certain effects of underfunding through contracts, unions cannot allocate consistent, long-term funding for the agency absent an appropriation by Congress. But the IRS union, relying on official time, dues, and other organizing rights conferred by federal law, has aggressively lobbied Congress against cuts to enforcement, with some success.³²² The union has been especially vocal in emphasizing the effects that repeated budget cuts have had on agency attrition, and the attendant risk of a fall in both enforcement and government revenue to finance other programs.³²³ Indeed, because congressional budget cuts and other legislation have been the primary means of incapacitating the IRS, tax is perhaps the most prominent example of unions leveraging the unique political rights granted by the CSRA to serve a public-facing "alarm" role, lobbying for a tax enforcement program from which the

³²⁰ Josh Hicks, *IRS May Pay \$70 Million in Employee Bonuses*, WASH. POST (June 19, 2013), https://www.washingtonpost.com/politics/federal_government/irs-may-pay-70-million-in-employee-bonuses/2013/06/19/5f80d74c-d91b-11e2-a9f2-42ee3912ae0e_story.html [https://perma.cc/WEL9-4T6D].

³²¹ IRS, 71 F.L.R.A. 527 (Jan. 24, 2020); *see also* Am. Fed'n Gov't Emps., 70 F.L.R.A. 161 (Jan. 11, 2017) (upholding an arbitrator decision to deny bonus pay to night shift employees temporarily assigned to day shifts).

³²² See, e.g., Barr, *supra* note 211 (noting some success in lobbying against budget cuts); Stephen Barr, *Look to IRS for Insight into Homeland Security Proposal*, WASH. POST (Sept. 26, 2002), <https://www.washingtonpost.com/archive/local/2002/09/26/look-to-irs-for-insight-into-homeland-security-proposal/a80425f7-7d56-4f93-a28e-535aa8a40009> [https://perma.cc/ERA9-AQF9] (noting that the NTEU supported legislation for flexible personnel rules and pay increases in the IRS in exchange for a greater say in workplace decisions).

³²³ See, e.g., Press Release, NAT'L TREASURY EMPS. UNION (Feb. 3, 2013), *Hundreds of NTEU Members to Engage with Congress During NTEU's 2015 Legislative Conference*, <https://www.nteu.org/media-center/news-releases/2016/04/13/hundreds-of-nteu-members-to-engage-with> [https://perma.cc/C8HN-8WY3].

public benefits, but which has a limited base of political support beyond federal personnel.

D. Environment

The story of labor rights inside the EPA mirrors aspects of both the immigration and tax stories. Like the IRS, the EPA has long been a target of political attacks and structural deregulation, to which labor has historically been a counterbalancing force.³²⁴

EPA staff first unionized in response to the deregulatory efforts of the Reagan Administration. President Reagan's first EPA director, Ann Gorsuch, dramatically reduced enforcement actions and actively lobbied Congress to reduce the agency's budget.³²⁵ In an echo of the Nixon Administration's "Malek memo" tactics, senior agency management developed "hit lists" of effective enforcement staff whom they reassigned to marginal positions.³²⁶ In response, an "oppositional culture bloomed among career staff, who gathered in bars to plot strategies of resistance and unionized themselves to promote job security and scientific integrity."³²⁷ Staff coordinated with Congress and leaked information about agency operations to the press, leading to investigations of key agency appointees. As the administration sought to discipline, reassign, or demoralize untrusted staff, the union represented employees in disputes over discipline, pay, and working conditions.³²⁸ President George H.W. Bush was likewise hostile to career EPA staffers, though he learned from Reagan's failures and took a less direct assault on staff, instead bypassing career staff on key policy and enforcement decisions.³²⁹

President Trump pursued similarly aggressive deregulatory policies toward the EPA, including attempts to limit enforcement actions, limit the use of scientific research in decisionmaking, and to increase work

³²⁴ See, e.g., Leif Fredrickson et al., *History of U.S. Presidential Assaults on Modern Environmental Health Protection*, 108 AM. J. PUB. HEALTH S95 (Supp. II 2018) (providing an overview of the history of these attacks).

³²⁵ Joanna Brenner, *Neil Gorsuch's Late Mother Almost Annihilated the EPA. Is History Repeating Itself?*, NEWSWEEK (Feb. 1, 2017), <https://www.newsweek.com/anne-gorsuch-new-bill-abolish-epa-551382> [<https://perma.cc/5YF9-M558>]; accord Freeman & Jacobs, *supra* note 23, at 622.

³²⁶ Fredrickson et al., *supra* note 324, at S96.

³²⁷ *Id.* at S97.

³²⁸ See, e.g., Nat'l Treasury Emps. Union, 8 F.L.R.A. 136, 136 (Feb. 11, 1982) (litigating employee rights in disciplinary proceedings); IRS, 9 F.L.R.A. 1029, 1029 (Aug. 20, 1982) (doing the same for pay); Nat'l Treasury Emps. Union, 11 F.L.R.A. 271, 272 (Feb. 3, 1983) (contesting performance evaluation).

³²⁹ *Id.* at 324.

burdens on staff and encourage resignations.³³⁰ As a central component of this policy, the administration took a hardline view on employees' labor rights.³³¹ The agency sought to impose a new contract consistent with the administration's 2018 executive orders,³³² replacing the parties' 2007 CBA. When the parties failed to agree on key provisions, the FSIP imposed largely management-friendly terms, including sharply reduced official time, hobbling union organizing efforts;³³³ restrictions as to what matters could be the subject of grievance proceedings; and provisions granting management more extensive discretion on employee performance evaluations.³³⁴ The agency also made more subtle attacks on staff, such as tightening telework allowances. The availability of telework is often a key tool for recruiting and retaining staff in areas of the country with long commutes or remote offices, allowing the agency to operate and conduct environmental enforcement nationwide.³³⁵ An EPA employee, characterizing management's posture, summarized: "We're going to make it difficult for you to carry out your mission of using science and the law to protect the environment . . . And now we're also going to make it difficult for you to spend time with your families."³³⁶

As in the IRS, the EPA's union has been a focal point of resistance to structural deregulation. James Sherk, President Trump's senior labor and civil service reform adviser, later claimed that the "vast majority of career staff" at the EPA "appeared hostile to Trump Administration policies," and "treated political appointees not as the representatives of the will of the people but as an occupying army to be resisted."³³⁷

³³⁰ See Freeman & Jacobs, *supra* note 23, at 619, 622 (noting that over 400 EPA employees reported experiencing violations of the EPA's scientific integrity policy during the Trump Administration); Fredrickson et al., *supra* note 324, at S95 (highlighting the scope of the Trump Administration's attempts to enforce structural deregulation upon the EPA).

³³¹ See Eric Lipton & Lisa Friedman, *E.P.A. Employees Spoke Out. Then Came Scrutiny of Their Email.*, N.Y. TIMES (Dec. 17, 2017), <https://www.nytimes.com/2017/12/17/us/politics/epa-pruitt-media-monitoring.html> [https://perma.cc/PV79-DQQ7] (noting instances of employees' email addresses being targeted after participation in union rallies challenging budget cuts).

³³² See *supra* Section II.B.1.

³³³ Erich Wagner, *EPA Begins Rolling Back Trump-Era Union Policies*, GOV'T EXEC. (Apr. 8, 2021), <https://www.govexec.com/management/2021/04/epa-begins-rolling-back-trump-era-union-policies/173237> [https://perma.cc/39UA-WWK6].

³³⁴ *Id.*

³³⁵ See Katie Johnston, *EPA Workers Call Limits on Working from Home Unfair*, BOS. GLOBE, at A1 (July 25, 2019) (noting that more stringent telework requirements are generating employee attrition at the EPA).

³³⁶ *Id.*

³³⁷ James Sherk, *Tales from the Swamp: How Federal Bureaucrats Resisted President Trump*, AM. FIRST POL'Y INST. (Jan. 26, 2021), <https://subscriber.politicopro.com/eenews/?id=00000184-73aa-daa0-a7e4-f3badd7b0000> [https://perma.cc/7VN9-EEVA].

Employees organized leaks, public protests, and lobbying, among other tactics.³³⁸ The union also successfully appealed management's FSIP-imposed limit on official time to the FLRA, receiving nearly double what the administration had offered.³³⁹ Beyond specific employment disputes, the union leveraged its employment rights to challenge the Trump Administration's policies more broadly. Union officials exercised their rights under 5 U.S.C. § 7102(1) to speak publicly about internal agency operations, criticizing, for instance, Trump Administration policies that discouraged environmental enforcement actions.³⁴⁰ The union also lobbied against deep agency budget cuts and publicly protested the appointment of Scott Pruitt as EPA administrator, though with less success than similar protests by ICE and CBP.³⁴¹

Since the end of the Trump Administration, the union has sought to leverage labor rights for more permanent bureaucratic independence by negotiating a new contract with the Biden Administration, which has rescinded the agreement imposed during the Trump Administration. This development could signal a new era in EPA labor relations, similar to the one that has emerged in the immigration context, in which the union and friendly presidents leverage labor rights to further specific policy goals. The union is, for instance, seeking a "guarantee that scientists will have a say in the drafting of any EPA position or decision" in order to ensure that scientists' "words have not been taken out of context," as they allegedly had during the Trump Administration.³⁴² Such provisions have been criticized by Sherk, who warned that their "goal does indeed appear to be to lock in career employees' preferred policies no matter who the American people elect president."³⁴³ The union's proposed contract also includes protections against harassment and bad faith discipline, including negotiated standards governing promotions, safety

³³⁸ See, e.g., Mintz, *supra* note 26, at 623–24.

³³⁹ EPA, 72 F.L.R.A. 114, 115 (Mar. 3, 2021).

³⁴⁰ See, e.g., Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017) <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html?searchResultPosition=7> [https://perma.cc/BET5-XRQS] ("[An E.P.A. lawyer] agreed to speak to The Times because she is protected by her status as a union official. The E.P.A. did not authorize agency employees to speak.").

³⁴¹ Coral Davenport, *E.P.A. Workers Try to Block Pruitt in Show of Defiance*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/scott-pruitt-environmental-protection-agency.html?searchResultPosition=1> [https://perma.cc/8L73-FE9V].

³⁴² Stephen Lee, *EPA Union Girds for Contract Talks with Eye Toward 2024*, BLOOMBERG L. (June 8, 2022), <https://news.bloomberglaw.com/environment-and-energy/epa-union-girds-for-contract-talks-with-eye-toward-2024-election> [https://perma.cc/UA8R-WM43].

³⁴³ Kevin Bogardus, *Trump-Aligned Think Tank Digs Into EPA Staff, Union Records*, GREENWIRE (Nov. 16, 2022), <https://www.eenews.net/articles/trump-aligned-think-tank-digs-into-epa-staff-union-records> [https://perma.cc/3V9A-HBVN].

and health, and diversity initiatives,³⁴⁴ as well as changes to pay scales to address attrition among the EPA workforce.

In its most recent round of negotiations, the union has openly acknowledged that its approach to labor rights is informed by the use of managerial techniques to undermine the agency's performance. A union representative explained that “[a] contract with robust language on promotions, health and safety, and other items on the union’s wish list would mean a hostile administration wouldn’t be able to violate those terms without risking a lawsuit.”³⁴⁵ As the union’s Executive Vice President summarized, “I actually think we have to be more cynical in putting in safeguards.”³⁴⁶

IV

THEORETICAL IMPLICATIONS OF COLLECTIVE BARGAINING

The preceding sections have shown that collective bargaining imports many aspects of traditional American democratic politics into the bureaucratic management of the executive branch. The democracy enabled by collective bargaining is not direct democracy, however. There is no vehicle for mass popular input into core questions of bureaucratic management. Rather, bargaining provides a means of indirect democratic control, which has several key features. First, bureaucratic management of the executive branch is overseen by other democratic institutions, including Congress and the courts. Second, and relatedly, the balance of power between the President and the bureaucracy becomes transparent and legalistic. Bureaucratic relationships are reduced to formal, written agreements and subject to highly formalized bargaining and dispute resolution processes. These relationships are far less opaque and siloed off from traditional politics than is generally assumed. Finally, while bargaining does not necessarily promote direct democratic supervision, it does allow for extensive public participation in bureaucratic politics via interest groups. In particular, unions act as links between the insular world of executive branch management and the wider world of democratic participation. Through lobbying, litigation, leaks, political endorsements, and direct publicity campaigns, unions connect the internal political struggles of executive branch organization to the broader partisan struggles of American political culture.

³⁴⁴ Lee, *supra* note 342.

³⁴⁵ *Id.*

³⁴⁶ Zahra Hirji, *EPA Employees Want to Put Protections Against Attacks on Science into Their Union Contract*, BUZZFEED NEWS (Apr. 21, 2022), <https://www.buzzfeednews.com/article/zahrahirji/epa-unions-trump-science-protections> [https://perma.cc/2XXF-HHHC].

These democratic characteristics of collective bargaining, largely overlooked by previous scholarship,³⁴⁷ offer a number of new perspectives on the modern administrative state. I focus here on two such perspectives. First, the structure and history of bargaining rights complicate longstanding critiques of the administrative state as democratically unresponsive and therefore illegitimate. The modern federal bureaucracy is far more responsive to both democratic pressure and interbranch supervision than these critiques assume; indeed, as history demonstrates, its democratic responsiveness is by design.

Second, this democratic responsiveness raises troubling questions of its own. While collective bargaining imports some of the legitimizing aspects of American democracy and constitutionalism, it may also import some of its pathologies as well. For instance, making bureaucratic power dependent on the continual support of the political branches may make bureaucracy susceptible to manipulation or corruption by those same institutions. Likewise, federal sector labor law allows—even encourages—the creation of sophisticated, well-funded interest groups within the federal bureaucracy in the form of unions. While these unions can advocate for public values that the administrative process might otherwise overlook, they can also import many of the fraught cultural and political divisions that have destabilized American politics in recent years. In short, collective bargaining may in some respects gain democratic legitimacy while diminishing the values of impartiality, political insulation, and technocratic expertise that earlier generations of public administrators saw as core to the survival of the bureaucratic state.

A. The Legitimizing Role of Collective Bargaining

Collective bargaining changes the structure of federal bureaucracy in ways that challenge both unitarist critiques of the administrative state, as well as critiques which see bureaucracy as valuable but insufficiently democratic.

1. Implications for Presidential Power

The practice of bargaining and contracting suggests a more complex and mutualistic model of presidential-bureaucratic relations than the unitary theory implies. Many unitary critiques of bureaucracy center on the federal bureaucracy's supposed undemocratic character and its insulation from direct presidential control. These accounts assume

³⁴⁷ The literature on bureaucratic governance law is vast. For some other perspectives on bureaucratic government at the federal level, see the sources cited at *supra* note 2, which address a wide range of constitutional, organizational, and sociological questions.

that bureaucratic protections subvert the President’s “sole authority to execute the law”³⁴⁸—or the requirement that “lesser officers must remain accountable to the President, whose authority they wield.”³⁴⁹ This critique is increasingly leveled at federal unions.³⁵⁰ But the history and practice of labor suggest a more complicated story. Bargaining arose at the initiative of President Kennedy and was expanded by Presidents Johnson and Nixon. Part of their goal was to tame an existing civil service system that was substantially more insulated from presidential control. Even President Nixon, initially hostile to labor, came to support labor as a means of combatting the CSC and agency management.³⁵¹

Even absent political competition with Progressive Era administrators, the President saw value in enhancing labor protections for civil servants. Labor autonomy was a way of attracting talent from the private sector when the federal government could not compete on salary or other benefits due to fiscal constraints. As studies by the CSC and the President’s own commissions make clear, it was also a means of improving decisionmaking and outcomes within the executive branch by its “rational analysis, negotiation, and incentives” rather than hierarchical control.³⁵² As core state functions turned increasingly on complex technical, scientific, and administrative questions, traditional methods of top-down management were seen as less effective. Labor autonomy was useful not only in recruiting skilled labor, but in allowing labor to shape the workplace so as to foster productive intellectual work. Thus, labor protections, even if they limited managerial control in certain ways, also enhanced state capacity, expanding, among other things, the President’s ability to project power internationally and to compete with Congress and courts on policymaking.³⁵³ The empowered presidency often celebrated by unitarists was made possible, in part, by the success of this recruitment drive.

Labor protections, then, empowered the President at least as much as they restrained him. To bind himself to contractual agreements with labor was a rational, and ultimately quite profitable, tradeoff. It was not some alien agenda originating in Congress or in shadowy interest groups, imposed on the President against his will. Commentators have occasionally puzzled about why modern law confers semi-private rights

³⁴⁸ Yoo et al., *supra* note 27, at 108.

³⁴⁹ *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

³⁵⁰ See, e.g., PHILLIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS (2023) (arguing that public unions have disempowered elected executives and eliminated accountability mechanisms).

³⁵¹ See *supra* Section I.B.

³⁵² 1978 Senate CSRA Hearings, *supra* note 66, at 475.

³⁵³ See *supra* Section I.B.

in government employment.³⁵⁴ Scholars of the historical development of the modern American state, including Karen Tani and Jeremy Kessler, have observed that individualized rights served often to expand rather than restrict state growth and capacity in the twentieth century. Enforceable rights to welfare disbursements replaced a system in which local administrators might be inclined to distribute funds in an arbitrary or discriminatory manner.³⁵⁵ Likewise, the right of conscientious objectors to serve in non-combat capacities during the First World War worked not to thwart the nation's military effort, but rather to allow citizens to "participate in the warfare state in a particularistic manner."³⁵⁶ Procedural rights granted by the state were "a tool of state-building, not a trump against state power."³⁵⁷ So too with labor rights: Protections for professional autonomy and against managerial abuse ultimately enticed more, and more competent, workers into the burgeoning post-war state, thereby expanding state power.

Proponents of unitarism, including those in the federal judiciary, have expressed skepticism of legal restraints on presidential power. Even though modern jurisprudence generally permits tenure protections for "inferior officers," including civil servants,³⁵⁸ conservative justices have become increasingly skeptical of any legal restraints on the ability of the President to manage the executive branch.³⁵⁹ Conservative elected officials have also expressed a growing hostility toward bureaucratic labor protections, pushing to weaken the civil service and to replace tenured bureaucrats with political allies.³⁶⁰ Historically, the President could not limit himself by contract. That rule was rooted in the same concerns about democracy and sovereignty that now ground many unitary critiques of the administrative state.³⁶¹ But as the foregoing history shows, the President did not necessarily experience this "freedom" as empowering. The inability to limit managerial discretion impeded the development of a strong executive by hampering recruitment of skilled

³⁵⁴ See, e.g., Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 944–47 (1976).

³⁵⁵ See KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 14–15 (2016) ("[S]tatutory law and implementing regulations remade a localized, patchwork system of poor relief and put in its place the modern U.S. welfare state.").

³⁵⁶ Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1090 (2014).

³⁵⁷ *Id.* at 1084.

³⁵⁸ Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020) (emphasis omitted).

³⁵⁹ See, e.g., West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (warning of a "ruling class of largely unaccountable 'ministers'" (quoting THE FEDERALIST No. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

³⁶⁰ See, e.g., Katz, *supra* note 5.

³⁶¹ See *supra* Section I.A.

employees and government modernization. By entering into contracts that limited his managerial discretion in some circumstances, the President could gain valuable personnel who could allow the President to pursue other aspects of his political agenda. A unitary theory that prevented the President from negotiating such contracts would not necessarily free the President from external restraints or expand his power over the executive branch. Rather, it might simply impose a limitation enforced by a different external institution (the courts), thereby removing a valuable management and state-building tool from the President's repertoire.

It is worth acknowledging some additional unitarist objections to civil servant unions. First, nothing about the federal bargaining regime necessarily rebuts the unitary theory as a strict matter of text or history. If one believes that the text of Article II prohibits work protections for executive branch employees, and that the inquiry must end there, the recent history and policy benefits of civil servant bargaining are immaterial.³⁶² The fact that the President both pushed for, and benefited from, a regime of negotiation and contractual commitment does not alter the plain meaning of Article II, nor does it tell us anything about how the Founding generation viewed presidential authority. But most unitary accounts rely not just on text and history, but also on arguments about democratic accountability and efficiency. Unitarists often argue as a practical matter that the “steady administration of the laws,” the “protection of property,” and the preservation of property and liberty require that power over the executive branch be concentrated in a single person—“the most democratic and politically accountable official in Government.”³⁶³ Here, the history of bargaining poses a challenge. The President has often used bargaining not to shirk political accountability, but precisely to meet voters’ expectations. Presidents have concluded, repeatedly, that federal sector bargaining is necessary to ensure the “steady administration of the laws.”³⁶⁴ Recruiting federal personnel capable of delivering the services expected of a modern state meant making strategic concessions to labor over working conditions and managerial prerogative.

Second, one might object that Article II prohibits collective bargaining with the civil service *even if* the President sees an advantage to these contractual arrangements, either for herself or for the

³⁶² The canonical statement of this view is Justice Scalia’s dissent in *Morrison v. Olson*, which reads the Article II Vesting Clause to require that “all” executive power be vested exclusively with the President, precluding any limitations on the President’s ability to control or remove other executive officials. 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (emphasis omitted).

³⁶³ *Seila*, 140 S. Ct. at 2203.

³⁶⁴ *Id.*

executive branch more generally. This argument, which arguably has some grounding in Supreme Court precedent from recent decades,³⁶⁵ might claim that the President cannot discharge her duty to take care that the laws are “faithfully executed” if she cedes her managerial authority to unions by contract. Indeed, that is how many commentators framed objections to public sector unions pre-1960: as a kind of non-delegation doctrine for the Executive.³⁶⁶ But that would pose a host of complications to other areas of law—the same objection could be raised to privatization, government contracting, etc. Where would one draw the line? It is not really a doctrine that has been recognized in contemporary law. But if it were, it would be hard to cabin the effects to unions alone. Such an argument, if accepted, would require a more comprehensive reformulation of the presidency.

2. *Implications for Bureaucracy and Democracy*

Civil servant labor rights also respond to critiques that bureaucracy, even where valuable, is not sufficiently subject to legal and democratic oversight. While labor rights restrain presidential power, they do so in a more transparent and legally structured manner than most accounts of bureaucratic “resistance” assume. Skeptics of bureaucracy view the administrative state as an anti-democratic and illegitimate force, a lawmaking institution fundamentally insulated from democratic oversight.³⁶⁷ While the President and Congress might wield formal power to control the bureaucracy, its complexity, and the opaque network of rules and norms governing it, afford it a “significant degree of independence” from political control “in practice.”³⁶⁸ This skepticism of bureaucracy’s accountability seeps into important legal questions ranging from proper constitutional limits on removal protections for Senate-confirmed officers to the validity of civil service laws. To the extent that bureaucrats are seen as insulated from direct democratic supervision, they are often presumed to act outside of legitimizing legal and political restraints.³⁶⁹

³⁶⁵ There are arguably some articulations of this argument in contemporary Supreme Court precedent. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010) (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment)) (stating that the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” even when doing so might be beneficial, because Article II “makes a single President responsible for the actions of the Executive Branch.”).

³⁶⁶ See, e.g., Parker, et al., *supra* note 49, at 162.

³⁶⁷ See, e.g., HAMBURGER, *supra* note 4, at 505–06.

³⁶⁸ *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

³⁶⁹ See *supra* notes 4, 6, and 9 and accompanying text.

Even scholars who understand bureaucracy as a valuable check on an imperial presidency struggle with its supposedly anti-democratic character.³⁷⁰ The prospect of “civil service disobedience” of presidential directives “heightens administrative law’s already considerable anxieties” about democratic accountability.³⁷¹ Indeed, recent scholarship has been at pains to emphasize the different methods by which federal bureaucracy legitimates itself, including by self-regulating; by imposing enforceable limits on its own discretion;³⁷² by cultivating the support of public opinion and key public constituencies;³⁷³ and by replicating certain features of the constitutional separation of powers within executive branch institutions.³⁷⁴

Civil servant bargaining demonstrates that, in practice, the coordinate branches of government have been restructuring bureaucratic power for decades to respond to such democracy-facing concerns, with significant practical impact despite little scholarly fanfare. Labor rights are not inconsistent with democracy. To the contrary, structuring bureaucratic relations through a regulated system of contract is designed precisely to counteract many of the perceived shortcomings of traditional bureaucracy. Conflicts that would otherwise be resolved through upward resistance from tenured civil servants or downward pressure from an empowered President are instead reduced to writings and formally adjudicated. Congress, courts, and independent agencies are all empowered to participate. This restructuring enables not only legal oversight, but democratic input. The abolition of the independent CSC was designed to empower democratically responsive institutions, rather than insulated ones, to shape executive branch management.

Bargaining and labor rights thus bring bureaucratic management much closer to traditional forms of law and dispute resolution. Whereas in traditionally hierarchical institutions, bureaucrats obediently follow commands from political leaders, bargaining encourages employees to negotiate with and resist managerial authority.³⁷⁵ Likewise, while traditional models assume that a bureaucratic workforce will be governed by the insular rules and norms of the institution, bargaining is highly legalistic: Contracts are negotiated through a formal, statutorily

³⁷⁰ See, e.g., Nou, *supra* note 2, at 362 (questioning the conditions under which civil servant disobedience is democratically legitimate).

³⁷¹ *Id.* at 363.

³⁷² See, e.g., Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009).

³⁷³ See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2081–87 (2018).

³⁷⁴ See, e.g., Katyal, *supra* note 2, at 2317–18; Rosenblum, *supra* note 76, at 70–75.

³⁷⁵ See *supra* Part I.

defined process, and contractual rights are enforced through litigation and independent adjudication, including by Article III courts. As Nicholas Parrillo has observed, separation-of-powers commitments mean that the American administrative state “must answer to multiple masters.”³⁷⁶ American bureaucracy must attend not only to questions of efficiency, but also those of legality and democratic accountability. It must respond to the interests of a plural democracy and the supervision of competing branches of government. So, too, with labor. The purpose of the CSRA was to import not just democracy, but law, into bureaucratic organization. Scholars of “internal administrative law” have long reconceptualized various sociological phenomena—management methods, bureaucratic cultures, professional or historical norms—as forms of “law” that, while neither formally enacted nor enforceable, structure the American state.³⁷⁷ But bargaining subjects bureaucratic relations to the same forms of traditional legal oversight as proprietary or contractual relations in private law. Labor rights were designed to depart from the Progressive-era model of bureaucracy in which policy would be made, and the President constrained, by professionalized expertise. In a labor regime, legal and democratic process as much as subject matter knowledge shape bureaucratic rules.

It is worth considering potential objections to these claims. One is that that collective bargaining does not actually render bureaucratic relationships more “transparent,” but rather subjects them to complex bargaining and dispute resolution procedures that mostly occur outside the public eye. It is true that disputes over executive branch management rarely make headlines, though as set forth above they are becoming more prominent subjects of political dispute. But transparency does not necessarily require that every management dispute inside the executive branch become a subject of broad public attention. Rather, labor rights channel conflicts over managerial authority—Can an asylum officer be penalized for granting too many applications? Can an EPA scientist be reassigned for reaching politically undesirable scientific conclusions?—into formal and widely understood systems of dispute resolution. Protections for labor are written into contracts, and alleged breaches of those contracts are resolved through familiar litigation processes. These otherwise obscure conflicts over bureaucratic culture are translated into a legal and contractual language that a wide range of other political and constitutional stakeholders—Congress, courts, unions, independent agencies, the press, the bar—speak with relative fluency. The outside

³⁷⁶ NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 360 (2013).

³⁷⁷ See, e.g., Metzger & Stack, *supra* note 3, at 1244–48.

world may often choose to ignore these disputes, but it can also take notice of them and learn about them in detail when it chooses, as demonstrated by recent controversies surrounding labor at ICE, CBP, the EPA and other agencies.³⁷⁸

Another potential objection to federal sector bargaining is that the federal bureaucracy is not a genuinely democratic constituency, but rather an entrenched interest group that distorts executive decisionmaking for its own members, including better working conditions at taxpayer expense and more control over federal law. It is true that labor's interests may differ, at times, from the interests of other segments of society. The public is diverse, and there is no guarantee that a federal union's membership will be aligned with all or even most of the public on any given question of regulatory policy. One possible response to this critique is that modern administrative law is designed to facilitate interest group participation in the administrative state, and that participation by civil servant unions is no less legitimate than participation by any other well-organized constituency. Most of the administrative law reforms since the 1970s—from the strengthening of notice-and-comment rulemaking and hard-look review to the expansion of FOIA and executive branch records³⁷⁹ to the growth in the number and influence of political appointees and outside advisors in the executive branch—have allowed a wide range of interests, from businesses to elite non-profits, to influence core aspects of public administration. This rendered the administrative state more responsive to interest groups from across civil society.³⁸⁰ The expansion of civil servant labor rights was consistent with the general thrust of administrative reform throughout the 1970s and afterward. It made the managerial relationships of the executive branch itself more responsive to organized labor on the one hand, and presidential initiatives on the other.

The question, then, is whether unions are a uniquely threatening or illegitimate interest group, one that sets them apart in some way from the business interests and well-heeled nonprofits that typically lobby administrative agencies. There was a historical argument for treating unions differently, articulated by Professor Winter and others: Public unions, by carrying out the work of public administration, were uniquely

³⁷⁸ See *supra* Part III.

³⁷⁹ See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 354–56, 393–95 (2019) (noting a surge in the use of “transparency tools” in conjunction with strict judicial oversight beginning in the 1970s).

³⁸⁰ See, e.g., POSTELL, *supra* note 34, at 247; see also PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM, at xi–xviii (2021) (describing a collection of left- and right-wing interest groups that sought to rein in the administrative state in the 1970s through lobbying, legislation, and litigation).

powerful, and therefore uniquely capable of holding public services hostage to their demands through strikes, slowdowns, and other forms of labor resistance. But, ironically, the decline of labor, including major state and local public sector unions, in the 1970s assuaged many of those fears.³⁸¹ And the crushing of the PATCO strike in the 1980s ended any serious notion that labor was a force powerful enough to hold the President hostage. Indeed, as shown in Parts II and III, while labor has real influence in the Executive Branch, it is far from all powerful. The President retains considerable management rights over the federal work force and wins many important labor disputes before courts and the FLRA.³⁸² Available evidence suggests that the public now views bureaucratic protections as a boon, rather than a threat, to effective government. Public perceptions of agency staff are more favorable than perceptions of elected officials, and some evidence that tenure protections for civil servants might increase perceived legitimacy.³⁸³ Even political appointees within the executive branch tend to view tenured bureaucrats favorably, as capable civil servants who rarely resist or subvert democratic will.³⁸⁴

Moreover, there are reasons to believe that unions serve a valuable pro-democratic role in public administration. First, unions represent interests that might otherwise be underrepresented in administrative decisionmaking. Civil servant unions are often among the only groups advocating for more robust enforcement in areas dominated by industry

³⁸¹ See *supra* Part I.

³⁸² See *supra* Section III.A.

³⁸³ See J. Baxter Oliphant & Andy Cerda, *Americans Favorable of Many Federal Agencies, Especially the Postal Service, Parks Service, and NASA*, PEW RSCH. FOUND. (Mar. 30, 2023), <https://www.pewresearch.org/short-reads/2023/03/30/americans-feel-favorably-about-many-federal-agencies-especially-the-park-service-postal-service-and-nasa> [https://perma.cc/E2MH-28YF] (noting that a majority of Americans have net favorable views of many federal agencies); *The People of Government: Career Employees, Political Appointees and Candidates for Office*, PEW RSCH. FOUND. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/the-people-of-government-career-employees-political-appointees-and-candidates-for-office> [https://perma.cc/Y7V2-JFQX] (noting that even as favorable views of career civil servants have decreased, a majority of Americans still view them favorably); Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. (forthcoming 2024) (manuscript at 6, 42–58) (noting that Americans are more likely to perceive decisions as legitimate when they learn about the role of politically motivated experts in reaching them).

³⁸⁴ See, e.g., Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1607 (2023) (observing that bureaucratic decisionmaking is often mutualistic, characterized by “ongoing reason-giving” and “negotiation” between political appointees and civil servants, rather than traditional command-and-control hierarchies); see also JOEL D. ABERBACH & BERT A. ROCKMAN, IN THE WEB OF POLITICS 129 (2000) (noting that the attitudes of political appointees toward career civil servants between the 1980s and 1992 were “particularly positive,” and that civil servants “overwhelmingly reject sabotage as a tool” when confronting undesirable policies).

lobbying. Unions representing IRS workers, for instance, routinely lobby and litigate against administrative changes meant to slow or weaken tax enforcement. While more effective tax enforcement would have broad public benefits, its beneficiaries are widely dispersed and poorly organized.³⁸⁵ IRS unions are often the only sophisticated operations pushing for pro-enforcement measures, while opponents have large and well-funded lobbying operations.³⁸⁶ Even in areas where nonprofits and other advocacy groups regularly lobby, such as environmental regulation, labor, education, prison administration, or immigration, unions may contribute subject matter expertise, a detailed knowledge of internal executive branch practices, and valuable resources to policy debates.³⁸⁷

Unions also represent groups that might otherwise be underrepresented in administrative decisionmaking. There is a growing body of literature on the benefits of diversifying public participation in administrative law.³⁸⁸ Public unions are one means of advancing this goal. While not perfectly representative of the public, the civil service is diverse along lines of race, gender, veteran status, and geography, and represent a generally middle-class constituency.³⁸⁹ Unions also play an active role in promoting diversity in public employment by, among other things, negotiating protections for civil servants on behalf of underrepresented groups and effectively litigating discrimination claims against federal agencies.³⁹⁰ They can thus be a valuable addition to a system that is

³⁸⁵ See Chye Ching-Huang, *Depletion of IRS Enforcement is Undermining the Tax Code*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 11, 2020), <https://www.cbpp.org/research/federal-tax/depletion-of-irs-enforcement-is-undermining-the-tax-code> [https://perma.cc/F299-MCAH] (“The most well-resourced filers can afford creative tax advisors, litigators, and lobbyists to aggressively push the boundary between lawful tax avoidance and unlawful tax evasion, including when they are audited, recent reporting starkly illustrates.”); see also Kiel & Eisinger, *supra* note 302; Charles O. Rossotti, Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: A Comprehensive Approach*, 169 TAX NOTES 1467, 1468 (2020) (noting that as of 2020 the federal government was estimated to lose \$7.5 trillion over the coming decade due to enforcement of the tax code).

³⁸⁶ See *supra* Section III.C.

³⁸⁷ See *supra* Sections II.B, III.C.

³⁸⁸ See, e.g., PUB. ENGAGEMENT IN RULEMAKING, 84 Fed. Reg. 2146 (2018), <https://www.acus.gov/document/public-engagement-rulemaking> [https://perma.cc/57PP-NFTU]. The Biden Administration has recently launched its own initiative through OIRA to “make” a variety of voices “heard” in the regulatory process. See *Making Voices Heard in the Regulatory Process*, WHITE HOUSE (July 19, 2023), <https://www.whitehouse.gov/omb/briefing-room/2023/07/19/making-voices-heard-in-the-regulatory-process> [https://perma.cc/A6F3-9K96].

³⁸⁹ See P'SHIP FOR PUB. SERV., FED FIGURES: FEDERAL WORKFORCE 2–5 (2019), https://ourpublicservice.org/wp-content/uploads/2022/03/FedFigures_FY18-Workforce-1.pdf [https://perma.cc/TRQ2-5G6Y] (showing that federal civil service is 42.7% female, 37.7% non-white, and distributed across all 50 states).

³⁹⁰ See *supra* Part II.

already predicated on filtering broad-based democratic participation in the administrative state through well-organized interest groups.

And finally, as set forth above, unions are often a vehicle for activating other political stakeholders in disputes that might otherwise evade public debate. Unions can rarely achieve victory on their own: The surest way to attain their goals is to activate Congress through lobbying and testimony, courts and the FLRA through litigation, and the public through messaging campaigns.³⁹¹ Unions thus often serve to increase, rather than decrease, public involvement and political oversight of executive branch management.

B. Collective Bargaining's Challenge to Administrative Legitimacy

The CSRA thus responded to the perceived legitimacy deficit of mid-twentieth century bureaucracy by tying it more closely to the rhythms of American electoral and constitutional politics. A labor-based bureaucracy became more legalistic, more subject to interbranch supervision and democratic pressures, and less structured by rigid managerial hierarchies. But there are risks to this form of legitimacy as well. Political insulation was historically seen as a counterweight to the narrow self-interest of democratic politics. Collective bargaining was self-consciously designed to erode that isolation. Rather than an insulated citadel of management and subject matter expertise, the federal bureaucracy would become an active participant in national politics. It would bargain with the President for its rights and lobby Congress for changes to statutory law. The interests of labor would be represented directly by unions, rather than indirectly by independent civil service commissioners. Public opinion, political priorities, and fiscal conditions would determine the bargaining power of the President and labor when they convened regularly to negotiate new labor agreements. But by tying executive branch bureaucracy to the wider world of American law and politics, bargaining also exposed it to the pathologies of those institutions as well. This Part closes by suggesting some ways in which labor, as compared to more traditional forms of civil service protections, creates risks as well as benefits for the federal bureaucracy.

One risk is that bureaucracy can be corrupted by increasingly polarized institutions. David Pozen, Jonathan Gould, and others have explained the corrosive effect of polarization in other democratic

³⁹¹ See *supra* Section II.B.

institutions.³⁹² Bargaining, by subjecting bureaucracy to greater interbranch oversight, exposes it to these trends in a way that traditional civil service structures deliberately avoided. The President, Congress, and courts all have much greater influence over how the federal bureaucracy is managed, and how the incentives of bureaucrats are structured, under a bargaining regime than under the traditional independent commission system. While that influence produces a certain degree of democratic legitimization, it also tempts political actors to tinker with bureaucratic structures for strategic advantage. President Trump's attempt to entrench harsh immigration enforcement policies by granting extraordinary labor rights to the ICE and CBP unions exemplifies this trend, but it is not unique. As shown in the foregoing sections, every President seeks to work with friendly unions to advance her policy goals to some degree, while negotiating more combatively with unfriendly ones.³⁹³ Under the Biden Administration, more liberal-leaning unions, including those representing EPA, Department of Education, and Department of Labor workers, have followed the example of ICE and CBP workers and sought to entrench expansive labor rights in contracts, hedging against the possibility of a much more hostile presidential administration in 2024 or beyond.³⁹⁴ Likewise, Congress may seek to empower unions it sees as checks on presidential power—as it did for DHS during the Bush Administration—or to slowly undermine unions whose missions may be legally valid but politically unpalatable, such as those representing IRS workers.³⁹⁵

In short, while civil service protections have historically been justified as a protection for bureaucratic expertise against political interference, labor rights appear to serve the opposite objective, turning worker protections into tools for more intensive politicization of the bureaucracy. This is not a phenomenon unique to federal sector labor. Many legal tools—including delegations of power through rules, treaties, government contracts, and aggressive attempts at structural deregulation³⁹⁶—can entrench a President's policy preferences beyond her term in office. But that is precisely the danger of increasingly aggressive forms of labor gamesmanship—they compromise the

³⁹² See Gould & Pozen, *supra* note 217, at 90–118 (describing how political parties have leveraged executive, legislative, and judicial rules for partisan advantage).

³⁹³ See *supra* Parts II–III.

³⁹⁴ See *supra* Section III.D.

³⁹⁵ See *supra* Sections III.C–D.

³⁹⁶ For an overview of entrenchment strategies at administrative agencies, see Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 451–54 (2015). For a discussion of how structural deregulation serves to entrench policy preferences, see Freeman & Jacobs, *supra* note 23, at 590–91.

perceived neutrality and respect for professional norms and expertise that have made the civil service an exceptional, and exceptionally popular, feature of the modern federal government.

A related risk is that labor politics can also push bureaucrats themselves into more partisan postures, politicizing the civil service from within. In the federal sector, bargaining power is often a function of political popularity. When unions are perceived as prioritizing their own economic interests over the public interest, the President pays little price for stifling labor. President Reagan's success in crushing the PATCO strike is perhaps the most vivid illustration of the risks labor runs by making overly aggressive demands.³⁹⁷ By the same token, the President may pay a political price if the public believes she is attempting to stifle or interfere with the effective operation of federal agencies. President Bush's unsuccessful attempts to deunionize immigration enforcement, and President Trump's many legal and political setbacks in attempting to straighten federal labor rights, are examples of the latter phenomenon.³⁹⁸ As a result, unions have a strong incentive to mobilize public opinion in their favor when negotiating for new benefits or protections. Increasingly, unions use podcasts, social media accounts, press releases, protests, and other advocacy campaigns,³⁹⁹ in addition to the traditional tools of bargaining, lobbying, and litigation, to shore up public support for their positions.

This dynamic has the benefit of inviting greater public participation in bureaucratic politics. But it also risks pushing civil servants to take increasingly aggressive positions on a range of contested policy questions. To extent the civil service achieves widespread popularity, it is based in part on the belief that civil servants do not foist their policy preferences on the President—that when they resist presidential power, it is because a President's course of action arguably violates important laws or scientific or professional norms that civil servants are uniquely positioned to defend.⁴⁰⁰ If different corners of the civil service take, or are perceived to take, controversial policy positions that place them in tension with the President, that perception of neutral integrity may suffer.

³⁹⁷ See *supra* Sections II.A.1, II.B.3.

³⁹⁸ See *supra* Sections II.B, III.D.

³⁹⁹ See *supra* Sections III.B–D.

⁴⁰⁰ See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 232 (2016) (arguing that the “triangulation of administrative power among agency heads, civil servants, and members of the public helps legitimize the administrative sphere as a self-regulating, constitutionally sound ecosystem unto itself”); Katyal, *supra* note 2, at 2318 (advocating civil service structures that create “modest internal checks that, while subject to presidential override, could constrain presidential adventurism on a day-to-day basis”).

CONCLUSION

Labor restructures American bureaucracy in profound ways. It substitutes a system based on bargaining for one based exclusively upon hierarchy. This structure, which deviates from the Weberian ideal, is rooted in a combination of ideological aspirations. One is the desire to import democratic norms into bureaucratic structure. In the post-war era, the President needed to accommodate the autonomy of federal workers in order to recruit them for critical projects, and thus to expand the capacity of the American state. But beyond raw executive power, the move toward bargaining, and away from the pyramidal agency structure of the Progressive Era, was also rooted in a mid-century desire to spread industrial democracy to the federal sector; to ensure that the federal government, no less than the private market, was guided by workers' needs and inputs as much as by management's. And, remarkably, rather than die along with many of the rest of the social democratic projects of the New Deal order, federal sector bargaining expanded and thrived during the neoliberal era of the 1970s and afterwards. The attributes that made contractual relations appealing from a democratic perspective—their ability to capture the shifting preferences of both presidents and labor, their susceptibility to oversight by Congress and courts—spoke to the fundamental American desire across the Progressive, New Deal, and post-New Deal eras to square bureaucratic efficiency with the values of democratic and legal accountability.

That system now plays a prominent role in shaping bureaucratic power within the executive branch. It determines how critical federal policies are implemented and enforced and reshapes the relationship between the President and the civil service in profound ways. How to reform the federal sector labor regime to reflect the realities of modern partisan entrenchment, and to prevent its use as a tool of political capture, would be a valuable subject for future research. But because labor is designed to facilitate, rather than prevent, intervention from other democratic institutions, and because it reduces bureaucratic relationships to legible contractual agreements, those debates can be had in concrete terms. One can propose specific statutory, doctrinal, or contractual changes, rather than reducing every dispute about bureaucracy to an existential conflict over its legitimacy.