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President Ronald Reagan is reported to have once said, "A nation that cannot control its borders is not a nation." During the past three decades, the U.S. has faced a mounting immigration problem as an increasingly larger number of aliens have come into the country illegally—straining government resources, imposing huge costs on taxpayers and state and local governments, and endangering national security, public safety, and the rule of law. A sovereign country with sound immigration policy controls who is allowed to come into the country, both temporarily and permanently, and selects future citizens, expecting them to become part of the cultural, intellectual, economic, and political body of the republic.

For centuries, the United States has welcomed millions of people from every corner of the globe to join the great mixing bowl of America. That open, welcoming attitude exists in the Trump Administration, as evidenced by the fact that the United States still lawfully admits over 1 million permanent resident immigrants per year, more than any other country.

Article I, Section 8, Clause 4 of the Constitution of the United States provides that Congress shall have the power to "establish an uniform Rule of Naturalization." As *The Heritage Guide to the Constitution* explains, few powers are more fundamental to sovereignty than control over immigration and the vesting of citizenship in aliens.[1]

Over decades, Congress has passed dozens of immigration and immigration-related laws. Each was designed to address a specific set of policy goals and perceived issues. As new issues arise in the public debate about immigration policy, Congress is tempted to take legislative action to address the issue.

In the past few decades, the national debate—and thus the congressional debate—has revolved around how best to enforce existing immigration laws,

how best to stem the tide of illegal immigration, what we should do about the millions of illegal immigrants already residing here, and what changes should be made in our legal immigration system.[2] Many proponents of open borders have tried to extinguish the distinction between legal and illegal immigration.

Candidate Donald Trump ran for the presidency promising to enforce existing immigration laws and secure the border. That was a radical departure from the Obama Administration, which, as we chronicle, abused the authority given to the President—and arguably broke the law and violated the Constitution by issuing executive edicts to satisfy its policy preferences.[3]

Once he became the President, Donald Trump began to enforce immigration law *as written,* rolling back the extra-constitutional policies put in place by the Obama Administration, and reframed the debate by announcing a tectonic shift in how new immigrants would be chosen. The Trump Administration's immigration policies have been consistently challenged in the courts, including in the U.S. Supreme Court. The Administration has won many of those challenges, in large part because it was following the law and exercising its discretion accordingly, as we demonstrate.

This *Special Report* outlines most of the major immigration policy actions taken by the Trump Administration, and, when appropriate, contrasts them with previous Administrations. When read together, the actions taken by the Trump Administration have been bold and decisive. The Administration has made major strides in rolling back the bad policies of the Obama Administration, has enforced existing laws as written, and has attempted to modernize and rebalance the way we attract new citizens by transitioning from a family-based system to a merit-based system.

The Border Wall

If there were two words that Democrats and Republicans had to choose to encapsulate everything that is supposedly wrong and right, respectively, with Trump's immigration stance, both as a candidate and now as President, those words would be "the wall." These two simple words induce visceral cries of xenophobia from the left, and flag-saluting patriotism from the right. Trump rallies, when he was a candidate, and now as President, included chants of "Build That Wall." The wall became more than a campaign pledge; it formed the backbone of his "America First" campaign, and he rode that to victory in November 2016.

Congress Authorized a Border Wall Decades Ago. Building a wall was not controversial before Trump was elected. Congress passed the Secure Fence Act in 2006,[4] which authorized and partially funded over 700 miles

of border fence along the U.S.–Mexican border. The Senate voted 80–19 in favor of the act, with former Democratic Senators Barack Obama (D–IL) and Hillary Clinton (D–NY), and current Democratic Senators Chuck Schumer (D–NY) and Dianne Feinstein (D–CA) voting for the act.

One decade earlier, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[5] One of the goals of that act was to improve security at the nation's borders. Section 102 of the IIRIRA directed the executive to undertake the construction of border infrastructure.[6] As originally enacted, Section 102(a) provided that the Attorney General "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States."

Homeland Security Secretary Has Ability to Waive Laws to Secure the Border. Section 102(c) authorized the Attorney General to waive the provisions of the Endangered Species Act of 1973[7] and the National Environmental Policy Act of 1969[8] to the extent he "determine[d] necessary to ensure expeditious construction of the barriers and roads under this section."[9] In 2002, Congress created the Department of Homeland Security, and these functions were transferred to the Secretary of Homeland Security.[10]

According to a legal brief filed by the Justice Department (DOJ) in litigation involving challenges to Trump's border wall, the Secretary has issued waiver determinations under Section 102(c) on several occasions.[11] Several waiver determinations have been the subject of unsuccessful legal challenges.[12] The Trump Administration was sued for exercising two waiver determinations issued by the Secretary in 2017.

According to the government's brief in opposition, on July 26, 2017, the Secretary issued a Section 102(c) waiver of more than 30 laws "to ensure the expeditious construction of barriers" in the San Diego area.[13] The San Diego waiver identified two projects to be completed in the San Diego Sector to "further Border Patrol's ability to deter and prevent illegal crossings."

Second, on September 5, 2017, the Secretary issued a separate Section 102(c) waiver of various laws "to ensure the expeditious construction of barriers and roads" near Calexico, California, in the United States Border Patrol's El Centro Sector.[14]

National Emergency Declaration. After taking office, President Trump acted on his promise to build the wall—despite fierce political and legal resistance. Over time, it became obvious to the new Administration that the border wall had become more than a wall: To his opponents, it

became a symbol of all that was wrong with Trump as President.

Congress, which has the power of the purse, refused to provide the funds necessary to continue building a border wall in accordance with laws they had passed. By late 2018 and early 2019, the situation at the border was becoming a humanitarian and security crisis. On January 8, 2019, President Trump delivered a prime-time address to the American people on the crisis at the southern border, explaining the reasons why he requested $5.7 billion for 234 miles of new border wall.[15]

Democrats in Congress resisted. On February 15, 2019, President Trump declared a national emergency and invoked the National Emergencies Act[16] as he signed a massive government spending bill. That bill provided only $1.5 billion for 55 miles of a border wall. As a result, President Trump noted that he had identified $8.1 billion of already appropriated funds that he would redirect to the border wall.[17]

As Trump predicted when he signed the spending bill, lawsuits challenging his actions were filed almost immediately. Plaintiffs in the lawsuits ran the gamut, from the Sierra Club[18] to the U.S. House of Representatives[19] to the state of California[20] to the County of El Paso.[21]

In May of 2019, the Sierra Club obtained a preliminary injunction from a California federal district court, which blocked the Trump Administration from diverting $2.5 billion of military construction money and spending it to build the wall. The Ninth Circuit Court of Appeals upheld the injunction. But the Supreme Court, by a vote of 5–4, granted a stay of the injunction, allowing the Administration to go forward with building the wall using the $2.5 billion, while the lower courts consider the underlying merits of the still-pending challenges.

The County of El Paso suffered a similar setback when the Fifth Circuit Court of Appeals stayed a preliminary injunction issued by a Texas federal district court, thus clearing the way (for the moment, anyway) for the government to use already appropriated military funds to build the border barrier.[22]

Progress So Far. The U.S.–Mexican border is approximately 2,000 miles long, 654 of which had a border barrier prior to the Trump Administration.[23] The Trump Administration's goal was to build 450 to 500 miles of new wall by the end of 2020. As of January 2020, the Administration had completed over 100 miles of new border barrier.[24] The Administration claims to be on track to build 400 to 450 miles of new wall by the end of 2020. It seems obvious that an effective physical barrier in geographically open areas of the border is a necessary component of any systematic effort to secure that border.

Merit-Based Immigration

Arguably the most far-reaching and boldest aspect of the Trump Administration's immigration-reform platform is the proposal to base the selection of future immigrants on their skills and potential contribution to our economy. Moving from a family-based immigration system to a merit-based system would upend the status quo and move from a system in which non-citizens and lawful permanent residents select future American citizens based solely on familial ties—to a system in which we choose future American citizens based on the skill sets we need and their ability to contribute to our economy.[25]

This sounds radical, but it is not: Other countries have already implemented merit-based immigration systems. Those countries include Australia, Austria, Canada, the Czech Republic, Denmark, Germany, Hong Kong, Japan, New Zealand, Romania, South Korea, and the United Kingdom.[26]

In October 2017, less than one year into office, President Trump submitted a letter to the House and Senate, laying out his vision of how best to reform the immigration system in the United States.[27] Included in that letter was a section entitled "Merit-Based Immigration System," arguing for the need to transition from a family-based immigration system, which we currently have, to a merit-based system.[28]

The Administration's merit-based concept contained four main parts:

1. Ending family-based chain migration as it currently exists by limiting family-based green cards to immediate family members, and replacing it with a system based on merit, with a special emphasis on "skills and economic contributions" to the U.S. economy;

2. Establishing a point system for green cards;

3. Eliminating the "visa lottery" program,[29] which provides 50,000 immigrant visas annually to random individuals from countries with low rates of immigration to the United States; and

4. Limiting the number of refugees to "prevent the abuse of the generous U.S. Refugee Admissions Program and allow for effective assimilation of admitted refugees into the fabric of our society."[30]

Like with all recent immigration reform proposals, the call to fundamentally reform our immigration system into one that puts America first

was aspirational, as there is, as a political reality, very little likelihood that bipartisan immigration legislation can pass both houses of Congress, no matter how commonsense the legislation might be.

The lack of political will in Congress, however, did not stop the Administration from pushing forward with its plans. On January 25, 2018, three months after sending the reform vision letter to Congress, the White House published the framework document on how it would implement its overall goals. In addition to proposing the legalization of all Deferred Action for Childhood Arrivals (DACA) recipients, the Administration proposed to "promote the nuclear family" by limiting family migration to "spouses and minor children only, thus ending chain migration." The changes would be applied prospectively so as not to harm those already in the queue.

The Administration's plan to shift to a predominately merit-based legal immigration system is noteworthy in one other respect: It does not lower, or raise, the number of legal immigrants allowed to come into the United States each year. Despite media fearmongering to the contrary, the Trump Administration has not lowered the number of legal immigrants admitted to the United States each year (over 1.1 million)—nor would a merit-based system. Rather, a merit-based system would radically shift the percentage of family-based lawful immigrants from a majority to a minority, while increasing the percentage of merit-based immigrants dramatically for the good of our economy. In sum, the Administration is proposing a rebalancing of the current numbers.

With respect to the visa-lottery program, the Administration proposed to eliminate it because it was "riddled with fraud and abuse and does not serve the national interest." Furthermore, the program selects individuals "at random"; it does not take into consideration "skills, merit or public safety."[31] By eliminating the lottery program, the Administration aimed to reallocate those 50,000 annual visas to reduce the family-based backlog and the high-skilled employment backlog.

The Heritage Foundation also proposed a shift to a merit-based immigration system. In our *Special Report* entitled "An Agenda for Immigration Reform,"[32] we laid out, in detail, the policy reasons why the shift makes sense, both economically and culturally.

Birth Tourism

Due to the federal government's misinterpretation of the Fourteenth Amendment, the executive branch classifies all individuals born in the United States as citizens—even if their parents are illegal aliens or are in

the country legally but only temporarily as tourists, students, or to conduct business.[33] Due to this interpretation, an illegal "birth tourism" industry has grown over the decades.[34]

That started to change when, in 2019, the Trump DOJ filed the first-ever criminal indictments against 19 individuals for immigration fraud for operating birth tourism agencies, breaking up three big operations in Southern California that made millions of dollars bringing thousands of pregnant Chinese women to the U.S. for the sole purpose of securing U.S. citizenship for their children. A 20th individual, a lawyer, had already been sentenced to federal prison for helping material witnesses flee to China at the time of these indictments.[35]

According to the DOJ, the birth tourism operators not only engaged in immigration fraud, money laundering, tax evasion, marriage fraud, and identity theft, they also "defrauded property owners when leasing the apartments and houses" used as "maternity" or "birthing" houses for the Chinese nationals to reside in while they waited for their babies' due dates.[36] They coached Chinese women to apply for tourist visas and lie to the U.S. consulates in China by claiming they were only coming for two weeks. They were then told to wear "loose clothing to conceal their pregnancies" and "trick U.S. Customs at ports of entry."[37]

The clients included Chinese government officials, as well as others associated with Chinese Central Television, China Telecom, the Bank of China, the Public Security Bureau of the Beijing Municipal Government, and a government radio station. Assuming the allegations in the indictment are true, officials of the Chinese government were directly involved in fraudulently procuring birthright citizenship for their children in part to obtain "priority for jobs in the U.S. government," raising serious potential national security concerns.

The amount of money involved is staggering. A "You Win USA" bureau in Orange County used 20 apartments in Irvine to house its clients, charged each customer $40,000 to $80,000, and received $3 million in international wire transfers from China in just two years. The Star Baby Care operation in Los Angeles County bragged that it had brought more than 8,000 pregnant women to the U.S. A San Bernardino operation, USA Happy Baby Inc., charged its "VIP" customers as much as $100,000 each and used 14 different bank accounts to "receive more than $3.4 million in international wire transfers from China" in just two years, according to the DOJ.[38]

It was not until the Trump Administration that the DOJ finally started prosecuting this type of immigration fraud. One study estimates that "birth tourism results in 33,000 births to women on tourist visas annually," while "hundreds of thousands more are born to mothers who are illegal aliens or present on temporary visas."[39]

To prevent birth tourism coming to the U.S., the White House announced on January 23, 2020, that beginning the following day, the State Department would no longer issue temporary visitor visas to aliens "travelling to the United States to secure automatic and permanent American citizenship for their children by giving birth on American soil."[40] The White House said this was necessary to "enhance public safety, national security, and the integrity of the immigration system," as well as to protect taxpayers from the "direct and downstream costs associated with birth tourism."[41]

The actual change in the State Department regulation applies to "B" visas for temporary visitors for pleasure —tourist visas. It provides that consular officers will deny visas to any alien who the officer has "reason to believe intends to travel" to the U.S. for "the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States." It provides an exception for aliens who can establish "a legitimate reason" for required medical treatment in the U.S., as long as they can establish that they have the "means and intent to pay for the medical treatment and all incidental expenses."[42]

All of these steps taken by the Trump Administration—both prosecuting the operators of birth tourism agencies who are committing immigration fraud and preventing aliens from entering the country for the sole intent of giving birth here to obtain U.S. citizenship for their children—are long overdue. As President Trump said, those who engage in these actions are "systematically exploit[ing] this loophole and unfairly" obtaining citizenship, avoiding "the scrutiny and procedures they would normally undergo if they became citizens through naturalization."[43]

Executive Office for Immigration Review

One of the chokepoints in the immigration system is the backlog of cases in immigration courts, which currently totals over 1.1 million cases. In 2010, there were only 262,742 cases in the backlog. No other court system in the United States, at the federal or state level, has the backlog that the immigration courts have.[44] To fix the backlog, there is only so much the Administration can do on its own without seeking legislation from Congress.[45]

But the Administration does have options to alleviate the problem, and the Trump Administration has taken several steps to drive down the backlog. Some of the changes involved the Executive Officer of Immigration Review (EOIR).[46] The EOIR developed a strategic caseload-reduction plan in 2017, which had five components:

1. Increasing adjudicatory capacity,
2. Maximizing the use of available adjudicatory capacity,
3. Transforming the EOIR's institutional culture and infrastructure,
4. Enhancing partnerships with the Department of Homeland Security, and
5. Improving existing laws and policies.

Those changes, long overdue, also included reorganizing the EOIR itself and increasing fees to file an appeal.

Reorganizing the EOIR. On August 26, 2019, the Trump Administration published an interim rule in the *Federal Register* with the bland title "Organization of the Executive Office of Immigration Review."[47] The interim rule proposed minor clarifications and changes to the rules related to the Office of Policy, the Office of the General Counsel, and the Office of Legal Access Programs, updated the organizational chart, and provided more delegation of authority from the Attorney General to the EOIR director to efficiently dispose of cases.

The EOIR is a component of the DOJ, and its primary mission is to adjudicate immigration cases "fairly, expeditiously, and uniformly" and must apply the nation's immigration laws uniformly.[48] Before 2017, the EOIR contained eight components. Three were adjudicatory: the Chief Immigration Judge; the Board of Immigration Appeals (BIA); and the Office of the Chief Administrative Hearing Officer. Three were non-adjudicatory: the Office of General Counsel (OGC); the Office of Administration; and the Office of Information Technology. The remaining two components were the Office of the Director and the Office of the Deputy Director.

The director of EOIR is a career employee of the DOJ (not a political appointee) who oversees the seven other component heads of the EOIR.

In 2017, Attorney General Jeff Sessions added the Office of Policy to the EOIR to "assist in effectuating authorities given to the Director [by statute] including the authority to...issue operational instructions."[49] Before the Attorney General created the Office of Policy, the OGC handled—in addition to providing legal advice—several policy matters such as developing regulations. Under the new regulation, policy matters will be handled in the Office of Policy, legal matters in OGC. That only makes sense.

Critics of the reorganization claim that the new organizational structure allows the director to decide cases not based on the law, but rather on policy. This is incorrect.

This concern arises out of a minor change to the way the BIA manages cases that it cannot decide within the time frame set by immigration regulations. Under the former system, the BIA chairman could assign delayed cases to himself, a vice chairman, or the Attorney General himself for expedited review. The new rule simply substitutes the director for the Attorney General because "due to his numerous other responsibilities and obligations, the Attorney General is not in a position to adjudicate any BIA appeal." Thus, the director adjudicates those cases on the Attorney General's behalf.

The director still retains the ability to elevate a case up to the Attorney General, but the chairman may not do so directly. Regardless, the director can only decide cases that the BIA could not timely resolve and that the chairman assigns to the director. This is not a situation, as critics argue, in which a political appointee is taking politically sensitive cases away from the judges because the director of the EOIR is a career employee of the DOJ.

Furthermore, the director has no power to arbitrarily assign cases to himself. He can only resolve cases that the BIA cannot resolve within the regulatory time frame: 90 days after briefs are filed or within 180 days of assignment to the BIA panel, plus a 60-day extension for "exigent circumstances." Thus, the director is not pulling politically sensitive cases in order to issue political judgments dressed up as judicial opinions, as critics suggest. Even if the director is making policy determinations, that is permissible. The Attorney General has substantial power to set immigration policy.[50]

The director wields the Attorney General's delegated authority—just as all immigration judges and BIA members do. Of course, the counterargument is that "issuing binding legal rulings is not policy; it's just interpreting the law." But that ignores the reality of the Immigration and Nationality Act (INA). Like so many laws that defer to executive agency expertise, the INA leaves so much up to the Attorney General that it is impossible to issue legal rulings and determinations without considering policy. Indeed, the law seems to specifically anticipate, even require, the Attorney General to make policy determinations.

In summation, these changes make the EOIR run more smoothly by clarifying the roles of the various offices. They speed resolution of delayed immigration appeals by giving them to the director, who has more time to spend on them than does the Attorney General. These are commonsense, good-governance changes, and much of the criticism of them is, at best, overblown or, at worst, divorced from reality.

Strategic Caseload-Reduction Plan. In addition to reorganizing the EOIR, the DOJ announced a five-part plan to reduce the caseload.[51] The DOJ memorandum notes how the caseload has increased dramatically since fiscal year (FY) 2014 and that policy changes (under the Obama Administration) have "slowed down the adjudication of existing cases and incentivized further illegal immigration that led to new cases."[52]

The policy changes included the Deferred Action for Childhood Arrivals program (*supra*), the Obama Administration's "prosecutorial discretion" memo, and provisional waivers. The memorandum notes that "representatives of illegal aliens have purposely used tactics designed to delay the adjudication" of cases, highlighting the fact that between FYs 2006 and 2015, continuances in immigration courts increased *23 percent*. To make matters worse, as of 2012, "cases averaged four continuances," and each continuance "totaled 368 days per continuance."[53]

As a result of these dilatory tactics and policies designed, no doubt, to inure to the benefit of illegal aliens, not surprisingly, the productivity of immigration judges fell by 31 percent between FYs 2006 and 2015.[54] Immigration cases are not complicated compared to homicide, rape, and child abuse cases, yet those cases are adjudicated much faster than immigration cases. That makes no sense whatsoever.

In 2018, Attorney General Sessions tightened the rules for granting continuances by immigration judges. Under federal law,[55] immigration judges can grant a continuance if good cause is shown. But the good-cause standard, over the years, has become virtually meaningless, as judges were granting continuances for any reason whatsoever, further contributing to the clogged immigration docket.

On August 16, 2018, Sessions issued a written legal opinion in the *Matter of L-A-B-R* that clarified and tightened the good-cause standard. Going forward, although they must consider the multi-pronged factors set out in prior cases that are still binding on immigration courts, immigration judges should focus on two primary factors when considering a motion for a continuance:

1. The likelihood that the alien will be granted collateral relief, and

2. Whether the grant of relief would materially affect the outcome of the removal proceeding.[56]

Increasing Adjudicatory Capacity. The Trump Administration has increased the number of front-line immigration judges and, on two separate occasions, increased the number of members of the BIA, all with a goal to reduce the backlog.

In addition to adding judges, the DOJ announced a plan to reduce the hiring process from a staggering 742 days to a more reasonable six to eight months. In 2017, there were 338 immigration judges, but by the second quarter of 2020, that number had increased to 489 immigration judges.[57]

On February 27, 2018, the EOIR published a rule in the *Federal Register* announcing that it is expanding the BIA by four members, from 17 to 21.[58] In March of this year, the EOIR published another rule, adding two additional members to the BIA, for a total of 23.[59]

Maximizing the Use of Available Adjudicatory Capacity. According to the EOIR memorandum, there are at least 100 courtrooms across the nation that are not being used on Fridays because of immigration judge alternate-work schedules.[60] Federal alternate-work schedules allow an employee to work an extra hour each day in week one and then Monday to Thursday in week two in order to take the second Friday off.

The Department decided that, with a massive case backlog, it makes no sense to have unused or "dark" courtrooms across the country. As a result, EOIR established a "no dark courtroom policy." That policy involved using retired immigration judges to conduct cases on Fridays; hiring new immigration judges for video teleconferencing hearings in the EOIR's Falls Church, Virginia, location; and creating a nationwide scheduling and docketing program to move cases to completion more efficiently.

Transforming the EOIR's Culture. Many courtrooms across the country have transitioned to electronic filing systems, including the federal courts. As of 2017, the immigration courts still had not. To modernize, the EOIR started the process of transitioning from a paper-based filing system to an electronic system. This not only makes sense but is a more efficient way of processing cases from beginning to end. On July 19, 2018, EOIR announced an electronic filing pilot program in San Diego.[61]

Another change was the deliberate decision to establish a culture of case completion. Changing a litigation culture is difficult, as the parties before a court, and the court itself (including court staff), become accustomed to doing things a certain way over time and are loathe to change. When a case, on average, takes *more than four years* to complete, the parties all operate on the assumption that a new case in the system should also take four years.

Pushing immigration judges to move cases to completion in a fair and orderly manner was a bold, but necessary step in the process of changing the culture of the immigration courts. In 2018, the department established a policy that immigration judges should complete 700 cases per year with less than a 15 percent remand rate from the BIA in order to earn a "satisfactory"

grade on their annual performance evaluations. Judges who completed fewer than 560 cases per year would fall into the "unsatisfactory" category.

Judges who allow cases to drag on for years, for example, are not graded as well as judges who adjudicate cases efficiently and close them out appropriately. This departmental cultural change is ongoing and will take time to be fully implemented.

Enhancing DHS Partnership and Improving Laws and Policies. The final two components of the strategic caseload-reduction plan involve closer engagement and coordination with the Department of Homeland Security (DHS) to improve the immigration docket by managing the input of new cases and more efficiently monitoring cases that are delayed pending an adjudication before the United States Citizenship and Immigration Services (USCIS).

The EOIR also vowed to review existing regulation and policies "to determine changes that could streamline current immigration proceedings." That is a laudatory goal, but it is unclear what the EOIR has done to make progress in this area.

Finally, it has been 33 years since the federal government raised the fees associated with filing an appeal with the BIA. The low filing fees meant it cost virtually nothing to file an appeal. During the pendency of one's appeal, the applicant typically stays in the United States.

That changed on February 27, 2020, when the EOIR submitted to the *Federal Register* a notice of proposed rulemaking, increasing the filing fees for various appeals to the BIA.[62]

Public Charge Rule

On August 14, 2019, the DHS published a final rule amending regulations about how to determine whether an alien applying for admission or adjustment of status will be deemed inadmissible because the alien is likely to become a "public charge."[63] A "public charge" is an individual who is unable to support himself, and instead relies on public benefits such as welfare assistance. The public charge rule is a long-standing principle of U.S. immigration law, first implemented at the federal level in 1882.[64]

It is common sense—and a smart choice in the best interests of the country as a whole—to ensure that new, legal immigrants to our country are self-sufficient individuals who will be a net plus for our economy. In selecting new citizens, do we really want individuals who will immediately be reliant on the extensive and very expensive medical, housing, welfare, and other public assistance programs paid for by the American taxpayer at both the state and federal level?

These programs are a major source of our economically dangerous (and risk-filled) trillion-dollar budget deficits, along with our massively growing public debt. Why would we want to bring in immigrants who will only add to that deficit and that debt?

The statute does not define "public charge" but leaves that up to the federal government, although it does specify that the DHS—"at a minimum"—shall consider an alien's age, health, family status, assets, resources, financial status, education, and skills.[65] As the DHS points out in its new rule, in a related immigration provision, Congress articulated our immigration policy that "aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."[66] This is intended to prevent damage to the economy and increased public debt, of course—but also to ensure that "the availability of public benefits not constitute an incentive for immigration to the United States."[67]

In the past, federal rules focused only on "the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense."[68] This definition essentially ignored the numerous other costly public benefits the government provides.[69]

The new rule defines the public charge requirement to reflect today's system of government benefits. In other words, it brings reality into the system. It defines "public charge" to include:

- Cash benefits for income maintenance;
- Non-cash benefits under the Supplemental Nutrition Assistance (SNAP) and food stamp programs;
- Most forms of Medicaid;
- Section 8 Housing Assistance under the Housing Choice Voucher Program;
- Section 8 Project Rental Assistance; and
- Certain other forms of subsidized housing.

In short, the rule insists that to become a permanent resident in the U.S. with eventual access to U.S. citizenship, to be admitted as a legal immigrant on a visa, to change your status and extend your stay, or to apply for

citizenship when you are already legally in the country, an individual must not be reliant on, or likely to become reliant on, such welfare programs.

There are numerous exceptions in the new rule. For example, it does not apply to humanitarian-based immigration programs for refugees, asylum seekers, victims of sex-trafficking, or other special cases such as victims of qualifying criminal activity (including domestic violence). It does not apply to aliens who serve in the U.S. military or to pregnant women and aliens under the age of 21 who receive Medicaid benefits. It also will not apply to Medicaid benefits paid for emergency medical or school-based services (such as provided under the Individuals with Disabilities Education Act).

Additionally, if the DHS decides that an immigrant is not admissible because of the public charge rule, in limited circumstances, the DHS will offer the aliens the opportunity to post a public bond. The amount of the bond will vary depending on the alien's circumstances.

The new public charge rule became effective on February 24, 2020,[70] as a result of the U.S. Supreme Court staying (lifting) nationwide injunctions that had been issued by various federal courts preventing implementation of the rule. The stay will remain in effect while the cases are being litigated in the lower courts and any adverse decisions are appealed by the Trump Administration.[71]

Birthright Citizenship

One action not yet taken by the Trump Administration is ending the federal government's recognition of "birthright citizenship"—the mistaken believe that the Fourteenth Amendment requires that citizenship be granted to anyone born in the U.S. *even if their parents are aliens who are here illegally or legally present on visas as temporary visitors or tourists*. President Donald Trump said in an interview in October of 2018 and again in August of 2019 that he was considering ending birthright citizenship through an executive order or other action. To date, however, the Administration has not taken any steps to end this misinterpretation of the law.[72]

Those who believe that the Fourteenth Amendment requires universal birthright citizenship are ignoring the text and legislative history of the amendment, which was ratified in 1868 to extend citizenship to freed slaves and their children.[73] The Fourteenth Amendment does not say that all persons born in the U.S. are citizens. It says that "[a]ll persons born or naturalized in the United States *and subject to the jurisdiction thereof*" are citizens.[74] That second, critical, conditional phrase is conveniently ignored or misinterpreted by advocates of "birthright" citizenship.

Critics of the President's possible action erroneously claim that anyone present in the United States has "subjected" himself "to the jurisdiction" of the United States, which would extend citizenship to the children of tourists, diplomats, and illegal aliens alike.

But that is not what that qualifying phrase means. Its original meaning refers to the political allegiance of an individual and the jurisdiction that a foreign government has over that individual. The fact that a tourist or illegal alien is subject to our laws and our courts if they violate our laws means they are subject to the territorial jurisdiction of the U.S. and can be prosecuted.—but it does not place them within the political "jurisdiction" of the United States as that phrase was defined by the framers of the Fourteenth Amendment.

The amendment was intended to give citizenship *only* to those who owed their allegiance to the United States and were, therefore, subject to its complete jurisdiction. Senator Lyman Trumbull (IL), a key figure in the adoption of the 14th Amendment, said that "subject to the jurisdiction" meant not owing allegiance to any other country.

Modern theorists do not seem to understand the distinction between partial, territorial jurisdiction, which subjects all aliens who enter the U.S. to the jurisdiction of our laws, and complete political jurisdiction, which requires allegiance to the government, too. Thus, while a German tourist could be prosecuted for violating a criminal statute while visiting our country, he could not be drafted if we had a military draft or otherwise be subjected to other requirements imposed on citizens, such as serving on a jury. If that German tourist has a baby while in the U.S., that child is a German citizen, and he owes no political allegiance to the U.S.

In the famous *Slaughter-House* cases of 1873, the Supreme Court stated that this qualifying phrase was intended to exclude "children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[75] This was confirmed in 1884 in another case, *Elk vs. Wilkins*, in which citizenship was denied to an American Indian because he "owed immediate allegiance to" his tribe and not the United States.[76]

American Indians and their children did not become citizens until Congress passed the Indian Citizenship Act of 1924. There would have been no need to pass such legislation if the Fourteenth Amendment extended citizenship to every person born in America, no matter what the circumstances of their birth, and no matter the legal status of their parents.

Most legal arguments for universal birthright citizenship point to the Supreme Court's 1898 decision in *U.S. v. Wong Kim Ark*.[77] But that decision only stands for the very narrow proposition that children born of

lawful, permanent residents are U.S. citizens. It says nothing about the children of illegal aliens or of tourists, students, and other aliens only temporarily present in this country being automatically considered U.S. citizens. Those children are considered citizens of the native countries of their parents, just like children born abroad to American parents are considered U.S. citizens.

Federal immigration law simply repeats the language of the amendment, including the phrase "subject to the jurisdiction thereof."[78] The federal government, starting with the Franklin Roosevelt Administration,[79] has erroneously interpreted that statute to provide passports and other benefits to anyone born in the United States, regardless of whether their parents were here illegally and regardless of whether the applicant met the requirement of being "subject to the jurisdiction" of the U.S.

Thus, the President has the authority to direct federal agencies to act in accordance with the original meaning of the Fourteenth Amendment and to issue passports and other government documents and benefits *only* to those individuals whose status as U.S. citizens meets this requirement.

Universal birthright citizenship acts as an incentive for illegal immigration, raises serious national security concerns, and imposes significant economic burdens on taxpayers.[80] The majority of nations around the world do not recognize birthright citizenship, and the U.S. does so based not upon the requirements of federal law or the Constitution, but upon an erroneous executive interpretation of the Constitution. That should be changed.

Deferred Action for Childhood Arrivals

In June 2012, President Barack Obama—without legal authority under any immigration statute or the approval of Congress—directed the Department of Homeland Security to establish the Deferred Action for Childhood Arrivals (DACA) program. Five years later, Attorney General Jeff Sessions said, when he announced the six-month wind down of the program on September 5, 2017, it was "an unconstitutional exercise of authority by the Executive Branch."[81] He was right.[82]

DACA provided a temporary promise—deferred action—that the DHS would not deport illegal aliens who arrived in the U.S. before their sixteenth birthday, had resided continuously in the U.S. since June 15, 2007, and were under the age of 31 as of June 2012. This administrative amnesty was for two years, although it could be renewed. It also provided government benefits such as work authorizations. The DACA program covered a staggering 700,000 illegal aliens.[83]

The Obama Administration tried to expand the program in 2014 by adjusting the original entry date back to January 1, 2010, and removing the age maximum of 31. At the same time, the Administration tried to establish a new, similar administrative amnesty, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA would have provided the same types of benefits as DACA for illegal aliens who were the parents of minors who were U.S. citizens or lawful permanent residents.

However, Texas and 25 other states sued to stop DAPA and the expansion of the DACA and obtained a nationwide injunction that stopped both the implementation of the DAPA program and the DACA expansion.[84] As the Fifth Circuit Court of Appeals said, federal immigration law establishes an "intricate system of immigration classifications and employment eligibility" and "does not grant the Secretary [of Homeland Security] discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens."[85] The court also noted that Congress had repeatedly declined to enact legislation "closely resembl[ing] DACA and DAPA."[86]

After the Trump Administration announced that it was ending DACA, numerous lawsuits were filed and the plaintiffs were successful in obtaining preliminary nationwide injunctions keeping the program in place.[87] The Trump Administration filed interlocutory appeals and that consolidated litigation ended up before the U.S. Supreme Court.[88]

The Solicitor General, on behalf of the United States, argued that the rescission of DACA was not reviewable by the courts under the Administrative Procedure Act (APA), which governs rulemaking by federal agencies, because decisions on whether to enforce federal law—here, federal immigration law—is committed to agency discretion.[89] In any event, the government argued that the rescission was lawful because it was beyond the authority of the executive branch to decline on this scale to enforce a law adopted by Congress, and the DHS could not impose such a general amnesty with government benefits without "express statutory authorization."[90]

As the government summarized:

> These cases concern the Executive Branch's authority to revoke a discretionary policy of nonenforcement that is sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens. At best, DACA is legally questionable; at worst, it is illegal. Either way, DACA is similar to, if not materially indistinguishable from, the policies—including an expansion of DACA itself—that the Fifth Circuit previously held were contrary to federal immigration law in a decision that this Court affirmed by an equally divided vote. In the face of

> those decisions, DHS reasonably determined—based on both legal concerns and enforcement priorities—that it no longer wished to retain DACA.[91]

On June 18, 2020, however, in a legally unsound decision, a five-justice majority held that the DHS's decision to end the program was "arbitrary and capricious" under the Administrative Procedure Act because the DHS did not give "adequate" reasons for its actions. Spirited dissents were filed, including by Justices Samuel Alito and Clarence Thomas, disagreeing that any further justification needed to be provided by the DHS. Alito said that DACA was "unlawful from the start, and that alone is sufficient to justify its termination." Thomas wrote that this litigation "could—and should—have ended with a determination that [former Attorney General Jeff Sessions's] legal conclusion [that DACA was unconstitutional] was correct." The Court remanded the case to the lower courts to give DHS an opportunity to further explain its reasons for terminating the program.[92]

The Trump Administration's decision to end DACA was the correct decision since President Obama did not have the constitutional or statutory authority to implement a general amnesty program or to provide government benefits to illegal aliens. Providing such an amnesty simply attracts even more illegal immigration—and does not solve the myriad enforcement problems we have along our borders and in the interior of the country.

Moreover, we should not be rewarding law breaking, incentivizing criminal behavior, or providing benefits and preferential treatment to illegal aliens ahead of legal immigrants who have followed the rules to come to the United States and become citizens.

Travel Restrictions

In 2017, President Donald Trump issued a series of executive orders and a proclamation[93] seeking to improve vetting procedures for aliens travelling to the U.S., and to identify shortcomings in the information needed to assess the national security threats posed by those aliens. After an extensive and in-depth review of all threats posed by individuals from foreign countries by the DHS and the State Department, the President restricted entry from eight countries—Chad (later removed from the list), Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—that were state sponsors of terrorism, provided safe havens for terrorists, or provided insufficient information to U.S. authorities, although there were exemptions for permanent resident aliens and case-by-case waivers under certain circumstances for alien travelers (such as undue hardship).

The President acted pursuant to 8 U.S.C. § 1182(f), which gives him the authority to "suspend the entry of all aliens or any class of aliens...or impose on the entry of aliens any restrictions he may deem to be appropriate" when he determines that their entry "would be detrimental to the interests of the United States." The proclamation provides that the DHS will assess, on a continuing basis, whether those entry restrictions should be modified and report to the President every 180 days.[94]

Numerous nationwide injunctions were issued by lower federal courts against the proclamation and executive orders, claiming the President was acting beyond his authority or had an improper motive—a supposed "bias" against Muslims. However, in 2018, the U.S. Supreme Court dissolved those injunctions, holding that the President had lawfully exercised the broad discretion granted to him under § 1182(f) to suspend the entry of aliens into the country.[95]

Chief Justice John Roberts, writing for the majority, stated that through the "comprehensive evaluation of every single country's compliance with the information and risk assessment baseline" established by the DHS to determine the "deficiencies in the practices" of foreign governments, the President "undoubtedly fulfilled" the requirement in the statute that he determine if the entry of covered aliens would be "detrimental" to the interests of the country and our national security.[96] Furthermore, Roberts continued, the plaintiffs' demand that the courts inquire "into the persuasiveness of the President's justifications" was "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere."[97]

These entry restrictions remain in place. Based on the recommendation of DHS Acting Secretary Chad Wolf, on January 31, 2020, the President imposed restrictions on the entry of aliens from six additional countries that "failed to meet a series of security criteria": Burma, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania.[98]

Beginning January 31, 2020, President Trump issued a new series of presidential proclamations suspending the entry of aliens from countries posing a risk of transmitting COVID-19 or coronavirus because of the threat to "the security of our transportation system and infrastructure and the national security."[99] The initial proclamation applied to China, where the virus originated, except for travelers from Hong Kong and Macau. Iran was added on February 29; 26 countries in Europe were added on March 11; and the United Kingdom and Ireland were added on March 14.[100]

These proclamations apply to aliens who were "physically present" in the affected countries "during the 14-day period preceding their entry or attempted entry into the United States" and do not apply to U.S. citizens.

The U.S. also reached an agreement with Mexico and Canada to limit non-essential travel across their borders.[101]

All of these proclamations cite the President's authority to suspend the entry of aliens under the same immigration provision, 8 U.S.C. § 1182(f), that the Supreme Court upheld in *Trump v. Hawaii*. Under the Public Health Service Act of 1944, the President is also given extensive authority to quarantine or suspend the entry of aliens into the country "to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States."[102] No legal actions have yet been filed to try to stop these entry restrictions.

Sanctuary Jurisdictions

Sanctuary jurisdictions are cities, counties, and states that refuse to cooperate with federal enforcement of immigration laws and, in some cases, actually attempt to *obstruct* federal enforcement.

Federal immigration law provides that state and local jurisdictions "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration officers] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[103] In other words, local jurisdictions cannot forbid their law enforcement officials, such as county sheriffs, from sending notice to the DHS that an illegal alien has been arrested or detained, or requesting information about the immigration status of an individual arrested for a local crime.

After this provision was passed in 1996, the City of New York sued, claiming that it violated the Tenth Amendment since it attempted to force the city to enforce federal immigration law. However, the Second Circuit Court of Appeals held that the statute did not violate the Constitution because the federal government was not forcing "state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service." Instead, Congress was only prohibiting local governments from "directly restricting the voluntary exchange of immigration information with the INS [Immigration and Naturalization Service]." Any other holding would allow "states and localities to engage in passive resistance that frustrates federal programs," which is exactly what has happened with the sanctuary movement.[104]

In addition to prohibiting notifying the federal government of the arrest of illegal aliens, many sanctuary jurisdictions refuse to honor detainer warrants issued by the DHS asking local law enforcement officials to notify DHS

as early as possible (at least 48 hours) before they release a deportable illegal alien so the alien can be picked up by immigration agents.[105] Instead, these sanctuary jurisdictions release these convicted criminals to enable them to avoid deportation and removal from the country.

Thus, sanctuary jurisdictions create sanctuaries for criminals—endangering the residents of their communities. The DHS has been issuing shocking reports, at the direction of the President, on the numerous, serious crimes committed by such aliens after sanctuary jurisdictions ignored detainer warrants and released them back into local communities.[106]

Sometimes, these actions step over the line from noncooperation to active obstruction. In 2019, a federal grand jury indicted a state court judge and her bailiff in Massachusetts for obstruction of justice for helping an illegal alien charged with a local crime slip out the back door of the courtroom to avoid handing him over to an immigration agent with a valid detainer warrant the judge knew was waiting to take custody of the alien.[107]

In order to stop "the immeasurable harm" caused by sanctuary jurisdictions, President Trump issued an executive order on January 25, 2017, directing the Attorney General and the Secretary of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. §1373 (sanctuary jurisdictions) are not eligible to receive Federal grants."[108] The word "grants" and the specific inclusion of the Attorney General and the Secretary meant that the President was referring to the type of discretionary grant programs administered by the DOJ and DHS that local jurisdictions must apply for, not federal entitlement programs and funds such as Medicaid or the Highway Trust Fund or any other executive department.

On May 22, 2017, Attorney General Jeff Sessions issued a memorandum implementing the President's executive order.[109] Sessions instructed all the "grant-making components" within the DOJ to cut off any grants to sanctuary jurisdictions. The memorandum outlined that any city or county applying for a DOJ grant "administered by the Office of Justice Programs and the Office of Community Oriented Policing Services" that requires the applicant to certify compliance with all federal laws would not be eligible for a grant if it is a sanctuary jurisdiction. A sanctuary jurisdiction was defined as any city or county that refused to comply with 8 U.S.C. § 1373, to provide advance notice of the release of criminal aliens, and to give federal immigration agents access to local jails.

The DOJ began applying this directive to the Edward Byrne Memorial Justice Assistance Grant Program, in which the department awards grants to improve state and local law enforcement operations. Almost immediately,

litigation ensued to stop the withholding of grants to sanctuary jurisdictions, including Chicago, which challenged the legality of the directive and sought an injunction. A nationwide preliminary injunction was issued by a federal district court in Illinois that was upheld by the Seventh Circuit Court of Appeals in 2018 (although it was later limited to Illinois).[110] The injunction included preventing the government from requiring cities like Chicago that receive Byrne grants to send advance notice to federal authorities of the release date of criminal illegal aliens and to allow federal agents access to local correctional facilities to be able to interview incarcerated aliens, although it did not grant an injunction against the information-sharing requirement of Section 1373.[111]

On the other hand, the Second Circuit Court of Appeals has ruled that the DOJ can apply all three of these conditions to applicants for Byrne funds. It threw out an injunction issued by a federal district court in New York that had been granted as to all three conditions to New York, Connecticut, New Jersey, Washington, DC, Massachusetts, Virginia, Rhode Island, and New York City.[112]

The court held that the statutory language governing Byrne grants that requires applicants to certify compliance with all federal laws was broad enough to require compliance with the information-exchange requirements of Section 1373. Furthermore, the advance notice requirement was well within the statute's authorization that the attorney general can decide "what data, records and information a Byrne grant recipient must maintain and report" to the federal government. Finally, the requirement to allow federal agents' access to incarcerated criminal aliens is also within the authority of the Attorney General because the Byrne statute allows "appropriate coordination with affected agencies" and DHS is obviously an affected agency.[113]

Due to the conflicting opinions of the courts of appeal, which have not yet been resolved by the U.S. Supreme Court, the DOJ is able to enforce the conditions against sanctuary jurisdictions in some parts of the country but not others. The website at the department that gives an overview of the Byrne grant program provides up-to-date information on the status of the applicable conditions depending on a jurisdiction's geographic location.[114]

In a move similar to the withholding of grants to sanctuary jurisdictions, the DHS has suspended enrollment of New York residents in the "Trusted Traveler Programs" (such as Global Entry) administered by the DHS. In a letter to the New York Department of Motor Vehicle (DMV), Acting DHS Secretary Chad Wolf informed the state that because of its passage of a state law, the Driver's License Access and Privacy Act, that limited access

of the DHS to Department of Motor Vehicles driver's license and vehicle registration information, the DHS no longer had the information it needs to fully vet and check the backgrounds of New York residents applying to the program.[115]

The intent of this new law was to limit the DHS's access to information about aliens who are residents of the state—since New York is one of the states that provides driver's licenses to aliens in the country illegally. But this law, as Secretary Wolf said, prohibited the DHS from obtaining "important data used in law enforcement, trade, travel, and homeland security...[to] investigate and build cases against terrorists, and criminals who commit child sexual exploitation, human trafficking, and financial crimes."[116] New York filed a lawsuit in February arguing the move was unconstitutional.[117]

All of these sanctuary policies and laws like New York's DMV law are shortsighted and unwise. They create sanctuaries for criminals and limit the ability of federal law enforcement to protect national security and the safety of the public and the nation. They give aliens who are in the country illegally *greater rights and protections than U.S. citizens,* and they obstruct enforcement of federal immigration and criminal laws.

Temporary Protected Status

Temporary Protected Status (TPS) is a humanitarian form of protection designed to permit aliens to remain temporarily in the U.S. after a natural disaster, ongoing armed conflict, or extraordinary and temporary conditions occur in their home country. Like so many aspects of U.S. immigration law, what was intended when Congress enacted the provision and what the program has become are two very different things. TPS became seemingly permanent for nationals of several countries during previous Administrations. In addition, an unauthorized practice of country re-designations developed, expanding the population of aliens eligible for the relief.

The Trump Administration has worked to return TPS to its original intent, consistent with the law. Section 244 of the INA states that the Secretary of Homeland Security may grant an alien TPS in the U.S. and shall not remove the alien during the period in which such status is in effect. It also requires the Secretary to grant the alien the prize benefit of employment authorization, along with an "employment authorized" endorsement or work permit.[118]

The Secretary of Homeland Security, after consulting with other appropriate federal agencies, is charged with designating a foreign country, or part of such country, for TPS if the Secretary finds one of three categories:

1. An ongoing armed conflict within the country and, due to such conflict, requiring the return of aliens who are nationals of that country would pose a serious threat to their personal safety;

2. There has been an earthquake, flood, drought, epidemic, or other environmental disaster in the country, resulting in a substantial, but temporary, disruption of living conditions in the area affected; the country is temporarily unable to adequately handle the return of its nationals; and the country has officially requested designation; or

3. There exist extraordinary and temporary conditions in the country that prevent nationals of the country from returning in safety, unless the Secretary finds that permitting the aliens to remain temporarily in the U.S. is contrary to the national interest of the United States.[119]

An initial period of a country designation lasts from six to 18 months.[120] At least 60 days before the end of the designation period, the Secretary of Homeland Security, in consultation with relevant agencies, must review the country conditions and determine whether the conditions for the designation continue to exist. If the Secretary determines a country no longer meets the conditions for designation, the Secretary shall terminate the TPS designation.[121] If the Secretary determines the country conditions of the designation continue to be met, the Secretary extends the TPS designation for six, 12, or 18 months.[122]

As of January 2017, 10 countries had TPS designations:[123] El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. The majority of these 10 countries had designations, extensions, and re-designations for at least 10 years.[124] The countries with the most egregious violations of the TPS "temporary" principle are Honduras and Nicaragua, which were first designated by former Attorney General Janet Reno for devastation they experienced from Hurricane Mitch in 1998.[125] These and other TPS countries have successfully lobbied past and current Administrations for extensions—showing their reliance on the benefit to boost their own economy, both in not having to receive their nationals back into their own weak economies, and more important, the remittances the TPS beneficiaries send back to their families in the home country. This was not the purpose of TPS.

Somalia has had a longer TPS designation than Honduras and Nicaragua; it was first designated in 1991.[126] While the country conditions and basis for Somalia's designation and many extensions are very different from those of Honduras and Nicaragua, the sense of "temporary" ended long ago with respect to Somalia.

The Trump Administration sought to terminate TPS designations for countries that no longer had conditions warranting the designation. The Secretary of DHS, in consultation with the Secretary of State, decided to terminate TPS for six of the 10 countries: El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan.[127]

Opponents sued the DHS and the President, seeking to enjoin the USCIS from terminating the TPS status and employment authorization for the nationals with TPS from all six countries. Despite express statutory language that states that "[t]here is no judicial review of any determination of the [Secretary of Homeland Security] with respect to the designation, or termination or extension of a designation, of a foreign state," district courts not only reviewed the plaintiffs' cases, but they enjoined the USCIS from terminating TPS and employment authorization.[128] While cases await judicial decisions on the merits, the USCIS continues to provide the TPS beneficiaries from these countries with the benefit and employment authorization.[129]

The Trump Administration has extended TPS for four countries: Somalia, South Sudan, Syria, and Yemen. The Secretary of Homeland Security did not, however, "re-designate" any of the countries. Past Administrations have developed a practice of re-designating TPS for various countries. A re-designation moves the date by which a foreign national must have been physically present in the U.S. to be eligible for TPS. Because the new date is more recent, a re-designation expands the population of eligible aliens who may apply for TPS.

Problems with Re-designation. There are two issues with this past practice. First, it departs from the intent of TPS. The humanitarian temporary relief was meant to protect those who happen to be in the U.S. *when* bad conditions strike their home countries, and it would be either dangerous to return the aliens or the country is not in a condition to accept return of its nationals. By expanding the eligibility period to include aliens who came to the U.S. *after* armed conflict, a natural disaster, or extraordinary and temporary conditions occur, the protection becomes like group asylum. The difference, however, is that an alien did not have to establish an individual fear of persecution.

Second, the term "re-designation" is nowhere to be found in Section 244 of the INA. Under the TPS section of the law, only designations, extensions, and terminations are described. The past practice of re-designating countries for TPS is *not* authorized.

The Trump Administration correctly terminated TPS for countries that no longer meet the conditions for their designation. The most obvious examples of Nicaragua and Honduras—past extensions of TPS for 18 years and 19

years, respectively, after Hurricane Mitch—were abusive and departed from the purpose of TPS. The lawsuits brought against the Administration for the terminations should be dismissed because the law affirmatively states there is to be no judicial review of the Secretary's determination.

Southwest Border Crisis

A number of designed loopholes and benefits in U.S. immigration law have both been a pull factor for mass migration to our southern border and have been exploited—converging into a perfect storm of consistent, significant increases in illegal entries along our border, with recent historic spikes in volume. To understand what the Trump Administration faced on the southwest border and why the Administration made so many immigration changes, it is important to know some of the background.

Flores, a case initially about detention standards for an unaccompanied illegal alien minor turned into a 1985 class action lawsuit that launched more than a 33-year court process, resulting in a far-more expansive policy regarding when a minor alien had to be released from detention and who would be given custody.[130] Despite a 1993 U.S. Supreme Court ruling in favor of the INS,[131] then-INS Commissioner Doris Meissner signed the *Flores* settlement agreement in 1997, making unnecessary concessions on behalf of the government.[132] Under the agreement, the government must release minor aliens "without unnecessary delay" to the minor's parents, legal guardians, other adult relatives, or other individual designated by the parent/guardian, who is in the United States.[133]

Two California Members of Congress, Senator Dianne Feinstein (D–CA) and Representative Zoe Lofgren (D–CA), attempted to codify provisions of the *Flores* agreement in the Unaccompanied Alien Child Protection Act (UACPA), which they introduced each Congress, starting in 2000.[134] The UACPA went further than even the *Flores* agreement.

It would have:

- Created a right to both a guardian ad litem and access to counsel for unaccompanied alien children (UACs);
- Expanded protections for alien minors, using the rarely used Special Immigrant Juvenile (SIJ) program; and
- Created the category of UACs in "asylum and refugee-like circumstances."[135]

The stated intent of the bill's sponsors was to protect alien minors, but the bill lowered the bar for UACs to receive immigration benefits and services—providing easily foreseeable consequences that parents would intentionally send their children unaccompanied across the border in the hopes of gaining a family foothold in the U.S.

In 2002, a new government bureaucracy for UACs and refugees was created by the Homeland Security Act (HSA), the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS), adding to the already fragmented immigration bureaucracy across federal agencies. The HSA transferred functions from the INS to the ORR, including making placement determinations for all UACs in federal custody by reason of their immigration status, implementing policies with respect to the care and placement of UACs, and ensuring qualified and independent legal counsel is timely appointed to represent the interests of each child.[136]

After several failed attempts to pass the UACPA through both chambers of Congress, former Representative Howard Berman (D–CA) folded UAC protections into the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which became law—and recklessly changed the course of U.S. immigration.

The law distinguishes between UACs from contiguous countries and those from elsewhere. It provides for the return of UACs to their contiguous home countries.[137] For UACs from non-contiguous countries, however, the law requires they be placed in removal proceedings, be eligible for relief from removal, provided access to counsel[138] and child advocates,[139] and expands eligibility for asylum.[140] The TVPRA also amended the SIJ section of the INA to both accelerate and ease the application process for a green card.[141]

Predictably, the number of unaccompanied alien minors coming to the U.S. subsequently ballooned, as shown in Chart 1.

Providing special privileges for aliens apprehended from non-contiguous countries resulted, predictably, in a significant jump in volume of non-contiguous country nationals at our southern border, as shown in Chart 2, particularly from El Salvador, Guatemala, and Honduras.

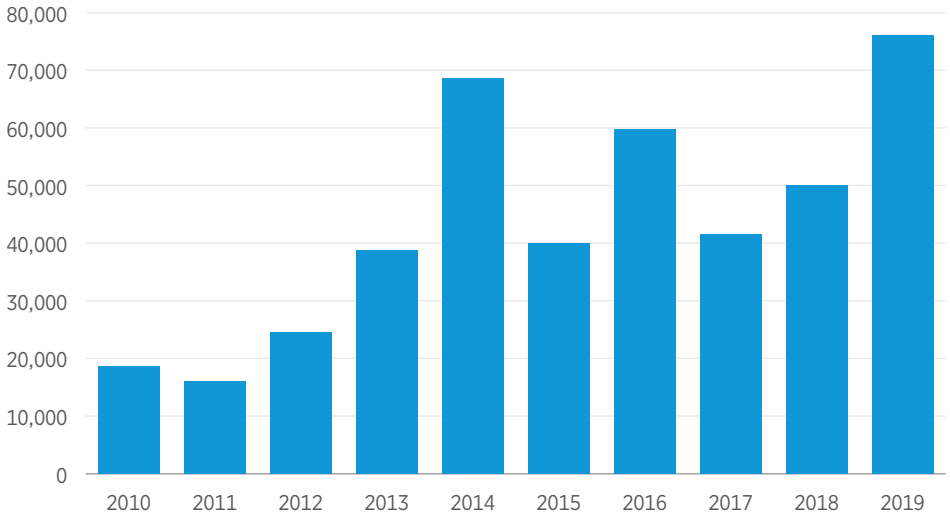
The number of SIJ applications also grew significantly for the same reason, as shown in Chart 3.[142]

The *Flores* Settlement became an even more powerful incentive for illegal immigration in 2015, when Dolly Gee, an Obama-appointed federal district judge in California, ordered the Obama Administration to release detained minors and their mothers because she found that the *Flores* detention standards were not being met in Texas. This expanded the scope of *Flores* by adding *accompanied* minors to operations that previously covered

CHART 1

Unaccompanied Alien Children Reach Record Levels

TOTAL APPREHENSIONS OF UNACCOMPANIED ALIEN CHILDREN AGES 0–17



SOURCE: U.S. Border Patrol, "Total Unaccompanied Alien Children (0–17 Years Old) Apprehensions by Month," https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20FY%202019%29_0.pdf (accessed June 24, 2020).

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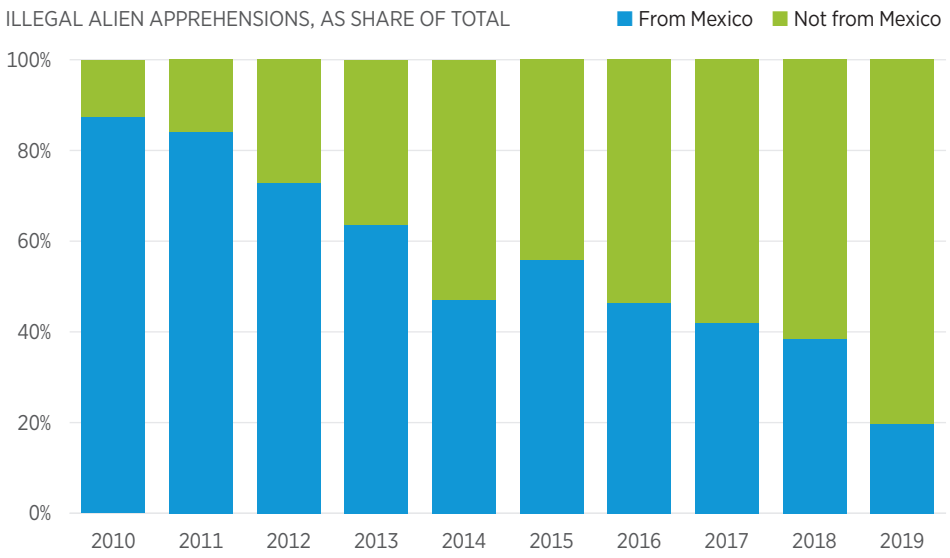
only unaccompanied minors.[143] It also meant that family units with a child would be ordered released from detention. Judge Gee went further, interpreting the *Flores* settlement language "without unnecessary delay" to mean no more than 20 days of detention was allowed.[144] Because removal proceedings cannot be completed within 20 days, Immigration and Customs Enforcement released UACs and family units from detention into American communities to comply with the new *Flores* order, resulting in a "catch and release" posture.

Not surprisingly, the number of family units—and *claimed* family units—coming to the southwest border soared, as shown in Chart 4.

In addition to knowing that claiming they are a family unit would lead to their likely release into the U.S., aliens know that claiming asylum at the border due to a fear of "persecution" is a way to enter and remain in the country. An asylum application also comes with a very valuable employment authorization document (EAD), which allows an alien to be employed 180 days after an asylum application is filed.[145]

CHART 2

Most Illegal Aliens Originate from Outside Mexico



SOURCE: U.S. Border Patrol, "Total Illegal Alien Apprehensions by Fiscal Year," https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_0.pdf (accessed June 24, 2020).

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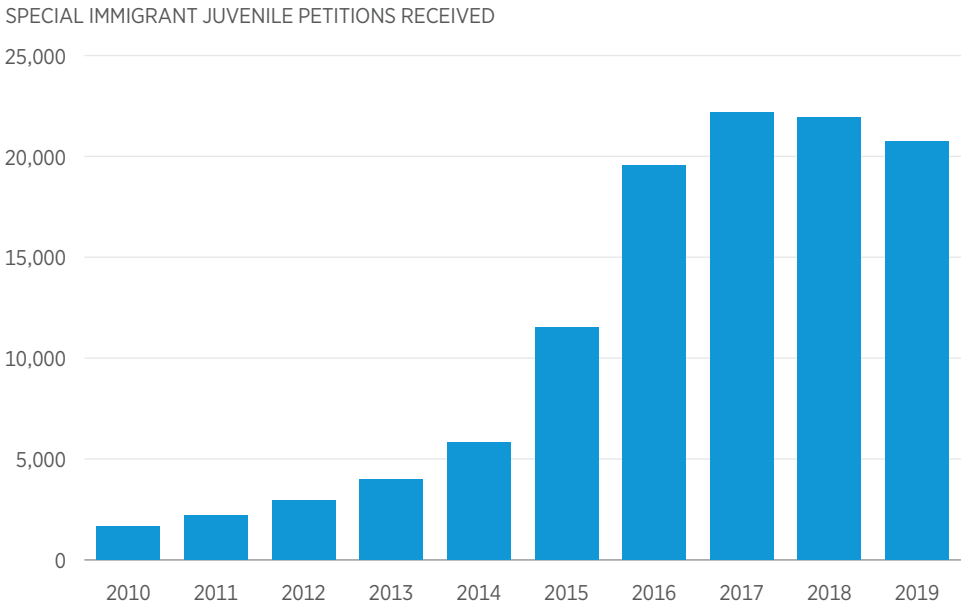
Aliens have exploited the asylum process in explosive numbers over the past decade, as shown in Charts 5 and 6. Asylum applicants crossing our southern border most commonly claim a fear of persecution "on account of membership in a particular social group," associated with domestic violence,[146] or gang or criminal violence.[147]

Faced with mounting, unprecedented numbers of invalid claims—a clear abuse of the asylum process—as well as fraudulent family units and other aliens taking advantage of the court's misinterpretation of the *Flores* settlement, the Trump Administration implored Congress to legislatively close these obvious loopholes.[148]

Members of Congress, however, have been either incapable or uninterested in passing such immigration legislation. As such, the Trump Administration made several changes via regulatory, policy, and operational means with the goal of returning immigration benefits to their original intent and decreasing fraud.

CHART 3

Immigrant Juvenile Petitions Surge



SOURCE: U.S. Citizenship and Immigration Services, "Number of I–360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status Fiscal Year 2010–2019," https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2019_qtr4.pdf (accessed June 24, 2020).

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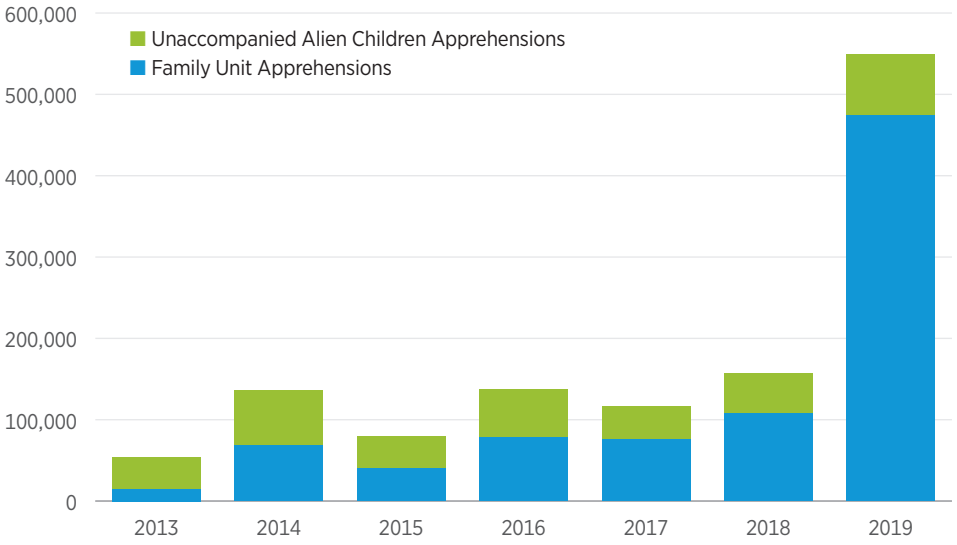
Zero Tolerance. To address the rising numbers of family units apprehended at the border and to increase the consequences for dangerous illegal crossings,[149] President Trump issued a memorandum on April 6, 2018, directing cabinet departments to apply all resources and tools to end the practice of "catch and release."[150] The same day, then–Attorney General Jeff Sessions issued a memo directing each United States Attorney's Office along the Southwest Border to immediately adopt a zero-tolerance policy for all immigration offenses referred for prosecution.[151]

By detaining and prosecuting a parent from a family unit for illegal entry, the minors in the family unit had to be referred to HHS. Opponents of these criminal prosecutions berated the Administration and labeled the policy as intentional "family separation."[152] Then–DHS Secretary Kirstjen Nielsen explained that when American parents are prosecuted and detained for a crime, their child does not go to jail with them. So, too, are alien children separated from their parents when those parents are prosecuted for a crime,

CHART 4

Family Apprehensions Spike at Southwest Border



NOTE: A Family Unit represents the total number of individuals (either a child under 18 years old, parent, or legal guardian) apprehended with a family member by the U.S. Border Patrol.

SOURCES:

- U.S. Border Patrol, "Total Family Unit Apprehensions By Month," https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf (accessed June 24, 2020).
- U.S. Border Patrol, "Total Unaccompanied Alien Children (0–17 Years Old) Apprehensions by Month," https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20 FY%202019%29_0.pdf (accessed June 24, 2020).

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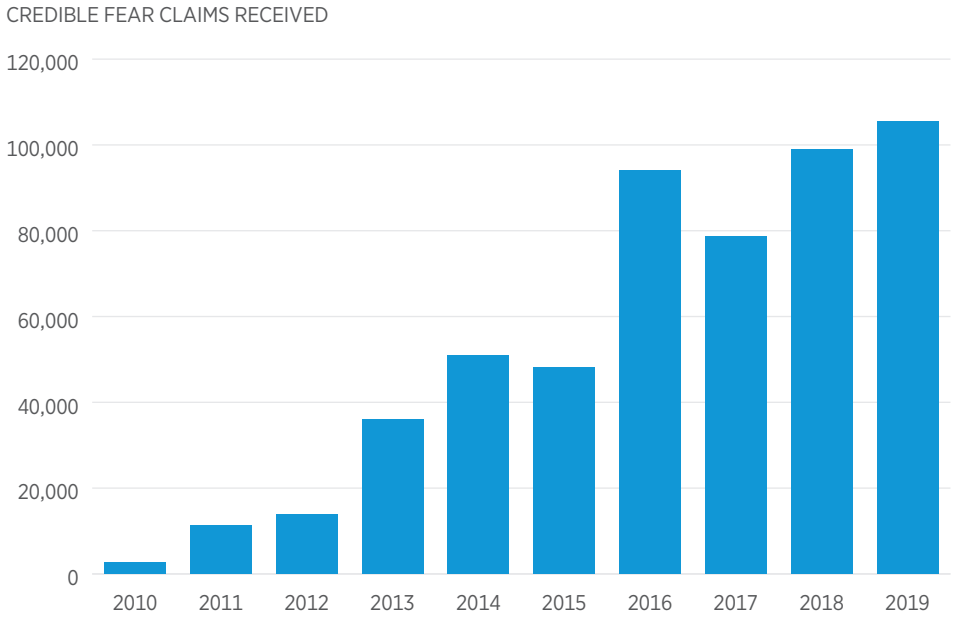
she explained.[153] Nevertheless, President Trump signed another executive order two months later, ending family separation in favor of family detention during criminal prosecution or immigration proceedings.[154]

Last In, First Out. To curb the rapid growth of the affirmative asylum backlog, the USCIS announced in January 2018 that it was returning to a Last In, First Out (LIFO) approach.[155] At that point, the agency faced "a crisis-level backlog" of 311,000 pending asylum cases, an increase of *more than 1,750 percent* in five years, and the rate of new asylum applications had more than tripled.[156] This volume made the asylum system almost unmanageable and increasingly vulnerable to fraud and abuse.[157]

Aliens looking to game the system knew that, with the overwhelming backlog, if they filed an asylum application, it would not be processed within 180 days,

CHART 5

Credible Fear Claims Have Risen Steadily



SOURCE: U.S. Citizenship and Immigration Services, "Immigration and Citizenship Data," https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=All&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=&combined=credible%20fear%20fiscal%20year&items_per_page=10 (accessed June 24, 2020).

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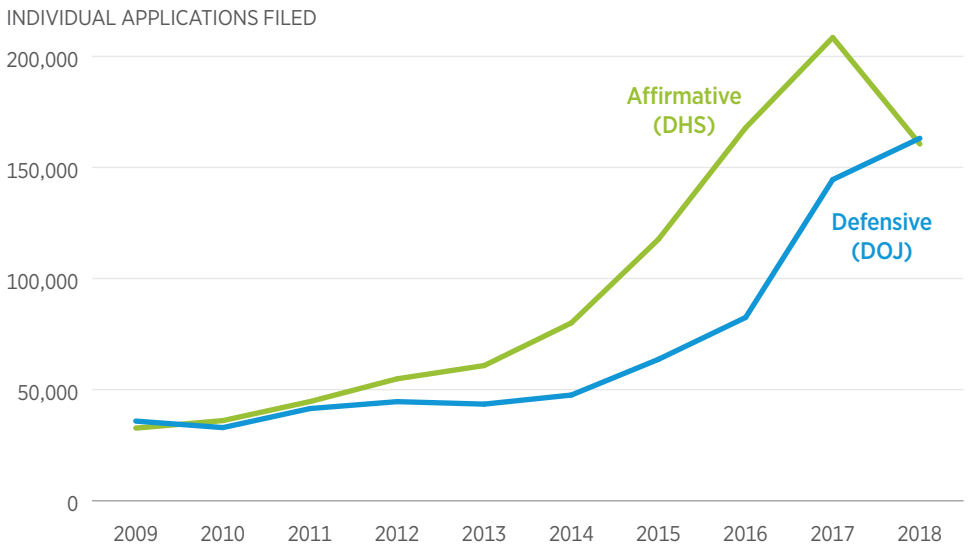
thereby garnering them a work authorization card.[158] Returning to a LIFO approach meant the USCIS would schedule interview appointments for newer cases ahead of older cases. This would prevent the newer cases from hitting the 180-day mark, which would act as a deterrent to fraudulent asylum filings. By August 2018, the USCIS saw a 30 percent decrease in new asylum applications.[159]

Matter of A-B-. In June 2018, the DOJ confronted the run-away volume of asylum claims. It addressed the expansion of asylum claims to include victims of domestic violence in an alien's home country. In a 2014 asylum appeal, *Matter of A-R-C-G-*, the BIA found the respondent, a victim of domestic abuse in Guatemala, to be a member of a particular social group subject to persecution "composed of married women in Guatemala who are unable to leave their relationship."[160] Domestic violence is a common claim of persecution in asylum applications by Central Americans,[161] but with this BIA precedent decision, asylum applicants were given a more likely chance at having their application granted.

CHART 6

Asylum Applications Have Increased



SOURCE: U.S. Department of State, "Report to Congress on Proposed Refugee Admissions for FY 2020," https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/ (accessed June 24, 2020).

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Attorney General Jeff Sessions directed the BIA to refer the 2014 case to him for his review. He sought briefing from the parties and any interested *amici* on whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum.[162] In *Matter of A-B-*, the Attorney General overruled *Matter of A-R-C-G-*, holding that the BIA wrongly decided the case and should not have issued it as a precedential decision.[163]

Of note, the Attorney General held that the mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime cannot of itself establish an asylum claim.[164] Regarding membership in a particular social group, the Attorney General ruled that to be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum.[165]

Opponents of *Matter of A-B-* successfully sought an injunction to prevent application of the USCIS's *Matter of A-B-* guidance in Credible Fear interviews.[166]

Matter of L-E-A-. In July 2019, Attorney General William Barr issued a decision on whether a family forms the basis of a cognizable social group under the asylum statute. The alien in that case claimed that he was persecuted by a criminal gang on account of his father's family, which owned a store targeted by a local drug cartel.[167]

The Attorney General held that the BIA improperly recognized the alien's family as a "particular social group" for purposes of qualifying for asylum. "The fact that a criminal group—such as a drug cartel, gang, or guerrilla force—targets a group of people does not, standing alone, transform those people into a particular social group," the Attorney General stated.[168] He cited *Matter of S-E-G-*, in which the BIA concluded that respondents who feared harm from their refusal to join MS-13 were not a particular social group; they were "not in a substantially different situation from anyone [else] who has crossed the gang, or who is perceived to be a threat to the gang's interests."[169]

Opponents of Matter of L-E-A- filed suit against the DOJ and DHS, challenging implementation of the Attorney General's decision in the U.S. District Court for the District of Columbia.[170] The case is pending.

Border Patrol Credible-Fear Pilot. One incentive for illegal immigration across our southern border has been the high rate of "credible fear" findings by USCIS officers. Aliens know that, when apprehended by the Border Patrol, if they claim they fear returning to their home country, they will likely be permitted into the U.S. to file an asylum application.[171] The large gap between the USCIS findings of credible fear and subsequent asylum application grants by DOJ immigration judges has been a point of contention during the Trump Administration. Of the more than 94,000 credible-fear interviews conducted in FY 2019, credible fear was found in *79 percent* of the cases.[172] Over the past 12 years, however, after more complete hearings, immigration judges have only granted asylum in 11 percent to 37 percent of the cases, depending on the year.[173]

To inject a different group of adjudicators (with more front-line experience) into the credible-fear interview process, the DHS ran a pilot program with Border Patrol agents supplementing USCIS asylum officers in conducting credible-fear interviews at the border.[174] USCIS asylum staff trained small groups of Border Patrol agents and a USCIS supervisor to review the Border Patrol agents' decisions.[175] Opponents of this pilot program have sued the DHS under the Freedom of Information Act to compel the department to release records about the program.[176] The case is pending.

Safe Third Country. A number of exceptions to asylum eligibility exist in U.S. law that have infrequently been applied in the past. One is the concept

of a safe third country. Section 208(a)(2)(A) of the INA states that an alien shall not be eligible for asylum in the U.S. if the Secretary of Homeland Security determines the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the alien's home country) where the alien would not face persecution and would have access to a full and fair asylum procedure or equivalent temporary protection.[177]

Because aliens travel through other countries before applying for asylum in their destination country, the natural question is why did they not seek protection in the first safe country they entered? Asylum is about *safety*, not a preferred destination. With the caravans of aliens departing Central America and traveling through multiple countries, including Mexico, on their way to the U.S., the Trump Administration decided to apply the safe third country rule.

In July 2019, the DOJ and the DHS published a joint interim final rule to provide that, with limited exceptions, an alien who enters or attempts to enter the U.S. across the southern border after failing to apply for protection in a third country through which the alien transited that is outside the alien's country of citizenship, nationality, or last lawful habitual residence, is ineligible for asylum.[178] The Safe Third Country rule was written to also require asylum officers and immigration judges to apply this new bar on asylum eligibility when administering the credible-fear screening process.[179]

Predictably, opponents of the safe third country rule immediately sued the Administration, seeking an injunction against its implementation.[180] Two federal district court judges handed down opposite rulings. Washington, DC, Judge Timothy J. Kelly let the rule stand, stating, "[T]he plaintiffs before me here are not asylum seekers" and therefore, did not sufficiently support their claim that they would be irreparably harmed.[181]

California Judge Jon Tigar, however, imposed a nationwide injunction against the Administration's use of its new rule.[182] The Ninth Circuit Court of Appeals upheld the injunction as it applied to jurisdictions within the Ninth Circuit, but overturned the nationwide injunction.[183] After Judge Tigar granted a second nationwide injunction,[184] the U.S. Supreme Court granted the government's application to stay that injunction, pending disposition of the case on the merits.[185]

Internal Relocation. A second rarely used aspect of asylum law is internal relocation. The question is whether, despite an alien's fear of persecution, the alien could be safely relocated to another area of the alien's home country?[186] As discussed above, high among the asylum claims from the Northern Triangle countries have been claims of private violence. The State Department country reports indicated that such violence is *not* prevalent

throughout the Northern Triangle countries.[187] Because asylum officers were rarely finding that asylum applicants could internally relocate, the acting USCIS director issued guidance to asylum officers, reminding them to consider internal relocation while adjudicating asylum applications.[188] This is common sense for most claims of fear of criminal violence, including domestic abuse.

Limiting Extra Asylum Process for UACs. In May 2019, the USCIS issued a memo to asylum officers regarding UACs seeking asylum under TVPRA procedures.[189] The memo reversed a 2013 policy,[190] which had permitted the USCIS to rely on a prior UAC determination made by ICE or Customs and Border Protection (CBP) in order to assert initial jurisdiction over UAC asylum applications. The new policy requires asylum officers to resume making the determination whether a UAC continued to meet the statutory definition of a UAC on the date of filing for asylum.[191]

Asylum applicants who submitted their filing after turning 18 or after reunifying with a parent or legal guardian could be rejected for consideration by the USCIS, and instead have their asylum application referred to an immigration judge for initial jurisdiction, similar to adult asylum applicants who had been encountered by CBP or ICE.[192] The policy change also meant that the former UACs would have to file their asylum application within one year of arriving in the U.S., just as non-UACs do.[193]

Opponents of the policy change filed a class-action lawsuit against the DHS, seeking an injunction. A federal district court in Maryland enjoined the USCIS from applying the May 2019 memo.[194] The court further ordered the USCIS to retract any adverse decisions already rendered in cases in which the 2019 UAC memorandum had been applied, and to re-evaluate those cases applying the May 28, 2013, UAC memorandum.[195] In accordance with the court's order, the USCIS is reviewing all asylum applications in which the USCIS determined that it did not have jurisdiction under the 2019 UAC memorandum.[196]

New Credible-Fear Lesson Plan. The USCIS also revised its lesson plan for asylum officers in April 2019 to address the high percentage of credible-fear findings.[197] The new language emphasizes country conditions, internal relocation, and clarifies standards to be used.[198]

Opponents sued DHS and DOJ officials, requesting that the USCIS be enjoined from using the new lesson plan.[199] The federal district court in the District of Columbia ordered that the case be stayed, pending the D.C. Circuit Court of Appeal's decision in *Grace v. Whitaker*, regarding the USCIS' *Matter of A-B-* asylum officer guidance, because the credible-fear lesson plan case contains substantially similar questions of law as those in *Grace*.[200]

Proposed USCIS Asylum Fee. The USCIS examines its immigration application fees in biannual fee studies and periodically changes its fees using a proposed rulemaking and comment period to ensure recovery of the full cost of adjudicating applications and petitions.[201] The USCIS has not previously charged a fee for asylum applications.[202] Rather, the cost of adjudicating such applications is subsidized in other benefit application fees.[203] Credible-fear asylum adjudications are also exempt from a fee.[204] These are but two of several immigration benefits that have fee waivers or exemptions. In its 2019/2020 fee study, the USCIS estimated it would lose *$1.49 billion* in forgone revenue from fee waivers and fee exemptions if it did not change its waiver policy.[205]

The sheer volume and backlog of asylum applications led the USCIS to propose, for the first time, a $50 fee for asylum applications filed with the USCIS.[206] It estimated that the cost of adjudicating Form I-589 is approximately $366.[207] The agency, however, determined that a $50 fee would alleviate the pressure on the immigration benefit system, mitigate the proposed fee increase of other immigration benefit requests, was in line with U.S. international treaty obligations under the 1951 U.N. Convention Relating to the Status of Refugees and the 1967 U.N. Protocol Relating to the Status of Refugees, and was in line with other countries' asylum fees as well.[208]

While it is significant that the USCIS is proposing to charge an asylum application fee for the first time, the $50 fee is inadequate, given the actual adjudication cost, the high volume of applications, and the exemptions for related applications such as credible-fear and UAC asylum applications. The USCIS should consider increasing the asylum fee in future fee studies or provide an explanation for why other applicants should be subsidizing these claims—particularly those claims that are determined to be fraudulent or invalid.

Asylum-Related Work Authorization Changes. As explained above, obtaining work authorization (an EAD) is a very valuable benefit associated with filing asylum applications—and is a common motive behind fraudulent asylum applications. The Trump Administration has made and proposed a number of EAD reforms to prevent asylum abuse.

The USCIS published a final rule in June 2020 that governs asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application.[209] The rule makes several changes, including:

- Extending the waiting period from 180 days to 365 days before an asylum applicant can apply for and receive an EAD;

- Barring employment authorization for aliens who, absent good cause, entered or attempted to enter the U.S. unlawfully;

- Excluding aliens who fail to file for asylum within one year of their last entry, unless and until an asylum officer or immigration judge determines that an exception to the statutory one-year filing requirement applies;[210]

- Excluding aliens whose asylum applications have been denied by an asylum officer or an immigration judge during the 365-day waiting period or before the request for initial employment authorization has been adjudicated;

- Excluding aliens who have been convicted of: (1) any aggravated felony; (2) a particularly serious crime; or (3) a serious non-political crime outside the U.S.;

- Revising when employment authorization terminates, based on when an asylum application or appeal is denied;

- Denying employment authorization for delays caused by the asylum seeker if not resolved by the date the application for employment authorization is filed;

- Clarifying that the time period of employment authorization is discretionary and proposing that any EAD, whether initial or renewal, will not exceed two-year increments; and

- Limiting eligibility for aliens paroled into the country after establishing a credible fear or reasonable fear of persecution or torture.[211]

The DHS has additional EAD rules in the pipeline, according to the Office of Management and Budget's Unified Agenda of Regulatory Actions. One such rule would "strengthen DHS's ability to effectively administer its parole and employment authorization authorities in support of DHS's statutory obligation to ensure the prompt removal of inadmissible or deportable aliens from the United States, in keeping with current immigration enforcement priorities."[212]

Another unpublished DHS rule listed in the Unified Agenda would "eliminate eligibility for employment authorization for certain aliens who have

final orders of removal but are temporarily released from custody on an order of supervision with limited exceptions."[213]

Congress Will Not Fix What It Broke. Members of Congress and activist judges have sown the seeds of a chaotic and dangerous southwest border with reckless legislation for unaccompanied alien children and overreaching court orders that misinterpret the law and gut detention authority of immigration officials. This combination has resulted in a historic volume of illegal immigration across our border, leading the President to declare a national emergency.[214] Not only was Congress unwilling to close the very immigration loopholes it created, but many Members of Congress long *denied* there was any crisis at the border that needed to be addressed.[215]

The Trump Administration understandably made necessary immigration changes through regulatory, policy, and operational means. Unfortunately, opponents have sought to enjoin nearly every change the Administration has made—with the intention of delaying those changes and frustrating the process through years of litigation. The Administration has had mixed success in having the preliminary injunctions lifted while the cases are pending final decisions.

Migrant Protection Protocols. One of the problems with a "catch-and-release" immigration policy is that it encourages aliens to claim asylum when they are caught to avoid being sent back across the border, even when those claims are invalid, since it allows them to stay here while their claims are being evaluated. To compound matters, many aliens do not even show up for their hearings, but instead disappear into the vast expanse of the country.

Bogus asylum claims are common. In fact, the DOJ reports that in 2017, 2018, 2019, and the first quarter of 2020, only about *20 percent* of asylum claims were found to be valid.[216] All of these invalid asylum claims slowed down the processing and review of legitimate asylum claims of those fleeing true persecution in their native countries.

To address this problem, the Trump Administration implemented a new directive in 2019, the Migrant Protection Protocols (MPP), otherwise known as the "Remain-in-Mexico" policy.[217] The Administration acted lawfully, pursuant to the authority granted under a provision of federal law ignored by prior Administrations. In particular, 8 U.S.C. § 1225(b)(2) specifies that in the case of immigrants who arrive "on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," they can be returned "to that territory" while their claims for asylum are pending.[218]

Under the MPP, "non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking to enter the United States from Mexico illegally or without proper documentation" are returned to Mexico while their asylum claim is being evaluated.[219] The MPP contains an exemption for unaccompanied minors and aliens who "would more likely than not" be subject to persecution in Mexico on account of their race, religion, nationality, membership in a particular social group, or political opinion.[220]

The MPP was issued only after successful negotiations with Mexico, which issued a statement on December 20, 2018, authorizing—for "humanitarian reasons"—the temporary entrance of aliens who were detained in the U.S. "and have received a notice to appear before an immigration judge."[221]

The MPP has been highly successful. In the 13 months it has been in effect, 60,000 aliens seeking asylum were returned to Mexico to await disposition of their claims.[222] Despite its success—or perhaps because of its success—litigation ensued to stop the policy. A federal district court issued a preliminary injunction against the MPP, an injunction upheld by the Ninth Circuit Court of Appeals but only for the border states within the jurisdiction of the Ninth Circuit, California and Arizona (not Texas and New Mexico).[223]

However, on March 11, 2020, the U.S. Supreme Court issued an order granting an emergency request for a stay of the preliminary injunction filed by the DOJ. The stay will remain in effect until the case is appealed on the merits to the Supreme Court and there is a final disposition of the case.[224]

This is a necessary and important policy. As the DHS says, the MPP "will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum."[225] And it stops smugglers and traffickers from using false asylum claims to entice "migrants to undertake the dangerous journey north where on the route migrants report high rates of abuse, violence, and sexual assault," allowing the smuggling cartels to "turn human misery into profit."[226]

DNA Testing of Family Units. One of the problems encountered by the DHS has been groups of illegal aliens caught at the southern border making false claims that they are "families" in order to exploit loopholes in federal immigration laws and unwise court decisions that allow actual families to stay in the U.S. indefinitely while awaiting protracted immigration court proceedings, avoiding detention and deportation back to their native countries.

Then–Acting DHS Secretary Kevin McAleenan reported in August 2019 that in the first nine months of FY 2019, there had been a *469 percent*

increase in the number of "family units" apprehended along the southwest border between ports of entry over FY 2018. By June 2019, almost 400,000 family units had been caught.[227] This "influx of family units has led to CBP facilities operating at unprecedented and unstainable capacity."[228]

As Gregory Nevano, DHS Assistant Director of Investigative Programs, told a Senate committee on June 26, 2019:

> Human smugglers are currently capitalizing on the trend of fraudulent families crossing the border.... The cartels and human smugglers are well versed in our inability to detain family units for the length of time necessary for their cases to be decided, in large part due to the *Flores* Settlement Agreement and judicial decisions that interpret it. By falsely claiming to be a legal family unit, migrants avoid detention and/or prosecution and are subsequently released after being processed in an expedited fashion.[229]

Almost all of these smugglers work for the dangerous and brutal Mexican drug cartels and often beat, assault, rob, and rape the individuals they are smuggling across the border.

As one would expect, many of these aliens never show up for their scheduled immigration hearings because they know they have no legal right to be in the country. They just disappear into the anonymity of the heartland after they are processed and released by the Border Patrol.

Since being part of a family is essentially a "Get-Out-of-Detention-Free" card, it should come as no surprise that a lot of fraud is apparently occurring. Nevano told the Senate committee that between mid-April and June 21, 2019, DHS teams of special agents sent to the southwest border identified 316 fake family units when they detected fraudulent documents being used by the aliens.

To prove beyond any doubt that fraud was happening, the DHS initiated a pilot DNA testing program in El Paso and McAllen, Texas, that ran from May 6 to May 10, 2019. The DHS tested 84 alleged family units (with their consent) during those four days: 16 turned out not to be related by blood. In other words, almost 20 percent of these supposed families were frauds.[230]

Nevano also related that Border Patrol agents said other "families" who were not selected for testing "voluntarily came forward and admitted they were part of a fraudulent family, as they heard/witnessed that DNA testing was being conducted."[231]

The second pilot DNA testing program identified 79 fake families out of 522 family units (15.13 percent). The DHS had identified 6,000 aliens who fraudulently claimed to be members of a family by August 2019.[232]

In fact, DHS has evidence that aliens and human smugglers are "renting"—and even *buying*—children to get into the country. Nevano said the DHS caught a 51-year old Honduran who admitted that the infant child he initially claimed was his son was actually purchased from the birth mother for the equivalent of $84. The Honduran had been previously deported two separate times in 2006 and 2013.

The DOJ finalized a new regulation, effective April 8, 2020, requiring DNA samples from all individuals who are arrested, facing charges, or convicted in U.S. courts, including aliens who are detained by federal authorities. This removed a prior regulation that allowed the secretary of the DHS to exempt certain detained aliens from DNA sampling.[233]

The loopholes in our immigration system—which Congress refuses to fix—are being exploited in a way that is not only dangerous to our security, but also for those who want to come into our country, albeit illegally. They are, sadly, abused, exploited, and even killed by human smugglers. DNA testing on alleged family units is a necessary component of any enforcement plan to minimize fraud at the border and the human suffering caused by the cartels that are intimately involved in the smuggling of aliens across the border.

Refugees

During the last year of the Obama Administration (FY 2017), the U.S. had the highest annual ceiling (110,000) of refugee admissions in more than 20 years.[234] This was concerning, especially given the large number of refugees fleeing the armed conflict in Syria, the difficulty of vetting the backgrounds of individuals from a war-torn area, and the rapidly growing asylum application backlog.

The Trump Administration quickly paused the U.S. Refugee Admissions Program (USRAP), lowered the FY 2017 admissions ceiling, and requested a security assessment of the program. The Administration subsequently faced a crisis on the southwest border with record numbers of aliens attempting to enter the U.S. by also claiming a fear of persecution. To address the ballooning claims of credible fear made at the southwest border and the increasing asylum application backlog, the President continued to lower the annual refugee admissions ceilings to shift resources to those legitimately seeking protection at our border. He also issued an executive order in September 2019 to ensure that states and localities are consulted before refugees are resettled in their communities.[235]

Refugee Admissions Ceiling. The INA authorizes the President, after consultation with Congress, to set the number of refugees who may be

admitted each fiscal year.[236] This number is a ceiling rather than a floor, but the number of actual admissions has historically tracked closely with the ceiling most years.

The Obama Administration justified setting the high number due to the Syrian civil war and large numbers of refugees in the Middle East and around the globe. Senior leaders in the FBI and Intelligence Community, however, had publicly stated that terrorists were infiltrating refugee populations traveling to Europe and noted there was inadequate information on Syrians, or those claiming to be from Syria, to safely vet them and detect terrorists among refugee groups.[237] Opponents of the Obama Administration's decision, including then-candidate Trump, expressed security concerns over the rush to bring in large numbers of Syrians with insufficient information.

Because the State Department's Bureau of Population, Refugees, and Migration and the USCIS typically view the annual ceiling as their admissions target, they prioritized processing refugee cases in FY 2017 to attempt to meet the ceiling.[238] The USCIS pulled asylum officers from other asylum casework to instead adjudicate refugee cases for FYs 2016 and 2017.[239] The asylum backlog grew larger as a result.

To illustrate the point, consider the following: At the end of FY 2012, the pending affirmative asylum caseload was approximately 15,000 cases;[240] by the end of January 2016, the pending affirmative asylum caseload was 133,710 cases[241]—and it reached 233,389 cases by the end of January 2017.[242] This was a direct result of Obama's policies.

When President Trump came into office, he directed a strategic pause of our refugee program operations to assess the program's security. On January 27, 2017, Trump issued Executive Order No. 13769, "Protecting the Nation from Foreign Terrorist Entry into the U.S." In it, he suspended the USRAP for 120 days, pending a review of the procedures for screening refugee applicants.[243] After 120 days, the executive order directed the Secretary of State to resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence jointly determined that such additional procedures were "adequate to ensure the security and welfare of the United States."[244]

President Trump also proclaimed in Executive Order No. 13769 that the continued admission of Syrian refugees was detrimental to U.S. interests, and suspended Syrian refugee admissions until the USRAP was reformed to ensure such admissions were consistent with the national interest.[245] He further proclaimed that the entry of more than 50,000 refugees in FY 2017 would be detrimental to the interests of the United States.[246] Because

opponents of Executive Order No. 13769 sued to delay implementation, President Trump revoked the January order and replaced it with a similar one in March 2017.[247]

Following that executive order, the State Department, DHS, and theIntelligence Community identified additional screening methods, identification tools, and anti-fraud measures to ensure that refugee applicants did not pose a threat to the security and welfare of the United States.[248] President Trump ended the USRAP suspension via an October 24, 2017, executive order, but directed the State Department and the DHS to continue to assess and address any risks posed by refugees.[249]

One overdue anti-fraud action undertaken by the USCIS involved resettled refugees who subsequently request a Refugee Travel Document (RTD) back to the native countries that were supposedly persecuting them—raising questions about the credibility of their refugee status.[250] A person with refugee or asylum status who wishes to travel outside the U.S. needs an RTD to return to the United States.[251] A sufficient number of RTD requests were from refugees seeking to travel back to their native countries, causing the USCIS to investigate these types of requests.

If a refugee voluntarily re-avails himself of the protection of his feared country, he may lose his refugee status under the law.[252] The USCIS should consistently and broadly investigate this and other types of refugee fraud. In addition, the USCIS should report such fraud to the State Department and the United Nations High Commissioner for Refugees (UNHCR), which are both upstream in the refugee admissions process, to bring more integrity to the program.[253] Refugee status is likely the most revered immigration benefit this country confers. The U.S. should ensure that those who apply for, and those who have received, refugee status have *bona fide* claims.

As the numbers of aliens arriving at our southwest border claiming asylum rose in FYs 2018 and 2019, the Trump Administration lowered the refugee admissions ceilings each corresponding fiscal year, as well as in FY 2020. For FY 2018, the Trump Administration set the ceiling at 45,000.[254] In setting that number, the Administration stated: "[I]t is important, when considering our nation's humanitarian response[,] to consider not only refugee resettlement, but also the work being done and the challenges confronted in providing asylum to tens of thousands of refugees who are already in the United States, many of whom have first made those claims upon arrival at the border or soon after crossing into the United States."[255]

For FY 2019, the Trump Administration set the refugee admissions ceiling at 30,000.[256] For FY 2020, it was set at 18,000.[257] For both years, the Administration emphasized the growing volume of credible-fear claims

and asylum applications, two humanitarian benefits that also involve adjudicating persecution claims.[258] In its FY 2020 report to Congress, the State Department cited the UNHCR statistic that the U.S. led the world in new asylum applications in calendar years 2017 and 2018.[259]

> These new cases simply added to the lengthy backlog of pending claims, undermining the integrity of the asylum system. They delay the grant of asylum to individuals who are legitimately fleeing persecution and have valid claims. Further, such delays are a pull factor for illegal immigration. By providing protection from removal, they create an incentive for those without lawful status to enter and remain in the United States. Asylum applicants also may obtain employment authorization after their asylum applications have been pending for six months, creating an incentive to file frivolous or fraudulent asylum applications.[260]

The Obama Administration used asylum officers to work on refugee cases because of the high resettlement ceiling. In contrast, USCIS under the Trump Administration shifted some refugee officers to work on the asylum backlog.[261]

The Trump Administration has received strong and repeated criticism for lowering the annual refugee admissions ceilings. Such critics, however, view the USRAP in isolation, rather than as one part of the humanitarian immigration equation—let alone one subpart of the U.S.'s generous overall immigration system. In addition to resettling an average of 75,000 refugees a year, the U.S. annually:

- Grants asylum to approximately 26,000 aliens;
- Provides lawful permanent resident status (green cards) to 1.1 million immigrants;
- Admits 182 million temporary visitors; and
- Naturalizes 700,000 new U.S. citizens.[262]

Critics of the current refugee admissions numbers do not discuss these other statistics or the fact that the U.S. provides, by far, the largest number of immigration benefits *in the world*.[263]

The decision of the Obama Administration to prioritize refugee admissions over asylum applications resulted in serious, negative consequences

for the affirmative asylum case backlog. Those consequences have been compounded by record numbers of credible-fear claims at our southwest border, as well as asylum applications. It is important to note that asylum applicants must prove the same elements to establish the legitimacy of a claim of fear of persecution as refugee applicants.

The difference between the two is this: Asylum applicants are already inside the U.S.; refugee applicants are abroad. Furthermore, credible-fear claims must be considered immediately, because the aliens asserting these claims are in detention. Given these operational realities and the crisis numbers the DHS has faced at our southwest border the past few years, it makes sense that the Trump Administration prioritized domestic cases involving claims of persecution over cases involving such claims made overseas by aliens who had many other countries to which they could apply for asylum, including the entire European Union.

States and Localities. In addition to lowering the annual refugee admission ceiling year after year, President Trump placed a spotlight on the effects that U.S. refugee resettlement has on states and localities. The law requires HHS's Office of Refugee and Resettlement to consult with state and local government officials regarding refugee resettlement in the community. The purpose of the consultations is to:

> (1) ensure a refugee is not initially placed or resettled in an area highly impacted by the presence of refugees or comparable populations, unless the refugee has an immediate family member residing in that area;
> (2) provide a mechanism for regular meetings between voluntary agencies' local affiliates and representatives of State and local governments to plan and coordinate, in advance of their arrival, the appropriate placement of refugees among the various States and localities; and
> (3) take into account:
>
> (a) the proportion of refugees and comparable entrants in the population in the area;
> (b) the availability of employment opportunities, affordable housing, and public and private resources (including educational, health care, and mental health services) for refugees in the area;
> (c) the likelihood of refugees placed in the area becoming self-sufficient and free from long-term dependence on public assistance; and
> (d) the secondary migration of refugees to and from the area that is likely to occur.[264]

In reality, those consultations occurred inconsistently, and states have complained about their limited ability to participate in resettlement planning.[265] President Trump's September 2019 executive order re-enforced the consultation requirement upon resettlement agencies.[266] In it, he stated that "[c]lose cooperation with State and local governments ensures that refugees are resettled in communities that are eager and equipped to support their successful integration into American society and the labor force."[267] He further required express communication by a state or locality with HHS and the State Department, indicating its consent to resettle refugees prior to the placement of refugees in that jurisdiction.[268]

Most states consented to resettlements in writing.[269] Texas Governor Greg Abbott (R), however, announced that the State of Texas would opt out of resettling refugees for FY 2020.[270] Texas has consistently resettled one of the largest groups of refugees each year.[271] In addition, Texas has been on the front line of the southwest border crisis. In his letter to U.S. Secretary of State Mike Pompeo, Governor Abbott voiced his position, writing that Texas had already been forced to "deal with disproportionate migration issues" due to federal inaction to fix a broken immigration system.[272] He added that "state and nonprofit organizations have a responsibility to dedicate available resources to those who are already here, including refugees, migrants, and the homeless—indeed, all Texans."[273]

The State Department sought to make its grant funding to resettlement agencies contingent upon the executive order's required consent by states. Predictably, however, refugee resettlement agencies sued the Administration and were granted a preliminary injunction against implementation of the executive order and the State Department's funding contingency.[274] Given the clear statutory requirement that states and localities be consulted prior to resettlement, the DOJ decided to appeal the issue, and that appeal is pending before the Fourth Circuit Court of Appeals.[275]

The refugee statutes grant the President broad authority to set the yearly refugee admissions ceilings. At the same time, the law upholds states' interest in their willingness and ability to resettle and assimilate refugee populations within their jurisdictions. President Trump has managed to take the middle ground between federal and states' rights. Faced with historic asylum application numbers due to the southwest border crisis, he has reasonably prioritized adjudicating asylum claims made at our front door over those made overseas. The Administration has also given the states a stronger voice in whether and where refugees resettle within their jurisdictions.

Parole Programs

Under the heading of "Temporary Admission of Nonimmigrants," the INA provides that the Secretary of Homeland Security may, in his discretion, *temporarily* parole into the United States any alien applying for admission under such conditions as the Secretary may prescribe, and *only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.*[276] Such a parole shall not be regarded as an admission of the alien into the U.S., and *when the purpose* of such parole, in the opinion of the Secretary of Homeland Security, *has been served, the alien shall immediately return* or be returned to the custody from which he was paroled and thereafter, he shall continue *to be treated as* any other *applicant for admission* to the United States.[277]

The classic scenario for parole in the immigration context is when an alien needs emergency surgery in the U.S. and does not have time to obtain a visa from the State Department ahead of time.[278]

Like many other parts of the INA, however, parole has been turned into something very different—and much more expansive—than originally intended. Past Administrations have used parole as a loophole to help groups or classes of aliens enter and remain in the U.S.—essentially acting as end runs around other sections of the INA that prohibit their admission. This systemic and deliberate abuse of parole defies Section 212(d)(5)(A) of the INA in that it is not case-by-case, for urgent humanitarian reasons or significant public benefit, or temporary.

When President Trump came into office,[279] the following programs were just *some* of the major parole programs that were available:

- The Central American Minor Refugee/Parole Program,
- The Cuban Family Reunification Parole Program,
- The Filipino World War II Veterans Parole Program,
- The Haitian Family Reunification Parole Program,
- The International Entrepreneur Parole, and
- Parole in Place.

In a January 25, 2017, executive order, President Trump wrote, "It is the policy of the executive branch to end the abuse of parole...provisions currently used to prevent the lawful removal of removable aliens."[280] He directed the Secretary of Homeland Security to "immediately take all appropriate action to ensure that the parole provisions...are not illegally exploited to prevent the removal of otherwise removable aliens." The executive order added that the Secretary "shall take appropriate action to ensure that parole authority...is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole."

Despite this clear and unambiguous directive, the Administration has been unable to end group parole programs quickly or easily, due to constituencies and interest groups for each program advocating for their continuation.

International Entrepreneurs Parole. The INA provides dozens of types of immigration benefits, including temporary and permanent benefits for investors, businesspeople, highly skilled aliens, and intracompany transferees. Because entrepreneurs did not fit the qualifications for those benefit types, the Obama Administration created yet another benefit avenue by publishing a final rule with a mere three days left in the Administration.[281]

The rule states that the DHS may use its parole authority to grant a period of authorized stay, on a case-by-case basis, to foreign entrepreneurs who "demonstrate that their stay in the United States would provide a significant public benefit through their business venture and that they merit a favorable exercise of discretion."[282] Under the rule, entrepreneurs granted parole are eligible to work only for their start-up business. The spouses and children of the foreign entrepreneur may also apply for parole and spouses may apply for work authorization.[283]

During the Trump Administration, the DHS published a delay of the rule's effective date from the original July 17, 2017, to March 14, 2018, to provide public comment on the DHS' proposal to rescind the rule pursuant to President Trump's executive order.[284] Opponents of the rule's delay sued, and on December 1, 2017, the U.S. District Court for the District of Columbia vacated the delay rule.[285] The USCIS implemented the Obama rule, in compliance with the court order.

On May 29, 2018, the DHS published a proposed rule to remove the prior final international-entrepreneur rule, stating it represents an overly broad interpretation of parole authority, lacks sufficient protections for U.S. workers and investors, and is not the appropriate vehicle for attracting and

retaining international entrepreneurs.[286] The DHS has not yet published the final rule.

Central American Minor Refugee/Parole Program. During the Obama Administration, in November 2014, the U.S. State Department and the DHS announced, via a fact sheet, the creation of a Central American In-Country Refugee/Parole Program in El Salvador, Guatemala, and Honduras "to provide a safe, legal, and orderly alternative to the dangerous journey that some children" were taking to the United States.[287] This Central American Minor (CAM) program allowed parents who were lawfully present in the U.S., though not a lawful permanent resident or U.S. citizen (and therefore not eligible to file an immigrant visa petition for the family member), to request access to the U.S. Refugee Admissions Program for their under-21, unmarried children still in one of those three countries.

The program went further. Believe it or not, children found ineligible for refugee admission, "but still at risk of harm," would be considered for parole into the U.S. to be reunited with a parent in the United States.[288] The Obama Administration expanded the parole program in July 2016, again through a press release, to add a child's over-21 and/or married siblings; biological parent, regardless of whether married to the U.S.-based parent; and caregivers related to the child or U.S.-based parent.[289]

Not only did this parole program clearly abuse the statutory language of parole, but the manner the Obama Administration created the program was an obvious violation of the Administrative Procedure Act. Using press releases to both create this dual refugee/parole program and to expand it provided no notice or opportunity for comments in the rulemaking process. This is similar to how the Obama Administration created the DACA and DAPA programs—by memo, without statutory authority or compliance with the notice and comment requirements of the APA.

The Trump Administration published a notice in the *Federal Register*, announcing termination of the CAM Parole program in August 2017.[290] Opponents of the termination filed suit. A U.S. district judge dismissed the plaintiffs' APA challenge to the DHS' termination of the CAM Parole Program going forward.[291] However, the court held that the DHS acted arbitrarily and capriciously when it failed to consider and address the "serious reliance interests" of participants who were conditionally approved for parole when the DHS mass-rescinded those approvals.[292] The parties reached a settlement agreement and jointly requested the court to convert the partial preliminary injunction into a permanent injunction.[293] Pursuant to the settlement agreement, the USCIS reopened and continued processing the CAM parole cases of individuals who had received a conditional parole

approval notice that the USCIS rescinded in 2017, following the program's termination.[294]

Haitian Family Reunification Parole Program. The USCIS created the Haitian Family Reunification Parole program via notice in the *Federal Register* in December 2014.[295] With the exception of "immediate relatives" of U.S. citizens (spouse, parent, and unmarried children under 21 years of age), the number of family-based immigrant visas that are available in any given year is limited by statute.[296] These statutory limits have resulted in family members having to wait in their home countries for years before they may join the U.S. citizen or lawful permanent resident family member in the U.S. who petitioned for them.

The Obama Administration decided that Haitians should be treated better than aliens in most other countries and be permitted to "wait" inside the U.S. for their immigrant visa (green card) to become available for up to *two years* after being paroled into the country. The USCIS justified the program as "expedit[ing] family reunification through safe, legal, and orderly channels of migration to the United States, increas[ing] existing avenues for legal migration from Haiti, and help[ing] Haiti continue to recover from the devastation and damage suffered in the January 12, 2010, earthquake."[297]

Under the Trump Administration, however, the USCIS announced in August 2019 that it would end the Haitian parole program.[298] The USCIS terminated the program through a lengthy wind down, using a form update.[299]

Filipino World War II Veterans Parole Program. In May 2016, the USCIS published a notice in the *Federal Register* to implement a parole program for certain Filipinos.[300] Like the Haitian Family Reunification Parole Program, this offered certain beneficiaries of approved family-based immigrant visa petitions an opportunity to request parole to come to the U.S. to "wait for" their immigrant visa numbers to become available. Due to annual country caps and oversubscription of Filipino family visa petitions, the Philippines has the longest wait time for family-based immigrant visas—up to 20 years.[301]

The notice explained that as many as 26,000 of the 260,000 Filipino soldiers enlisted to fight for the United States during World War II became U.S. citizens.[302] In 2016, an estimated 2,000 to 6,000 Filipino American World War II veterans were still alive in the United States, "many of whom greatly desire[d] to have their family members in the United States during their final days."[303]

At the same time that the USCIS announced it would end the Haitian Family Reunification Parole program, it also announced the termination of the Filipino World War II Veterans Parole program.[304] Like the Haitian

program, the Filipino program was terminated through a lengthy wind down process.[305]

Parole in Place. In November 2013, the USCIS created, via a policy memorandum, a parole program for illegal aliens who are family members of U.S. military members and veterans, and who are already in the United States.[306] The memo justified the illegal alien parole program, stating:

> [T]here is concern within [the Defense Department] that some active members of the U.S. Armed Services, individuals serving in the Selected Reserve of the Ready Reserve, and individuals who have previously served in the U.S. Armed Forces or Selected Reserve of the Ready Reserve face stress and anxiety because of the immigration status of their family members in the United States.... Similarly, our veterans, who have served and sacrificed for our nation, can face stress and anxiety because of the immigration status of their family members in the United States.[307]

Because the illegal alien family members were already in the U.S., they did not meet the statutory requirements of parole under Section 212(d)(5) of the INA. This did not prevent the Obama Administration from further abusing the law. The parole memo cited a Clinton Administration INS General Counsel opinion and stated that "[a]lthough it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called 'parole in place.'"[308]

In line with President Trump's executive order, the Administration has considered ending military parole in place. It has yet to do so, however.

H-1B Visas

The term "H-1B" visa refers to Section 101(a)(15)(H)(i)(b) of the INA, which defines the temporary visa for an alien coming to the U.S. to perform services in a specialty occupation or as a fashion model. The INA defines "specialty occupation" as an occupation that requires: (1) theoretical and practical application of a body of highly specialized knowledge; and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.[309]

H-1B visas became very popular among employers, starting in the 1990s high-tech boom. High-tech companies successfully lobbied for the

"American Competitiveness in the Twenty-First Century Act of 2000," which temporarily increased the American worker protection cap from 65,000 visas annually to as high as 195,000 H-1B visas annually for multiple years.[310] The annual cap eventually returned to 65,000, but demand from high-tech companies has not subsided.[311] Because employers apply for far more H-1B visas than are available each year, the USCIS administers a lottery to treat the employer petitioners fairly.[312]

The first 20,000 petitions filed on behalf of beneficiaries with a U.S. master's degree or higher are exempt from the cap.[313] Additionally, H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization are not subject to the 65,000 cap.[314]

American high-tech workers have complained about the H-1B program, contending that employers use the visas to pay lower wages for foreign workers instead of American workers.[315] Employers argue that they pay the prevailing wage to H-1B visa employees. Some American high-tech workers have reported that they were not only replaced by H-1B foreign workers—but that they had to train their foreign replacements.[316]

Then-candidate Trump pledged to end abuse of the H-1B program used to import foreign workers to replace American workers for lower pay.[317]

Buy American and Hire American. In April 2017, President Trump signed the "Buy American and Hire American" executive order.[318] The Buy American portion of Executive Order No. 13788 emphasized compliance with Buy American laws, which "require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods."[319] The Hire American portion of the Executive Order addressed immigration, specifically the H-1B visa program.

The Executive Order states: "[T]o create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad."[320] The President directed several cabinet members to propose new rules and issue new guidance "to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse."[321] He further requested reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries "to promote the proper functioning of the H-1B visa program."[322]

The Trump Administration made moderate policy, regulatory, and operational changes to the H-1B program before the onset of COVID-19. In June 2020, the President announced additional H-1B reforms to prioritize getting Americans back to work following the sudden historic COVID-related unemployment and to combat fraud in the program.

Rescinding the Deference Memo. The USCIS amended prior policy memos to enhance the integrity of the immigration system and to protect the interests of U.S. workers. In October 2017, it published a new memo to ensure H-1B petitioners meet the burden of proof when applying for extensions of their visa petitions. The USCIS rescinded an April 2004 memo, which had directed adjudicators to defer to prior determinations of eligibility when adjudicating petition extensions involving the same parties and underlying facts as the initial petition, except in certain limited circumstances.[323]

The USCIS explained that the fundamental issue with the April 2004 memorandum was that it appeared to place the burden on the USCIS to assess whether the underlying facts in the extension request remained the same as the original petition.[324] The 2017 memo reminded adjudicators that the burden of proof in establishing eligibility is, *at all times*, on the petitioner, even for extension requests. Further, the 2017 memo stated that because adjudicators viewed the 2004 memo as creating a default position of deference to the eligibility finding of the initial petition, the old memo may have had the effect of limiting the ability of adjudicators to conduct a thorough review of the facts and assessment of eligibility in each case.

This likely had the "unintended consequence of officers' not discovering material errors in prior adjudications," according to the 2017 memo.[325] The new memo re-asserted that adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought, including nonimmigrant petition extensions. The USCIS explained that "[w]hile adjudicators may, of course, reach the same conclusion as in a prior decision, they are not compelled to do so as a default starting point."[326]

Contracts and Itineraries Memo. In February 2018, the USCIS issued an H-1B policy memorandum regarding workers employed at one or more third-party worksites.[327] In the H-1B context, employers frequently use a third-party arrangement business model to petition for foreign workers. In these arrangements, the petitioner is not the high-tech company in which the alien beneficiary ultimately works, but rather a service company that petitions for many aliens and then places the alien workers at the service company's clients' locations.

The USCIS explained in its 2018 memorandum that it had encountered significant employer violations in the third-party model, including paying less than the required wage, "benching" employees (not paying workers the required wage while they wait for projects or work), and having employees perform non-specialty occupation jobs.[328] To protect the wages and working conditions of both U.S. and H-1B nonimmigrant workers, and to prevent fraud and abuse, the USCIS provided clarifying guidance regarding the contracts and itineraries that petitioners must submit in third-party worksite cases.

The USCIS stated that when an alien beneficiary will be placed at one or more third-party worksites, the visa petitioner must demonstrate that it has "specific and non-speculative qualifying assignments in a specialty occupation for the alien beneficiary for the entire time requested on the petition."[329] The memo explained that additional corroborating evidence, such as contracts and work orders, may substantiate a petitioner's claim of actual work in a specialty occupation for third-party, off-site arrangements.[330] The USCIS added that as "the relationship between the petitioner and beneficiary becomes more attenuated through intermediary contractors, vendors, or brokers, there is a greater need for the petitioner to specifically trace how it will maintain an employer–employee relationship with the beneficiary."[331] "Evaluating the chain of contracts and/or legal agreements between the petitioner and the ultimate third-party worksite may help USCIS to determine whether the requisite employer–employee relationship exists and/or will exist," the agency explained to adjudicators and the public.[332]

With respect to specialty occupation services that will be performed in more than one location, the USCIS stated that the prior itinerary memo's "allowance of general statements, as opposed to exact dates and places of employment, had been incorrectly interpreted by some adjudicators, and some members of the general public, as excusing the petitioner from having to submit an itinerary."[333] Accordingly, the agency reiterated that immigration regulations require petitioners to file an itinerary with a petition, which must include the dates and locations of the services to be provided.[334]

Opponents sued the USCIS over the Contract and Itineraries Memo,[335] resulting in a settlement agreement and the USCIS subsequently rescinded the memo and provided new guidance in June 2020.[336] Despite the memo rescission, the Trump Administration has sought to combat H-1B abuse and fraud, and protect both U.S. workers and foreign workers. To further those goals, the USCIS also created an H-1B Fraud Reporting site.

Reporting H-1B Fraud. In announcing the fraud reporting site, the USCIS explained that the H-1B visa program:

> [S]hould help U.S. companies recruit highly-skilled aliens when there is a shortage of qualified workers in the country. Yet, too many American workers who are as qualified, willing, and deserving to work in these fields have been ignored or unfairly disadvantaged. Employers who abuse the H-1B visa program may negatively affect U.S. workers, decreasing wages and opportunities as they import more foreign workers.[337]

Common examples of H-1B fraud include:

The H-1B worker is not paid the wage certified on the Labor Certification Application (LCA) made to the Department of Labor;

- A wage disparity between H-1B workers and other workers performing the same or similar duties, particularly to the detriment of U.S. workers;
- The H-1B worker is not performing the duties specified in the H-1B petition;
- The H-1B worker has less experience than U.S. workers in similar positions in the same company; and
- The H-1B worker is not working in the intended location as certified on the LCA.[338]

Administration Site Visits. The USCIS also changed its prioritization in investigating H-1B sites. Allowing administration site visits of H-1B locations is a requirement that employers and foreign workers must comply with to use the H-1B visa program.[339] Under the Obama Administration, the agency had been using a random site-visit approach. The Trump Administration changed to a smarter, targeted site-visit approach to focus resources where fraud and H-1B program abuse is more likely to occur, including:

- H-1B-dependent employers (those with a high ratio of H-1B workers as compared to U.S. workers);
- Cases in which the USCIS cannot validate the employer's basic business information through commercially available data; and
- Employers petitioning for H-1B workers who work off-site at another company or organization's location.[340]

Department of Justice Anti-Discrimination Cooperation. In May 2018, the USCIS and the DOJ issued a memorandum of understanding that expanded their cooperation "to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States."[341] In 2017, the DOJ's Civil Rights Division started the "Protecting U.S. Workers Initiative, which is aimed at targeting, investigating, and taking enforcement actions against companies that discriminate against U.S. workers in favor of foreign visa workers."[342] The Civil Rights Division's Immigrant and Employee Rights Section is responsible for enforcing the INA's anti-discrimination statute, which prohibits citizenship status and national origin discrimination in hiring, firing, or recruitment or referral for a fee.[343]

Providing More H-1B Data to the Public. To be more transparent about the H-1B Program, the USCIS under the Trump Administration has provided much more data to the public, including gender and country of origin data and an employer data hub. The new gender and country data confirmed what was long suspected about the H-1B program: H-1B petitions are dominated by aliens from India and China, and males receive many more petitions than females. In FY 2019, for example, India had almost 314,000 H-1B petitions, or 74.5 percent of all petitions.[344] Of that amount, 78.4 percent of the petitions were males.[345] China placed second, but far behind India. China received nearly 50,000 petitions, or 11.8 percent of the total.[346]

The data hub allows the public to search for H-1B petitioners by fiscal year (back to FY 2009), North American Industry Classification System (NAICS) code,[347] employer name, city, state, or ZIP code.[348] This gives the public the ability to calculate approval and denial rates and to review which employers are using the H-1B program.[349]

Prioritizing Advanced Degrees. To be consistent with the intent of the H-1B program that beneficiaries are truly occupying a "specialty occupation," the Trump Administration decided to prioritize beneficiaries with a master's degree or higher. The USCIS published a final rule in January 2019 that reversed the order by which the USCIS selects H-1B petitions under the H-1B regular cap and the advanced degree exemption.[350] Under the new rule, the USCIS first selects H-1B petitions submitted on behalf of all beneficiaries, including those who may be eligible for the advanced degree exemption.[351] The USCIS then selects a number projected to reach the advanced degree exemption from the remaining eligible petitions.[352] The purpose in changing the order in which the USCIS selects these allocations was to increase the number of petitions for beneficiaries with a master's or higher degree from a U.S. institution of higher education.

Electronic Registration. The second part of the January 2019 rule sought to improve the operational management of the H-1B petition and lottery system. Prior to the new rule, all petitioners would send complete paper applications to the USCIS with their application fee. The size of each paper petition is usually measured in pounds, due to the significant number of supporting evidentiary documents needed to prove eligibility for the visa. Each spring, truckloads of petitions would arrive at the USCIS service centers, where pallets of petitions would fill rooms to the ceiling. The USCIS would then operate the lottery, selecting enough petitions to reach the cap, and reject and return filing fees for all unselected cap-subject petitions. It was a burdensome process for both petitioners, many of whom are not selected, and for the USCIS.

The new rule required petitioners seeking H-1B visas to first register electronically with the USCIS.[353] The USCIS would run the lottery, considering only those who had properly registered. Then those petitioners that were selected from the lottery would be required to submit their complete petitions. This change was designed to ease the burden on both petitioners and the USCIS.[354] While this new electronic registration was announced in the January 2019 rule, the agency explained that the new process would not begin until the following fiscal year to allow for system testing. The USCIS did use the new electronic registration and lottery in March 2020.[355]

While the strong language of the Buy American and Hire American Executive Order directed the Administration to bring more integrity to, and combat fraud in, the H-1B visa program, the regulatory, policy, and operational changes that were made before the COVID-19 pandemic were more moderate than bold. The historic unemployment caused by the coronavirus and stay-at-home orders generated additional presidential proclamations to get Americans back to work.

On June 22, 2020, the President issued Proclamation 10052, "Suspending Entry of Aliens who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak."[356] In it, he suspended entry of various temporary labor categories, including new H-1B visa holders and their accompanying family members, for six months to prioritize employment opportunities for Americans during the coronavirus recovery.[357] The President also directed the Secretaries of Labor and Homeland Security to issue regulations to ensure aliens with H-1B visas do not disadvantage U.S. workers and to restore integrity to the H-1B program.[358]

The proposed H-1B changes include: issuing H-1Bs to the highest paying 85,000 jobs rather than using a random lottery; requiring that the minimum pay be at least 50 percent of the local prevailing wage; requiring employers to

increase H-1B visa holders' salaries after two years; measuring for displacement of American workers by H-1B employees; and the Labor Department investigating complaints of companies abusing the visa program.[359]

It is critical that the Administration bring more integrity to the H-1B Program to meet the intent of the program and to allow U.S. workers with specialized skills an opportunity to perform specialty occupation jobs—particularly following the effects of the coronavirus on the U.S. job market.

Conclusion

President Ronald Reagan is attributed to have once said, "A nation that cannot control its borders is not a nation." That sentiment is certainly correct. A country cannot remain an independent, sovereign nation if it is unable or unwilling to control its borders. A sovereign country with sound immigration policy controls who is allowed to come into the country, both temporarily and permanently, and selects future citizens, expecting them to become part of the cultural, intellectual, economic, and political body of the republic. This truth has not been lost on many Americans, who elected Donald Trump in 2016, in part, to fix a broken immigration system.

During the past three decades, the U.S. has faced a mounting immigration problem as an increasingly larger number of aliens have come into the country illegally, straining government resources, imposing huge costs on taxpayers and state and local governments, and endangering national security, public safety, and the rule of law.

The Constitution gives Congress plenary authority over naturalization. Congress has passed a series of complex laws governing immigration. They have delegated substantial authority to the President and the executive branch to make immigration decisions, including implementation and enforcement of immigration law. The President also has substantial, independent constitutional authority, and the duty, as commander in chief to protect the national security of the country, including at our borders.

There has been a reluctance by some prior Administrations, including the Obama Administration, to fully enforce the law. And Congress has failed to act to close some of the legislative loopholes that they created and they know are being taken advantage of by those who want to get into the country illegally.

President Trump was elected, in part, based on his promise to finally enforce federal immigration law, including securing the border, and to bring the growing problem of illegal immigration under control. He has tried to fulfill that promise from almost his first day in office through numerous

executive orders and directives to the key cabinet agencies like the DHS and the DOJ.

But change is difficult, even if that change is a pivot back to enforcing the law as written. Those wedded to the status quo and in favor of lax enforcement have much to lose—so they have sued the Administration at virtually every turn, even when the President was clearly acting within the statutory authority granted to him by Congress.

Numerous federal judges, particularly at the district court level, have issued nationwide injunctions not justified by the law, acting more like legislators who disagree with the President's policy decisions than judges enforcing the law. Most of these injunctions have been lifted or modified when those cases have reached the Supreme Court. But the President's attempts to solve these problems have often been successfully stymied and slowed down, endangering the nation and our legal immigration system—and providing even more incentives for illegal immigration.

This resistance has also stemmed from the push by those who support open borders and nonenforcement of our immigration laws and who want to extinguish the difference between legal and illegal immigration. To silence opposition, they resort to name-calling rather than engaging in a serious debate over immigration policy.

As we have outlined in this paper, despite immense resistance, the Trump Administration has made substantial progress reforming U.S. immigration policy and recommitting to enforcing the laws as passed by Congress. Those changes, many of which are well-known by the American people, were long overdue. Reforming government practices at the state or federal level is hard, as entrenched bureaucracies get accustomed to doing things a certain way and recoil at change. But the Administration forged ahead and over time, its hard work will make our immigration system function better for America and Americans.

Some of these changes are common sense, like making sure that courtrooms are used on Fridays, using DNA testing to disprove fraudulent claims of "family" status, or replacing porous, dilapidated border barriers with secure, effective modern walls and fencing. Others were long overdue, such as recommitting ourselves to the public-charge principle, rescinding unconstitutional executive actions like DACA, banning entry of people from countries that are terrorist havens and whose backgrounds cannot be vetted, and cutting off federal dollars to sanctuary cities that obstruct federal law. Others are transformational and forward thinking, such as pivoting from an outdated 20th-century family-based immigration system to a 21st-century merit-based immigration system that will benefit the country.

There is so much more work that needs to be done in the area of immigration law and policy. Most of the remaining work, such as fixing legislative loopholes, falls squarely in Congress's lap. Congress, however, has proven unable or unwilling to pass commonsense immigration legislation, so for now, all the action is in the executive branch.

Endnotes

1. See David F. Forte and Matthew Spalding, eds., *The Heritage Guide to the Constitution* (Washington, DC: The Heritage Foundation, 2005), p. 139. Throughout this *Special Report*, when referring to those people who are here in the country illegally, we use the term that Congress and the U.S. Supreme Court use: illegal alien. See also Hans von Spakovsky, "'Undocumented Immigrant' Is a Made-Up Term That Ignores the Law," The Daily Signal, July 30, 2018, https://www.dailysignal.com/2018/07/30/undocumented-immigrant-is-a-made-up-term-that-ignores-the-law/ (accessed May 27, 2020).
2. See, generally, James Carafano, John Malcolm, and Jack Spencer, eds., "An Agenda for American Immigration Reform," Heritage Foundation *Special Report* No. 210, February 20, 2019, https://www.heritage.org/immigration/report/agenda-american-immigration-reform.
3. See John Malcolm, "President Obama's Executive Action on Immigration Sets a Dangerous Precedent," Heritage Foundation *Issue Brief* No. 4313, December 5, 2014, https://www.heritage.org/immigration/report/president-obamas-executive-action-immigration-sets-dangerous-precedent.
4. Secure Fence Act of 2006, Public Law 109–367.
5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208.
6. Ibid., title I, § 102.
7. 16 U.S. Code § 1531 et seq.
8. 42 U.S. Code § 4321 et seq.
9. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102(c).
10. See Homeland Security Act of 2002, Public Law 107–296. See also 6 U.S. Code §§ 251, 291, and 8 U.S.C. § 1103(a)(1) and (5). Section 102 of the IIRIRA was subsequently amended to refer to the Secretary of Homeland Security. See 8 U.S.C. § 1103 note.
11. See *Animal Legal Defense Fund v. Department of Homeland Security*, Brief for the Federal Respondents in Opposition, October 2018, pp. 5–6, https://www.supremecourt.gov/DocketPDF/18/18-247/68385/20181029180420793_18-247%20-%20Animal%20Legal%20Defense%20Fund.pdf (accessed May 28, 2020). See also *Federal Register*, Vol. 70, No. 183 (September 22, 2005), pp. 55622–55623; *Federal Register*, Vol. 72, No. 12 (January 19, 2005), pp. 2535–2536; *Federal Register*, Vol. 72, No. 207 (October 26, 2007), p. 60870; and *Federal Register*, Vol. 73, No. 68 (April 8, 2008), pp. 19077 and 19078.
12. See *County of El Paso v. Chertoff*, No. 08-CA-196 (W.D. Tex. Sept. 11, 2008), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008); and *Sierra Club v. Ashcroft*, No. 04-cv-272 (S.D. Cal. Dec. 13, 2005).
13. *Federal Register* Vol. 82, No. 147 (August 2, 2017), pp. 35984–34985 (San Diego Waiver). The waiver set forth specific findings that a specified area in the United States Border Patrol's San Diego Sector is "an area of high illegal entry" and that there is a present "need to construct physical barriers and roads...in the vicinity of the border...to deter illegal crossings" in that area. Ibid. at 35,985.
14. See *Federal Register* Vol. 82, No. 175 (September 12, 2017), pp. 42829–42931 (Calexico Waiver). The waiver set forth specific findings that a specified area in the El Centro Sector is an area of "high illegal entry," and that there is "a need to construct physical barriers and roads in the vicinity of the border...to deter illegal crossings" in that area. The Calexico Waiver identified one project to be completed in furtherance of this goal: the replacement of existing primary fencing—which, like the fencing in San Diego, had been constructed in the 1990s using the outdated landing-mat style—and improvements to the existing patrol road within the project area. Ibid. As with the San Diego Waiver, the Calexico Waiver set forth specific findings that, "to ensure the expeditious construction of the barriers and roads" in the project area, "it [wa]s necessary" for the Secretary to waive specific laws under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102(c).
15. See Donald Trump, "Trump Transcript: President Trump's Full Speech on Immigration," January 8, 2019, https://abc11.com/politics/trump-transcript-President-trumps-full-speech-on-immigration/5039534/ (accessed May 28, 2020).
16. See Donald Trump, "Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States," Presidential Proclamation 9844, February 15, 2019, https://www.whitehouse.gov/Presidential-actions/Presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/ (accessed May 28, 2020).
17. See Hans von Spakovsky, "Trump Forced to Declare Emergency Because of Congressional Apathy, Negligence, and Incompetence," Heritage Foundation *Commentary*, February 19, 2019, https://www.heritage.org/homeland-security/commentary/trump-forced-declare-emergency-because-congressional-apathy-negligence.
18. *Sierra Club v. Donald Trump*, 140 S.Ct 1 (2019).
19. *United States House of Representatives v. Steven T. Mnuchin*, 379 F. Supp. 3d 8 (2019).
20. *State of California v. Trump*, 379 F.Supp.3d 928 (N.D. Cal. 2019).
21. *El Paso County, Texas v. Trump*, 407 F.Supp.3d 655 (W.D. TX 2019).
22. *El Paso County, Texas v. Trump*, Case No. 19-151144 (5th Cir. Jan. 8, 2020).

23. See Government Accountability Office, *Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, February 2017, p. 1, https://webcache.googleusercontent.com/search?q=cache:Ao17PAxwmYkJ:https://www.gao.gov/assets/690/682838.pdf+&cd=5&hl=en&ct=clnk&gl=us&client=firefox-b-1-d (accessed May 28, 2020).
24. See statement by Acting DHS Secretary Chad Wolf in Quinn Owen, "Trump Administration Announces Completion of 100 Miles of Border Wall Construction," ABC News, January 10, 2020, https://abcnews.go.com/Politics/trump-administration-announces-completion-100-miles-border-wall/story?id=68200934 (accessed May 28, 2020).
25. As shown in the previously mentioned Heritage Foundation *Special Report* on immigration, based on FY 2017 numbers, the United States admitted 1.127 million people into the country. Of those, 748,746 (66 percent) were family-sponsored and immediate relatives of U.S. citizens. Employment-based preferences were 137,855 or 12.2 percent of admissions. Moving to a merit-based immigration system would flip those numbers, so that two-thirds of admissions would be based on specific skills and other economic benefits to the United States. Family-based immigration would remain but be focused on a narrower class of *immediate* family members—and represent a much smaller percentage of total admissions. See Carafano et al., eds., "An Agenda for American Immigration Reform," p. 3.
26. Ibid., pp. 3–4. As highlighted in our report.
27. See Donald Trump, "Letter to House and Senate Leaders & Immigration Principles and Policies," October 8, 2017, https://www.whitehouse.gov/briefings-statements/President-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/ (accessed May 28, 2020).
28. The idea of a merit-based immigration system in the United States was not a new idea. Two months before the Administration sent the letter to Congress outlining its principles and policies, Senators Tom Cotton (R–AR) and David Purdue (R–GA) introduced the RAISE Act, which, among other things, advocated for a merit-based immigration system. See news release, "Cotton and Purdue Introduce the Reforming American Immigration for a Strong Economy Act," Office of Tom Cotton, August 2, 2017, https://www.cotton.senate.gov/?p=press_release&id=765 (accessed May 28, 2020).
29. The actual name of the program is the Diversity Immigrant Visa Program. See U.S. Department of State, "Diversity Visa Program: Entry," https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry.html (accessed May 28, 2020).
30. See Trump, "Letter to House and Senate Leaders & Immigration Principles and Policies."
31. Ibid.
32. James Carafano, John Malcolm, and Jack Spencer, eds., "An Agenda for Immigration Reform," Heritage Foundation *Special Report* No. 210, February 20, 2019, https://www.heritage.org/sites/default/files/2019-02/SR210_0.pdf. With respect to a merit-based system, the authors wrote,

    Congress should modify the family preference system and move to a new merit-based system of immigration. This shift from family-based to merit-based immigration would prioritize economically and fiscally beneficial immigration and better serve the national interest.

    Such a system should be designed in a way that recognizes that the market is the best and most objective way to identify those who will benefit the economy. This starts with requiring immigrants to have an offer of employment or financial means of self-support before entering the country. The government would not be picking winners and losers among industries, job categories, or immigrants. The offer of employment is an objective market signal. If there were more requests for green cards than were available, Congress could consider a limited points system that again would place emphasis on the market. Another approach would be to implement an auction system whereby employers would pay for the permits of the immigrant labor they need.

    For example, a company's offered compensation to the immigrant would have significant priority, as compensation provides objective evidence of market demand. Other heavily weighted factors could include financial resources and assets, educational achievement, professional credentials, job experience, and fluency in English. These factors, while not perfect or completely objective measures, are designed to focus on reasonable measures of economic and fiscal impact that avoid government micromanagement and burdening American taxpayers with higher levels of government welfare assistance.

    One way to ensure that merit-based green card candidates are indeed working or otherwise providing significant benefit to the U.S. would be to make their legal permanent residence conditional for the first several years. In order to transition from a conditional lawful permanent resident (LPR) to full LPR status, immigrants should be required to maintain employment for most of the conditional period even though they would be allowed to switch jobs. The total period of time required to hold a green card before becoming a citizen—five years— would remain unchanged, but a requirement that the holder not be a public charge before becoming a U.S. citizen could be added.
33. See Amy Swearer, "The Original Meaning of the Citizenship Clause and What the Clause Means Today," Heritage Foundation *Legal Memorandum* No. 243, May 14, 2019, https://www.heritage.org/sites/default/files/2019-05/LM-243.pdf.
34. Ibid. See also Hans von Spakovsky, "Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment," Heritage Foundation *Commentary*, October 30, 2018, https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment.

35. News release, "Federal Prosecutors Unseal Indictments Naming 19 People Linked to Chinese 'Birth Tourism' Schemes that Helped Thousands of Aliens Give Birth in U.S. to Secure Birthright Citizenship for Their Children," U.S. Department of Justice, January 31, 2019, https://www.justice.gov/usao-cdca/pr/federal-prosecutors-unseal-indictments-naming-19-people-linked-chinese-birth-tourism (accessed May 29, 2020), and news release, "Chinese National Pleads Guilty to Running 'Birth Tourism' Scheme that Helped Aliens Give Birth in U.S. to Secure Birthright Citizenship," U.S. Department of Justice, September 17, 2019, https://www.justice.gov/usao-cdca/pr/chinese-national-pleads-guilty-running-birth-tourism-scheme-helped-aliens-give-birth-us (accessed May 29, 2020).
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42. *Federal Register* Vol. 85, No. 16 (January 24, 2020), pp. 4219–4225.
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45. Heritage Foundation authors have written two research papers arguing that the Administration should give Immigration Judges Summary Judgment Authority to dispose of cases—and the ability to dismiss meritless cases on the pleadings. Furthermore, one paper pointed out the fact that immigration judges are the only judges at the state or federal level who do not have contempt authority—even though Congress passed a statute 23 years ago giving immigration judges contempt authority (but delegated to the Attorney General the task of writing the implementing rule). No Attorney General has written the contempt rule. (A draft rule was written during the Clinton Administration [*Federal Register*, Vol. 63, No. 12 (January 20, 1998) pp. 2901–2911], but not finalized.) Heritage has called on the Attorney General to write the rule in accordance with the statute, or, in the alternative, for Congress to pass a stand-alone statute giving immigration judges contempt authority—bypassing the Attorney General. Our research suggests that if immigration judges had summary judgment authority and the ability to dismiss cases on meritless pleadings, the current caseload would decrease by approximately *60 percent*. See Charles Stimson and GianCarlo Canaparo, "Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dismiss Meritless Cases," Heritage Foundation *Legal Memorandum* No. 247, July 18, 2019, https://www.heritage.org/sites/default/files/2019-08/LM247.pdf. See also Charles Stimson and GianCarlo Canaparo, "Authority Delayed Is Authority Denied: Giving Immigration Judges Contempt Authority," Heritage Foundation *Legal Memorandum* No. 249, August 8, 2019, https://www.heritage.org/sites/default/files/2019-08/LM249.pdf.
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47. See *Federal Register*, Vol. 84, No. 165 (August 26, 2019), and Charles Stimson and GianCarlo Canaparo, "Reorganizing This Immigration Office Isn't a 'Power Grab.' It's Common Sense," Heritage Foundation *Commentary*, September 12, 2019, https://www.heritage.org/immigration/commentary/reorganizing-immigration-office-isnt-power-grab-its-common-sense.
48. See U.S. Department of Justice, "About the Office."
49. *Federal Register*, Vol. 84, No. 165 (August 26, 2019).
50. See Immigration and Nationality Act, 8 U.S. Code § 1103(a)(1) (2009). The Attorney General can shape immigration policy by issuing binding rulings on legal questions. It provides: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter.... *Provided, however,* that determination and ruling by the Attorney General with respect to all questions of law shall be controlling" (emphasis added).
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52. Ibid.

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109. Jeff Sessions, "Implementation of Executive Order 13768: Enhancing Public Safety in the Interior of the United States," U.S. Department of Justice Memorandum, May 22, 2017, https://www.justice.gov/opa/press-release/file/968146/download (accessed May 29, 2020).
110. *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), rehearing *en banc* granted in part, opinion vacated in part, 2018 WL 4268817 (7th Cir. June 4, 2018) (vacating nationwide injunction), rehearing grant vacated, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); similar rulings were issued in *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019) (ruling as to notice and access conditions); *City of Philadelphia v. Attorney General*, 916 F.3d 276 (3rd Cir. 2019) (ruling as to all three conditions); and *City of Providence v. Barr*, No. 19-1802 (1st Cir. March 24, 2020) (ruling as to all three conditions).
111. Sanctuary jurisdictions routinely provide such access to federal law enforcement agencies such as the FBI who want to interview citizen criminals—illustrating that cities like Chicago are providing illegal aliens with *greater* protection than citizens.
112. *New York v. Barr*, 951 F.3d 84 (2nd Cir. Feb. 26, 2020).
113. Lisa Soronen, "2nd Circuit Rules Against Cities and States in Sanctuary Jurisdictions Case," National Conference of State Legislatures, February 27, 2020, https://www.ncsl.org/blog/2020/02/27/2nd-circuit-rules-against-cities-and-states-in-sanctuary-jurisdictions-case.aspx (accessed May, 29, 2020).
114. See U.S. Department of Justice, "Edward Byrne Memorial Justice Assistance Grant (JAG) Program," Bureau of Justice Assistance, https://bja.ojp.gov/program/jag/overview (accessed May 29, 2020).
115. News release, "Department of Homeland Security Suspends New Enrollment/ReEnrollment in CBP Trusted Traveler Programs for New York Residents," U.S. Department of Homeland Security, February 6, 2020, https://www.dhs.gov/news/2020/02/06/department-homeland-security-suspends-new-enrollmentreenrollment-cbp-trusted (accessed May 29, 2020).
116. Ibid.
117. Michael Gormley, "NY Sues Over Federal Suspension of 'Trusted Traveler Programs," *Newsday*, February 10, 2020, https://www.newsday.com/news/region-state/cuomo-trump-trusted-traveler-1.41674437 (accessed May 29, 2020).
118. Immigration and Nationality Act, § 244(a)(1).
119. Ibid., § 244(b)(1).
120. Ibid., § 244(b)(2).
121. Ibid., § 244(b)(3)(B).
122. Ibid., § 244(b)(3)(C).
123. U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "Temporary Protected Status: Calendar Year 2017 Annual Report," May 15, 2018, p. 3, https://www.uscis.gov/sites/default/files/Temporary_Protected_Status_Calendar_Year_2017_Annual_Report.pdf (accessed April 9, 2020). The Obama Administration decided to terminate TPS for Guinea, Liberia, and Sierra Leone on September 26, 2016, with effective dates of May 21, 2017. See ibid.
124. Sudan was designated in 1997, Honduras and Nicaragua in 1999, El Salvador in 2001, Haiti in 2010, South Sudan in 2011, Syria in 2012, and Nepal and Yemen in 2015. See U.S. Citizenship and Immigrations Services, "Temporary Protested Status Designated Countries," https://www.uscis.gov/humanitarian/temporary-protected-status (accessed April 9, 2020).
125. See *Federal Register*, Vol. 83, No. 108 (June 5, 2018), pp. 26074–26080.
126. See *Federal Register*, Vol. 85, No. 48 (March 11, 2020), pp. 14229–14235.
127. See U.S. Citizenship and Immigrations Services, "Temporary Protected Status Designated Countries."
128. See U.S. Citizenship and Immigration Services, "Immigration and Nationality Act," § 244(b)(5), https://www.uscis.gov/legal-resources/immigration-and-nationality-act (accessed June 1, 2020). U.S. District Court Judge Edward Chen enjoined USCIS from terminating TPS for beneficiaries from El Salvador, Haiti, Nicaragua, and Sudan in *Ramos v. Nielsen*, 18-cv-01554 (N.D. Cal). See U.S. Citizenship and Immigration Services, "Temporary Protected Status: Alerts," https://www.uscis.gov/humanitarian/temporary-protected-status (accessed April 9, 2020). The same district court agreed to the stipulated agreement in *Bhattarai v. Nielsen*, No. 19-cv-731 (N.D. Cal) that USCIS would extend TPS benefits and work authorization for beneficiaries from Honduras and Nepal, pending appeal of the *Ramos* injunction. See U.S. Citizenship and Immigrations Service, "Update on *Bhattari v. Nielsen*," https://www.uscis.gov/humanitarian/temporary-protected-status/update-bhattarai-v-nielsen (accessed April 9, 2020). On April 11, 2019, in *Saget v. Trump*, No. 18-cv-01599 (E.D.N.Y.), the U.S. District Court for the Eastern District of New York also enjoined the termination of TPS for Haiti, pending a final decision on the merits of the case. See U.S. Citizenship and Immigration Services, "Temporary Protected Status: Alerts."
129. Ibid.
130. Matthew Sussis, "The History of the Flores Settlement: How a 1997 Agreement Cracked Open Our Detention Laws," Center for Immigration Studies, February 11, 2019, https://cis.org/Report/History-Flores-Settlement (accessed April 1, 2020).
131. *Reno v. Flores*, 507 U.S. 292 (1993).

132. Ibid.
133. Ibid.
134. Senator Dianne Feinstein (D–CA) introduced the Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong., 2nd Sess., https://www.congress.gov/bill/106th-congress/senate-bill/3117 (accessed June 1, 2020); the Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong., 1st Sess., https://www.congress.gov/bill/107th-congress/senate-bill/121 (accessed June 1, 2020); the Unaccompanied Alien Child Protection Act of 2004, S. 1129, 108th Cong., 1st Sess., https://www.congress.gov/bill/108th-congress/senate-bill/1129 (accessed June 1, 2020) (passed Senate October 11, 2004); the Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong., 1st Sess., https://www.congress.gov/bill/109th-congress/senate-bill/119 (accessed June 1, 2020) (passed Senate December 22, 2005); and the Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong., 1st Sess., https://www.congress.gov/bill/110th-congress/senate-bill/844/text (accessed June 1, 2020). Senator Feinstein submitted her bill as an amendment (S.Amdt.1146) to S. 1348, the Comprehensive Immigration Reform Act of 2007. The amendment was agreed to in the Senate by a voice vote on May 23, 2007. See Comprehensive Immigration Reform Act of 2007, 110th Cong., 1st Sess., https://www.congress.gov/bill/110th-congress/senate-bill/1348 (accessed June 1, 2020). Representative Zoe Lofgren (D–CA) introduced the companion bill in the U.S. House of Representatives in multiple sessions of Congress. See Unaccompanied Alien Child Protection Act of 2001, H.R. 1904, 107th Cong., 1st Sess., https://www.congress.gov/bill/107th-congress/house-bill/1904 (accessed June 1, 2020); Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong., 1st Sess., https://www.congress.gov/bill/108th-congress/house-bill/3361 (accessed June 1, 2020); and Unaccompanied Alien Child Protection Act of 2005, H.R. 1172, 109th Cong., 1st Sess., https://www.congress.gov/bill/109th-congress/house-bill/1172 (accessed June 1, 2020).
135. Unaccompanied Alien Child Protection Act, H.R. 1904.
136. Homeland Security Act of 2002, Public Law 107–296, § 462(b).
137. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457, § 235(a)(2).
138. Ibid., § 235(a)(5)(D).
139. Ibid., § 235(c)(6).
140. Section 235(d)(7) of the TVPRA waives the safe third country and one-year application bars. It also gives initial jurisdiction of UAC asylum applications to asylum officers rather than immigration judges. The effect of this is to give UACs an additional opportunity for review of the asylum application.
141. Section 235(d) of the TVPRA requires adjudication of an SIJ application within 180 days and waives several grounds of inadmissibility: public charge, labor certification, presence without admission or parole, misrepresentation, stowaways, immigrants without documentation, and unlawful presence in excess of 180 days. It also provides assistance to SIJs, including federal reimbursement to states.
142. The SIJ classification was established by Congress in 1990 to provide a pathway to legal status for children in the U.S. foster care system who required court intervention to protect them from parental abuse, abandonment, or neglect. The U.S. Citizenship and Immigration Services (USCIS) noted in 2019 that "the SIJ classification has increasingly been sought by juvenile and young adult immigrants solely for the purposes of obtaining lawful immigration status and not due to abuse, neglect or abandonment by their parents." News release, "USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection," U.S. Citizenship and Immigration Services, October 15, 2019, https://www.uscis.gov/news/uscis-clarifies-special-immigrant-juvenile-classification-better-ensure-victims-abuse-neglect-and-abandonment-receive-protection (accessed April 7, 2020). The USCIS issued three Administrative Appeals Office–adopted decisions and reopened a comment period for an SIJ rule to realign the SIJ classification with congressional intent and address shortcomings in the regulations that threaten the integrity of the SIJ program. Ibid.
143. *Flores v. Johnson*, 212 F. Supp. 3d 864, 871-73 (C.D. Cal. 2015). In 2016, a three-judge panel of the Ninth Circuit Court of Appeals reaffirmed that *Flores* applies to all children, regardless of whether they are accompanied. *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).
144. *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015).
145. Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, "The U.S. Asylum System in Crisis: Charting a Way Forward," Migration Policy Institute, September 2018, p. 4, https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward (accessed March 31, 2020).
146. Amien Kacou, "Claiming Asylum Based on Domestic Violence," https://www.nolo.com/legal-encyclopedia/claiming-asylum-based-domestic-violence.html (accessed March 31, 2020).
147. Meissner, Hipsman, and Aleinikoff, "The U.S. Asylum System in Crisis," pp. 18–19.
148. Jamie Dupree, "White House Demands Congress Act on Illegal Immigration Loopholes," April 2, 2018, https://www.wpxi.com/news/politics/white-house-demands-congress-act-on-illegal-immigration-loopholes/725835769/ (accessed April 1, 2020).
149. Department of Homeland Security, "Memorandum for the Secretary," April 23, 2018, pp. 1–2, https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html (accessed March 31, 2020).
150. *Federal Register*, Vol. 83, No. 72 (April 13, 2018), pp. 16179–17181. Citing his January 25, 2017, executive order, "Border Security and Immigration Enforcement Improvements," in which he sought an end to the "catch and release" practice, the President stated more needed to be done "to enforce our laws and to protect our country from the dangers of releasing detained aliens into our communities while their immigration claims are pending." See Trump, "Enhancing Public Safety in the Interior of the United States."

151. U.S. Department of Justice, "Memorandum for Federal Prosecutors Along the Southwest Border," Office of the Attorney General, April 6, 2018, https://www.justice.gov/opa/press-release/file/1049751/download (accessed March 31, 2020). Section 1325(a) of Title 8 of the U.S. Code reads: "Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under [T]itle 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under [T]itle 18, or imprisoned not more than 2 years, or both."
152. Zolan Kanno-Youngs and Michael D. Shear, "Homeland Security Chief Spars with Democrats over Splitting Migrant Families," *The New York Times*, March 6, 2019, https://www.nytimes.com/2019/03/06/us/politics/kirstjen-nielsen-house-homeland-security-committee-testimony.html (accessed March 31, 2020).
153. Aaron Blake, "Kirstjen Nielsen's Mighty Struggle to Explain Separating Families at the Border, Annotated," *The Washington Post*, June 19, 2018, https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated/ (accessed March 31, 2020).
154. Donald Trump, "Affording Congress an Opportunity to Address Family Separation," June 20, 2018, Executive Order 13841, https://www.whitehouse.gov/Presidential-actions/affording-congress-opportunity-address-family-separation/ (accessed March 31, 2020). The President also instructed the Attorney General to promptly file a request with the U.S. District Court for the Central District of California to modify the *Flores* settlement agreement in a manner that would permit DHS to detain alien families together throughout the pendency of criminal proceedings for improper entry or any immigration proceedings. Ibid., § 3(e).
155. News release, "USCIS to Take Action to Address Asylum Backlog," U.S. Citizenship and Immigration Services, January 31, 2018, https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog (accessed March 31, 2020).
156. Ibid.
157. Ibid.
158. Ibid. See also, Meissner, Hipsman, and Aleinikoff, "The U.S. Asylum System in Crisis," p. 9, stating that the "high and growing level of EAD grants" suggest that, "as [asylum] processing times have grown, so too have incentives to file claims as a means of obtaining work authorization and protection from deportation, without a sound underlying claim to humanitarian protection."
159. U.S. Citizenship and Immigration Services, "USCIS Asylum Division Quarterly Stakeholder Meeting," August 7, 2018, p. 6, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_StakeholderPrivateAgenda_08072018Meeting.pdf (accessed March 31, 2020). In May 2019, the USCIS still reported a 30 percent decrease in affirmative asylum receipts. U.S. Citizenship and Immigrations Services, "USCIS Asylum Division Quarterly Meeting," May 20, 2019, pp. 2–3, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsylumStakeholderMeetingQA_05202019.pdf (accessed March 31, 2020).
160. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).
161. Meissner, Hipsman, and Aleinikoff, "The U.S. Asylum System in Crisis," p. 19.
162. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).
163. Ibid.
164. Ibid.
165. Ibid.
166. Following the Attorney General's decision, the USCIS issued guidance to its asylum officers to instruct application of the decision in its varying types of benefit interviews. U.S. Department of Homeland Security, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-," U.S. Citizenship and Immigration *Appeals Policy Memorandum*, July 11, 2018 https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf (accessed April 1, 2020). U.S. District Court Judge Emmet Sullivan enjoined the USCIS from applying its guidelines to credible-fear interviews. *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). The USCIS and DOJ subsequently issued revised guidance, via e-mail, to align with the court order. See American Immigration Lawyers Association, "USCIS Released Updated Guidance in Light of Court Order in *Grace v. Whitaker*," December 19, 2018, https://www.aila.org/infonet/uscis-updated-guidance-grace-v-whitaker (accessed June 1, 2020), and American Immigration Lawyers Association, "EIOR Releases Memo Establishing Interim Policy and Procedures for Compliance with Court Order in *Grace v. Whitaker*," December 19, 2018, https://www.aila.org/infonet/eoir-interim-policy-compliance-grace-v-whitaker (accessed June 1, 2020).
167. *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).
168. Ibid., p. 582.
169. *Matter of S-E-G-*, 24 I&N Dec. 579, pp. 586–587 (BIA 2008).
170. *Matter of L-E-A- and SAP v. Barr*, Clinic Legal, https://cliniclegal.org/resources/asylum-and-refugee-law/matter-l-e-and-sap-v-barr (accessed April 6, 2020).

171. Kirstjen Nielsen, testimony before the Committee on the Judiciary, U.S. House of Representatives, December 20, 2018, https://www.dhs.gov/news/2018/12/20/written-testimony-dhs-secretary-nielsen-house-committee-judiciary-hearing-titled (accessed April 2, 2020). In her testimony, DHS Secretary Nielsen noted that "[n]early half of the cases completed by DOJ in FY 2018 involving aliens from the Northern Triangle countries of El Salvador, Guatemala, and Honduras who had a positive credible fear failed to file an asylum application with the immigration judge or failed to appear at all."
172. U.S. Department of Homeland Security, "Credible Fear Workload Report Summary: FY2019 Total Caseload," U.S. Citizenship and Immigration Services January 14, 2020, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf (accessed April 2, 2020).
173. U.S. Department of Justice, "Adjudication Statistics," Executive Office for Immigration Review, October 23, 2019, https://www.justice.gov/eoir/page/file/1062976/download (accessed April 2, 2020).
174. Camilo Montoya-Galvez, "Border Patrol Agents Now Screening Migrants for 'Credible Fear' Under Controversial Pilot Program," CBS News, September 20, 2019, https://www.cbsnews.com/news/us-border-patrol-cbp-agents-now-screening-migrant-families-for-credible-fear-under-controversial-pilot-program/ (accessed April 2, 2020).
175. Ibid.
176. News release, "FOIA Lawsuit Demands Information About CBP Officers' Role in Credible Fear Interview Process," American Immigration Council, October 2, 2019, https://www.americanimmigrationcouncil.org/litigation/foia-lawsuit-demands-information-about-cbp-officers-role-credible-fear-interview-process (accessed April 2, 2020).
177. 8 U.S. Code § 1158(a)(2)(A) (2008).
178. *Federal Register*, Vol. 84, No. 136 (July 16, 20199), pp. 33829–33845, https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications (accessed April 3, 2020).
179. Ibid. The new bar established by this rule does not apply to withholding or deferral of removal proceedings. Aliens who fail to apply for protection in a third country of transit may continue to apply for withholding of removal under the INA and deferral of removal under regulations implementing U.S. obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See United Nations, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Office of the High Commissioner, December 10, 1984, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (accessed June 1, 2020).
180. One case was filed in San Francisco (*East Bay Sanctuary Covenant v. Barr*, No. 19-04073) and one in Washington, D.C. (*CAIR Coalition v. Trump*, No. 19-2117).
181. Miriam Jordan and Zolan Kanno-Youngs, "Trump's Latest Attempt to Bar Asylum Seekers is Blocked After a Day of Dual Rulings," *The New York Times*, July 24, 2019, https://www.nytimes.com/2019/07/24/us/asylum-ruling-tro.html?searchResultPosition=1 (accessed April 3, 2020).
182. Vishnu Kannan, "Court Grants Preliminary Injunction in Challenge to Asylum Ban," Lawfare, July 24, 2019, https://www.lawfareblog.com/court-grants-preliminary-injunction-challenge-asylum-ban (accessed April 3, 2020), and *East Bay Sanctuary Covenant v. Barr*, No. 19-04073, https://assets.documentcloud.org/documents/6213167/7-24-19-East-Bay-Sanctuary-Asylum-TRO.pdf (accessed April 3, 2020).
183. *East Bay Sanctuary Covenant v. Barr*, ___ F.3d. ___ (9th Cir. 2019), http://cdn.ca9.uscourts.gov/datastore/general/2019/08/16/19-16487o.pdf (accessed April 3, 2020).
184. News release, "East Bay v. Barr: Order Granting Motion to Restore Nationwide Scope of Injunction," American Civil Liberties Union, September 11, 2019, https://www.aclu.org/legal-document/east-bay-v-barr-order-granting-motion-restore-nationwide-scope-injunction (accessed April 3, 2020).
185. *Barr v. East Bay Sanctuary Covenant*, 588 U.S. ____ (2019), https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf (accessed April 3, 2020).
186. 8 Code of Federal Regulations § 208.13(b)(3) (2019) states:

    > [A]djudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.
    >
    > (i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.
    >
    > (ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

187. News release, "Asylum and Internal Relocation Guidance," U.S. Citizenship and Immigration Services, July 26, 2019, https://www.uscis.gov/news/news-releases/asylum-and-internal-relocation-guidance (accessed April 3, 2020).

188. Ibid.
189. News release, "USCIS Asylum Memo: Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children," May 31, 2019, https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/uscis-asylum-memo-updated-procedures-for-asylum-applications-filed-by-unaccompanied-alien-children-may-31-2019 (accessed April 3, 2020).
190. U.S. Citizenship for Immigration Services, "Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children," Memorandum, May 28, 2013, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf (accessed April 6, 2020).
191. U.S. Citizenship and Immigration Services, "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children," Memorandum, May 31, 2019, https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/uscis-asylum-memo-updated-procedures-for-asylum-applications-filed-by-unaccompanied-alien-children-may-31-2019 (accessed April 6, 2020).
192. Ibid.
193. Ibid.
194. *J.O.P. v. U.S. Dept. of Homeland Security, et. al*., Case GHJ19-1944 (S.D. MD), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/J.O.P._v._U.S._Dept._of_Homeland_Security_et._al._Civil_Action_819-cv-01944.pdf (accessed April 3, 2020).
195. Ibid.
196. Ibid.
197. U.S. Citizenship and Immigrations Services, "USCIS Asylum Division Quarterly Meeting," p. 4.
198. The lesson plan included standards to be used while the *Grace v. Whitaker* injunction is in place and standards to be used if the injunction is lifted. See *Grace v. Whitaker*, *supra* note 154, and American Immigration Lawyers Association, "Updated Credible Fear Lesson Plans Comparison Chart," May 30, 2019, https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison (accessed April 6, 2020). The lesson plan also analyzes *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), implying that the well-founded fear threshold may actually be higher than 10 percent because facts in that case were unusual.
199. News release, "IRAP & RAICES File Challenge to Trump Administration's Latest Attack on Asylum Seekers," International Refugee Assistance Project, July 1, 2019, https://refugeerights.org/irap-and-raices-file-challenge/ (accessed April 6, 2020).
200. *Kiakombua v. McAleenan*, Case 19-01872 (D.D.C. 2019).
201. News release, "USCIS Proposes to Adjust Fees to Meet Operational Needs," U.S. Citizenship and Immigration Services, November 8, 2019, https://www.uscis.gov/news/news-releases/uscis-proposes-adjust-fees-meet-operational-needs (accessed April 6, 2020).
202. *Federal Register*, Vol. 84, No. 220 (November 14, 2009), pp. 62280–62371.
203. Ibid.
204. Ibid., p. 62293.
205. Ibid., p. 62298.
206. Ibid., p. 62318.
207. Ibid.
208. Ibid., pp. 62318–62319. The USCIS did not propose a filing fee for UACs in removal proceedings who file an asylum application.
209. *Federal Register*, Vol. 85 (June 26, 2020), pp. 38532-38628, https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants (accessed June 26, 2020).
210. Because the one-year asylum application filing deadline does not apply to UACs, the rule does not propose to exclude UACs from an EAD based on the one-year filing deadline.
211. *Federal Register*, Vol. 85, pp. 38626-38628.
212. U.S. Office of Management and Budget, "Agency Rule List: Fall 2019," Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1615-AC47 (accessed April 7, 2020).
213. Ibid. In his June 22, 2020, Proclamation, President Trump directed the Secretary of Homeland Security "to prevent certain aliens who have final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States." Donald Trump, "Presidential Proclamation Suspending Entry of Aliens who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak," Presidential Proclamation 10052, June 22, 2020, https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/ (accessed June 24, 2020).
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