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Emily Chertoff, Violence in the Administrative State, 112 Calif. L. Rev. __ (forthcoming 2024), available at SSRN.

With all the changes swirling in administrative law, one trend seems to be getting less attention than perhaps it should: the death of regulatory exceptionalism in administrative law. For decades, many regulatory fields—such as tax, intellectual property, and antitrust—viewed themselves as exceptional, such that the normal rules of the road in administrative law do not apply. The Supreme Court and the lower courts have increasingly rejected such exceptionalism in many regulatory contexts, emphasizing that the Administrative Procedure Act (APA) and related administrative law doctrines are the default rules unless Congress has clearly chosen to depart from them by statute in a particular regulatory context.

Immigration exceptionalism, however, remains a puzzle. Not because administrative law does not apply. It does. But, as Jill Family has detailed, Congress has departed from the APA defaults in many respects. As a constitutional and interpretive matter, moreover, immigration regulation operates against the backdrop of the plenary power doctrine. As more administrative law scholars have turned to immigration law (and vice versa), deeper insights have emerged to better situate immigration regulation in the modern administrative state. Immigration law scholars and newer voices in administrative law have played a critical role in moving the field forward. Here, I want to highlight one such newer voice, Emily Chertoff, whose article Violence in the Administrative State makes a promising contribution.

As the title suggests, Chertoff’s main contribution is a call for the field of administrative law to better appreciate the role of violence (and force) in certain regulatory contexts. In Part I, Chertoff sketches out the conventional bureaucratic model for administrative law. An outdated view of immigration regulation might fit within this model: Congress directs immigration agencies to implement a public benefits program and accompanying regulatory enforcement scheme for the admission and continuing presence of noncitizens in the United States. A professionalized “information-processing” bureaucracy, as Jerry Mashaw defined it decades ago in Bureaucratic Justice, carries out that mission—guided and overseen by the political branches, checked deferentially for rationality by federal courts, and improved by procedural best practices developed by the agency itself through internal administrative law. The goals are accuracy, consistency, and efficiency, and the bureaucracy is structured hierarchically to advance program implementation.

This conventional bureaucratic model in immigration regulation—at least on the enforcement side—quickly gets complicated. As many immigration law scholars have noted, immigration regulation can and often does lead to criminal consequences. As such, “crimmigration” has become a burgeoning subfield. Similarly, even on the civil enforcement side, detention of the regulated party—here, the noncitizen—is a central, complicating feature. My soon-to-be-colleague Paulina Arnold’s work on immigration detention comes immediately to mind.

In Part II, Chertoff attempts to bring conceptual clarity to this type of regulatory scheme by introducing
“the domain of violence.” In this type of “force agency” model (compared to the bureaucratic model), order (not accuracy and efficiency) is the legitimating value, and control (not program implementation) is the primary goal. In Chertoff’s view, the organizational structure is not hierarchical at the front-line enforcement level. Instead, there is an in-group/out-group dynamic on the front lines, often “form[ing] strong internal ties while becoming isolated from senior officials and outsiders, including the people they are meant to control and the broader public.” The decisionmaking process, moreover, is not information processing, but instead the “identification of risk in a dynamic context.”

To illustrate this agency force model, Part III presents a case study of the enforcement operations at U.S. Immigration and Customs Enforcement (ICE). To build the case study, Chertoff reviewed several thousand pages of agency guidance documents and materials and then conducted fourteen semi-structured interviews with individuals who have interacted with ICE. Obviously, this is just an exploratory study, and much more empirical work needs to be done to fully understand the role of administrative law and regulatory practice in immigration enforcement. But even this preliminary exploration reveals fascinating details about the role of agency guidance documents, bureaucratic management and quality assurance practices, and judicial review in immigration enforcement on the ground.

Part IV concludes by previewing an ambitious reform project for force agencies. In this article, Chertoff makes three recommendations: (1) training should focus more on danger for a force agency than a bureaucracy or public benefits agency; (2) street-level enforcers should have less decisional independence and be subject to more disciplinary consequences than traditional civil servants; and (3) unions in force agencies should not be treated the same as other public-sector unions, as their incentives for cultivating pathologies on the job are greater and more consequential.

There is so much to like (lots) about this article. As is typical in terrific scholarship, it raises many questions and avenues for future research. I’ll mention a few here. First, how much purchase does the concept of “force agency” have outside of immigration regulation? Chertoff gestures to prisons and law enforcement, contexts generally not studied in administrative law—with some important exceptions. Second, and conversely, how much of immigration regulation falls within the force agency model? Immigration enforcement obviously does. It seems immigration benefits—think U.S. Citizenship and Immigration Services—would not, more naturally categorized as an information-processing bureaucracy. But what about immigration adjudication that occurs in the Justice Department’s immigration courts system? It seems like that may fall outside the force agency category, and yet civil detention and potential criminal consequences flow from that regulatory system.

It is also fascinating to explore how this force agency model may play out in other agency enforcement contexts, such as tax, environmental protection, and financial regulation. (Or in the fishing industry regulatory context at issue in Loper Bright Enterprises v. Raimondo—the case the Court will decide this Term on whether to eliminate Chevron deference to agency statutory interpretations.) To be sure, Chertoff’s focus is on physical force or violence, whereas in other schemes regulatory restrictions and civil penalties more likely affect property and livelihood than life and liberty. But some of those enforcement structures are similarly decentralized, and the focus is likewise on order and control with street-level enforcers identifying risk in a fast-changing enforcement landscape. As such, similar policy proposals of different training, less decisional independence, and distinct unionization may be worth studying and exploring there as well.

In other words, is a large part of this story about enforcement per se as a regulatory tool, compared to rulemaking and adjudication? In that sense, this article is a must read for scholars who focus on agency enforcement in other regulatory contexts. (One of the unfortunate byproducts of the exceptionalism phenomenon in administrative law is that it often leads to scholarly siloing, with regulatory subfields not
learning from and talking with one another.) Indeed, one may even wonder how many agencies today actually fit the conventional bureaucratic model well, or whether we need more agency- or mode-specific administrative law models and theories (even if not doctrinal exceptionalism). I am excited to see how Chertoff and others continue to explore the concept of force in administrative law in the years to come. This article is a great conversation starter, and an important contribution to the literature on immigration exceptionalism in administrative law.