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# Trading Information for Safety: Immigrant Informants, Federal Law-Enforcement Agents, and the Viability of Non-Deportation Agreements

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# TRADING INFORMATION FOR SAFETY: IMMIGRANT INFORMANTS, FEDERAL LAW-ENFORCEMENT AGENTS, AND THE VIABILITY OF NON-DEPORTATION AGREEMENTS

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*Abstract:* Federal law-enforcement agents use informants to help guide investigations. Immigrants sometimes possess valuable information about organized crime connected with their home countries. To persuade an immigrant to divulge such information, federal agents and prosecutors often promise to reward cooperation with permission to stay in the United States. Non-deportation is a persuasive enticement to an informant who might otherwise be unwilling to help; criminal groups would likely harm a known informant returning home. After deciding to cooperate, many immigrants are placed in deportation proceedings notwithstanding their deals. This Comment discusses the persistent legal conundrum faced by immigrant informants after the U.S. government refuses to honor a non-deportation contract. It begins with a review of two forms of deportation relief commonly pursued by immigrant informants: withholding of removal under the Convention Against Torture or an injunction against deportation under substantive due process. For reasons specific to each, both approaches frequently fail. The agency theory of ratification may provide an alternative mechanism for enforcing some non-deportation agreements. Ratification applies to contracts with the U.S. government and has been used by plaintiffs in similar contexts. This Comment argues that extending ratification to immigrant-informant claims comports with the legal framework and broader purpose underlying the doctrine.

## INTRODUCTION

Maria Rosciano emigrated from Colombia to the United States and settled in Arizona as a lawful permanent resident.[1] After her brother was killed by drug traffickers, the Federal Bureau of Investigation (FBI) sent confidential informants to secretly befriend her in hopes that she knew the identity of a major drug lord known as "El Indio."[2] One of the undercover informants became her neighbor and asked her to introduce him to a drug dealer.[3] Ultimately, Rosciano was arrested for her role in arranging a meeting between the dealer and the informant. The FBI asked Rosciano to become an informant herself, and prosecutors told her they doubted she would be deported if she cooperated.[4]

1. Rosciano v. Sonchik, No. 01-CV-00472, 2002 WL 32166630, at *7 (D. Ariz. Sept. 9, 2002).
2. *Id.*
3. *Id.* at *8.
4. *Id.*

Rosciano cooperated and her testimony helped convict the parties involved in her own arrest.[5] Pursuant to the FBI's request, she also called her sister and surviving brother in Colombia to ask for El Indio's real identity. Her brother refused to provide the information out of fear, but her sister eventually divulged the true name of El Indio. Shortly thereafter, Rosciano's sister received a phone call informing her that El Indio would not forgive her.[6] She died in an automobile accident a short time later after someone tampered with the brakes on her car. Despite conceding that that "the risk of danger as a result of her assistance is high," government officials sought to deport Rosciano back to Colombia.[7] During deportation proceedings, the immigration judge admitted, "[I]t is likely [Rosciano] will be killed if returned to Colombia" because she had helped uncover El Indio's identity.[8] Nevertheless, the immigration judge ordered that Rosciano be deported.[9]

Rosciano's circumstances are neither rare nor new; law-enforcement officers employ a longstanding practice of seeking leads from immigrant informants.[10] Federal officials often approach immigrants arrested on drug charges[11] because they are interested in capturing bigger players in

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* On appeal, Rosciano was ultimately able to avoid deportation under the theory discussed *infra* Part I.B.

10. *See, e.g.*, Morgan v. Gonzales, 495 F.3d 1084, 1088 (9th Cir. 2007) (reviewing plea agreement from 1983); Nunez v. Att'y Gen. of U.S., 226 F. App'x 177, 178 (3d Cir. 2007) (observing documented death threats and attempts to kidnap informant); Williams v. Att'y Gen. of U.S., 219 F. App'x 258, 261 (3d Cir. 2007) (discussing allegations that Jamaican drug dealer and Jamaican police threatened informant); Burke v. Att'y Gen. of U.S., 219 F. App'x 200, 201 (3d Cir. 2007) (analyzing claim by informant on violent gangs and political-party involvement in drug trafficking); Vasquez v. Att'y Gen. of U.S., 208 F. App'x 184, 185 (3d Cir. 2006) (reviewing claim brought by informant on Dominican cocaine trade); Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 44, 46, 58 (D. Mass. 2005) (1986 agreement), *remanded sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006); Reyes-Gomez v. Gonzales, 163 F. App'x 293, 294 (5th Cir. 2006) (discussing drug informant's fears of torture or murder); Guerra v. Gonzales, 138 F. App'x 697, 698 (5th Cir. 2005) (noting allegations that drug traffickers allegedly threatened informant in open court while he was testifying and placed threatening phone calls to his family); Builes v. Nye, 239 F. Supp. 2d 518, 522 (M.D. Pa. 2003) (finding that immigrant's brother and sister were both executed in retaliation for his cooperation), *disagreed with by* Kamara v. Att'y Gen. of U.S., 420 F.3d 202, 217 (3d Cir. 2005); *In re* Y-L-, 23 I. & N. Dec. 270, 281 (A.G. 2002) (discussing death threats to immigrant making controlled drug purchases to implicate others); Ramallo v. Reno, 114 F.3d 1210, 1211 (D.C. Cir. 1997) (reviewing claim brought by cooperating informant in drug-trafficking prosecution); Thomas v. INS, 35 F.3d 1332, 1335 (9th Cir. 1994) (analyzing cooperation agreement from 1983).

11. Not all immigrant informants are approached after being arrested for a crime. In *Wang v.*

the criminal organization. Cooperating can place an immigrant in serious danger upon return to his or her home country, sometimes rising to the level of torture or death.[12] Many immigrants cooperate only after receiving assurances that they will be kept safe.[13]

This Comment argues that the agency theory of ratification applies to non-deportation agreements. Part I surveys two legal claims commonly brought by immigrant informants and reviews the reasons they frequently fail. Part II lays out the elements of a government contract and discusses past application of agency principles to contract claims brought by immigrant informants. Part III introduces the agency theory of ratification, which can be used to prove the existence of an enforceable contract. It also discusses how ratification operates when one party to the contract is the U.S. government. Part IV reviews recent cases in which informants employed ratification in suits against the United States. Those claims were brought by U.S. citizens who worked as informants and subsequently sought to be paid for their services. They used ratification, sometimes successfully, to argue that they held a valid contract for monetary compensation. Finally, Part V argues that ratification should apply in the immigrant-informant context, where the plaintiffs seek relief from deportation instead of money. It discusses similarities between the immigrant- and citizen-informant claims, and argues that extending ratification to the immigrant context squares with the purpose underlying ratification.

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*Reno*, 81 F.3d 808, 811–12 (9th Cir. 1996), prosecutors brought a Chinese man to the United States to testify in a heroin-smuggling trial. After the trial, the government sought to deport him despite the serious danger that the Chinese government would imprison, torture, and execute him for embarrassing it with his testimony. In *Pronsivakulchai v. Gonzales*, 461 F.3d 903, 904–06 (7th Cir. 2006), a woman spent over five years in federal custody without being tried for a crime, during which time Drug Enforcement Agency representatives asked her to write letters to known Thai drug gang members. The U.S. government initiated an investigation based on the correspondence and simultaneously sought to deport Pronsivakulchai despite reports from Thailand that the gang repeatedly visited her home looking for her.

12. *See* 8 U.S.C. § 1101(a)(15)(S)(ii)(III) (2000) (recognizing non-citizens can be endangered as a result of cooperating and providing the visa discussed *infra* note 15); John Ashcroft, Attorney General, Announcement of Responsible Cooperators Program (Nov. 29, 2001), *available at* http://avalon.law.yale.edu/sept11/doj_brief027.asp (acknowledging potential danger encountered by immigrants because of cooperation), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev599n12.pdf.

13. *See* cases cited *supra* note 10.

## I. THE TWO LEGAL CLAIMS BROUGHT BY IMMIGRANT INFORMANTS GENERALLY FAIL

The government often seeks to deport immigrants who claim they received a promise not to be removed in exchange for information about criminal groups.[14] To avoid deportation, immigrants commonly seek two forms of relief: Convention Against Torture (CAT) protection and an injunction against deportation under the constitutional doctrine of substantive due process.[15] For reasons specific to each claim, immigrant informants rarely succeed on these theories.

### *A. Convention Against Torture Protection Requires Government Participation or Acquiescence in Torture, but Drug Traffickers Are Usually Not Government Agents*

As a signatory to the CAT, the United States may not deport an individual to a country where he or she will face severe physical pain or suffering out of discriminatory, punitive, or coercive motives.[16] Cooperating witnesses placed into removal proceedings frequently invoke the CAT.[17] As incorporated into domestic law by regulation, the CAT requires an applicant to demonstrate that he or she will "more

14. *See* cases cited *supra* note 10.

15. Besides the CAT and substantive due process, immigrant informants may seek an "S visa." The S visa is available to a non-citizen "in possession of critical reliable information concerning a criminal organization or enterprise," "whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise. . . ." 8 U.S.C. § 1101(a)(15)(S)(i)(I), (III) (2000). Two hundred S visas are available per year. 8 U.S.C. § 1184(k)(1) (2000). The law-enforcement agent needing the informant's help must petition for the visa on the immigrant's behalf. 8 C.F.R. § 214.2(t)(4) (2008). Federal law-enforcement officers are free to decline to help immigrant informants apply for the visa, even while conceding that the immigrant cooperated. *See, e.g.*, Morgan v. Gonzales, 495 F.3d 1084, 1089 (9th Cir. 2007); Jun Ying Wang v. Gonzales, 445 F.3d 993, 999 n.2 (7th Cir. 2006); Hong v. Att'y Gen. of U.S., 165 F. App'x 995, 1003 n.5 (3d Cir. 2006); Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 50 (D. Mass. 2005), *remanded sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006); Rosciano v. Sonchik, No. 01-CV-00472, 2002 WL 32166630, at *8 (D. Ariz. Sept. 9, 2002). The government's failure to grant an S visa cannot be challenged in court, however, because the Attorney General's power to grant the visa is discretionary. 8 U.S.C. § 1101(a)(15)(S)(i).

16. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, 113; 8 C.F.R. § 1208.18(a)(1) (2008).

17. *See, e.g.*, Pronsivakulchai v. Gonzales, 461 F.3d 903, 905 (7th Cir. 2006); *Enwonwu*, 376 F. Supp. 2d at 54; Builes v. Nye, 239 F. Supp. 2d 518, 521 (M.D. Pa. 2003).

likely than not" be tortured if returned home.[18] Furthermore, the applicant must show that torture will be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[19] This second requirement means the CAT applies only if the applicant can connect the torturer to the government.

The requirement of government complicity results in the denial of many CAT claims—even where an immigrant presents evidence of grave danger—because the torturer lacks a direct link to the state.[20] *Builes v. Nye*[21] is illustrative. There, an immigrant informant's brother and sister were executed in Colombia in retaliation for his cooperation with U.S. law enforcement.[22] The CAT standard for government involvement was not met, however, because even though the Colombian government would not be able to stop Builes's likely torture, it disapproved of drug-gang killings.[23]

As a counterexample, the government-complicity standard was met in In re *G-A-*,[24] where an immigrant showed that he would more likely than not be tortured by the Iranian government if deported.[25] G-A- was a Christian of Armenian descent who showed, during an immigration hearing that spanned twelve years, that the Iranian government had an established practice of detaining and torturing members of religious and

18. 8 C.F.R. § 1208.16(c)(2) (2008).

19. *Id*. § 1208.18(a)(1). CAT protection is different from asylum because it requires actual government participation or acquiescence. Asylum is available to individuals who have been persecuted by non-governmental groups that the government cannot or will not control. Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985). Asylum, however, is not available to anyone convicted of a "particularly serious crime" as defined by the Attorney General. 8 U.S.C. § 1158(b)(2)(A)(ii) (2000). The Attorney General determined that all drug-trafficking offenses carrying a potential sentence of one year or more in jail are presumptively "particularly serious crimes." *In re* Y-L-, 23 I. & N. Dec. 270, 274 (A.G. 2002), *disapproved of on other grounds by* Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) *and* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004). Therefore, any person who becomes an informant following his own drug conviction likely will be ineligible for asylum.

20. *See, e.g.*, Chinchilla-Jimenez v. INS, 226 F. Supp. 2d 680, 685–86 (E.D. Pa. 2002) (affirming BIA decision that persecution by high-level drug dealers does not rise to the level of government torture); *In re* S-V-, 22 I. & N. Dec. 1306, 1307, 1313 (BIA 2000) (ruling that the Colombian government's inability to control violent narco-traffickers is insufficient to trigger the CAT).

21. 239 F. Supp. 2d. 518 (M.D. Pa. 2003).

22. *Id*. at 522.

23. *Id*. at 525.

24. 23 I. & N. Dec. 366 (BIA 2002).

25. *Id*. at 366.

ethnic minorities.[26] The Board of Immigration Appeals found that government thugs were "notorious" for indefinite incommunicado detention, suspension from ropes, whipping with cables, and severe cranial beatings intended to cause blindness and deafness.[27] G-A-'s twenty-five-year residence in the United States and documented attempt to apply for asylum helped show, over years of hearings, that the Iranian government would likely detain and torture him immediately after his deportation plane touched down.[28]

The hurdle of tracing torture to the government accounts, at least in part, for the low percentage of successful CAT petitions. In 2007, fewer than two percent of all CAT claims nationwide were granted.[29] The CAT cannot serve as a source of protection from an extra-governmental group if government officials have not acquiesced to the group's conduct.

### *B. Federal Courts Are Split over Whether Immigrant Informants May Invoke the State-Created-Danger Theory of Substantive Due Process*

Immigrant informants seeking to avoid deportation have also raised Fifth Amendment substantive-due-process claims. The Due Process Clause applies to all persons within the United States, regardless of immigration status.[30] Due-process protections apply to a non-citizen even after an immigration judge orders deportation.[31]

Generally, the Due Process Clause limits the government's power to infringe on individual rights but does not impose an affirmative duty to safeguard.[32] That is, the government may not deprive individuals of life, liberty, or property without due process of law, but it has no constitutional obligation to protect individuals from one another.[33] The U.S. government, therefore, has no general duty to protect deportable

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26. *Id*. at 367–70.

27. *Id*. at 370.

28. *Id*. at 369.

29. OFFICE OF PLANNING, ANALYSIS & TECH., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEARBOOK M1 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf (541 of 28,130 CAT claims granted), *permanent copy available at* http://www.law.washington.edu/wlr/articles/83wlr599n29.pdf.

30. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

31. *Id*. at 693–94 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

32. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

33. *Id.* at 195–96 ("Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.").

immigrants from dangers they may face in their home countries once deported.

In *DeShaney v. Winnebago County Department of Social Services*,[34] the Supreme Court recognized two potential exceptions to the general rule that substantive due process does not require the government to protect individuals from third-party actors.[35] First, where the state creates a special relationship with an individual by incarcerating or forcibly institutionalizing him, it incurs an affirmative duty of care.[36] This duty arises because the government deprives an individual of the ability to fend for himself.[37]

The second potential *DeShaney* exception is for state-created dangers. *DeShaney* involved a tort claim arising from Wisconsin social workers' failure to remove a child from his abusive father's care.[38] His father ultimately beat him so badly that he was rendered profoundly retarded and likely to require lifelong care in a specialized facility.[39] In affirming the lower court's judgment that the injured child could not recover damages from the county on due process grounds, the Supreme Court emphasized that the social workers "played no part in creating" the abusive conditions, "nor did [they] do anything to render [the child] any more vulnerable to them."[40]

Since *DeShaney*, a majority of the courts of appeals have recognized the state-created-danger doctrine, whereby public officials can be liable if they create a dangerous situation and then place an individual into it.[41]

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34. 489 U.S. 189 (1989).

35. *Id*. at 198–200.

36. *Id*.

37. *Id.* at 200.

38. *Id*. at 192–93.

39. *Id*. at 193.

40. *Id.* at 201.

41. *See, e.g.*, Kneipp v. Tedder, 95 F.3d 1199, 1201–1203 (3d Cir. 1996) (finding viable claim where police left an intoxicated woman to walk home alone on a highway where she fell unconscious in freezing conditions and sustained massive brain damage from the cold); Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (allowing claim where police arrested driver but left drunk passenger alone with the car keys; passenger drove car and killed a pregnant woman and her unborn child); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (permitting claim where officers at demonstration involving flag burning allegedly did not intervene to prevent skinheads from beating demonstrators), *overruled on other grounds by* Leatherman v. Tarrant County Narcotics & Intelligence Coordination Unit, 507 U.S. 163, 164 (1993); L.W. v. Grubbs, 974 F.2d 119, 122 (9th Cir. 1992) (finding properly stated claim where female nurse at custodial institution was left alone with known violent sex offender who raped her); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (allowing amended complaint to make state-created-danger argument where

The Supreme Court has never revisited the state-created-danger doctrine.[42] In the absence of clear signals about the doctrine's viability, some courts of appeals have created specific tests for its application,[43] while others have yet to recognize it at all.[44]

In the context of immigration, even those courts recognizing the doctrine are split over whether it can be used to enjoin deportation. Immigrant informants argue—sometimes successfully—that federal agents affirmatively create dangerous conditions by recruiting them to cooperate.[45] The argument is that the criminals back home would not seek violent revenge against their returning countrymen had the U.S. government not used them as informants in the first place.

The First and Third Circuits flatly reject this approach and refuse to apply the state-created-danger doctrine to immigration cases.[46] Relying on separation-of-powers principles, these courts reason that application of state-created-danger would impermissibly intrude upon Congress's plenary power to define the conditions under which immigrants will be admitted and deported.[47] The Fifth Circuit, acknowledging the issue but not deciding whether the state-created-danger doctrine applies in the immigration context, has cited the cases rejecting the theory.[48]

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estranged husband killed wife and daughter after police chief failed to enforce protection order out of friendship with husband).

42. *See* Daniel J. Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 301 (2007) (citing David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 358 (2001)).

43. Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (four-part test); Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (five-part test).

44. *See* Moore, *supra* note 42, at 300 (noting that the First and Fifth Circuits' have yet to adopt the doctrine, but predicting the First Circuit might accept it under the proper circumstances); Recent Cases, 116 HARV. L. REV. 1912, 1912 (2003) (observing that eleven circuits apply the doctrine).

45. Federal district courts agreed with this argument and enjoined deportation in *Rosciano v. Sonchik*, No. 01-CV-00472, 2002 WL 32166630, at *10–12 (D. Ariz. Sept. 9, 2002) and *Builes v. Nye*, 239 F. Supp. 2d 518, 526 (M.D. Pa. 2003), *disagreed with by Kamara v. Att'y Gen. of U.S.*, 420 F.3d 202 (3d Cir. 2005). Likewise, the district court in *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 74 (D. Mass. 2005), would have enjoined deportation based on the state-created-danger theory. Before the court issued its order, the REAL ID Act of 2005 went into effect, stripped jurisdiction, and required the district court to transfer the case to the First Circuit. *Id*. at 85. That First Circuit treated the opinion below as advisory and rejected the state-created-danger argument. Enwonwu v. Gonzales, 438 F.3d 22, 27, 30 (1st Cir. 2006).

46. *Enwonwu*, 438 F.3d at 30; *Kamara*, 420 F.3d at 217–18.

47. *Enwonwu*, 438 F.3d at 28; *Kamara*, 420 F.3d at 218.

48. Lakhavani v. Mukasey, 255 F. App'x 819, 823 (5th Cir. 2007). In *Lakhavani*, the Fifth Circuit admitted its refusal to apply the doctrine once before but explained that its earlier decision was unpublished and non-binding. *Id*. (discussing Guerra v. Gonzales, 138 F. App'x. 697, 699–700 (5th

By contrast, the Ninth Circuit has applied the state-created-danger doctrine to enjoin deportation. In *Wang v. Reno*,[49] the court affirmed the district court's grant of a permanent injunction against Wang's deportation after government agents brought him from China to San Francisco to testify in a federal drug trial.[50] Following his testimony, the government sought to deport Wang back to China even though the Chinese government would likely torture him due to the content of his testimony.[51] The Ninth Circuit agreed with the district court that the government treated Wang with "gross negligence and deliberate indifference" that affirmatively placed him in danger.[52]

No other court of appeals has addressed the state-created-danger doctrine in the immigration context, so it remains to be seen whether they will extend a warmer reception than the First and Third Circuits have. The prospects appear unpromising; the Ninth Circuit—the only court to accept and apply the doctrine—has not granted deportation relief under the theory since *Wang*.[53]

To summarize, immigrant informants commonly turn to two claims when facing deportation and harm in their country of origin because of information they provided to the U.S. government. Although the above overviews are brief, they illustrate why each doctrine often fails to provide relief. The CAT requires actual awareness and inaction on the part of government officials, which is difficult to prove when non-governmental agents pose the threat. The state-created-danger doctrine is another possibility, but two courts of appeals reject it in the immigration context and a third has not granted relief under the theory since accepting it over a decade ago. Because the current legal options for immigrant informants rarely succeed, a new theory of relief may be required. With a view to finding a new approach, Part II introduces agency theory and its application to contract claims brought by immigrant informants.

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Cir. 2005) (explaining that even if doctrine were to apply to immigration cases, it did not apply to the facts before the court because the immigrant had not shown an increased risk of harm if deported)).

49. 81 F.3d 808 (9th Cir. 1996).

50. *Id*. at 811–14.

51. *Id*. at 812, 819–20.

52. *Id.* at 818.

53. For a recent case where the Ninth Circuit applied the theory but denied relief, see *Morgan v. Gonzales*, 495 F.3d 1084, 1092–94 (9th Cir. 2007).

## II. AGENCY PRINCIPLES APPLY TO THE CONSTRUCTION OF NON-DEPORTATION CONTRACTS

As noted earlier, many immigrants agree to cooperate with law-enforcement officials after being arrested for a crime. In the 1990s, some courts of appeals began enforcing immigration-related promises as part of the plea-bargain contract. Those courts first examined the four necessary elements of any government contract. Next, they applied agency theory and contract principles, with two circuits finding non-deportation agreements enforceable. Although an intervening regulation undercut the specific reasoning used in those cases, the decisions continue to illustrate the applicability of agency principles to non-deportation contracts.

### *A. A Valid Government Contract Requires That the Agent Have Actual Authority*

A party alleging a contract with the government must show the standard elements: offer, acceptance, and consideration.[54] When the United States is a party, a fourth requirement is that the official entering into the agreement has "actual authority" to bind the government.[55] Apparent-authority or estoppel theories are generally not available to a plaintiff attempting to enforce a deal with the United States.[56] Instead, actual authority is required for all government contracts, including a plea bargain with a federal prosecutor.[57] Courts have applied agency principles to determine the source and scope of plea-bargain authority when the plea includes a non-deportation promise.

54. Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997); City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990); Roy v. United States, 38 Fed. Cl. 184, 187 (1997).

55. *Trauma Serv. Group*, 104 F.3d at 1325; *City of El Centro*, 922 F.2d at 820; *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.").

56. Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994) (citing Utah Power & Light Co. v. United States, 243 U.S. 389, 408–09 (1917) and *Fed Crop Ins. Corp*., 332 U.S. at 384).

57. San Pedro v. United States, 79 F.3d 1065, 1068 (11th Cir. 1996); *Thomas*, 35 F.3d at 1337.

### *B. Courts Apply Agency Principles to Non-Deportation Contract Claims*

Agency is a fiduciary relationship arising from a person's consent to permit another to act on his or her behalf.[58] The "agent" acts on behalf of the "principal."[59] Through express words or conduct, a principal manifests intent to allow an agent to act in his or her place.[60] The agent's actions affect the legal rights and duties of the principal, including the power to enter into contracts.[61] Agency allows the principal "to broaden the scope of his activities and receive the product of another's efforts" because the principal avoids individually negotiating every agreement.[62] When an agent contracts on the principal's behalf, the benefits and duties of the contract accrue to the principal.[63]

In the 1990s, three courts of appeals applied agency analyses to immigrant informants' claims that they held a contract right not to be deported. Under the doctrine of implied authority,[64] the Eighth and Ninth Circuits found that an Assistant United States Attorney (AUSA) could act as an agent and negotiate plea bargains that would bind immigration officials as the principals. In *Thomas v. INS*,[65] Thomas agreed to work as a narcotics informant for two years following a drug conviction.[66] In exchange, the AUSA promised to advise the parole board of his cooperation and to not oppose Thomas's request for deportation relief.[67] Once deportation proceedings began, immigration officials ignored the AUSA's promise and advocated deportation.[68] While acknowledging that AUSAs did not have express authority to bind immigration officials, the Ninth Circuit held that the congressional delegation of power to

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58. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

59. *Id*.

60. *Id*. § 1.03.

61. *Id*. § 1.01 cmt. c.

62. WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 1 (3d ed. 2001).

63. *Id*.

64. Implied authority is one type of actual authority. RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2006).

65. 35 F.3d 1332 (9th Cir. 1994).

66. *Id*. at 1335.

67. *Id.*

68. *Id.* at 1336.

prosecute crimes implied a corollary power to bind the government in plea bargains.[69] Absent a regulation to the contrary, that power included binding the government in immigration matters.[70] Because the government breached its agreement, the court ordered a new hearing in which the government could not oppose Thomas's request to stay in the United States.[71]

The Eighth Circuit agreed with the *Thomas* court's agency analysis in *Margalli-Olvera v. INS*.[72] In *Margalli-Olvera*, an immigrant agreed to be debriefed about his knowledge of drug trafficking in exchange for the government's promise either to be silent during deportation proceedings or to actively oppose deportation.[73] The court found that the AUSA who made the promise had authority to bind immigration officials because that power was "reasonably necessary" to accomplish the larger prosecutorial task.[74] When immigration authorities later breached the agreement by proposing deportation, the court remanded the case for a trial-type hearing on the merits during which the attorney for the government had to simply sit quietly and say nothing.[75]

The Eleventh Circuit also analyzed the agency relationship between immigration officials and AUSAs, but came to a different conclusion. In *San Pedro v. United States*,[76] San Pedro claimed that an AUSA orally promised that he would not be deported to Cuba if he pleaded guilty to conspiracy to bribe a federal official.[77] When immigration officials nevertheless initiated deportation proceedings, San Pedro sought a restraining order to prevent deportation.[78] The court examined the congressional grant of authority to AUSAs and found no implied power to bind immigration decision-makers.[79] Congress expressly delegated immigration-enforcement authority to the Attorney General, the *San*

69. *Id.* at 1340.

70. *Id*. at 1339.

71. *Id.* at 1342–43.

72. 43 F.3d 345, 353 (8th Cir. 1994).

73. *Id*. at 348. Whether the government would actively oppose deportation or just be quiet during the deportation proceeding depended on whether Margalli-Olvera participated fully and truthfully in the debriefing process.

74. *Id.* at 353–54 (citing RESTATEMENT (SECOND) OF AGENCY § 50 (1958)).

75. *Id.* at 357.

76. 79 F.3d 1065 (11th Cir. 1996).

77. *Id*. at 1067.

78. *Id.*

79. *Id*. at 1072.

*Pedro* court reasoned, so Congress did not impliedly delegate the same authority to U.S. Attorneys and AUSAs.[80]

The *Thomas* and *Margalli-Olvera* courts granted relief because they agreed with the agency argument advanced by the immigrant informant. That route to contract enforcement, however, was closed in 1996 when the Department of Justice (DOJ) responded to *Thomas* and *Margalli-Olvera* by issuing a regulation governing plea bargains with immigrants.[81] The regulation announced that immigration officials would not be bound by any contracts to which they were not parties, and required that any agreements affecting immigration be in writing.[82] *Thomas* and *Margalli-Olvera* recognized that an AUSA's power to bind immigration officials was implied only—the Attorney General nowhere expressly delegated it.[83] By issuing the regulation, the Attorney General clarified that deportation-contracting was *not* an implied power granted to federal prosecutors.[84] Post-regulation, the implied-authority theory cannot assist an immigrant in proving a contract with a federal prosecutor. Nonetheless, *Thomas*, *Margalli-Olvera*, and *San Pedro* show that agency principles apply to non-deportation contracts, so alternative agency theories may be useful to immigrant informants seeking to enforce their agreements.

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80. *Id*. at 1069.

81. 28 C.F.R. § 0.197 (1996).

82. *Id.*

83. Thomas v. INS, 35 F.3d 1332, 1340 (9th Cir. 1994); Margalli-Olvera v. INS, 43 F.3d 345, 353 (8th Cir. 1994).

84. The Ninth Circuit foreshadowed the Attorney General's regulation. The *Thomas* opinion refers to a hypothetical Attorney General order or federal regulation no fewer than three times. *Thomas*, 35 F.3d at 1339–41. Inviting the Attorney General to regulate, the *Thomas* court explained, "If the Attorney General wished to limit the incidental authority of United States Attorneys in this respect, she could easily do so with a section in the Code of Federal Regulations, but she has not chosen to do that." *Id.* at 1341. Nudging further, the court stated, "As a matter of administrative prudence the Department of Justice might wish to have some internal coordinating procedure for agreements by United States Attorneys which affect the Immigration and Naturalization Service." *Id.* However, in a case heard after the regulation was promulgated, the Ninth Circuit referred to its decision in *Thomas* as holding that a United States Attorney has the power to bind other federal agencies without mentioning the regulation. Morgan v. Gonzales, 495 F.3d 1084, 1091 (9th Cir. 2007). This may evidence that the regulation is not, at least in the Ninth Circuit, an end to successful contract claims where a United States Attorney promises deportation relief. *Morgan* did not engage in a full analysis of *Thomas* or the regulation, however, because the plaintiff did not allege the existence of a specific promise. *Id*. at 1091.

## III. RATIFICATION REPLICATES ACTUAL AUTHORITY AND APPLIES TO THE U.S. GOVERNMENT

Ratification, like implied actual authority, is an agency doctrine that can be used to prove an enforceable contract. Also like implied authority, ratification applies to contracts negotiated by government agents. Two types of ratification, individual and institutional, apply to contract claims brought against the U.S. government.

### *A. The Agency Theory of Ratification Replicates Contracting Authority Where an Agent Otherwise Lacks It*

Ratification is a theory of agency law that operates when the principal consents to an agent's act *after* it has already been performed.[85] The Restatement (Third) of Agency defines ratification as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."[86] The principal may ratify a completed act expressly or through conduct.[87] Ratification replicates actual authority, and its effect is retroactive; it "relate[s] back" to give the agent authority to contract as if he or she had it all along.[88] Therefore, where a plaintiff can prove a ratified contract, it is valid from the time the plaintiff and the unauthorized agent first entered into the deal.[89]

### *B. Both Individual and Institutional Ratification Apply to the U.S. Government*

Ratification applies to government contracts.[90] In order to succeed on a ratification claim against the United States, a plaintiff must show that the ratifying federal official had actual or constructive knowledge of the unauthorized acts and facts upon which they were taken.[91] Whether the

85. RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (2006).

86. *Id*.

87. *Id*. § 4.01(2).

88. *Id.* §§ 4.01 cmt. b; 4.02(1); 4.02 cmt. b.

89. *Id*. § 4.01 cmt. b.

90. *See* United States v. Beebe, 180 U.S. 343, 354 (1901); Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1433 (Fed. Cir. 1998).

91. *Beebe*, 180 U.S. at 354; *Harbert/Lummus*, 142 F.3d at 1433 ("Agreements made by government agents without authority to bind the government may be subsequently ratified by those with authority if the ratifying officials have actual or constructive knowledge of the unauthorized

official had such knowledge and approved the agent's action involves questions of fact.[92] Courts apply two types of ratification to the U.S. government when federal employees contract on the government's behalf.

First, U.S.-government officials may ratify contracts "individually." Individual ratification occurs when a specific government individual on whose behalf the ratified act was professedly done manifests acceptance of the act.[93] The doctrine of individual ratification requires that the superior officer possess full knowledge of the material facts and then confirm, adopt, or acquiesce in the transaction.[94] For example, the Federal Circuit refused to find ratification where an unauthorized deputy director committed the Department of Energy to guaranteeing a loan for an ethanol plant.[95] Even though the deputy's boss—an officer with the authority to make the loan guarantee—was sitting in the room when the oral commitment was made, the plaintiff did not show that the boss heard the promise or acted to affirm it.[96] When the Department of Energy stopped funding the project, the construction company was unable to collect almost $3,000,000 in damages because the authorized contracting officer had not individually ratified the guarantee.[97]

Second, government officials can "institutionally" ratify a contract. Unlike individual ratification, institutional ratification does not require that a specific person affirm the agent's action.[98] Instead, it occurs "when the [g]overnment seeks and receives the benefits from an otherwise unauthorized contract."[99] Institutional ratification stands for the principle that "knowing acceptance of benefits by those empowered

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acts."); Winter v. Cath-Dr/Balti Joint Venture, 497 F.3d 1339, 1347 (Fed. Cir. 2007); *accord* RESTATEMENT (THIRD) OF AGENCY § 4.06 (2006) ("A person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge.").

92. *Winter*, 497 F.3d at 1347 (citing *Beebe*, 180 U.S. at 354).

93. *Id*., (looking to the behavior of the specific contracting officer to test for ratification); *Harbert/Lummus*, 142 F.3d at 1433 (same).

94. Gary v. United States, 67 Fed. Cl. 202, 215 (2005).

95. *Harbert/Lummus*, 142 F.3d at 1430–32.

96. *Id*. at 1433.

97. *Id*. at 1430–31.

98. *See Gary*, 67 Fed. Cl. at 216.

99. *Id*. Ratification based on retention of benefits is elsewhere referred to as "implied ratification," where the principal "receives or retains something to which he would otherwise not be entitled." MELVIN ARON EISENBERG, AN INTRODUCTION TO AGENCY, PARTNERSHIPS, AND LLCS 14 (3d ed. 2000).

to bind the government can result in ratification of the unauthorized official's promise."[100] For example, the Federal Circuit looked to institutional ratification in *Janowsky v. United States*.[101] The FBI contacted Janowsky, the owner of a vending-machine business, and asked him to cooperate in an organized-crime investigation.[102] Janowsky was to purchase gambling equipment, bribe corrupt local officials, and record incriminating conversations.[103] He worried that his business would go bankrupt if he were exposed as an informant, so FBI agents promised to indemnify him for any business losses.[104] No indemnification clause was recorded in writing.[105] Janowsky cooperated, but a short time later the FBI indirectly exposed him as an informant and the sting ended.[106] When Janowsky sued to recover the value of his ruined business, the government asked the court to dismiss his claim because the FBI agents did not have the authority to indemnify Janowsky.[107] The court remanded the case for trial, finding that the government received the benefit of Janowsky's cooperation because the FBI captured one or more of its suspects.[108]

In sum, institutional and individual ratification can be used to evidence an enforceable contract, and both apply to the federal government. While individual ratification requires approval by the government official for whose benefit the act was allegedly done, institutional ratification occurs when the government knowingly retains the benefits of a bargain. The next section reviews recent cases where U.S.-citizen informants employed both theories in attempts to enforce financial contracts with the federal government.

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100. Perri v. United States, 53 Fed. Cl. 381, 401 (2002) (original emphasis omitted) (citing Janowsky v. United States, 23 Ct. Cl. 706, 715–16 (1991)); *see also* City of El Centro v. United States, 922 F.2d 816, 821 (Fed. Cir 1990); Silverman v. United States, 679 F.2d 865, 867 (Ct. Cl. 1982); Philadelphia Suburban Corp. v. United States, 217 Ct. Cl. 705, 707 (1978).

101. 133 F.3d 888, 891 (Fed. Cir. 1998).

102. *Id.* at 889.

103. *Id.*

104. *Id.*

105. *Id.* at 890.

106. *Id.*

107. *Id.* at 891.

108. *Id.* at 892.

## IV. COURTS APPLY RATIFICATION TO INFORMANTS' CONTRACT CLAIMS FOR MONEY DAMAGES

Although *immigrant* informants have yet to employ ratification to enforce contracts, *U.S.-citizen* informants have. Citizen informants recently advanced both individual and institutional ratification arguments in support of claims to monetary rewards for help and information they provided to the government.

In *Gary v. United States*,[109] Gary assisted FBI agents in a public-corruption investigation through the use of his bond business.[110] Gary provided information about former co-conspirators in fixing bond prices. He worked with several FBI agents, the U.S. Attorney for the Southern District of Florida, and at least four AUSAs.[111] These officials allegedly promised Gary compensation for losses arising from the investigation.[112] After the FBI inadvertently exposed him as an informant, Gary was "blacklisted by every municipality and county government with which his firm had previously done business."[113] When the government refused to compensate him, Gary sued for the value of the bond-securities business.[114]

Among other theories, Gary pleaded both individual and institutional ratification. While the Court of Federal Claims rejected both in his case, it engaged in an analysis of each.[115] As to individual ratification, Gary failed to show that any official with contracting authority approved the business-compensation agreement.[116] Moving to institutional ratification, the court emphasized that although ratification can occur when the government seeks and receives benefits through an otherwise-unauthorized contract, an official with ratifying authority must know of the deal.[117] The court found no evidence that high-level officials knew of the specific compensation promise, even though they knew about Gary's

109. 67 Fed. Cl. 202 (2005).

110. *Id*. at 204–05. Gary agreed to cooperate during plea negotiations surrounding his own role in the bribery conspiracy. *Id*. at 205.

111. *Id.* at 206–08.

112. *Id.* at 208.

113. *Id.* at 205–06.

114. *Id.* at 204.

115. *Id.* at 215–18.

116. *Id.* at 215.

117. *Id*. at 216.

involvement in the undercover investigation.[118] Having failed to provide evidence that any official beyond the South Florida U.S. Attorney's Office and local FBI unit knew of the agreement, Gary could not show that the contract was institutionally ratified.[119]

The Court of Federal Claims also applied ratification in *SGS-92-X003 v. United States*.[120] The plaintiff was a confidential informant known as "Princess" who sued under her designated informant number for confidentiality purposes.[121] Princess, the ex-wife of a one-time narcotics trafficker, participated in a four-year money-laundering investigation designed to bring down major Colombian drug lords.[122] Several Drug Enforcement Administration (DEA) agents—including the Assistant Special Agent in Charge of the DEA's Fort Lauderdale field office—admitted to promising Princess twenty-five percent of the value of all money and property confiscated as a result of her cooperation.[123] No agent had authority to make such a promise; indeed, they were specifically barred from doing so by federal statute, the DEA Agent's Manual, and DEA standard practice.[124] Princess's efforts resulted in at least ten arrests, millions of dollars in seizures, and more than twenty spin-off investigations.[125] Because of her involvement, she was kidnapped and held captive in Colombia for six months, and she stopped cooperating with the federal government after her release.[126]

Princess brought a contract claim against the government seeking the alleged twenty-rive percent commission. The court denied the

118. *Id.* at 217.

119. *Id.* at 218.

120. 74 Fed. Cl. 637, 653–54 (2007).

121. *Id.* at 638 n.2.

122. *Id.* at 639. Princess had no criminal record herself. Agents approached her at home after her husband's arrest to seek her assistance. *Id.* at 639–40.

123. *Id.* at 640–41.

124. The record was unclear on the extent to which the agent promised Princess money out of the Justice Assets Forfeiture Fund created by 28 U.S.C. § 524 (2000). Assuming it was made out of that fund, the promise violated the amount limits set out in § 524(c)(2). The court also considered the DEA Agent's Manual, whose provisions the agent disobeyed as to the amount promised as well as the mode of payment. 74 Fed. Cl. at 645–46. Finally, the Deputy Assistant Attorney General for the Criminal Division stated in a declaration that promising a percentage of future cash seizures "would have been a departure from DEA's standard practice" of waiting until the end of the investigation before determining if and how much a cooperating informant would be paid. *Id.* at 644. According to the Deputy Assistant Attorney General, to do otherwise complicates and compromises prosecutions for the DOJ. *Id.*

125. *SGS-92-X003*, 74 Fed. Cl. at 640, 648.

126. *Id.* at 639, 649.

government's motion for summary judgment and allowed Princess's individual and institutional ratification claims for $33,900,000 to go to trial.[127] First addressing individual ratification, the court credited a lower-level DEA agent's testimony that he communicated the promise to high-level DOJ officials.[128] The court also found evidence of task-force meetings where higher-ups were likely present, even though those individuals expressly denied hearing about any percentage-based promises.[129] Despite their professed lack of knowledge, the court held that the existence of individual ratification remained an issue for the trier of fact. Turning to institutional ratification, the court concluded that DEA officials sought and obtained benefits from Princess's work as an informant.[130] Because issues of material fact remained as to whether DOJ officials with ratifying authority knew of the deal and continued accepting its benefits, summary judgment was precluded on the institutional-ratification claim.[131]

In sum, the Court of Federal Claims recently engaged two informants' claims for money damages under the ratification rubric. The outcomes were intensely fact-based, turning on the allegations and evidence about what each official knew. Returning to the immigrant-informant context, Part V argues that the agency theory of ratification can be extended to non-deportation agreements made by federal law-enforcement agents.

## V. INDIVIDUAL AND INSTITUTIONAL RATIFICATION CAN BE IMPORTED TO THE IMMIGRANT-INFORMANT CONTEXT

Part II examined the previous application of agency law to immigrant-informant claims. Part III introduced ratification, an agency principle allowing an official to approve a subordinate's completed, unauthorized act. Part IV explored ratification's application to citizen-informant claims. This Part argues that ratification is applicable to cases where an immigrant informant is promised non-deportation. In this situation, the informant would ask a court to analyze whether the government benefited from the information provided and whether an official with

127. *Id.* at 639, 653–54.

128. *Id*. at 654.

129. *Id.*

130. *Id*.

131. *Id*.

authority to withhold deportation knew of the agreement. Extending ratification to immigrant-informant claims conforms with both the legal framework and the purpose underlying the doctrine.

### *A. Immigrant-Informant Claims Are Analogous to Citizen-Informant Claims Where Ratification Already Applies*

Immigrant informants seeking to enforce non-deportation promises would present ratification claims similar to the information-for-money cases recently adjudicated by the Court of Federal Claims. Like informants claiming money damages for breach of contract, an immigrant informant would allege that a low-level federal law-enforcement agent made a promise that was later ratified by a higher-up in the DOJ. The immigrant informant is promised deportation relief, whereas the U.S. citizen informant is promised money. In both cases, the promise is unauthorized. In *SGS-92-X003 v. United States*, the Assistant Special Agent had no authority to make the compensation promise,[132] but Princess successfully alleged that officers possessing such authority ratified the contract.[133] An immigrant informant stands in the same legal position; although a low-level officer making a non-deportation promise has no such authority,[134] the promise could be enforceable if a higher-level DOJ official were aware of the deal.

In fact, in both the citizen- and immigrant-informant scenarios, not only does the agent lack authority to make the promise, but federal regulation expressly bars it. In *Gary v. United States*, two FBI agents and two AUSAs allegedly agreed to compensate Gary for business losses arising from his cooperation.[135] This promise was prohibited by a federal regulation, two different FBI manuals, and United States Attorney contracting procedures.[136] In spite of the regulation and

132. *Id.* at 651; *see also* Roy v. United States, 38 Fed. Cl. 184, 188–91 (1997) (determining that FBI special agents have no authority to contract for information in exchange for cash payments); Cruz-Pagan v. United States, 35 Fed. Cl. 59, 61–63 (1996) (concluding that DEA agents have no authority to contract for money).

133. *SGS-92-X003*, 74 Fed. Cl. at 653–54.

134. 28 C.F.R. § 0.197 (1996).

135. Gary v. United States, 67 Fed. Cl. 202, 212–13 (2005).

136. *Id.* at 213 (citing the Federal Acquisition Regulation, 48 C.F.R. § 1.601(a) (2007), the FBI Manual of Administrative Operations and Procedures, the FBI Manual of Investigative Operations and Guidelines, and lists of DOJ employees delegated procurement authority by the U.S. Attorney's Office).

directives, the court analyzed Gary's ratification claim.[137] Similar regulations barred the promise in *SGS-92-X003*.[138] The regulations in *Gary* and *SGS-92-X003* are analogous to the DOJ regulation[139] stating that immigration officials will not be bound by non-deportation agreements unless those officials were a party to the contract. While those regulations circumscribe the scope of a low-level agent's contracting authority, they do not prevent a superior official from ratifying the agreement. As long as the ratifying official has the power to direct immigration officials to honor the promise, ratification overcomes the agent's failure to follow procedure.[140]

A second similarity between citizen- and immigrant-informant claims is that both require the ratifying official to order other government actors to fulfill the promise. That is, the act allegedly ratified is not one that the ratifying official himself will execute. For example, in *SGS-92-X003*, the ratifying official allegedly approved the twenty-five-percent promise by his conduct, but the plaintiff was not asking that specific official to write a $34 million check. Rather, once an official with capacity ratifies, the burden is on the government as a whole to honor the deal.[141] Indeed, none of the courts in the government-ratification cases reviewed for this Comment engaged in an analysis of which agency or branch contractually bound another. Instead, courts looked to whether a contract binding "the Government" was formed.[142] Therefore, if a high-level

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137. *Id.* at 215–16.

138. *SGS-92-X003*, 74 Fed. Cl. at 651–52 (citing the statute governing the Asset Forfeiture Fund, 28 U.S.C § 524 (2000), and the DEA Manual).

139 28 C.F.R. §0.197 (1996).

140. *See Gary*, 67 Fed. Cl. at 215–16 (procedure for money contracts violated); *SGS-92-X003*, 74 Fed. Cl. at 651–52 (same).

141. *SGS-92-X003*, 74 Fed. Cl. at 638 (analyzing whether "the Government" breached a contract).

142. *See* Janowsky v. United States, 133 F.3d 888, 891 (Fed. Cir. 1998) (referring to breach-of-contract claim as against "the government"); City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990) (whether supervisor's ratification had bound "the Government" in contract); Silverman v. United States, 679 F.2d 865, 870 (Ct. Cl. 1982) (Federal Trade Commission official accepted benefits and contracted for "the Government"); Philadelphia Suburban Corp. v. United States, 217 Ct. Cl. 705, 707 (1978) (ratification may arise where "the Government" has or takes the benefit of property). Some courts go further, explicitly holding that promises on behalf of the government bind other government agencies and branches. *See, e.g.*, Morgan v. Gonzales, 495 F.3d 1084, 1091 (9th Cir. 2007) (citing Thomas v. INS, 35 F.3d 1332, 1337 (9th Cir. 1994), for rule that United States Attorneys may bind other federal agencies, including immigration officials); Margalli-Olvera v. INS, 43 F.3d 345, 352 (8th Cir. 1995) (interpreting term "United States" in plea agreement to embrace multiple agencies within the DOJ); United States v. Harvey, 791 F.2d 294, 303 (4th Cir. 1986) ("It is the Government at large . . . that is bound by plea agreements negotiated

official bound "the Government" by ratifying a non-deportation contract, an immigration judge should be bound not to order the individual deported.

A third similarity between the citizen-informant claim and the immigrant-informant claim is that success would turn on the same type of factual inquiry. An immigrant informant would be required to prove two fact-heavy elements. First, the immigrant and law-enforcement agent must have reached an agreement.[143] While this would be easier to prove if a written document existed, some immigrants enter into purely oral contracts for deportation relief.[144] Where an oral contract forms the basis of the claim, the immigrant may need to supplement his or her allegations with circumstantial evidence of the contract. If the informant's cooperation included trial testimony, for example, a court may take judicial notice of participation in those proceedings.[145] Alternatively, the circumstances might make it unlikely that the immigrant would provide information without a corresponding benefit of remaining safely in the United States.[146] That is, the more dangerous the

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by agents of Government."). Although the cases analyze contract claims against the government as a whole, all the actors in immigrant-informant cases usually fall within the DOJ. The AUSA, FBI, or DEA agents who most often promise relief from deportation are DOJ employees. 28 U.S.C. § 547 (2000) (authorizing U.S. Attorneys to prosecute crimes in section of U.S. Code pertaining to the DOJ); 28 U.S.C. § 533 (2000) (granting authority to Attorney General to appoint investigators); 28 C.F.R. § 0.85 (2008) (delegating authority to FBI); 28 C.F.R. § 0.100 (2007) (delegating authority to DEA). The immigration judges who order and withhold deportation also serve in the DOJ through the Executive Office for Immigration Review and are subject to "direction and regulation of the Attorney General. . ." 6 U.S.C. § 521(a) (2000) (creating Executive Office for Immigration Review); 8 U.S.C. § 1229a(a)(1) (2000) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."). The Attorney General may release an alien detained by immigration officials, provided the individual is not a danger to the safety or property of others. 8 U.S.C. § 1226(c)(2) (2000).

143. *See* Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (requiring a showing of offer and acceptance); City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990) (same).

144. *See, e.g.*, Morgan v. Gonzales, 495 F.3d 1084, 1088 (9th Cir. 2007) (rejecting claim because there was no written promise and immigrant failed to allege specific terms of oral promise); Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 44, 51 (D. Mass. 2005) (discussing immigrant's allegation that he was orally promised asylum), *remanded sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006).

145. FED. R. EVID. 201; *see also* Janowsky v. United States, 133 F.3d 888, 889 n.2 (Fed. Cir. 1998) (discussing federal criminal trial where informant testified); *Enwonwu*, 376 F. Supp. 2d at 48–49 (examining immigrant's testimony as part of cooperation with DEA).

146. *See Enwonwu*, 376 F. Supp. 2d at 58 (crediting immigrant's testimony that he would not have provided information to government in the absence of a promise from DEA agent that he would be safe from Nigerian drug dealers; immigrant testified, "If I knew that after I cooperated with the government to get [the high-ranking drug lord] that the government was going to send me

situation for the immigrant as a result of cooperating, the more likely that he or she received a non-deportation promise to elicit the information.[147]

Along with the existence of an agreement, an immigrant informant would have to show that a government agent with actual authority ratified the deal. Discovery is crucial at this stage because it allows the informant to learn who knew of the promise. Such discovery was the key to Princess's ability to overcome the government's motion for summary judgment in *SGS-92-X003*; she offered depositions and declarations from DEA agents, the Deputy Assistant Attorney General for the Criminal Division, and then-Attorney General Janet Reno.[148] Even where no ratifying official admits actual knowledge, it may be possible to prove constructive knowledge of the agreement.[149] On a constructive-knowledge theory, an immigrant could argue that the government ratified the contract by continuing to accept the information.[150]

Recent ratification cases in the citizen-informant context support the position that non-deportation contracts are enforceable when a government official with authority ratifies them. The last section argues that the purpose underlying ratification further supports its application to immigrant-informant claims.

### *B. The Fairness-Promoting Purpose Behind Ratification Supports Extending It to Immigrant-Informant Claims*

Ratification promotes fairness in contracting.[151] The Restatement (Third) of Agency states that it is "fair to hold the principal to [the legal consequences of an agent's act] when the principal has, after the fact, assented to the agent's act."[152] The concern for fairness also manifests

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back to Nigeria, I'll [sic] be the damndest [sic] fool to do that.").

147. *See id.*

148. SGS-92-X003 v. United States, 74 Fed. Cl. 637, 639 n.5 (2007).

149. *See* Telenor Satellite Servs. v. United States, 71 Fed. Cl. 114, 120 (2006) ("[T]he person with contracting authority must actually or constructively know about and explicitly or impliedly adopt the contract in question."); Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1433 (Fed. Cir. 1998) ("Agreements made by government agents without authority to bind the government may be subsequently ratified by those with authority if the ratifying officials have actual or constructive knowledge of the unauthorized acts.").

150. *See Telenor Satellite Servs.*, 71 Fed. Cl. at 120 ("[T]he person with contracting authority must . . . explicitly *or impliedly* adopt the contract in question.") (emphasis added).

151. RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b (2006).

152. *Id.*

itself in the way ratification works, because ratification requires the principal to ratify the contract in its entirety and accept the burdens along with the benefits.[153] It would be unfair to allow the principal to skim the benefits off an unauthorized contract while declining to bear the burdens that went along with it. That is why "knowing acceptance of the benefit of a transaction ratifies the act . . . even though the person also manifests dissent to becoming bound by the act's legal consequences."[154] Where the principal accepts the benefits, fairness dictates that he or she also accept the duties or burdens.

Ratification should be used in the immigrant-informant context because it produces fair results. For the immigrant, there is no way to undo the consequences of becoming an informant if the government later declines to honor its promise. In the criminal plea-bargain context, a breach by the government can invalidate a guilty plea and require remand to the trial court so that the defendant may elect between specific performance or withdrawal of the plea.[155] For the immigrant informant, withdrawing the information is simply not possible and the proper remedy should be specific performance of non-deportation. The fairness concerns embodied in ratification weigh in favor of holding the government to its duty not to deport an informant after accepting the law-enforcement benefits of the information.

## CONCLUSION

Ratification may represent a workable path to proving the existence of an enforceable contract not to be deported. Ratification would represent an alternative to often-unsuccessful claims currently raised, including the Convention Against Torture and the state-created-danger theory of substantive due process. To prevail, an immigrant informant would have to make specific factual showings of knowledge and agreement. Agency principles already apply to non-deportation contracts, and the similarity between citizen-informant claims and immigrant-informant claims supports extending ratification. Perhaps more importantly, the fairness

153. *Id.* § 4.07.

154. *Id.* § 4.01 cmt. d.

155. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); United States v. Morris, 470 F.3d 596, 600 (6th Cir. 2006) (holding specific performance is an appropriate remedy for breach of a plea agreement); United States v. Nolan-Cooper, 155 F.3d 221, 241 (3d Cir. 1998) (same).

concern animating ratification weighs in favor of its use in the immigrant-informant context because individuals like Maria Rosciano should be entitled to the benefit of their bargains with American police and prosecutors.