

UNSEEN POLICIES: TRUMP'S LITTLE-KNOWN IMMIGRATION RULES AS EXECUTIVE POWER GRAB

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ABSTRACT

Throughout the Trump presidency, immigration “horror stories” riveted Americans and people across the globe. Over the past four years, splashy headlines highlighted the United States government’s dehumanization and penalization of immigrants, from travel bans, to family separation, to the Wall. These stories not only captured public attention but also masked less sensational yet unjust executive rules that allowed the Trump administration to overhaul the immigration landscape and maximize executive power without changing a single immigration statute. Unseen policies of expanded enforcement, partisan immigration court controls, strategic administrative precedents, and tightened regulations have all been part of the Trump administration’s complex web of practical and legal barriers for immigrants.

This Article argues that President Trump and his administration have successfully exploited the power delegated to the executive branch, in part, by advancing policies that are out of the public’s view and which require the exercise of delegated powers at unprecedented levels. Within the humanitarian, enforcement, and bureaucratic realms, the Administration’s “unseen policies” impacted the day-to-day lives of immigrants, transformed the operation of our immigration system, and undermined the rule of law. This Article explores the detrimental impact of under-the-radar executive changes in these categories and offers broad solutions. Ultimately, to return to the rule of law and establish a humane immigration system, lawyers and policy makers from the Biden administration, and beyond, must identify and strategize around these quotidian, unseen policies as well as the well-known challenges.

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INTRODUCTION

A tiny toddler clad in a bright-pink shirt and matching sneakers stares up at her mother, a look of terror across her face. Most of her mother's body is blocked by the frame of a border patrol agent administering a pat-down. The

girl is crying, scared, her face illuminated by the lights of patrol cars shining on her that night at the United States-Mexico border.

Perhaps you, too, remember this haunting, heart-wrenching photograph¹ that went viral in the summer of 2018 and symbolized the Trump administration's "zero tolerance" family separation policy. The girl and her mother were Honduran asylum-seekers who crossed the Rio Grande near McAllen, Texas, in June 2018.² At the time, the Administration was separating thousands of children from their parents after they crossed the border,³ executing a policy crafted to deter asylum-seekers.⁴ This family separation provoked outrage from both sides of the aisle⁵ and censure from international bodies.⁶ Although the policy officially ended⁷ after enormous public outcry, families and their advocates still suffer the impacts today.⁸

However, what the photo of the little girl in the pink shirt failed to capture was the intricate web of executive policies that the child and her parent would have to navigate on their quest for asylum and the vast array of additional administrative hurdles enacted later.⁹ The photo also could not express the simultaneous, unseen executive changes limiting relief for other vulnerable immigrants. For example, that very same spring, the Trump administration quietly reinterpreted the legal provisions for Special Immigrant Juvenile

1. Lulu Garcia-Navarro, 'It Was Hard to Take These Pictures, Knowing What Was Coming Next,' NPR NEWS (June 17, 2018, 8:12 AM), <https://www.npr.org/sections/pictureshow/2018/06/17/620775153/a-photojournalist-at-the-border> (interview with photographer John Moore of Getty Images).

2. John Moore (@jbmooorephoto), INSTAGRAM (June 13, 2018), https://www.instagram.com/p/Bj-Us3Fn_IS/?utm_source=ig_embed.

3. See Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR NEWS (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>.

4. Julia Ainsley & John Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Say Officials*, NBC NEWS (Aug. 20, 2020, 3:15 PM), <https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416> (stating that the "separation of families [was] not as an unfortunate byproduct but as a tool to deter more immigration."); Richard Gonzales, *Sessions Says 'Zero Tolerance' for Illegal Border Crossers, Vows to Divide Families*, NPR NEWS (May 7, 2018, 8:17 PM), <https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>; see generally Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

5. David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, GUARDIAN (June 19, 2018, 14:23 EDT), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans>.

6. *UN Office Calls on US to Stop Separating Families at Border*, AP NEWS (June 5, 2018), <https://apnews.com/article/133271c91ef746bc83a43ba8e31aad1d>.

7. Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).

8. See, e.g., Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES, (Oct. 20, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html?smid=tw-share> (discussing ongoing separation of families); Caitlin Dickerson, *Migrant Children are Being Expelled to Mexico*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html?action=click&module=Top%20Stories&pgtype=Homepage> (discussing removal of Central American children to Mexico).

9. See generally Lindsay M. Harris, *Asylum Under Attack*, 67 LOY. L. REV. 1 (2020) (explaining many of Trump's asylum restrictions in detail).

Status, reducing availability of this important visa for children who were abused, neglected, or abandoned by a parent.¹⁰

Hallmark Trump administration immigration policies—including family separation, the Muslim Bans,¹¹ the Wall,¹² and the Migrant Protection Protocols (or “Remain in Mexico”)¹³—supplemented with anti-immigrant rhetoric,¹⁴ captured the national attention and set the tone of Trump’s immigration policy as “aspiring authoritarianism.”¹⁵ For example, the sudden Muslim ban executive order was a severe disruption to the normal immigration processes, seemingly at the despotic whim of the new President. Chaos ensued¹⁶ and protests erupted at airports across the country.¹⁷ The public outcry was met by legal activism as lawyers volunteered in shifts to provide counsel to travelers¹⁸ and multiple legal organizations immediately filed lawsuits.¹⁹ Similarly, inhumane policies at the border and in detention centers

10. See Liz Robbins, *A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>.

11. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); see also SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 7–8 (2019) (explaining that the term “Muslim Ban” is not entirely accurate, but better captures the greatest impact of the policy because it overwhelmingly targets nations that are majority-Muslim); Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA L. REV. 1444, 1479–80 (2019) (explaining how the administration targeted Muslims with these travel bans).

12. Mark Niquette, *The Border Wall That the U.S., Not Mexico, Is Paying For*, BLOOMBERG NEWS (Sept. 1, 2020, 10:45 AM), <https://www.bloomberg.com/news/articles/2020-09-01/the-border-wall-that-u-s-not-mexico-is-paying-for-quicktake>.

13. Johnathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico>.

14. See Laila Hlass, *Adultification of Immigrant Children*, 34 GEO. IMMIGR. L. J. 199, 222–23 (2020) (arguing that “in tandem with anti-immigrant policies, Trump’s administration has used explicitly and implicitly biased discourse attacking immigrants as a whole” with specific attacks on migrant children and Latinx immigrants); see also Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants Than Any American in History*, WASH. POST (Nov. 7, 2019, 10:03 AM), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html (noting that while the recent discourse has been extreme, Trump and his administration joined a long history of anti-immigrant rhetoric that influences policing of immigrants); see Karla McKanders, *America’s Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L. J. 197, 204 (2015) (“[T]here is a complex interplay between the terminology used to describe immigrant populations in the media and by elected state and local officials and how daily rhetoric can transform into policing policies that are implemented against immigrant communities.”).

15. See Stephen B. Burbank, *Reconsidering Judicial Independence: Forty-Five Years in the Trenches and in the Tower*, 168 U. PA. L. REV. ONLINE 18, 34 (2019) (referring to the first two years of the Trump administration as a “time of aspiring authoritarianism in the executive branch.”).

16. See, e.g., Yeganeh Torbati, Jeff Mason & Mica Rosenberg, *Chaos, Anger as Trump Order Halts Some Muslim Immigrants*, REUTERS (Jan. 28, 2017), <https://www.reuters.com/article/us-usa-trump-immigration-chaos/chaos-anger-as-trump-order-halts-some-muslim-immigrants-idUSKBN15COLD>; see also Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 569 (2018) (discussing the travel ban executive order as a political and legal matter).

17. See, e.g., *Protests Erupt at Airports Following Trump Travel Ban*, AP NEWS (Jan. 29, 2017), (listing protests in major cities across the U.S.).

18. See, e.g., *Airport Clinics served families and passengers impacted by the Muslim travel ban*, ONEJUSTICE, <https://onejustice.org/airportclinics/> (last updated Dec. 6, 2017); see also WADHIA, *supra* note 11, at 9.

19. See, e.g., *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Jan. 5, 2021).

spurred public outrage, action, and advocacy²⁰ as the public received reports of detained children without access to soap²¹ and detained women forced to undergo hysterectomies.²²

Yet, the public focus on the most captivating stories helped to obscure²³ hundreds of more quotidian, but equally damaging, immigration laws and policies established by the Trump administration through executive orders, rulemaking, and statutory reinterpretation.²⁴ These invisible changes do not inspire an easily digestible news story or activist social media post,²⁵ but they have an outsized impact on immigrants, the immigration system, and the accumulation of power in the executive branch. Thus, while numerous writers have provided in-depth analysis of various Trump immigration policies throughout the past four years,²⁶ this Article instead reviews some of the

20. See, e.g., Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C.L. REV. 1967, 2009 (2020) (explaining that Trump's prosecution policies have "proven unpopular with wide sectors of the American public. Community members, judges, elected officials, clergy, public defenders, and leaders of nonprofit organizations have called the border practices of the Trump administration inhumane, cruel, and unlawful.").

21. Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html?fbclid=IwAR2qvSsa-MAZMMVv6xdrK1s_P0XASMrvDoP6GWFMyg52186dvyCiXC DngNo#click=https://t.co/98pCyrvPML.

22. See Miranda Bryant, *Allegations of Unwanted Ice Hysterectomies Recall Grim Time in US History*, THE GUARDIAN (Sept. 21, 2020, 3:00 AM EDT), <https://www.theguardian.com/us-news/2020/sep/21/unwanted-hysterectomy-allegations-ice-georgia-immigration>.

23. Felipe De La Hoz, *Horror Stories*, THE BAFFLER (Sept. 28, 2020), <https://thebaffler.com/latest/horror-stories-de-la-hoz/>; see also *Race and Immigration in Trump's America*, WORDS MATTER (July 22, 2019), <https://shows.acast.com/words-matter/episodes/race-and-immigration-in-trumpns-america> (discussing how issues like "build the wall" have captured public attention, but how the public was largely unaware of regulations issued in July 2019 that required asylum applicants to apply for asylum first in countries they have transited through); see also *infra* Part II A.

24. See Catherine Rampell, *Opinion, Trump Didn't Build His Border Wall With Steel. He Built it With Paper*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/opinions/2020/10/29/trump-immigration-daca-family-separation/?arc404=true&itid=lk_inline_manual_1 ("The legal immigration system, to be clear, has long been broken. But since Trump took office, his aides have undertaken some 450 mostly technical, executive actions that have disfigured the system almost beyond recognition. Some changes rig the criteria for who counts as a "good" immigrant so that virtually no one qualifies. Some essentially try to trick still-eligible applicants into filling out their paperwork incorrectly."); Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL. INST. (July 31, 2020) <https://www.migrationpolicy.org/news/mpi-report-catalogs-immigration-executive-actions-trump-presidency; 100+ Policies That Have Devastated Immigrants and Asylum Seekers>, IMMIGRANT LEGAL RESOURCE CTR. (last visited Jan. 7, 2021), https://www.ilrc.org/immigration-attacks?fbclid=IwAR30W4RnyeMvof5XHdZnhxTydBn4JhtBZA9j40qwY60Ilc9DU1Ddr1z_4A#top.

25. See Terry Nguyen, *How Social Justice Slideshows Took Over Instagram*, VOX (Aug. 12, 2020, 7:00 AM), [https://www.vox.com/the-goods/21359098/social-justice-slideshows-instagram-activism; @nowthisnews, TWITTER \(Oct. 21, 2020, 11:13 AM\), https://twitter.com/nowthisnews/status/1318933559818801152](https://www.vox.com/the-goods/21359098/social-justice-slideshows-instagram-activism; @nowthisnews, TWITTER (Oct. 21, 2020, 11:13 AM), https://twitter.com/nowthisnews/status/1318933559818801152).

26. While some of the policies I cover will overlap with those mentioned in others' work, I focus on select lesser-known policies to illustrate the unseen, yet comprehensive web of restrictions that the Trump administration has crafted. I do not provide an in-depth view of all changes to a specific process, such as asylum, as others have focused articles on such topics. See generally Harris, *supra* note 9, (discussing Trump's attack on asylum in great detail); Laila Hlass, *Adultification of Immigrant Children*, 34 GEO. IMMIGR. L. J. 199 (2020) (explaining how Trump's policies have negatively impacted immigrant children); Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48 (Feb. 2020) (detailing agency actions that have led to injustice in immigration courts); Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 487–89 (2020) (covering many Trump policies such as the Muslim ban, asylum restrictions, and refugee caps);

most damaging, yet largely unseen policies across the immigration landscape. Because many of these policies were in litigation or otherwise in flux during the writing of this piece, the information about these policies is current only to January 2021 and the close of the Trump administration. This Article suggests high-level fixes targeted at specific governmental entities operating in today's immigration system, with the overarching goal of increased separation of powers and democratic accountability in the executive branch.

Part I offers a theory of unseen policies, explaining that they are impactful on multiple levels, from the individual immigrant, to the immigration system, to the separation of powers in our democracy. The next parts detail examples of such policies within various realms of the immigration landscape: Part II highlights humanitarian policies; Part III focuses on bureaucratic changes; Part IV homes in on select enforcement policies; and Part V addresses lesser-known immigration court problems. In each of these Parts, I propose immediate and long-term fixes for the next administration and discuss how these changes demonstrate the Trump administration's impact on the rule of law in the immigration context.

I. A THEORY OF UNSEEN POLICIES

“With the inauguration of President Trump, U.S. immigration policy shifted radically, although not one immigration statute changed between the two presidencies,” noted Professor Jerry L. Mashaw and co-author David Berke.²⁷ Instead, through “operational policy choices,”²⁸ executive orders, and regulations, Trump implemented changes to the immigration system outside the bounds of legislation. Trump's splashy policies, such as the Muslim Ban and Deferred Action for Childhood Arrivals (DACA) rescission, were politically charged and highly visible tactics met with nearly immediate legal challenges.²⁹ Litigation stymied these and many other well-known immigration policy changes—at least at first.³⁰ Some policies, like the attempt to roll back visas for students completing all-online coursework during the COVID-

Wadhia, *supra* note 11 (explaining various forms of increased immigration enforcement, including the Muslim bans); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019) (discussing Trump immigration policies as they connect to white supremacist rhetoric and goals); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019) (explaining how the Trump administration has marshalled state and local power in federal immigration enforcement); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 604–06 (2019) (detailing the Trump administration's systematic attack on Central American asylum-seekers); Johnson, *supra* note 11, at 1489 (detailing the matrix of restrictions on Latinx immigrants); Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707 (2019) (discussing political interference in immigration courts and case law); Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities,”* 59 B.C.L. REV. 1703 (2018) (discussing Trump's restrictions on sanctuary cities).

27. Mashaw & Berke, *supra* note 16 at 568.

28. *Id.* at 575–76.

29. *Id.* at 574.

30. *Id.*

19 pandemic, were met with such fierce public and legal opposition that the Administration reverted the policy on its own.³¹

However, the most successful of these changes, in terms of achieving the policy goals at hand, were those that occurred largely out of public view³² and used enforcement mechanisms and the administrative state as tools for presidential control.³³ For example, under-the-radar enforcement tactics, such as the Administration's massive ramp-up of deportations through re-envisioned enforcement priorities and hiring many additional immigration agents, were effective right away.³⁴ These enforcement policies worked for the Administration for at least two reasons: they were not immediately mired in public opposition and litigation, and they corresponded to the policy preferences of bureaucrats across immigration agencies, who were inclined to enforce them.³⁵ The lack of public knowledge and internal opposition served to help keep these policies in place, unlike well-known policies such as family separation that met swift and relentless public backlash³⁶ and even protest from civil servants.³⁷

Throughout the Trump administration's tenure, its winnowing of immigrant rights became more strategic as the executive branch increased use of what I call "unseen policies." Unseen Trump immigration policies are those that have not faced major public outcry, and yet, have negatively impacted the day-to-day existence of immigrant communities and the availability of immigration relief through humane and logical adjudication processes.

31. The Trump administration announced in July 2020 that international students would not be allowed to maintain lawful status while taking an entirely online course load, even though many schools had already announced plans for a fully virtual fall semester in 2020. *SEVP Modifies Temporary Exemptions for Nonimmigrant Students Taking Online Courses During Fall 2020 semester*, U.S. IMMIGR. & CUSTOMS ENF'T (July 6, 2020), <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during>. Following immediate and aggressive litigation, see Anemona Hartocollis & Miriam Jordan, *Harvard and M.I.T. Sue to Stop Trump Visa Rules for Foreign Students*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/08/us/harvard-mit-trump-ice-students.html>, the administration reversed its policy, see Jessica Dickler, *Trump Administration Reverses Course on Foreign Student Ban*, CNBC (July 14, 2020), <https://www.cnn.com/2020/07/14/fight-heats-up-over-foreign-student-ban-as-more-than-200-schools-join-in.html>.

32. See Mashaw & Berke, *supra* note 16, at 574 (noting that politically-charged changes were often stymied, at least initially, by litigation, while less-political changes had a more immediate impact).

33. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001) (discussing the trend toward presidential control over the administrative state, despite congressional delegation of the power to agencies).

34. Mashaw & Berke, *supra* note 16, at 574; see also *infra* Part IV.

35. Mashaw & Berke, *supra* note 16, at 575–76.

36. See David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, THE GUARDIAN (June 19, 2018, 2:23 PM), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans>; *UN Office Calls on US to Stop Separating Families at Border*, AP NEWS (June 5, 2018), <https://apnews.com/article/133271c91ef746bc83a43ba8e31aad1d>.

37. See Scott Shuchart, *Careless Cruelty*, WASH. POST (Oct. 25, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/10/25/feature/civil-servants-said-separating-families-was-illegal-the-administration-ignored-us/> (asserting that "[m]any senior civil servants at DHS believed that the [family separation] policy violated the civil and human rights of migrants."); see also Doug Stephens, *Why I Quit My Job Carrying Out Trump's Immigration Policies*, N.Y. TIMES (Nov. 20, 2019) <https://www.nytimes.com/2019/11/20/opinion/trump-asylum-remain-mexico-policy.html> (a civil servant explaining why he left his job in protest of the administration's Remain in Mexico policy).

Immigration experts may know of all, or most, of these policies. Yet, specific rules concerning mundane details like filing deadlines for asylum-seekers³⁸ and complex new rules constricting immigration judge docket control³⁹ have flown under the public radar because they are too ordinary to reflect the greater impact they have, because they take too long to explain, or both. While many unseen policies were ultimately met with pushback from immigration advocates through commenting on proposed regulations,⁴⁰ litigation challenges,⁴¹ or both, the public remained largely unaware of the policies and their impact on both individual cases and fair adjudication.

Further, these unseen policies helped consolidate excess authority in the executive branch, disrupting the balance of power. These policies worked together to fundamentally challenge the rule of law by expanding the power of the Executive beyond traditional legal norms.⁴² The rule of law and separation of powers undergirding our democracy requires the executive branch—like all branches—to operate within its delegated powers.⁴³ However, Trump consistently disregarded these norms, proclaiming, “I have the right to do whatever I want as president.”⁴⁴ He began his administration by undermining the rule of law through a collection of executive orders. Professor David M. Driesen argues that these actions were, together with Trump’s rhetoric,⁴⁵ “an effort to establish unilateral presidential control of policy as a substitute for the rule of law.”⁴⁶ Trump’s executive branch then acted to propel immigration changes, both large and small, effectively reworking the practical impact

38. Aaron Reichlin-Melnick, *Proposed 15-Day Filing Rule for Asylum Seekers Is Designed to Be Impossible*, IMMIGR. IMPACT (Sept. 24, 2020), <https://immigrationimpact.com/2020/09/24/asylum-15-day-filing-deadline/#.X7GUaRNkJOQ>.

39. See *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 274 (A.G. 2018); see also Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,588 (proposed regulations to finalize the administrative closure rule introduced in *Castro-Tum*, effective 1/15/21).

40. See *Pangea Legal Servs. v. U.S. Dept. of Homeland Sec.*, No. 20-cv-09253-JD at 13 (N.D. Cal. Jan. 8, 2021) (enjoining implementation of a proposed rule limiting asylum claims and noting that over 87,000 comments were submitted, amounting to “a tidal wave of responses” to the proposed rule).

41. See, e.g., *Pangea Legal Servs., et al v DHS et al: Lawsuit Challenges Harmful New Criminal Bars to Asylum*, NAT. IMMIGR. PROJECT, https://nipnl.org/our_lit/impact/2020_02Nov_lit-pangea-v-dhs.html (describing a lawsuit challenging Trump administration asylum regulations) (last visited Jan. 11, 2021).

42. See generally David M. Driesen, *President Trump’s Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489 (2019) (arguing that Trump’s executive actions, taken together, are an effort to “establish unilateral presidential control of policy as a substitute for the rule of law.”).

43. See *id.* at 491 (explaining the basics of separation of powers, including the President’s duty to faithfully execute the law set by Congress) and at 494–95 (explaining the evolution of delegation to the executive as the democracy developed); see also Mashaw & Berke, *supra* note 16 at 572 (discussing the delegation of political decisions to the political branches, specifically in the context of the travel bans).

44. Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. R. 887, 906 (2020) (discussing this statement and related challenges by Trump to separation of powers norms.).

45. See, e.g., Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants Than Any American in History*, WASH. POST (Nov. 7, 2019, 10:03 AM EST), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html.

46. Driesen *supra* note 42, at 524.

of immigration law without involving Congress.⁴⁷ While some of these actions fall within the normal purview of executive control, such as use of executive orders, they overstep consitutional delegation because they do not “faithfully execute” the law.⁴⁸ Trump’s administration continuously pushed back on court rulings as well, in one instance defying the Supreme Court DACA ruling for months⁴⁹ until lower courts demanded compliance.⁵⁰ The Administration also blatantly disregarded public critiques proffered through notice-and-comment rulemaking, promulgating regulations that departed from congressional intent, which resulted in court censure.⁵¹

To illustrate the depth of the challenges the Trump administration created for immigrants, and the rule of law, this analysis explores a representative sample of unseen policies: humanitarian policies, bureaucratic policies, enforcement and deportation policies, and changes to immigration court adjudication.

II. HUMANITARIAN UNSEEN POLICIES

Refugees, asylees, abused children, and vulnerable groups holding temporary status under DACA and Temporary Protected Status (TPS) have greatly suffered under unseen Trump administration policies that scaled back humanitarian relief. Each of these policies is discussed in the sections that follow.

A. *Refugee Caps and Asylum Restrictions*

Both refugee and asylum relief are available to people fleeing their countries on account of persecution—defined as harm motivated by the targeted person’s race, religion, nationality, political opinion, or particular social group.⁵² The main legal difference between the two lies in procedure, rather than in substance.⁵³ Refugees apply from outside the United States through a process established by the United Nations High Commissioner for Refugees.⁵⁴ In contrast, asylum-seekers apply either from within the United

47. Mashaw & Berke, *supra* note 16, at 578 (discussing Trump’s unilateral actions and noting that “if Trump’s overarching immigration policies were embodied in legislation, we doubt they would pass.”).

48. See Driesen, *supra* note 42, at 491 (discussing the principal of legislative supremacy and the Take Care Clause).

49. See *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905–15 (2020) (finding the rescission of DACA to be unlawful).

50. See Caitlin Dickerson & Michael D. Shear, *Judge Orders Government to Fully Reinstate DACA Program*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/us/daca-reinstated.html>; see also Press Release, Update: Deferred Action for Childhood Arrivals, DEP’T OF HOMELAND SEC. (Dec. 7, 2020), <https://www.dhs.gov/news/2020/12/07/update-deferred-action-childhood-arrivals>.

51. For example, a district court enjoined the asylum regulations after the Administration went ahead with them despite numerous critical comments, which “barely made an impact on the government.” See *Pangea Legal Servs. v. U.S. Dept. of Homeland Sec.*, No. 20-cv-09253-JD at 3 (N.D. Cal. Jan. 8, 2021).

52. 8 U.S.C. § 1101(a)(42)(A) (2018).

53. See DREE K. COLLOPY, *AILA’S ASYLUM PRIMER* 38 (7th ed. 2015) (explaining the legal procedures depend on whether the applicant is overseas or domestic).

54. *Id.* at 35–37 (explaining refugee resettlement in brief).

States or at the border.⁵⁵ The Trump administration's policies impact both groups and directly contradict Congress's intent both to substantively protect refugees and to constrain executive discretion.⁵⁶

The Trump administration lowered the cap for refugee admissions to the lowest number since the Refugee Act of 1980. While the Obama administration set the limit at 110,000 refugees for Fiscal Year (FY) 2017, the Trump administration set the limits at 18,000 for FY 2020 and 15,000 for FY 2021.⁵⁷ While it is generally agreed that the executive branch has the power to set the refugee cap,⁵⁸ President Trump's extreme reduction in refugee allowances should be viewed together with other deliberate acts to limit the entry of asylum-seekers, discussed below, rather than as a stand-alone policy.⁵⁹

In addition to limiting refugees, the Trump administration essentially slammed the door on asylum-seekers. As Professor Lindsay M. Harris explained, the Administration systematically attacked asylum via a suite of executive moves, combining more well-known "sweeping changes" in border policy⁶⁰ with unseen policies, like "regulatory changes at the granular level."⁶¹ Some of these critical, unseen policies include (1) the port-of-entry ban,⁶² (2) the third-country transit ban,⁶³ (3) rapid removal procedures for

55. *Id.* at 38 ("[a]sylum seekers" or "asylum applicants" are those who seek protection and already physically present in the United States).

56. See Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far: Matter of A-B-, "Particular Social Group," and Chevron*, 29 CORNELL J.L. & PUB. POL'Y, 345, 388 (2019) (explaining that the Refugee Act was meant to "remedy an overreliance on executive discretion" by providing a firm yet flexible refugee definition).

57. See Nick Miroff, *Trump Cuts Refugee Cap to Lowest Level Ever, Depicts Them on Campaign Trail as a Threat and Burden*, WASH. POST (Oct. 1, 2020, 2:07 PM EDT), https://www.washingtonpost.com/immigration/trump-cuts-refugee-cap/2020/10/01/a5113b62-03ed-11eb-8879-7663b816bfa5_story.html.

58. The President, in consultation with Congress, sets the number of refugees who may be admitted each year. COLLOPY, *supra* note 53, at 36; see also *Frequently Asked Questions: Refugee Ceiling and the Presidential Determination*, LIRS (Sept. 1, 2020), <https://www.lirs.org/faqs-refugee-ceiling/#PD>.

59. Driesen, *supra* note 42, at 524 (arguing that scholars should assess "a variety of executive actions together" when a President "poses a potential challenge to the entire constitutional order.>").

60. For more detail on these issues, see generally Harris, *supra* note 9; Koh, *supra* note 26, at 57 (explaining metering and turnback policies); Motomura, *supra* note 26, at 487-89 (2020) (discussing asylum changes including the third country transit ban, port-of-entry filings only policy, and narrowing of the refugee definition).

61. See Harris, *supra* note 9; see also Jeffrey S. Chase, *Taking a Sledgehammer to Asylum*, OPINIONS/ANALYSIS ON IMMIGR. L. (June 23, 2020), <https://www.jeffreyschase.com/blog/2020/6/23/taking-a-sledgehammer-to-asylum> (discussing the slate of regulations that will effect a "monumental change" on the availability of asylum). Prof. Harris also covers bureaucratic shifts such as fee changes and comprehensive "death to asylum" regulations, which will go into effect just days before Trump's term ends. See Jennie Guilfoyle, *Trump's 'Death to Asylum' Rule Will Go Into Effect Days Before He Leaves Office*, IMMIGR. IMPACT (Dec. 10, 2020), <https://immigrationimpact.com/2020/12/10/trump-asylum-rule-2021/>.

62. See *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661 (Nov. 15, 2018) (temporarily suspending entry to any non-U.S. citizen or non-lawful permanent resident seeking to enter outside a designated port of entry); see also Johnson, *supra* note 11, at 1490; *Al Otro Lado Inc. v. McAleenan*, 2019 U.S. Dist. LEXIS 12173 (S.D. Cal. July 29, 2019).

63. See *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>; see also Peter Margulies, *Asylum Update: Ninth Circuit Upholds Injunction Against Third Country Rule*, LAWFARE (July 8, 2020, 1:22 PM), <https://www.lawfareblog.com/asylum-update->

asylum-seekers; and (4) the Title 42 public health ban.⁶⁴ In combination,⁶⁵ these policies effectively eliminated asylum at the border via executive fiat. They also directly contravened congressional intent to protect those fleeing persecution, as codified in the Refugee Act of 1980,⁶⁶ and ignored international obligations to protect those at risk of persecution.⁶⁷ As of January 2021, all of the rules discussed below were in litigation, as advocates sought to restore rights to asylum-seekers and asked courts to check the Administration's unilateral rewriting of asylum law.

First, the Administration published the port-of-entry ban regulation in November 2018.⁶⁸ The regulation bars noncitizens from seeking asylum in the United States if they cross the border at a point other than an official port-of-entry.⁶⁹ Those who cross at an unmarked point at the border, perhaps by swimming across the Rio Grande or hiking through the desert—manners of entry which are often part of the practical realities of fleeing persecution—would be per se barred from receiving asylum. The Ninth Circuit enjoined this rule in February 2020.⁷⁰

Second, the third-country transit ban regulation was enacted in July 2019.⁷¹ This ban requires asylum-seekers who pass through a country other than their own before reaching the United States to first apply for asylum in that third country.⁷² Like the ban described above, this program targeted those seeking to enter at the Southern Border—the vast majority of asylum-seekers.⁷³ This policy was in place for several months during the summer of 2019, leaving attorneys representing asylum-seekers scrambling⁷⁴ because, in another reality for those fleeing persecution, very few Central Americans apply for asylum in Mexico first. The Ninth Circuit upheld a preliminary

ninth-circuit-upholds-injunction-against-third-country-rule (explaining the potential repercussions of the rule and the legal underpinnings of the rule).

64. See Harris, *supra* note 9.

65. See Koh, *supra* note 26, at 60 (explaining that the combination of rules like the port-of-entry ban with metering practices at the ports of entry “amounted to a wholesale prohibition on the grant of asylum to individuals seeking entry along the southern border.”).

66. See Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); Kelley-Widmer & Rich, *supra* note 56, at 355–56 (explaining that Congress drew the refugee definition codified in the Refugee Act of 1980 from the international Refugee Convention and Protocol).

67. The United States is a party to the 1967 Protocol on the protection of refugees and thus is obligated to protect those who meet the refugee definition. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; see also Sabrineh Ardalan, *Asymmetries in Immigration Protection*, 85 BROOK. L. REV. 319, 353–54 (2020) (discussing U.S. obligations of *non-refoulement*); Marouf, *supra* note 26, at 763.

68. Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018).

69. *Id.*

70. See *Federal Appeals Court Upholds Block on Port-of-entry Asylum Ban*, ACLU (Feb. 28, 2020), <https://www.aclu.org/press-releases/federal-appeals-court-upholds-block-port-entry-asylum-ban-0>.

71. See Asylum Eligibility and Procedural Modifications, *supra* note 63.

72. *Id.*; see also Harris, *supra* note 9, at 21 (explaining that the bar targets those who have transited through at least one other country who cannot show that they have applied for asylum and been denied in that other country).

73. See Koh, *supra* note 26, at 60.

74. Email from border attorney Hillary Rich to author (Feb. 4, 2020) (on file with author).

injunction on the program in July 2020.⁷⁵ The Trump administration used its last days to push through a final rule that would nevertheless cement this ban,⁷⁶ but those regulations were also enjoined.⁷⁷

Third, two programs implemented at the border beginning in October 2019 led to the swift removal of asylum-seekers by limiting their time and access to counsel. Prompt Asylum Claim Review (PACR) (which applies to migrants from countries other than Mexico), and Humanitarian Asylum Review Process (HARP) (which applies to Mexicans),⁷⁸ permit detained migrants only one day to consult with an immigration attorney and prepare for their credible fear interview.⁷⁹ This interview is the pivotal step to establish oneself as having a potential asylum claim;⁸⁰ without time to prepare, applicants are more likely to fail the interview and be summarily deported. Although the American Civil Liberties Union challenged the PACR and HARP programs,⁸¹ a D.C. District Court judge ruled that the programs are lawful because, in amending the Immigration and Nationality Act to establish expedited removal programs generally,⁸² Congress “unquestionably intended to permit the government to remove certain noncitizens expeditiously.”⁸³

Fourth, in July 2020, the Trump administration used the COVID-19 pandemic to justify near-total closure of the border. The Administration utilized Title 42, a provision that permits denial of entry when a person is deemed a public health risk.⁸⁴ The use of this law to indiscriminately close the border effectively abolishes the availability of asylum to those seeking it at the Southern Border.⁸⁵ A District Court preliminarily enjoined the policy in

75. See *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 838 (9th Cir. 2020).

76. See generally Asylum Eligibility and Procedural Modifications, 85 Fed. Reg. 82,260 (Dec. 17, 2020).

77. See Miriam Jordan, *A judge has blocked Trump's sweeping restrictions on asylum applications*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/us/politics/a-judge-has-blocked-trumps-sweeping-restrictions-on-asylum-applications.html>.

78. See Tanvi Misra & Camila DeChalus, *DHS Expands Programs that Fast-track Asylum Process*, ROLL CALL, (Feb. 26, 2020, 3:49 PM), <https://www.rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>.

79. Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL'Y INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum> (explaining PACR, HARP, and other policies).

80. See COLLOPY, *supra* note 53, at 467 (explaining the function of the credible fear interview).

81. See *Las Americas Immigrant Advocacy Ctr. v. Wolf*, No. 19-CV-3640, 2020 WL 7039516, at *1 (D.D.C. Nov. 30, 2020).

82. For more on other expanded forms of expedited removal, see *infra* section B, part 2.

83. *Las Americas Immigrant Advocacy Ctr.*, *supra* note 81, at *9; see also Suzanne Monyak, *Migrants Lose Challenge to Rushed Deportation Programs*, LAW360 (Dec. 2, 2020, 7:01 PM EST), <https://www-law360-com.proxy.library.cornell.edu/articles/1333645/migrants-lose-challenge-to-rushed-deportation-programs>.

84. See Security Bars and Processing, 85 Fed. Reg. 41,201, 41,210 (July 9, 2020); see also *Citing COVID-19, the Administration Seeks to Bar Asylum Seekers as a Danger to National Security*, CLINIC, <https://cliniclegal.org/resources/asylum-and-refugee-law/citing-covid-19-administration-seeks-bar-asylum-seekers-danger> (last updated July 21, 2020).

85. See Bill Ong Hing, *Trump Has Achieved His Goal of Abolishing Asylum*, SLATE (Apr. 10, 2020, 11:33 AM) <https://slate.com/news-and-politics/2020/04/trump-asylum-coronavirus.html>.

November 2020,⁸⁶ but the border remains mostly sealed.

Together with additional measures, the border policies discussed above create an interlocking web that literally and figuratively walls off nearly all those arriving at our Southern Border seeking refuge from persecution⁸⁷—as the Trump administration openly intended.⁸⁸ Those who successfully arrive despite the above barriers are now also met by substantive hurdles, including changes to legal and statutory interpretations published in opinions by the Attorney General.

Because immigration adjudication is housed within the Department of Justice, regulations permit the Attorney General to choose cases from the Board of Immigration Appeals (BIA) and certify them to him or herself.⁸⁹ While the practice of issuing formal opinions by Attorneys General may be seen as a form of executive accountability,⁹⁰ under Trump's appointees, the case certification process was used more than during any prior administration,⁹¹ and with overt political motives.⁹²

Attorneys General under Trump certified and decided numerous cases⁹³ that made “dramatic substantive changes” to immigration law as a whole,

86. See *P.J.E.S. v Wolf*, No. 1:20-cv-02245, 2020 WL 6770508, at *1 (D.D.C. Nov. 18, 2020).

87. See Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POLICY INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum> (discussing MPP, metering, PACR, and HARP. “Through a set of interlocking policies, the Trump administration has walled off the asylum system at the U.S.-Mexico border, guaranteeing that only a minuscule few can successfully gain protection.”).

88. See Tanvi Misra & Camila DeChalus, *DHS Expands Programs that Fast-track Asylum Process*, ROLL CALL, (Feb. 26, 2020, 3:49 PM), <https://www.rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/> (noting that Acting Homeland Security Secretary Chad Wolf stated that PACR and HARP were meant to work “with” MPP).

89. 8 C.F.R. § 1003.1(h)(1)(i) (2018) (“The Board [of Immigration Appeals] shall refer to the Attorney General for review of its decisions all cases that . . . [t]he Attorney General directs the Board to refer to him.”); see also Richard Frankel, *Deporting Chevron: Why the Attorney General's Immigration Decisions Should Not Receive Chevron Deference*, 54 U.C. DAVIS L. REV. 547, 561 (2020) (explaining these regulations and how they are a form of “agency head review” common in the administrative state); Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 841 (2016) (describing how a “little used mechanism, Attorney General referral and review, . . . could play an efficacious role in the executive branch's development and implementation of its immigration policy” and explaining how the procedure works).

90. See Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21, 24 (2013) (arguing that “the practice of rendering formal Attorney General opinions” is among the “institutional arrangements that foster a Rule of Law culture.”). *But see* Frankel, *supra* note 89, at 592 (arguing that Attorney General decisions in the immigration context do not provide meaningful democratic accountability).

91. See Frankel, *supra* note 89, at 562 (explaining that the Trump administration has used this tool at a high rate, whereas prior administrations used it rarely); see also Marouf, *supra* note 26, at 773 (“[F]ormer Attorney General Sessions pushed the use of the review mechanism to a new extreme.”).

92. See Marouf, *supra* note 26, at 774 (“The use of Attorney General review to advance partisan goals is undisputed.”).

93. See, e.g., *Matter of L-E-A-*, 27 I. & N. Dec. 581, 582 (A.G. 2019) (decision by then-Attorney General William P. Barr limited protections for asylum-seekers with family-based claims); *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020) (decision by Barr reiterating that the BIA must review all aspects of an asylum claim *de novo* and barring the common convention of the court accepting stipulations by the parties).

and asylum law in particular.⁹⁴ Many certified decisions on asylum cases by Trump's Attorneys General, like *Matter of A-B*,⁹⁵ received extensive attention,⁹⁶ and thus, were not technically unseen policies in and of themselves. However, the trend regarding increasing use of Attorney General certification to upend decades of developed precedent and well-settled law was a less-obvious, but critical, piece of the Trump machinations to overhaul immigration using the executive branch.⁹⁷ Though advocates have challenged some of these cases, the Trump administration also attempted to cement their rulings by issuing regulations to further entrench the principles espoused by the new precedent.⁹⁸ This two-pronged approach—use of both Attorney General decisions and federal regulations—maximized executive authority by setting up obstacles from multiple authorities on the same issues.

B. *Special Immigrant Juveniles*

The Trump administration's assault on immigrant children was not limited to the traumatic separation and detention policies at the border and also included aggressive undermining of protections for immigrant children.⁹⁹ Indeed, Trump and his administration used the term “loophole” to refer to protections for immigrant children established under various legal regimes,¹⁰⁰ implying that these rights are not valid or warranted. Among these legal programs is a form of relief called Special Immigrant Juvenile Status (SIJS), which Trump began undermining early in his term.¹⁰¹

94. See Frankel, *supra* note 89, at 562.

95. *Matter of A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

96. See, e.g., Theresa A. Vogel, *Critiquing Matter of A-B: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 373–74 (2019) (critiquing the decision for disregarding thirty years of progress in U.S. domestic-violence laws and for characterizing domestic violence as a “personal” matter); *465 Groups Ask Sessions to Rescind Matter of A-B*, LEXISNEXIS LEGAL NEWSROOM, (June 27, 2018), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/immigration-law-blog/posts/465-groups-ask-sessions-to-rescind-matter-of-a-b->.

97. For example, in his decision in the certified case *Matter of A-B*, then-Attorney General Jefferson B. Sessions reversed an immigration judge's decision granting asylum to a Salvadoran woman who had suffered abuse by a domestic partner and included dicta purporting to magnify the impact of his ruling to all cases involving gangs or domestic violence. This decision undermined decades of precedent and contravened congressional statute and the International Refugee Protocol. See Kelley-Widmer & Rich, *supra* note 56, at 350.

98. See Ted Hesson & Mimi Dwyer, *Trump Finalizes Sweeping Asylum Restrictions in Last-minute Immigration Push*, REUTERS (Dec. 10, 2020, 11:19 AM), https://www.reuters.com/article/usa-trump-immigration/trump-finalizes-sweeping-asylum-restrictions-in-last-minute-immigration-push-idUSKBN28K2D3?fbclid=IwAR2-KM8vq3-fIQAA023Y-U2JZv8duunvxue3QKxz2cymQF_S9WgdIwuS14.

99. See Hlass, *supra* note 14, at 228 (discussing rollback of protocols and programs for unaccompanied minors and detained children).

100. *Id.* at 227.

101. See President Donald J Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, DEMOCRACY IN ACTION (Oct. 8, 2017), <https://www.democracyinaction.us/immig100817.html> (calling for an additional SIJS requirement—that the child also be a victim of human trafficking).

SIJS leads to permanent residency¹⁰² and is the only form of immigration relief designed specifically for immigrant youth.¹⁰³ To be eligible, the relevant statute requires that a child was “abused, neglected, or abandoned” by one or both of their parents, and it must not be in their best interest to return to their home country.¹⁰⁴ Before filing for immigration relief with United States Citizenship and Immigration Services (USCIS), the youth must receive a predicate order from a state court with jurisdiction over juveniles¹⁰⁵ showing that they meet the SIJS requirement.¹⁰⁶ While the SIJS regulations permit this relief for youth up to age twenty-one,¹⁰⁷ in practicality, only a handful of states make SIJS available to youth between the ages of eighteen to twenty-one, and in most states, juvenile court jurisdiction ends at eighteen.¹⁰⁸

Despite these young immigrants’ vulnerability, the Trump administration proposed and implemented various restrictions to SIJS,¹⁰⁹ including reissuing proposed federal regulations to narrow the SIJS eligibility parameters.¹¹⁰ The changes include reinterpreting the statute to permit SIJS relief only to youth who have *no* parent available to them, rather than abuse or neglect by just *one* parent; a policy of denying petitions that USCIS deems were pursued primarily for immigration purposes;¹¹¹ and increased denials and lengthy delays for applications by youths in the age range of eighteen to twenty-one.¹¹² The Administration also limited the ability of SIJS applicants in immigration court to receive continuances—a mechanism which allowed their removal case to be put on hold so that USCIS could adjudicate their SIJS application first (which cannot be pursued in court).¹¹³ These policies, among other

102. Special Immigrant Status for Certain Aliens Declared Dependent On a Juvenile Court 8 C.F.R. § 204.11 (2009); *see also Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/sijs> (last updated Feb. 10, 2020).

103. Hlass, *supra* note 14, at 245.

104. 8 U.S.C. § 1101(a)(27)(J) (2012); 8 C.F.R. § 204.11(c) (2019).

105. *See* 6 USCIS Policy Manual, pt J., ch. 6, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#S-D>. (last updated Dec. 15, 2020).

106. 8 C.F.R. § 204.11(c)(6) (2009).

107. 8 C.F.R. § 204.11 (2009).

108. *See Predicate Order State-by-State Age-Out Analysis*, PROJECT LIFELINE, <https://projectlifeline.us/resources/state-by-state-analysis/> (last visited Jan. 11, 2021) (showing that New York, California, Connecticut, and nine other states have expanded family court jurisdiction to age twenty-one, and Alabama and Nebraska have extended to nineteen. The other 36 states currently end such jurisdiction at age eighteen).

109. *See* Hlass, *supra* note 14, at 245 (“[T]he Trump administration has also waged a multi-front assault on [SIJS].”); N.Y. BAR ASS’N, *IS AMERICA FULFILLING ITS PROMISE? SAFEGUARDING THE LEGAL PROTECTIONS OF IMMIGRANTS* 13 (Scott Fein & Rose Mary Bailly eds., 2019) (discussing Trump administration SIJS limitations announced in 2018).

110. Special Immigrant Juvenile Petitions, 84 Fed. Reg. 55,250 (Oct. 16, 2019).

111. *Id.*

112. *See The Legal Aid Soc’y & Latham & Watkins LLP, R.F.M. v. Nielsen Practice Advisory* (2019), <https://www.legalaidnyc.org/wp-content/uploads/2019/06/SIJS-RFMPPracticeAdvisoryJune102019.pdf>; Hlass, *supra* note 14, at 246.

113. *See* Lenni Benson & Alexandra Rizio, *EOIR Policy Memo 19–13, “Use of Status Dockets” How the Court Administration Is Constraining Local Control*, SAFE PASSAGE PROJECT (Sept. 4, 2019), <https://www.safeassageproject.org/2019/09/eoir-policy-memo-19-13-use-of-status-dockets-how-the-court-administration-is-constraining-local-control/>. The backlog in SIJS adjudication is largely due to

restrictions, have severely limited SIJS for vulnerable immigrant youth, leaving many with no remedy.¹¹⁴

C. *DACA and TPS*

The Trump administration also severely curtailed two forms of legally temporary protections: Deferred Action for Childhood Arrivals (DACA)¹¹⁵ and Temporary Protected Status (TPS).¹¹⁶ Both DACA and TPS are reserved for certain limited classes of immigrants, provide de facto long-term yet temporary protections, and are similarly susceptible to administrative whims.¹¹⁷ Here, I focus on the unseen impacts of DACA rescission.¹¹⁸ Although DACA rescission is, as a general matter, one of the Trump administration's more well-known moves,¹¹⁹ it merits discussion here because it illustrates a different executive tactic—pulling back an existing program created by the prior administration—and because it encompasses unseen bureaucratic changes as well.

the placement of SIJS visas in the EB-4 category, which is otherwise used for employment purposes and has strict caps that have been overwhelmed by numerous unaccompanied minors from Central America.

114. See, e.g., Andrea Salcedo, Cristina Baussan & Theodora Yu, *The Trials of Being Undocumented and Turning 18*, DOCUMENTED (Apr. 29, 2019, 6:00 AM EDT), <https://documentedy.com/2019/04/29/the-trials-of-being-undocumented-and-turning-18/> (describing the story of twenty-year-old Diego, SIJS applicant from El Salvador).

115. See Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al., *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017). This is the original memo announcing the rescission of DACA, which was followed by litigation and additional Trump administration memoranda.

116. Srikantiah & Sinnar, *supra* note 26, at 200 (in 2017 and 2018, the Administration announced an end to TPS for noncitizens from El Salvador, Haiti, Nicaragua, and Sudan). This rescission is in litigation, and TPS remains accessible for these groups—for now. See *Challenges to TPS and DED Terminations and Other TPS-Related Litigation*, CLINIC (Sept. 21, 2020), <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/challenges>; see also *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (extending TPS for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan through October 4, 2021) (last updated Dec. 7, 2020).

117. See WADHIA, *supra* note 11, at 72–73 (2019) (explaining that DACA and TPS have similarities, including that these programs are for long-term residents who are vulnerable to immigration enforcement); see also *100+ Policies That Have Devastated Immigrants and Asylum Seekers*, IMMIGRANT LEGAL RESOURCE CTR., (last visited Jan. 10, 2021), https://www.ilrc.org/immigration-attacks?fbclid=IwAR30W4RnyeMvof5XHdZNnhxTydBn4JhtBZA9j40qwY60Ile9DU1Ddr1z_4A#top (discussing policies in the category of “taking away status”).

118. For an in-depth look at the impact of losing temporary status under TPS, which is similar to DACA, see Kati L. Griffith, Shannon Gleeson & Vivian Vásquez, *Immigrants in Shifting Times on Long Island, NY: The States of Losing Temporary Status*, 97 DENV. L. REV. 743, 756 (2020). Griffith et al. point out that the tenuous status of TPS and DACA are interrelated, especially because some families include both TPS and DACA holders.

119. Numerous news articles are published regularly across the country providing updates on the status of DACA recipients and immigrant youth. See, e.g., Elvia Malagón, *Shut out of DACA Protections, Immigrant Youth in Chicago Area Face Uncertain Future*, CHICAGO SUN-TIMES (Oct. 27, 2020, 5:00 AM CDT), <https://chicago.suntimes.com/2020/10/27/21528805/immigration-daca-supreme-court-trump-youth-limbo>; Cindy Caracamo & Molly O'Toole, *After Missing DACA, She Resented Her U.S.-born Siblings. Trump Ruined Her Second Chance*, L.A. TIMES (July 30, 2020, 6:00 AM), [%3F%3F%3F%3F](https://www.latimes.com/california/story/2020-07-30/new-generation-daca-recipients).

The Obama administration created DACA by executive order in June 2012 to offer certain protections¹²⁰ to young undocumented immigrants who were brought to the United States when under sixteen years of age.¹²¹ The Trump administration moved to end DACA during its first year,¹²² resulting in numerous lawsuits which ultimately kept DACA open for those who already had it¹²³ while litigation worked its way up to the Supreme Court. In June 2020, the Supreme Court ruled¹²⁴ that DACA was not properly ended by the 2017 DHS memo purporting to do so because the memo violated the Administrative Procedure Act (APA).¹²⁵ While all parties to the Supreme Court litigation agreed that the executive branch has the power to end a program created by executive order, such termination must occur within the limits imposed by Congress under the APA. When the Administration terminated DACA, the Court ruled, it did not comply with legislative requirements to fully consider the benefits of the program¹²⁶ and the harm that rescission would cause.¹²⁷

120. Concrete benefits include protection from deportation, work authorization, and a social security number. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/consideration-of-deferred-action-for-childhood-arrivals-daca> (last updated Dec. 17, 2020); see also SOC. SEC. ADMIN., SOCIAL SECURITY NUMBER AND CARD—DEFERRED ACTION FOR CHILDHOOD ARRIVALS (Aug. 2020), <https://www.ssa.gov/pubs/EN-05-10009.pdf> (explaining that DACA recipients are eligible for a social security number).

121. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to all U.S. Immigr. & Customs Enf't Employees, Secretary Napolitano's Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Individuals Who Entered the United States as a Child (June 15, 2012); Olga Y. Kuchins, *Out of the Shadows: Deferred Action for Childhood Arrivals, Deferred Action to Parents of Americans and Lawful Permanent Residents, and Executive Prosecutorial Discretion in Immigration Law*, 43 HASTINGS CONST. L.Q. 705, 712 (2016) (stating that DACA does not grant formal immigration status and is not an amnesty, but does permit recipients to remain in the United States for a renewable two-year period).

122. See Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., to James W. McCament, Acting Dir., et. al., *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017); see also MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT & DACA 108–10 (2020) (explaining the Trump administration's approach to DACA and the ensuing lawsuits).

123. See *DACA Litigation Timeline*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/issues/daca/daca-litigation-timeline/> (last updated May 8, 2020); see also OLIVAS, *supra* note 122, at 110 (summarizing the four main strains of litigation regarding DACA during this period).

124. See *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905–15 (2020).

125. Jaclyn Kelley-Widmer, *A Dream Deferred*, THE REG. REV. (July 20, 2020), <https://www.theregreview.org/2020/07/20/kelley-widmer-dream-deferred/>.

126. For more on these benefits, see, e.g., Grace Tatter, *Why DACA Works*, HARV. ED. MAG. (Winter 2019), <https://www.gse.harvard.edu/news/ed/19/01/why-daca-works> ("DACA allowed previously undocumented youth to obtain drivers licenses, open bank accounts, and get jobs that gave them financial independence . . . [and] a greater sense of belonging."); Kuchins, *supra* note 119, at 718 (explaining why "DACA translates to increased prosperity to all Americans."); Moriah D. Umfress, *DACA and Agriculture: Why Deferred Action for Childhood Arrivals Should Not be Allowed to End*, 23 DRAKE J. AGRIC. L. 549, 563 (2019) (explaining how DACA benefits agriculture in the United States).

127. See, e.g., Jaclyn Kelley-Widmer, *High Court Hears DACA: Procedure, Practicalities, Predictions*, LAW360 (Nov. 18, 2019), <https://www.law360.com/delaware/articles/1220960/high-court-hears-daca-procedure-practicalities-predictions> ("DACA provides security and validity to over 700,000 young people whose lives will be thrown into disarray if the program ends. The case before the Supreme Court has sparked rallies, marches, and campaigns highlighting the positive impact DACA has had on the lives of individuals and on the economy"). Parties to the litigation fully briefed these harms. See Brief of

DACA litigation in lower courts continues today. Notably, a December 2020 ruling required the Trump administration to begin accepting new DACA applications.¹²⁸ Although the reopening of the program is a welcome development for immigrants, DACA's constant ups and downs¹²⁹ have been a daily, unpredictable stressor for DACA recipients and the larger Dreamer community.¹³⁰ "It's like we're literally in a Ping-Pong game," one DACA recipient said.¹³¹ "They're playing with our lives."¹³²

Beyond the rescission of DACA itself, the Trump administration further undermined access to DACA through the unseen rules of a bureaucratic "paper wall."¹³³ For example, in 2020, the Administration reversed its former policy of processing early-filed DACA renewals with priority,¹³⁴ leaving applications pending for ten or more months with no explanation given to the applicant.¹³⁵ Meanwhile, if advocates attempted to reach a USCIS representative to inquire about the status of an application, recent changes to the contact center policy resulted in callers being routed through an endless circle of recorded menu prompts with no ability to reach a person.¹³⁶ One attorney lamented, "this automated phone line just sends me in circles before hanging

143 U.S. Business Associations and Companies as Amici Curiae in Support of Respondents, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, and 18-589); Brief for Amici Curiae Nineteen Colleges and Universities in Support of Respondents, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, and 18-589).

128. See Dickerson & Shear, *supra* note 50; Press Release, Update: Deferred Action for Childhood Arrivals, DEP'T OF HOMELAND SECURITY (Dec. 7, 2020), <https://www.dhs.gov/news/2020/12/07/update-deferred-action-childhood-arrivals>.

129. For example, in July 2020, Acting Secretary Chad D. Wolf issued a memorandum implementing various DACA limitations, such as a one-year renewal instead of two. A few months later, a district court in New York invalidated the memorandum because Wolf was not lawfully appointed, thus apparently reopening DACA again. Compare Memorandum from Chad D. Wolf, Acting Sec'y of Homeland Sec., to Mark Morgan, Senior Official Performing the Duties of Comm'r, et. al., *Reconsideration of the June 15, 2012 Memorandum "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"* (July 28, 2020), with *Vidal v. Wolf*, 2020 U.S. Dist. LEXIS 213068, at *52 (E.D.N.Y. Nov. 14, 2020).

130. See generally Esther Yoona Cho, *Attempts to Cancel DACA Produce Negative Effects on Health*, BERKELEY INTERDISCIPLINARY MIGRATION INITIATIVE (2019), https://bimi.berkeley.edu/sites/default/files/shared/BIMI-HIFIS%20Policy%20Brief_Esther%20Yoona%20Cho_Attempts%20to%20Cancel%20DACA%20Produce%20Negative%20Effects%20on%20Health.pdf.

131. Miriam Jordan & Michael D. Shear, *They're Playing With Our Lives': What Happens Next for DACA's 'Dreamers,'* N.Y. TIMES (Dec. 5, 2020), https://www.nytimes.com/2020/12/05/us/daca-immigration-what-next.html?fbclid=IwAR0Taphq2O9DhG95kZGZr2g45YccbcMgg6zO_d2T8y_X2sPKvBUhhHdWZU.

132. *Id.*

133. See Rampell, *supra* note 24 ("Trump officials . . . pursued another strategy for keeping out legal immigrants, one that's more resilient to public opinion because few realize it exists: They built a barrier not of steel and reptiles but of paperwork.").

134. DACA applications should generally be filed between 120 and 150 days before their expiration. See U.S. CITIZENSHIP & IMMIGR. SERVS., INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2019), <https://www.uscis.gov/sites/default/files/document/forms/i-821dinstr.pdf>. However, given the ongoing uncertainty around whether DACA will continue to be available, some applicants routinely submit their applications earlier than this period.

135. This information is drawn from the author's client representation experience and the experience of her colleagues practicing in this space. See also listserv email thread to author collecting experiences of five attorneys with this same problem (Nov. 20, 2020) (on file with author).

136. See *Practice Pointer: Navigating the USCIS Contact Center*, AM. IMMIGR. LAW. ASS'N, (Dec. 2, 2020) (on file with author).

up on me. Are there ‘magic words’ that I need to say in order to get connected to a live human?”¹³⁷ These, and other minute bureaucratic changes, such as shifting filing addresses for applications, have increased the executive’s impact on DACA and its beneficiaries.

D. *Humanitarian Reforms*

Through the unseen policies above, as well as through many well-known strategies, the Trump administration has severely constrained access to humanitarian protections for immigrants. President Biden agrees that it is “not enough to simply reverse or dismantle the heartless policies of the Trump administration. We need to look for ways to do better.”¹³⁸ Though not enough on its own, Biden should start the process by rolling back many of the detrimental policies above to undo the last four years of damage and restore the protections enshrined in laws already passed by Congress. Instead of continuously narrowing relief for the most vulnerable—asylum-seekers and youth who have survived abuse—the next administration must grant relief to the full extent legally permitted. For example, USCIS should again permit SIJS for applicants over eighteen, as the Immigration and Nationality Act provides, realigning the regulation with the law. Fast work in this realm is essential, as asylum-seekers wait in peril for their claims to be adjudicated¹³⁹ and youth age out of protections daily. Further, the Biden administration should work with Congress to pass additional protective legislation such as the Refugee Protection Act¹⁴⁰ that cannot be pared back by an autocratic executive like Trump.

In the special case of DACA, which is not codified by statute, a dual approach of executive action and congressional collaboration is essential. Biden has promised to reinstate DACA in his first 100 days.¹⁴¹ However, his Administration could also use its executive power to properly modify DACA to create a self-updating set of parameters so that the program does not lapse for new applicants while Congress works out a solution. Although Republicans and some states have objected to DACA as an executive overreach by President Obama, such an argument may not hold water following

137. See email from Alissa Baier to author (Dec. 4, 2020) (on file with author).

138. Joe Biden, *My Statement on World Refugee Day*, MEDIUM: JOE BIDEN (June 20, 2020), <https://medium.com/@JoeBiden/my-statement-on-world-refugee-day-fddb4bddfd5>; see also Harris, *supra* note 9 at 44.

139. See Amanda Holpuch, ‘Family Detention Still Exists’: Immigration Groups Warn the Fight Is Far from Over, THE GUARDIAN (Jan. 1, 2021, 3:00 EST), <https://www.theguardian.com/us-news/2021/jan/01/family-detention-still-exists-immigration-groups-warn-the-fight-is-far-from-over>.

140. See Harris, *supra* note 9, at 45; see also Jeffrey S. Chase, *A Wish List for 2021*, OPINIONS/ANALYSIS ON IMMIGR. L. (Dec. 14, 2020), <https://www.jeffreyschase.com/blog/2020/12/14/a-wish-list-for-2021>.

141. See Jasmine Aguilera, *Biden Has Promised to Undo Trump’s Immigration Policies. How Much Is He Really Likely to Reform?* TIME (Nov. 20, 2020, 6:01 PM EST), <https://time.com/5909571/joe-biden-immigration-policy/>.

President Trump's vast expansion of the use of executive orders¹⁴² and the Supreme Court's decision examining DACA protections.

Further, the Biden team must work with Congress to finally pass legislation delineating clear protections that cannot be swayed by political winds.¹⁴³ While DACA is the only program that has ever functionally protected Dreamers, lawmakers have long sought to create a concrete path for them.¹⁴⁴ The initial Development, Relief, and Education for Alien Minors (DREAM) Act was a bipartisan bill proposed in 2001, but derailed by the events of September 11th.¹⁴⁵ Over the last two decades, at least ten variations of the DREAM Act have been proposed¹⁴⁶ but failed¹⁴⁷ or stalled.¹⁴⁸ Studies show that this uncertainty undermines the benefits of DACA for its recipients and their families.¹⁴⁹ With a Democratic majority in Congress, the time is right to gain momentum on the DREAM Act, and the Biden administration recently promised that it would introduce a bill that would grant green cards to both DACA and TPS holders.¹⁵⁰

Finally, the Biden administration must collaborate with advocacy groups that work directly with asylum-seekers, immigrant youth, and others with vulnerable statuses. Many such coalitions have developed firm priorities for necessary systemic changes to the asylum procedures¹⁵¹ and protections for

142. See Anne Gearan, *How Trump Learned to Embrace the Executive Order, Which He Once Called an 'Easy Way Out,'* WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/politics/trump-executive-orders/2020/10/29/c2329162-17bd-11eb-aeec-b93bcc29a01b_story.html (discussing Trump's "expansive" executive orders, which he "frequently used . . . to appeal to his largely White political base by stoking racial and cultural divisions."); see generally Driesen, *supra* note 42.

143. See Jaelyn Kelley-Widmer, *Dreamers Are Still Waiting for Congress to Act*, BLOOMBERG L. (June 24, 2020), <https://news.bloomberglaw.com/us-law-week/insight-dreamers-are-still-waiting-for-congress-to-act>.

144. See *id.*

145. OLIVAS, *supra* note 122, at 38; see also *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Aug. 27, 2020), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers>.

146. Ilana Etkin Green, *DACA, Dreamers, and the Limits of Prosecutorial Discretion: DHS v. Regents of the University of California*, 64 BOSTON BAR J. 11, 11 (2020).

147. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview>.

148. Currently, the House has passed the most recent version of the DREAM Act, see American Dream and Promise Act of 2019, H.R. 6, 116th Cong. (as passed by House, June 4, 2019), but the Senate Committee on the Judiciary has been sitting on its version of the DREAM Act since March 2019. S.874, 116th Cong. (as introduced in Senate, Mar. 26, 2019).

149. See, e.g., Caitlin Patler, Erin Hamilton, Kelsey Meagher & Robin Savinar, *Uncertainty About DACA May Undermine Its Positive Impact on Health for Recipients and Their Children*, 38 HEALTH AFFAIRS 738, 743 (2019).

150. Matthew Choi and Alice Miranda Ollstein, *Harris Teases Immigration Agenda: Green Cards for DACA and TPS Recipients, Shorter Waits for Citizenship*, POLITICO (Jan. 13, 2021), <https://www.politico.com/news/2021/01/12/kamala-harris-immigration-green-cards-daca-citizenship-458455?>

151. See, e.g., *Immediate Priorities for the Protection of Immigrant Children*, AM. ACAD. OF PEDIATRICS ET AL. (Nov. 2020) (on file with author) (demanding an end to Title 42 expulsions, MPP, metering, and video hearings, while advocating to restore access to legal services and refugee resettlement programs); *Our Path Forward: Recommendations for a Better Way Forward for Immigrant Communities*, IMMIGRANTS ADVOCATES RESPONSE COLLABORATIVE, (Nov. 2020), https://static1.squarespace.com/static/5e59359723b7d46f1ba15b75/t/5fad6c1cc2244972c62106af/1605200933961/Our+Path+Forward++IARC+Recommendations+for+Immigrant+Communities.pdf?mc_cid=8db8124fc2&mc_eid=e6e61687e (calling for

SIJS-eligible youth,¹⁵² as well as DACA and TPS holders.¹⁵³ DACA itself came about through persistent activism by young people who created a movement of Dreamers,¹⁵⁴ and the Administration should make space to be responsive to such communities.

III. BUREAUCRATIC UNSEEN POLICIES

The Administration implemented many unseen policies through bureaucratic changes to application processes and adjustments to eligibility for various immigrant groups. These newly created challenges included tightened USCIS procedures resulting in needless bureaucratic hassles, a heightened public charge rule impacting vulnerable immigrants, and restrictions on skilled worker visas.

A. *Bureaucratic Hassles: Paperwork, Payments, Printing*

USCIS is a branch of the Department of Homeland Security (DHS) that was established in 2003 to “enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications.”¹⁵⁵ The agency’s primary task is to adjudicate applications for immigration relief, such as visas and citizenship, carefully reviewing the extensive paperwork of each file and granting these benefits to all who qualify. However, over the course of Trump’s term, his administration continually built and fortified a “legal wall” around the United States through ever-

numerous reforms, with a focus on ensuring the right to counsel in proceedings); *see also* Harris, *supra* note 9, at 45.

152. For recommendations specific to SIJS applications, *see, e.g., KIND Blueprint: Concrete Steps to Protect Unaccompanied Children on the Move* 21, KIDS IN NEED OF DEF. (Nov. 2, 2020), <https://supportkind.org/wp-content/uploads/2020/11/KIND-Blueprint-Concrete-Steps-to-Protect-Unaccompanied-Children-on-the-Move-FINAL-2.pdf>; *see Asylum Priorities for the Next Presidential Term*, HASTINGS CTR. FOR GENDER & REFUGEE STUDIES (Nov. 2020), https://cgrs.uchastings.edu/sites/default/files/CGRS%20Asylum%20Priorities%20-%20Next%20Term_Nov.%202020.pdf; *2021 Immigration Action Plan* 17, AMERICA’S VOICE (Aug. 2020), <https://static1.squarespace.com/static/5b60b2381aef1dbe876cd08f1/5f3bbc9fb307b0ee11e59c3/1597750460712/2020+Immigration+Action+Plan+-+08182020.pdf>.

153. Organizations like United We Dream and the President’s Alliance on Higher Education and Immigration focus on advocating for DACA recipients and other similarly situated groups. *See About UWD, UNITED WE DREAM*, <https://unitedwedream.org/about/> (last visited Nov. 5, 2020); *Our Mission, PRESIDENTS’ ALLIANCE* (last visited Nov. 5, 2020), https://www.presidentsalliance.org/about/mission/?fwf_staff_founder=1; *see also* Griffith et al., *supra* note 118, at 745 (“The threat has mobilized TPS migrants and their advocates to demand preservation of the status as communities scramble to prepare for the real possibility that they will fail.”).

154. *See* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1918, 1920 (2020) (explaining that some undocumented youth began to mobilize, “the Dreamers movement was born” and that “[b]y the 1990s, the Dreamers had become a highly effective constituency in demanding changes to the nation’s immigration laws.”); *see* Luis Cortes Romero, *Activism Leads and the Law Follows: DACA and its Fate at the Supreme Court*, 45 HUM. RTS. L. REV. 18, 18–19 (2020); *see generally* LAURA WIDES-MUÑOZ, *THE MAKING OF A DREAM: HOW A GROUP OF YOUNG UNDOCUMENTED IMMIGRANTS HELPED CHANGE WHAT IT MEANS TO BE AMERICAN* (2018).

155. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history> (last updated Aug. 24, 2020). Before 2003, benefit adjudication and immigration enforcement were combined into one agency within the Department of Justice.

tightening USCIS procedures, effectively limiting the relief available through USCIS.

Policies like these have resulted in the lowest rate of legal immigration ever (outside of World War II and the Great Depression)¹⁵⁶ and the smallest growth in the foreign-born population since the 1970s.¹⁵⁷ Specifically, Trump created three primary hurdles through USCIS: (1) more complex paperwork; (2) increased application fees; and (3) delays in printing immigration documents.

First, the Trump administration added numerous arbitrary bureaucratic hurdles in completing paperwork.¹⁵⁸ For example, applicants must write “N/A” in every single field of a form that is “not applicable,” rather than leaving it blank.¹⁵⁹ While the “N/A” policy previously existed, the agency did not previously reject applications that missed some boxes, such as where an applicant left the space for “apartment number” blank when the applicant lives in a house.¹⁶⁰ Under the Trump administration, however, applications suddenly were summarily rejected for any blank boxes. This change is so significant that advocates filed a lawsuit to challenge it, with litigators describing the enforcement of this rule as a “tectonic shift in immigration adjudications” that requires USCIS employees to “arbitrarily reject applications from thousands of vulnerable immigrants.”¹⁶¹ Many of the forms that USCIS rejected were applications for asylum, U-visas (for survivors of certain crimes, such as domestic violence), and T-visas (for survivors of human trafficking)¹⁶²—disproportionately impacting vulnerable applicants who are undocumented and dealing with trauma.

156. See David J. Bier, *No Year Has Seen Legal Immigration Cut Like the 2nd Half of FY 2020*, CATO INST. (Mar. 12, 2020), https://www.cato.org/blog/no-year-has-seen-legal-immigration-cut-2nd-half-fy-2020?utm_source=twitter&utm_medium=social-media&utm_campaign=addtoany (noting that the immigration rate is now equivalent to 0.03 percent of the United States population, the lowest rate ever except for three years during World War II and the Great Depression).

157. See William H. Frey, *The Past Decade's Foreign-born Population Gains Will Be the Smallest Since the 1970s*, BROOKINGS (Sept. 28, 2020), <https://www.brookings.edu/research/the-past-decades-foreign-born-population-gains-will-be-the-smallest-since-the-1970s/>.

158. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., I-918, PETITION FOR U NONIMMIGRANT STATUS, <https://www.uscis.gov/I-918> (last visited Sept. 3, 2020) (stating at the top of the page, “You must provide a response to all other questions, even if the response is “none,” “unknown” or “n/a.” We will reject a Form I-918 or a Form I-918A that has, for example, an empty field for middle name.”) (these instructions later changed in 2021 in response to litigation); see also Rampell, *supra* note 24 (explaining that “U.S. Citizenship and Immigration Services (USCIS) has essentially booby-trapped many of these forms. Applications can be rejected or denied if any fields are left blank—even if the field in question isn’t applicable.”) Indeed, I spent much of summer 2020 triple-checking U-visa applications and assiduously writing “N/A” in black pen in the relevant fields. While the forms can generally be completed using Adobe, fields are set to only accept certain characters—and usually do not allow the user to type a slash (/) symbol. Further, USCIS requires the use of black, not blue, ink.

159. Catherine Rampell, *The Trump administration's No-blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, WASH. POST (Aug. 6, 2020), https://www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

160. Complaint at 2, *Vangala v. United States Citizenship & Immigration Serv.*, No. 3:20-cv-08143 (N.D. Cal. Nov. 19, 2020).

161. *Id.* at 1.

162. *Id.*

Further, USCIS lengthened forms considerably, requiring more pages to convey the same essential information. For example, Form I-765, Application for Employment Authorization, used to be one page long¹⁶³—an efficient way to deal with an application every work-authorized immigrant must file. But under Trump, the I-765 has grown, first to two pages¹⁶⁴ and eventually to its current seven pages.¹⁶⁵ Applicants must submit all pages of these forms, even if nothing on the page applies, marking a painstaking “N/A” in every box.

Second, the Trump administration increased fees for numerous immigration applications¹⁶⁶ and established a parallel decrease in the availability of fee waivers for low-income immigrants.¹⁶⁷ While courts have enjoined the fee increases,¹⁶⁸ they loom over many immigrants who do not have the means to pay them. Although USCIS still accepts fee waivers for low-income immigrants for certain applications, it has increasingly denied these fee waivers under Trump.¹⁶⁹ Many of these denials have been inexplicable and are apparently unconnected to any rational interpretation of an individual's financial need.¹⁷⁰ For example, a U-visa applicant with an annual income of \$2,000 was denied a fee waiver for a form with a \$930 fee for not providing a U.S. tax return for 2019—despite the fact that the applicant resides outside the U.S. and did not work in the U.S. in 2019.¹⁷¹ These under-the-radar fee waiver denials are also on their way to codification through a proposed rule to eliminate most fee waivers.¹⁷² While courts have currently enjoined this rule,¹⁷³ existing waiver denials already create a significant, often insurmountable, hurdle for those vulnerable immigrants who are most in need of relief, and higher fees would do the same.

163. See Form I-765 with expiration date 01/19/2011 (on file with author).

164. See Form I-765 with expiration date 02/28/2018 (on file with author).

165. See U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION FOR EMPLOYMENT AUTHORIZATION (2020), <https://www.uscis.gov/sites/default/files/document/forms/i-765.pdf>. The seven-page version came out in 2019.

166. See Victor Valdez Gonzalez, *USCIS Fee Increases Effective October 2, 2020*, IMMIGRANT LEGAL RESOURCE CTR. (Aug. 2020), https://www.ilrc.org/sites/default/files/resources/revised_uscis_fee_increases_october_2020.pdf.

167. See Peggy Gleason & Melissa Rodgers, *Status of USCIS Fee Waiver Changes – October 2, 2020*, IMMIGRANT LEGAL RESOURCE CTR. (Oct. 2020), https://www.ilrc.org/sites/default/files/resources/pa_fee_waiver_10.9.20.pdf.

168. *Immigration Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JWS (N.D. Cal.) (stating how the case preliminarily enjoined DHS from implementing or enforcing the proposed fee increases). *Immigration Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JWS (N.D. Cal.) (preliminarily enjoined DHS from implementing or enforcing the proposed fee increases on September 29, 2020).

169. See Email from Briana Beltran to author (Dec. 15, 2020) (on file with author) (providing a detailed chart showing nine denials in 2020 of fee waivers for Form I-192, which carries a \$930 fee).

170. *Id.*

171. *See id.*

172. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788 (Aug. 3, 2020).

173. See *Immigrant Legal Res. Ctr. v. Wolf*, No. 4:20-cv-05883-JSW, 2020 WL 5798269, at *1 (N.D. Cal. Sept. 29, 2020). Two other cases challenging the fee rule have also been filed. See *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, No. 19-cv-03283-RDM, 2020 WL 5995206 (D.D.C. Oct. 8, 2020); *Project Citizenship Inc. v. Dep't of Homeland Sec.*, No. 1:20-cv-11545 (D. Mass. Aug. 17, 2020).

Third, the government caused additional challenges for immigrants by ceasing production of necessary immigration documents.¹⁷⁴ For example, in summer 2020, the government ended a contract with a company that had been printing immigrant identity documents, including green cards for lawful permanent residents.¹⁷⁵ But instead of printing those documents in-house, a hiring freeze resulted in decreased printing capacity and a backlog of 75,000 unprinted employment authorization documents (EADs) and about 50,000 unprinted green cards.¹⁷⁶ This issue became so widespread and severe that advocates filed a class-action lawsuit to compel production of the documents.¹⁷⁷ Again, seemingly small bureaucratic hurdles add up to massive systemic inequities that require litigation for resolution. Together, the “N/A” policy, fee increases, and failure to print green cards set up obstacles at both ends of the system, preventing immigrants from both entering the bureaucratic maze to relief and obtaining the documents that prove their hard-won relief.

B. *Public Charge: The Wealth Test*

The Trump administration also used its executive power to expand the categories of immigrants that can be excluded under existing statutes. The revised and expanded public charge rule is a “new spin on an old test” and examines the wealth of applicants as a determining factor for admission.¹⁷⁸ Since the 1880s, the Immigration and Nationality Act has excluded from admission any person who is likely to become a “public charge.”¹⁷⁹ When the

174. See Catherine Rampell, *How the Trump Administration Is Turning Legal Immigrants Into Undocumented Ones*, WASH. POST (July 9, 2020, 7:30 PM EDT), https://www.washingtonpost.com/opinions/how-the-trump-administration-is-turning-legal-immigrants-into-undocumented-ones/2020/07/09/15c1cbf6-c203-11ea-9fdd-b7ac6b051de8_story.html; see also *Extension of Validity of Certain Forms I-797 Due to Continued Employment Authorization Document (EAD) Delays*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9-central/form-i-9-related-news/extension-of-validity-of-certain-forms-i-797-due-to-continued-employment-authorization-document-ead> (stating reauthorization from USCIS for immigrants to prove their work eligibility through use a paper form in place of a physical card because of delays in printing the cards) (last updated Nov. 23, 2020).

175. See Rampell, *supra* note 159.

176. *Id.*

177. See Erin Shaak, *USCIS Faces Class Action Over Months-Long Work Permit Printing Delays [UPDATE]*, CLASSACTION.ORG (Aug. 24, 2020), <https://www.classaction.org/news/uscis-faces-class-action-over-months-long-work-permit-printing-delays>.

178. Jenny Reiger, *Proposed Public Charge Regulations in Immigration Law: Subtle Changes and Significant Effects*, 97 DENV. L. REV. FORUM 87, 90 (2018); see also *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212-14, 245, 248); *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212-14, 245, 248); *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last updated Sept. 22, 2020). In fact, there are three parallel public charge rules implemented by the Departments of Homeland Security, State, and Justice. This Section focuses on the rule from the Department of Homeland Security. See Stephen Yale-Loehr, Jaclyn Kelley-Widmer, Camilah Hamideh & Sarah De Young, *Immigrants, Public Benefits, and COVID-19*, PowerPoint Presentation/Webinar, CORNELL L. SCHOOL (Apr. 13, 2020), <https://cornell.box.com/s/asxbampcrmm1afvqtsxogjcczix5u5oc> [hereinafter *Cornell Public Charge Webinar*].

179. 8 U.S.C. § 1182(a)(4)(A) (2020); see also Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L. J. 18, 18 (1939).

statute was enacted, the government defined a public charge as a person who was likely to be “wholly dependent” on government benefits to survive.¹⁸⁰ Since then, the definition and application of the rule have evolved numerous times.¹⁸¹

Though the concept of public charge has long been used in a discriminatory way,¹⁸² the Trump iteration of this regulation is significant and drastic because it expands the doctrine from examining whether an applicant will need *primary* governmental support for survival to encompass people who receive *any* financial support at any time.¹⁸³ The rule now examines whether the applicant may ever need to access benefits in the future, even if they have not previously needed such benefits.¹⁸⁴ To determine whether the rule is satisfied, DHS must use a complex “totality of the circumstances” test, with any past use of benefits serving as “nearly dispositive.”¹⁸⁵ Thus, this rule puts any green card applicant at risk of denial if they have, for example, ever received more than a year of SNAP benefits (“food stamps”), or if they have used seven months or more of Medicaid and Section 8 housing simultaneously.¹⁸⁶ The rule is also extremely complex, with nested sets of factors, different weights assigned to some factors, and layers that make the outcome of the rule’s application to any individual case unpredictable.¹⁸⁷

The impact of this rule is at least two-fold: first, the rule amounts to a “wealth test,”¹⁸⁸ a discriminatory exclusion of individuals who occasionally need to use public benefits.¹⁸⁹ And second, the rule has already had a chilling effect on use of public benefits due to fear and confusion that such use will cause deportation.¹⁹⁰ Advocates challenged this rule, which is currently enjoined.¹⁹¹

180. Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportability*, 108 GEO. L. J. 1363, 1370 (2020); see also Shanzeh Daudi, *Choosing Between Healthcare and a Green Card: The Cost of Public Charge*, 70 EMORY L.J. 201, 206 (2020); *Cornell Public Charge Webinar*, *supra* note 63, slide 9.

181. See generally Faber, *supra* note 180, at 1371–76.

182. *Id.* at 1366.

183. Reiger, *supra* note 178, at 91.

184. *Id.* at 92.

185. *Id.* at 90.

186. See *Cornell Public Charge Webinar*, *supra* note 178, slides 20–21.

187. See Daudi, *supra* note 180, 220–221; see also *Cornell Public Charge Webinar*, *supra* note, 178, slides 22–39.

188. See *USCIS Fee Rule Imposes a Wealth Test for Citizenship, Prevents Asylum Seekers, Refugees from Becoming U.S. Residents*, IMMIGRANT LEGAL RESOURCE CTR. (Aug. 3, 2020), <https://www.ilrc.org/uscis-fee-rule-imposes-wealth-test-citizenship-prevents-asylum-seekers-refugees-becoming-us>.

189. Daudi, *supra* note 180, at 223–24 (showing the 2019 iteration of the public charge rule “is punitive, essentially punishing low-income immigrants for their low-income status.”).

190. See Faber, *supra* note 180, at 1378; Daudi, *supra* note 180, at 232–33.

191. *Public Charge*, NAT’L. IMMIGR. L. CTR., <https://www.nilc.org/issues/economic-support/pubcharge/> (last visited March 30, 2021); see also *Inadmissibility on Public Charge Grounds Final Rule: Litigation*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation> (last visited Dec. 8, 2020).

C. *Skilled Worker Visa Restrictions*

The Trump administration also raised new hurdles for visas for highly skilled workers. A June 2020 executive order limited issuance of new H-1B visas, a type of visa for skilled workers in areas such as healthcare, tech, STEM, and academia.¹⁹² These limitations were spurred, in part, by apparent health concerns related to the COVID-19 pandemic and also by the perception that foreign workers may be hired into positions that would otherwise be filled by domestic workers—even though visa grants for such workers had already decreased.¹⁹³ This executive order was enjoined a few months later by a district court judge, who reasoned that “Congress’ delegation of authority in the immigration context does not afford the President unbridled authority to set domestic policy regarding employment of nonimmigrant foreigners.”¹⁹⁴ However, President Trump has continued to extend the applicability of this proclamation, including via an executive order that continues the policy until the end of March 2021—even after his tenure concludes.¹⁹⁵

In October 2020, DHS and the Department of Labor together issued another set of proposed regulations that go beyond Trump’s executive order to further limit H-1B availability¹⁹⁶ by narrowing the definition of “specialty occupation” and setting salary minimums.¹⁹⁷ The Administration explicitly framed these regulations as “protecting American jobs from unfair international competition.”¹⁹⁸ However, experts warned that the rules would make hiring foreign workers more difficult across all sectors and suggested that the rule could lead to a dearth of skilled professionals, such as doctors, especially in rural areas.¹⁹⁹

192. Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 22, 2020); *see also* Caroline Johnson, *Rising Restrictions Raise Concern for Cornell’s International Community*, CORNELL DAILY SUN (June 26, 2020) <https://cornellsun.com/2020/06/26/rising-restrictions-raise-concern-for-the-universitys-international-community/>.

193. David J. Bier, *Foreign Worker Visas Were Down 93% Before Trump’s Order*, CATO INST. (June 24, 2020), <https://www.cato.org/blog/foreign-worker-visas-were-down-93-trumps-order> (discussing ban on visas for foreign workers, including targeting H-1B visas for highly skilled foreign workers).

194. *See* Miriam Jordan, *Judge Blocks Trump’s Ban on Foreign Workers*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/foreign-workers-visas-h-1b-trump.html>.

195. *See* Donald J. Trump, *Proclamation on Suspension of Entry of Immigrants and Nonimmigrants Who Continue to Present a Risk to the United States Labor Market*, WHITE HOUSE (Dec. 31, 2020), <https://www.federalregister.gov/documents/2021/01/06/2021-00039/suspension-of-entry-of-immigrants-and-nonimmigrants-who-continue-to-present-a-risk-to-the-united-31-2020>.

196. *See* Press Release, *Department of Homeland Security and Department of Labor Rule Restores Integrity to H-1B Visa Program*, DEP’T OF HOMELAND SECURITY (Oct. 6, 2020), <https://www.dhs.gov/news/2020/10/06/department-homeland-security-and-department-labor-rule-restores-integrity-h-1b-visa>.

197. *See id.*

198. DHS, *Trump Administration Protect American Jobs from Unfair International Competition*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 28, 2020), <https://www.uscis.gov/news/news-releases/dhs-trump-administration-protect-american-jobs-from-unfair-international-competition>.

199. *See* Zolan Kanno-Youngs & Miriam Jordan, *Trump Moves to Tighten Visa Access for High-Skilled Foreign Workers*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/h1b-visas-foreign-workers-trump.html>. The U.S. Department of Labor runs a grant program designed explicitly to address the deficit of healthcare workers in rural areas by granting H-1B visas. *See H-1B Rural Healthcare Grant Program*, GRANTS.GOV, <https://www.grants.gov/web/grants/view-opportunity.html?oppld=329016> (noting that “[t]he intent of this grant program is to alleviate healthcare workforce

D. *Reform for Damaging Administrative Policies*

The challenges described above stem from DHS and its subagencies, which have the power to reinterpret regulations, making changes ranging from subtle to grand and shifting the entire tenor of the system with the political winds. The Trump administration neatly symbolized this fundamental systemic shift in an explicit change to the USCIS mission as stated on its webpage.²⁰⁰ Previously, the mission statement read: “USCIS secures America’s promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.”²⁰¹ The USCIS mission statement under Trump removed reference to a “nation of immigrants” and the goal of providing accurate and useful information to customers, reading: “[USCIS] administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”²⁰² This rewording²⁰³ was not merely semantic, but embodied in policy changes. For example, the emphasis on security gestures at the Wall, the Muslim Ban, and increased expedited removal.

To move in a more productive and immigrant-friendly direction, USCIS must revert to a mission closer to its pre-Trump message and goals of unbiased benefit adjudication, and must revamp its policies in parallel.²⁰⁴ USCIS was specifically created to neutrally adjudicate applications for immigration benefits, not to assist with enforcement. However, USCIS has not developed strong institutional practices, perhaps because it existed for a relatively short time prior to Trump, who disrupted its mission and redirected its focus towards enforcement. Thus, we are now in a critical moment for reframing USCIS.

shortages by creating sustainable employment and training programs in healthcare occupations (including behavioral and mental healthcare) serving rural populations.”) (last updated Oct. 20, 2020). However, the Trump administration limits on H-1Bs put this program at risk. See Jasmine Garsd, *H-1B Visa Freeze Might Hurt Rural Areas in Need of Doctors*, MARKETPLACE (June 23, 2020), <https://www.marketplace.org/2020/06/23/h1-b-visa-freeze-could-harm-rural-communities-need-doctors/>.

200. See Richard Gonzales, *America No Longer a ‘Nation of Immigrants,’ USCIS Says*, NPR (Feb. 22, 2018, 6:18 PM ET), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>. Further, the face of “Emma,” the USCIS website’s “virtual assistant,” was changed to be Caucasian rather than a person of color under the Trump administration.

201. *Id.*

202. *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/mission-and-core-values#:~:text=Mission%20Statement,homeand%2C%20and%20honoring%20our%20values> (last updated July 5, 2020).

203. See Motomura, *supra* note 26, at 3–6 (commenting that the change in mission statement is a “message of skepticism or hostility” to lawful immigration).

204. See Angelo A. Paparelli & Stephen Yale-Loehr, *Big-Picture, Clean-Slate Immigration Reforms for the Biden-Harris Administration*, THINK IMMIGRATION (Nov. 19, 2020), <https://thinkimmigration.org/blog/2020/11/19/big-picture-clean-slate-immigration-reforms-for-the-biden-harris-administration/>. Angelo A. Paparelli and Stephen Yale-Loehr similarly propose that the next administration “[r]estore the customer-service ethos and recognition of our heritage as a nation of immigrants in the USCIS mission statement.”

Under Biden, USCIS must remove bureaucratic hassles that prevent immigrants from obtaining relief. This requires an intentional, careful restructuring of dysfunctional elements of the system, such as the USCIS hotline merry-go-round. The agency must also revise its paperwork systems, shortening application forms and adjudicating humanely instead of employing excessively mechanical review causing needless form rejections. Reducing these logistical burdens should lead to more efficient processing, enabling the Administration to lower fees back within reach of more immigrants and grant fee waivers to those in need.

Finally, the Administration must reform USCIS and DHS more broadly to fairly address visas for professionals, students, and others and acknowledge the benefits international workers bring to the United States. The political backdrop surrounding this issue is challenging, as the perception that immigrants have a negative economic impact on citizens makes the broadening of work visas a “policy quagmire.”²⁰⁵ However, skilled workers are already a necessary and integrated part of the United States economy.²⁰⁶ In the short term, to make international workers once again feel welcome and secure in the United States, the Biden administration must create policies that provide enough room for industries to continue to function²⁰⁷ and which are not subject to swift changes that can upend the lives of workers depending on the programs.²⁰⁸ In the long term, Congress must reform the law to distribute the economic gains of such immigration more broadly, not just to those employing such workers.²⁰⁹

IV. UNSEEN ENFORCEMENT AND DEPORTATION POLICIES

Through executive enforcement, deportation policies, and nativist speech accompanying those policies, President Trump created and expanded cultural and legal rhetoric demonizing²¹⁰ and dehumanizing immigrants and causing

205. See Motomura, *supra* note 26, at 542.

206. See *H-1B Rural Healthcare Grant Program*, GRANTS.GOV, <https://www.grants.gov/web/grants/view-opportunity.html?oppId=329016> (noting that “[t]he intent of this grant program is to alleviate healthcare workforce shortages by creating sustainable employment and training programs in healthcare occupations (including behavioral and mental healthcare) serving rural populations.”) (last updated Oct 20, 2020).

207. See, e.g., Brian D. Brown, Andrew M. Leader, Jan Vilcek & Miriam Merad, “*America First*” Will Destroy U.S. Science, CELL (Sept. 18, 2020), [https://www.cell.com/cell/fulltext/S0092-8674\(20\)31222-8](https://www.cell.com/cell/fulltext/S0092-8674(20)31222-8) (explaining why limitations on H-1B visas will damage industries across the sciences); Elizabeth O’Day, *Cutting off H-1B Visas Will Hurt the Biopharma Industry*, STAT (Oct. 6, 2020), <https://www.statnews.com/2020/10/06/cutting-off-h-1b-visas-will-hurt-the-biopharma-industry/> (discussing the impact of H-1B restrictions on the biopharmaceutical industry).

208. See Miriam Jordan, *They Lost Their Jobs. Now They May Have to Leave the U.S.*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/05/12/us/foreign-workers-visas-immigrants.html>.

209. See Motomura, *supra* note 26, at 537–42, for a more-detailed discussion of possible legislative fixes and alternative trade structures.

210. See Hlass, *supra* note 14, at 222–23 (arguing that, “in tandem with anti-immigrant policies, Trump’s administration has used explicitly and implicitly biased discourse attacking immigrants as a whole” with specific attacks on migrant children and Latinx immigrants). Trump regularly equates immigrants with criminal behavior. See also *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015, 1:03 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/>

fear in immigrant communities.²¹¹ President Trump consistently called for mass deportations outside the purview of the courts,²¹² attempting to bypass the other branches of government by cutting out due process and full consideration of the available legal forms of relief. Below, I highlight (1) the Trump administration's indiscriminate enforcement priorities, implemented by enlarged and increasingly militarized immigration enforcement, and (2) the Administration's expanded use of rapid removal procedures such as expedited removal.²¹³ The Trump administration used these unseen policies, in combination with a lack of procedural protections²¹⁴ and punitive measures like family separation at the border,²¹⁵ to increase enforcement and deportation.

A. *Enforcement Priorities*

In President Trump's first days in office, he issued an executive order announcing a plan to massively increase the number of immigration enforcement agents²¹⁶ and simultaneously set new categories of immigrants who would be "enforcement priorities."²¹⁷ Together, these two policies set the stage for both actual enforcement and a culture of fear that still plagues immigrant communities.

Because no administration can effectively prosecute all of the immigrants who are unlawfully present or otherwise removable from the United States, every administration must use prosecutorial discretion and choose how to allocate prosecutorial resources.²¹⁸ For example, under the Obama administration, the line "felons not families" was the public prosecutorial discretion

full-text-donald-trump-announces-a-presidential-bid/ (explaining how then-candidate Donald Trump said, in reference to Mexican immigrants, "They're bringing drugs. They're bringing crime. They're rapists."). While the recent discourse has been extreme, it is worth noting that Trump and his administration joined a long history of anti-immigrant rhetoric that influences policing of immigrants. *See* McKanders, *supra* note 14, at 204 (establishing that "there is a complex interplay between the terminology used to describe immigrant populations in the media and by elected state and local officials and how daily rhetoric can transform into policing policies that are implemented against immigrant communities.").

211. *See, e.g., Race and Immigration in Trump's America* at 35:55, WORDS MATTER (July 22, 2019), <https://shows.acast.com/words-matter/episodes/race-and-immigration-in-trumps-america> (discussing the impact of ICE raids that the Trump administration repeatedly publicized as impending in order to create fear and score political points, but which several times did not come to pass or were in fact standard ICE operating protocol rather than a large-scale raid).

212. *See* Sarah Sherman-Stokes, *Third Country Deportation*, 53 INDIANA L. REV. 333, 336 (2020).

213. *See generally* WADHIA, *supra* note 11, Chapter 5: Speedy Deportations.

214. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1928 (2019).

215. *Id.*

216. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (stating that Customs and Border Protection (CBP) and ICE are the two units with DHS responsible for immigration enforcement at the border and in the interior of the United States).

217. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); *see also* Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et. al., *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017).

218. WADHIA, *supra* note 11, at 3, 30 (2019).

slogan for explaining which immigrants would be targeted for immigration enforcement.²¹⁹

Enforcement policies like this have a powerful impact on the day-to-day life of immigrant communities nationwide. Under President Obama, for example, most undocumented immigrants with no criminal record could live in relative peace, staying out of trouble and raising their children with comparable stability.²²⁰ Similarly, individuals with removal orders who checked in with ICE and maintained a clean record might not actually be deported because the Administration was prioritizing use of its enforcement resources elsewhere.²²¹

The Trump administration immediately upended the prior enforcement priorities and imposed a new list of priorities so comprehensive that it included nearly all unauthorized immigrants.²²² These “priorities” allowed the Administration to target an increased number of categories of deportable immigrants that significantly expanded what prior administrations had listed.²²³ Further, unlike the priorities of other administrations, these broad categories included no guidelines for use of prosecutorial discretion in situations involving humanitarian factors like length of time in the United States, length of time since a conviction, and family and community ties in the

219. See Barack Obama, Address to the Nation on Immigration (Nov. 20, 2014); see also Memorandum from Jeh Charles Johnson, Sec’y., U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigr. Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014). I do note, however, that many advocates—myself included—did not support President Obama’s “felons not families” policy for its targeting of immigrants who may have had relatively minor or old felonies on their records, and for its obvious disregard for the fact that felons also have families. Further, President Obama’s enforcement of so-called “criminal immigrants” often included those with only old convictions as well as collateral arrests of non-criminals; see Bill O. Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 270–71 (2018), and his administration deported more immigrants than any other in history. See Alex Nowrasteh, *Deportation Rates in Historical Perspective*, THE CATO INST. (Sept. 16, 2019), <https://www.cato.org/blog/deportation-rates-historical-perspective>. Thus, I raise his policy on enforcement priorities as a relative point of comparison to President Trump’s policy, but not to signal approval of it on its own merit.

220. See Memorandum from John Morton, Dir., U.S. Immigr. Customs Enf’t, to all U.S. Immigr. & Customs Enf’t Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011). Some immigration attorneys under Obama would advise their clients to this effect, acknowledging that because the government had a role in exercising “humane and reasonable discretion,” only certain actions carried the risk of prioritization for deportation under the Obama administration. See, e.g., WADHIA, *supra* note 11, at 30, 44 (quoting a removal defense attorney practicing on the West Coast).

221. See Ardalán, *supra* note 67, at 320 (“Until recently, immigration officials had often allowed such immigrants with unexecuted removal orders to remain in the United States for years.”); see, e.g., KARLA CORNEJO VILLAVICENCIO, *THE UNDOCUMENTED AMERICANS 121* (2020) (describing the story of Javier Quintanilla, an undocumented father with no criminal record who lived in the United States for six years after his removal order, during which he “dutifully checked in with immigration authorities every six months” until the Trump administration decided to deport him in March 2017).

222. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); Motomura, *supra* note 26, at 469–70 (2020); see generally WADHIA, *supra* note 11, Chapter 3: Everyone is a Priority.

223. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); see generally WADHIA, *supra* note 11, at 31–32. *But see* Hing, *supra* note 9, at 272 (noting that in the first year of the Trump Administration, deportation efforts were actually focused similarly to the Obama years).

United States.²²⁴ Thus, although Trump was acting within an established executive arena, his use of enforcement policies went beyond the typical enforcement mandate.²²⁵

These policies, in combination with the anti-immigrant scapegoating begun during Trump's campaign²²⁶ and continuing throughout his presidency,²²⁷ caused panic in the immigrant community²²⁸ even though they did not provoke national protests. Indeed, I can recall delivering multiple presentations to members of the San Francisco immigrant community in late 2016 and early 2017, in church basements and school cafeterias, during which the content of the presentation led to crying, despair, and visible panic attacks in the audience. These fears were valid. Within a few weeks of the announcement of the new priorities, I began working with an undocumented client who ICE had suddenly detained with no warning. My client had lived in the United States since 1990. An immigration judge ordered her removed around 1993 after she was convicted of marijuana possession, but she had never left. For twenty-five years, she had been living, working, and raising her family without additional incident. Under President Obama and other prior administrations, a person like this client, with only one decades-old conviction and strong ties to the United States, would not have been a priority despite her removal order.²²⁹ But under Trump, she was fair game.²³⁰ With stories like

224. See WADHIA, *supra* note 11, at 35 (explaining that DHS Secretary Jeh Johnson issued a memo with humanitarian guidance for prosecutorial discretion in 2014).

225. See Mashaw and Berke, *supra* note 16, at 574–75 (discussing Trump's expansion of enforcement).

226. See *Full Text: Donald Trump Announces a Presidential Bid*, *supra* note 210.

227. Trump's hate speech has not been limited to targeting immigrants. However, immigrants have been a special focus for racist speech from his campaign and through his presidency. See, e.g., Fabiola Cineas, *Donald Trump is the Accelerant*, VOX, <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech> (last updated Jan. 9, 2021); Nick Miroff, Maria Sacchetti & Josh Dawsey, *Trump Put up Walls to Immigrants, With Stinging Rhetoric and Barriers Made of Steel and Regulation*, WASH. POST (Oct. 31, 2020, 8:30 AM), https://www.washingtonpost.com/immigration/trump-immigration-walls/2020/10/31/e43453cc-09a3-11eb-991c-be6ead8c4018_story.html (“On the campaign trail in 2016, Trump promised to deport millions of ‘bad hombres,’” and his language has been used to dehumanize and criminalize immigrants). Trump's hate speech has not been limited to targeting immigrants. However, immigrants were a special focus for racist speech during his campaign and throughout his presidency.

228. See, e.g., Amanda Holpuch, “‘I Live in Fear’: Under Trump, Life for America's Immigrants Can Change in a Flash,” THE GUARDIAN (Oct. 18, 2018), <https://www.theguardian.com/us-news/2018/oct/18/immigration-ice-deportation-undocumented-trump>.

229. See WADHIA, *supra* note 11, at 34–35; Ardalan, *supra* note 67, at 320.

230. See, e.g., WADHIA, *supra* note 11, at 42 (describing the story of Fata, an immigrant caregiver to a child with Down's Syndrome who had lived in the United States under prosecutorial discretion for ten years before Trump officials pursued her case again). Similar stories of immigrants who once benefitted from prosecutorial discretion, but whose cases have since been reopened, abound. CORNEJO VILLAVICENCIO, *supra* note 221, at 129–31 (describing the story of Leonel Chávez, an undocumented father who resided in the United States for twenty years, with part of that under a stay of deportation, before the Trump administration scheduled his deportation in 2017); Ardalan, *supra* note 67, at 321 (describing “an Ohio businessman, Amer Adi Othman, husband of a U.S. citizen and father of four U.S. citizen daughters, who had lived in the United States for almost forty years, was deported to Jordan just two weeks after he was arrested based on a prior deportation order.”); Amanda Holpuch, “‘I Live in Fear’: Under Trump, Life for America's Immigrants Can Change in a Flash,” THE GUARDIAN (Oct. 18, 2018), <https://www.theguardian.com/us-news/2018/oct/18/immigration-ice-deportation-undocumented-trump> (Individuals arrested in the first year of Trump's enforcement policy “include[] a 10-year-old with cerebral palsy [ICE] arrested in October 2017 after she left a Texas hospital for treatment;

these going around the community, I frequently counseled clients like Raul,²³¹ an undocumented Mexican small-business owner who had lived in the United States for twenty years, who asked me if he should “self-deport.”²³²

B. *Expanded Expedited Removal*

Over the course of the Trump’s tenure, these enforcement priorities morphed and expanded in unprecedented ways. In July 2019, the Administration announced that it would expand use of a rapid deportation procedure called “expedited removal.”²³³ Congress created expedited removal in 1996²³⁴ as a way to allow low-level immigration officers to deport, or remove, immigrants who enter the United States without permission or by means of fraud²³⁵ when they are encountered within the last fourteen days and within 100 miles of a border.²³⁶

Expedited removal essentially permits Immigration and Customs Enforcement (ICE) to fast-track a deportation without judicial oversight or any form of meaningful review.²³⁷ This removal can happen within hours of apprehension and usually does not permit the immigrant to consult with an attorney or have a hearing before a judge.²³⁸ While expedited removal is a powerful tool, the federal government had previously used it only in narrow circumstances.²³⁹ Yet, even in the limited application of expedited removal to arriving noncitizens, the policy has been rife with abuses caused by immigration officials with unchecked power.²⁴⁰

undocumented adults who volunteer to take custody of children who crossed the border by themselves; and an elderly couple visiting their pregnant daughter-in-law and her husband at a military base in New York for the Fourth of July holiday.”); Liz Robbins, *Pizza Delivery Man Detained by ICE Is Freed by Judge*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/nyregion/pizza-deliveryman-deportation-judge-questions.html> (describing the case of an Ecuadorian man with a U.S. citizen-spouse who was in the process of applying for his green card when he was arrested and detained at an army base while he was delivering pizza).

231. Not his real name.

232. See Park, *supra* note 214, at 1884 (explaining that “self-deportation” is a strategy composed of “a variety of state-sponsored coercive removal that assigns some agency to individuals in their own departure.”). Such schemes are not new to the Trump administration, but in fact originated in colonial times and continue to evolve today. See *id.* at 1884, 1923.

233. 8 U.S.C. § 1225(b)(1) (2018); see also Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019); Koh, *supra* note 26, at 67–68 (noting that the plan for expanded expedited removal was first announced in the same January 2017 executive order as the enforcement priorities and additional officer hiring described above, but acted on in a specific executive order in July 2019).

234. Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA), Pub. L. No. 104-208, § 302, 110 Stat. 3009–546, 3009–579 (1996) (codified at 8 U.S.C. §§ 1225, 1252). Expedited removal was part of the Act.

235. 8 U.S.C. § 1182(a)(6)(C), (7)(a) (2018).

236. See *Featured Issue: Expedited Removal*, AM. IMMIGR. LAW. ASS’N (Nov. 6, 2019), <https://www.aiala.org/advo-media/issues/all/expedited-removal>.

237. See *Challenging the Expansion of Expedited Removal*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/expedited-removal-litigation> (last visited Jan. 11, 2021).

238. *Id.*

239. *Id.*

240. See Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U.L. REV. 337, 354–55 (2018)

The new expedited removal policy is a major expansion, permitting ICE to deport unauthorized immigrants found anywhere in the country who cannot prove that they have been in the United States for at least two years.²⁴¹ This policy greatly expands execution of enforcement priorities and puts all undocumented immigrants in fear of imminent, rapid deportation with no legal recourse. Although the D.C. District Court preliminarily enjoined the expedited removal policy changes in September 2019,²⁴² it later reversed its decision.²⁴³ In June 2020, the court held that the executive branch's decision to expand expedited removal is unreviewable under the APA and not subject to notice-and-comment rulemaking.²⁴⁴ With the injunction lifted, ICE is free to implement the policy nationwide.²⁴⁵

Although the threat of expanded expedited removal has not yet incited national fury or an online movement, it will have catastrophic effects on the rights and lives of immigrant communities and U.S. citizens alike. To start, there is real potential for mistaken deportations of lawfully present individuals—how many caught up in this process will have proof of their two-plus years of residence on hand when ICE detains them?²⁴⁶ If ICE does not accept the documents an individual has available, the person still may be deported without process, despite their lawful status. While the likelihood of deportation of citizens is low, under the version of expedited removal in place for the past two decades, the federal government has already unlawfully deported multiple United States citizens.²⁴⁷

If a targeted individual is undocumented, the “removal of noncitizens without process is a real possibility.”²⁴⁸ While undocumented people are already generally at risk of deportation,²⁴⁹ this policy removes the option to call a lawyer or pursue relief to which that the person might be entitled under

(discussing “rampant denials of procedure and accuracy” in expedited removal, including denial of asylum screenings at the border, verbal abuse of immigrants by CBP officers, and physical intimidation).

241. See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

242. *Make the Rd. N.Y. v. Wolf*, Case 1:19-cv-02369 (D.C. Dist. Ct. 2019).

243. *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

244. *Id.*

245. See Hamed Aleaziz, *ICE Is Planning to Fast-Track Deportations across the Country*, BUZZFEED NEWS (Oct. 7, 2020, 3:24 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-fast-track-deportations>.

246. See Jasmine Aguilera, *Some Undocumented Immigrants Are Now Subject to ‘Expedited Removal.’ Here’s What to Know*, TIME (July 23, 2019), <https://time.com/5632671/undocumented-immigrants-expedited-removal/>. (“We know that people don’t walk around with proof of where they’ve lived and worked for the past two years,” said immigration attorney Kursten Phelps).

247. See Ian James, *Wrongly Deported, American Citizen Sues INA for \$8 Million*, L.A. TIMES (Sept. 3, 2000), <https://www.latimes.com/archives/la-xpm-2000-sep-03-mn-14714-story.html>. For example, in 2000, the former Immigration and Nationality Service used expedited removal to deport U.S. citizen Sharon McKnight to Jamaica when they did not believe her passport was real. In 2009, ICE deported U.S. citizen Mark Lyttle to Mexico after convincing him to sign a statement that he was from Mexico, even though he had cognitive disabilities and had no Mexican heritage. See Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case against the Federal Government*, ACLU (Oct. 5, 2012), <https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government>.

248. See Sherman-Stokes, *supra* note 212, at 336.

249. See *supra* Part IV A, Enforcement Priorities.

immigration law. Further, new regulations require those placed in expedited removal proceedings to file for asylum within fifteen days of their first court hearing²⁵⁰—a deadline that will be impossible to meet, yet which controls what is often the only legal option available.

The expanded use of expedited removal is a paradigmatic example of Trump's executive branch taking the traditional power of prosecutorial prioritization and exercising it at an extreme level. Together with other strategies to ramp up enforcement, this less-visible "operational policy choice" allowed Trump to make enforcement more deportation-oriented and drastic than his predecessor.²⁵¹

C. *Reform for Enforcement*

This Section draws on the work of others²⁵² to briefly touch on a few steps the Biden administration and Congress could take to reform the current immigration enforcement system.

In the short term, the Biden administration should implement enforcement priorities that return to predictable and humane prosecution of only certain groups. Additionally, the Administration could go further than its predecessors in protecting immigrants, for example, by not only de-prioritizing those with no criminal record, but also declining to prosecute long-term lawful permanent residents who are nevertheless deportable under current law. At the border, the Biden administration could use discretion to refrain entirely from low-level prosecutions, instead of focusing on more serious crimes.²⁵³ Those who are subject to expedited removal must have access to fair screening for credible fear and asylum eligibility.²⁵⁴ The new administration should also consider immediately reducing the use of immigration detention, which would enable more immigrants to have a fair shake in court, and it should support access to counsel programs to promote due process.²⁵⁵

In the long term, however, Congress must institute systemic reforms to make immigration enforcement more humane and deportation less draconian while instituting a check on an overzealous executive branch, like Trump's. Professor Peter Markowitz, for example, argues for a number of such

250. See Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81,751 (Dec. 16, 2020).

251. See Mashaw & Berke, *supra* note 16, at 37–38.

252. See, e.g., Peter L. Markowitz, *A New Paradigm for Humane and Effective Immigration Enforcement*, CTR. FOR AM. PROGRESS (Nov. 30, 2020, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/> (proposing a new enforcement paradigm rethinking the heavy-handed punitive model currently in place in favor of "a paradigm that is more humane, significantly less expensive, and simultaneously more effective at increasing compliance with immigration law.").

253. Eagly, *supra* note 20, at 2022; see also Mary D. Fan, *The Case for Crimmigration Reform*, 92 N.C.L. REV. 75, 134 (2013).

254. See Ardalan, *supra* note 67, at 328.

255. See Peter L. Markowitz, *A New Paradigm for Humane and Effective Immigration Enforcement*, CTR. FOR AM. PROGRESS 7 (Nov. 30, 2020, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/>.

reforms: legislative changes to substantive immigration law regarding who is deportable, essentially enshrining some of the enforcement priorities above; creating scalable penalties for immigration offenses instead of the sole, drastic punishment of deportation; and creating a compliance system that does not utilize detention.²⁵⁶ Further, some scholars argue that, in relation to border enforcement, Congress should decriminalize illegal entry and reentry, reframing the narrative that migration is inherently “wrong” and reallocate resources toward criminal justice instead.²⁵⁷

Congress also must restructure its budgetary spending for immigration enforcement. While ICE’s budget has increased by 150 percent during its seventeen-year existence, “compliance with immigration law has gone down, not up.”²⁵⁸ Congress could reallocate some of ICE’s massive funds to other immigration needs instead, such as additional USCIS staff for adjudicating long-pending petitions and other programs focused on areas identified by activists and advocates within and for immigrant communities.²⁵⁹

Finally, Congress must engage in more systemic reform of immigration pathways to reduce the need for unlawful immigration, which is largely driven by the small number of lawful immigration pathways that currently exist.²⁶⁰ Such high-level reforms would reduce the size of the undocumented population as a whole while providing immigration avenues for those who otherwise would be undocumented, and thus, susceptible to deportation.

V. UNSEEN CHANGES TO IMMIGRATION COURT ADJUDICATION

The Trump administration also made extensive changes to the immigration courts, including appointing partisan, unqualified judges to the bench;²⁶¹ limiting the power of immigration judges to adjudicate cases neutrally and accurately;²⁶² and instituting a bevy of procedural changes aimed at hastening

256. *Id.*

257. See Eagly, *supra* note 20, at 2010–23, for a detailed discussion of this idea and concrete proposals on decriminalization and prosecutorial discretion.

258. See PETER L. MARKOWITZ, A NEW PARADIGM FOR HUMANE AND EFFECTIVE IMMIGRATION ENFORCEMENT, CTR. FOR AM. PROGRESS 2 (2020), <https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/>.

259. Community activism around defunding the police was a movement on the rise in 2020, see generally Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=373117. This movement could share lessons for institutional reform in the immigration context as well.

260. See Motomura, *supra* note 26, at 519 (“[I]t is essential to investigate how legal migration pathways can relieve the relentless pressure for irregular migration. A major reason for large-scale migration outside the law is the absence of legal channels.”).

261. See Nolan Rappaport, *How Many of Our Immigration Judges Are Amateurs at Immigration Law?* THE HILL (Nov. 23, 2020, 11:30 AM EST), <https://thehill.com/opinion/immigration/527104-how-many-of-our-immigration-judges-are-amateurs-at-immigration-law> (explaining that candidates for immigration judge positions need not have immigration law experience, and noting that in 2020, eleven new IJs with no immigration law background started hearing cases).

262. See, e.g., Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, LEXISNEXIS LEGAL NEWSROOM (Mar. 29, 2019), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insideneews/posts/the-immigration-court-issues-and-solutions—jeffrey-s-chase-discussing-case-completion-quotas-and-other-repressive-practices>.

deportation²⁶³ and limiting due process.²⁶⁴ These changes resulted in a backlog of 1.2 million cases,²⁶⁵ creating a wait of up to five years from the beginning of a case to its resolution.²⁶⁶ Further, these changes have contributed to vastly disparate asylum grant rates across immigration courts.²⁶⁷

A. *Partisan Appointments to Immigration Courts and the Board of Immigration Appeals*

Because immigration courts lie within the Department of Justice, the Attorney General has the power to hire and fire immigration judges and BIA members²⁶⁸—making such decisions inherently partisan. But, the Trump administration took the partisan nature of immigration court human resources to an unprecedented level. To start, the Trump administration hired far more immigration judges than prior administrations,²⁶⁹ shifting the political balance of the immigration courts and BIA.²⁷⁰ Nearly all of the newly hired judges were former prosecutors or otherwise aligned with the Administration’s political enforcement goals.²⁷¹ Next, the Trump administration’s restrictive policies, some of which are described below, have inspired many long-time judges to retire,²⁷² leaving the bench populated by new judges who are both inexperienced and ideologically aligned with the Trump

263. See Koh, *supra* note 26 (“Historic highs in the immigration court backlog, coupled with the stringency of the federal government’s immigration enforcement agenda, have prompted a series of government-led efforts to hasten the speed of adjudication in immigration court.”).

264. See *id.*

265. See *Backlog of Pending Cases in Immigration Courts as of November 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Dec. 14, 2020).

266. See *Relief Granted by Immigration Judges as of November 2021*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_relief.php (last visited Dec. 14, 2020).

267. See *Judge-by-Judge Asylum Decisions in Immigration Courts, FY 2015-2020*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> (last visited Dec. 14, 2020). For example, in Atlanta, Judge Scott D. Cris denied 97.7 percent of asylum cases before him between 2015 and 2020, while in San Francisco, Judge Dana L. Marks granted 91.1 percent of asylum cases before her in the same time period.

268. See *Frankel*, *supra* note 89, at 13.

269. See Molly O’Toole, Justice Department Touts New Immigration Judges Amid Struggle to Reduce Backlog, L.A. TIMES (Mar. 15, 2019), <https://www.latimes.com/politics/la-na-pol-trump-immigration-judges-backlog-20190315-story.html> [<https://perma.cc/C9NF-JHEU>] (last updated April 4, 2021) (“The Trump administration has hired more immigration judges in two years than was done in the previous seven years . . .”); see also Koh, *supra* note 26, at 49.

270. Marouf, *supra* note 26, at 731 (explaining that changing the size of the BIA is a way to “shift its political balance”).

271. See THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECOME A DEPORTATION TOOL, INNOVATION L. & S. POVERTY L. CTR., 8, 14–15, 22 (2019) (assessing the negative impact surrounding docket changes in immigration courts) [hereinafter THE ATTORNEY GENERAL’S JUDGES]; Chase, *supra* note 262 (“At present, nearly all new IJ hires are former prosecutors or those who otherwise have been deemed to fit this administration’s ideological profile.”); Marouf, *supra* note 26, at 29–30 (discussing the influence of politics on appointments to the immigration court and the BIA).

272. *Why US Immigration Judges are Leaving the Bench in Record Numbers*, WORLD (July 20, 2020), <https://www.pri.org/stories/2020-07-20/why-us-immigration-judges-are-leaving-bench-record-numbers> (quoting Immigration Judge Ashley Tabador as commenting that immigration judges have left the bench in record numbers because of Trump administration pressure to serve as law enforcement for administrative priorities rather than as neutral adjudicators).

administration.²⁷³ The politicization of immigration as a whole, and the pressure the Administration has applied to immigration judges specifically, appear to have caused immigration judges appointed during both Democratic and Republican administrations to issue harsher rulings generally.²⁷⁴ As a result, under Trump, federal courts reviewing immigration judge decisions have repeatedly criticized the adjudicators for abandoning their role as neutral fact-finders and instead adopting a prosecutorial approach.²⁷⁵ Cementing the inappropriate prosecutorial positioning of immigration judges in the system, the Trump administration has not given new judges comprehensive training on immigration law²⁷⁶—which is often compared to the tax code in complexity²⁷⁷—and has ended judicial training on topics such as diversity and inclusion.²⁷⁸

Further, the Trump administration has reshuffled and expanded appointments to the Board of Immigration Appeals in a highly politicized way,²⁷⁹ shaping the agency into an arm of the executive rather than an adjudicative body. Non-Trump era BIA appointees were demoted, moving only Trump appointees into decision-making positions and diluting the independence and neutrality of the court.²⁸⁰ Many newly appointed BIA administrative leaders

273. *Id.* (Immigration Judge Ashley Tabbador notes that new judges do not have institutional knowledge, and thus, will create inefficiencies felt for years.); *see also* Marouf, *supra* note 26, at 729–30 (explaining that politicized vappointments have been a major problem under Trump and noting that “[t]he qualifications to serve as an IJ still do not require any immigration law experience.”).

274. *See, e.g.*, Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1890 (2020) (noting that “bond amounts set by IJs have risen considerably during the Trump administration, and all cohorts of judges have behaved more harshly during the Trump Era than during prior eras.”).

275. *See* THE ATTORNEY GENERAL’S JUDGES, *supra* note 271, at 8 (quoting several federal court decisions to this effect).

276. *See* Roger A. Pauley, Scott Laurent, José Luis Peñalosa, Jr., Kevin Riley & Dan Cicchini, *Developments in Criminal Immigration and Bond Law: A Survey of Recent BIA Precedent Decisions and Updates in Bond Jurisprudence* (June 4, 2018), <https://www.hoppocklawfirm.com/wp-content/uploads/2018/08/Slides-Developments-in-Criminal-Immigration-and-Bond-Law.pdf>. And when comprehensive training has been given, it has sometimes been legally inaccurate. A PowerPoint from a training given to new immigration judges in June 2018 appeared to encourage new IJs to flout the law by declining to employ the categorical approach when applying it would not be “sensible”—i.e., would not permit more zealous prosecution.

277. *See* Nolan Rappaport, *How Many of our Immigration Judges are Amateurs at Immigration Law?* THE HILL (Nov. 23, 2020), <https://thehill.com/opinion/immigration/527104-how-many-of-our-immigration-judges-are-amateurs-at-immigration-law>.

278. Melissa Cruz, *Department of Justice Eliminates Diversity and Inclusion Training for All Immigration Judges*, IMMIGR. IMPACT (Oct. 13, 2020), <https://immigrationimpact.com/2020/10/13/departement-of-justice-diversity-inclusion>.

279. *See* Jeffrey S. Chase, *EOIR’s Hiring Practices Raise Concerns*, OPINIONS/ANALYSIS ON IMMIGR. L. (May 27, 2018), <https://www.jeffreyschase.com/blog/2018/5/27/eoirs-hiring-practices-raise-concerns>; *see also* Tanvi Misra, *DOJ ‘Reassigned’ Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020), <https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals> (discussing expansion of BIA from 17 members to 23 under Trump and the reassignment of nine career BIA members to non-adjudicative roles).

280. *See* Misra, *supra* note 279 (describing that critics say the restructuring “dilutes the independence of an important appeals body by filling it with new hires more willing to carry out the Trump administration’s restrictive immigration policies.”).

and judicial members have prosecutorial backgrounds,²⁸¹ suggesting a political bent aligned with the Trump administration. Ten of the BIA members appointed by then-Attorney General Barr had asylum denial rates of over ninety percent when they served as immigration judges.²⁸² Further undercutting the independence of the appointed BIA adjudicators, the Trump administration issued a new regulation that would allow the director of the Executive Office for Immigration Review—a political appointee, not a judge—to single-handedly reverse any BIA decision at the request of an immigration judge.²⁸³

Under Trump, the BIA has operated in total lockstep with the Administration, at times even defying orders of the higher federal circuit courts of appeals (to which BIA decisions can be appealed) on remand where the orders conflict with the Attorney General's announced priorities. The circuit courts have increasingly reprimanded the BIA for poor reasoning,²⁸⁴ noncompliance with precedent,²⁸⁵ and even for disobeying judicial orders.²⁸⁶ In *Baez-Sanchez v. Barr*, Judge Easterbrook was astonished that the BIA “flatly refused to implement [the Seventh Circuit’s] decision” on remand and “did not rely on any statute [or] regulation” in its analysis.²⁸⁷ “We have never before encountered defiance of a remand order,” Judge Easterbrook wrote, “and we hope never to see it again.”²⁸⁸ The Seventh Circuit declined to remand again to avoid giving the BIA “a free pass for its effrontery.”²⁸⁹

In light of the above-discussed partisan appointments and reappointments to immigration courts and the BIA, together with the policies discussed below, these agencies have become less like neutral courts and more like

281. See *Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead*, AM. IMMIGR. LAW. ASS'N (July 6, 2020), <https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e> (commenting that “[t]he nail in the coffin of judicial neutrality is the fact that the administration has put the courts in the control of a new Chief Immigration Judge who has no judicial experience but served as ICE’s chief immigration prosecutor”); see also Chase, *supra* note 279.

282. See *Board of Immigration Appeals*, U.S. DEP'T OF JUST. <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> (listing new immigration judges and their biographical information) (last updated Dec. 77, 2020); TRAC IMMIGR., *Judge-by-Judge Asylum Decisions in 7, 2020*; *Immigration Courts, FY 2015-2020*, SYRACUSE UNIV., <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> (listing the denial rates for each immigration judge) (last visited Jan.11, 2021) (finding that ten of Barr’s BIA appointees previously served as Immigration Judges, with the following asylum denial rates: Michael P. Baird (91.4%), William A. Cassidy (99%), V. Stuart Couch (93.3%), Deborah K. Goodwin (91%), Stephanie E. Gorman (92%), Keith Hunsucker (85%), Sunita Mahtabfar (98.7%), Philip J. Montante, Jr. (96.3%), Kevin W. Riley (90.4%), and Earle B. Wilson (98.2%).

283. See *DOJ Proposes Regulation to Turn Immigration Appeals into Tool of the Administration’s Anti-Immigrant Agenda*, AM. IMMIGR. LAW. ASS'N (Aug. 26, 2020), <https://www.aila.org/advo-media/press-releases/2020/doj-proposes-regulation-to-turn-immigration>.

284. See, e.g., *Hernandez-Chacon v. Barr*, 948 F.3d 94, 104–05 (2d. Cir. 2020) (explaining that the BIA failed to adequately address the fundamentals of the applicant’s asylum claim).

285. See, e.g., *Bedoya v. Barr*, 981 F.3d 240, 247 (4th Cir. 2020) (holding that “the BIA’s determination that [the applicant] had not suffered past persecution was manifestly contrary to the law and constituted an abuse of discretion.”).

286. See *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035 (7th Cir. 2020).

287. *Id.*

288. *Id.*

289. *Id.* at 1037.

political arms of the Executive under Trump—a paradigmatic example of executive power consolidation.

B. *Limiting Immigration Judge Power*

Numerous new rules and Attorney General decisions over the last four years have operated to severely curb immigration judge autonomy, neutrality, and ability to fairly decide cases. These policies also operate as procedural hurdles for immigrants, making winning relief and every step along that path more difficult.²⁹⁰ I catalog several of them here: (1) case completion quotas; (2) limits on procedural tools; (3) the decertification of the immigration judge's union; and (4) the continual changing of policies and dockets without warning.

First, in 2018, the Trump administration instituted case completion quotas and other performance metrics for immigration judges,²⁹¹ perhaps best exemplified by the “IJ Performance Data Dashboard”—a speedometer-like image that tracked case completion on their computer desktops.²⁹² These strict policies pressure judges²⁹³ into disposing of cases as quickly as possible, which effectively limits due process and makes judges more inclined to deny relief to immigrants.²⁹⁴

Second, the Attorney General's decision in *Matter of Castro-Tum*²⁹⁵ eliminated administrative closure as a docketing tool, allowing its use only when specifically authorized by regulations and federal court settlements.²⁹⁶ Administrative closure—the suspension of a removal proceeding pending the resolution of a collateral matter—allowed immigration judges to prioritize removal cases that were ripe for resolution, rather than clogging their calendars with cases requiring repeated continuances.²⁹⁷ *Castro-Tum* increased the case

290. See Marouf, *supra* note 26, at 757 (“By curtailing the use of administrative closure and continuances, and encouraging summary dismissals, Sessions scaled back procedural rights in removal proceedings and facilitated swift deportations.”).

291. See Memorandum from James R. McHenry III, Dir., Exec. Office of Immigration Review, U.S. Dep't of Justice, to the Office of the Chief Immigration Judge, all Immigration Judges, all Court Administrators & all Immigration Court Staff, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018); see also Marouf, *supra* note 26, at 734.

292. See Laura Lynch, *FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog*, AM. IMMIGR. LAW. ASS'N. (Feb. 21, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/79301>.

293. See Jeffrey S. Chase, *EOIR Imposes Completion Quotas on IJs* (Apr. 7, 2018), <https://www.jeffreyschase.com/blog/2018/4/7/eoir-imposes-completion-quotas-on-ijs?rq=quota>.

294. See Marouf, *supra* note 26, at 734 (explaining that the “new performance metrics . . . threaten to undermine the independence and integrity of IJs by pressuring them to complete cases quickly at the expense of ensuring a fair process”).

295. *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 274, 283 (A.G. 2018); see also Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,588 (Dec. 16, 2020) (proposed regulations to finalize the administrative closure rule introduced in *Castro-Tum*, effective January 15, 2021).

296. See ADMINISTRATIVE CLOSURE POST-CASTRO-TUM, AM. IMMIGR. COUNCIL & ACLU, 3 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf.

297. Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. FORUM (Feb. 11, 2020), <https://www.yalelawjournal.org/forum/the-rise-and-fall-of-administrative-closure-in-immigration-courts>.

backlog, severely reduced judicial autonomy, and put many immigrants needlessly back at risk of deportation.²⁹⁸ Similarly, a proposed rule limiting the use of procedural tools such as continuances²⁹⁹—i.e., a grant of additional time before a merits hearing—will make it more difficult for immigrants to find a lawyer or gather evidence before their hearing.

Third, the decertification of the immigration judge's union, which the Department of Justice justified by classifying immigration judges as “managers,”³⁰⁰ is an unambiguous symbol that the Trump administration viewed immigration judges as executive employees rather than neutral adjudicators. A panel of the Federal Labor Relations Authority decided that immigration judges do not meet qualifications to remain unionized,³⁰¹ effectively depriving them of the ability to “push back against the relentless attack on their independence, neutrality, and ability to fulfill their proper function as a check against executive branch overreach.”³⁰² This decision silences immigration judges—the very people who could best explain the impact of government policies in the courtrooms—and gives the politically-appointed Attorney General “more power to fire immigration judges whose rulings the administration deems out of step with its anti-immigrant policies.”³⁰³

The continual change in policies wrought by the Trump administration has made the work of immigration judges even more difficult. All of these changes have been magnified in the context of the constantly changing Trump immigration landscape. Even in the waning days of the Trump administration, continual implementation of new policies—often without warning—left immigration judges in the dark about how to do their jobs.³⁰⁴

298. See Marouf, *supra* note 26, at 746–47 (explaining that the limits on administrative closure undermine immigration judge authority and are aimed to “curtail noncitizens’ procedural rights and speed up removal cases”); see, e.g., Alissa Escarce, Mazin Sidahmed & Max Siegelbaum, *The Matter of Castro Tum*, LATINO USA (Oct. 9, 2020), <https://www.latinousa.org/2020/10/09/matterofcastrorum/?fbclid=IwAR0iJ4PYVF1KKtGtUO1g9K032D011vHtk4U1gko-gQ7xJml5nZy3RoDRN-g4> (giving an example of the impact of this policy on an individual’s case).

299. See Good Cause for a Continuance in Immigration Proceedings, 85 Fed. Reg. 75,925 (Nov. 27, 2020).

300. See Jeffrey S. Chase, *The Outrageous Decision to Decertify the IJ’s Union* (Nov. 6, 2020), <https://www.jeffreyschase.com/blog/2020/11/6/the-outrageous-decision-to-decertify-the-ij-s-union>.

301. See U.S. Dep’t of Justice, Exec. Office for Immigr. Review (Agency) and Nat’l Ass’n of Immigr. Judges, Int’l Fed’n of Prof’l and Tech. Eng’rs/Technical Engineers, Judicial Council 2 (Union), 71 F.L.R.A. 1046 (Nov. 2, 2020).

302. See Chase, *supra* note 300; see also Polly A. Webber, *Muzzling America’s Immigration Judges is a Travesty*, LEXISNEXIS LEGAL NEWSROOM (Nov. 19, 2020), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/outsidenews/posts/polly-a-webber-muzzling-america-s-immigration-judges-is-a-travesty>.

303. Laila L. Hlass, Elora Mukherjee, Carrie L. Rosenbaum & Maureen Sweeney, *Let Immigration Judges Speak*, SLATE (Oct. 24, 2019, 9:22 AM), <https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html>.

304. See, e.g., Priscilla Alvarez, *Justice Department Places New Pressure on Immigrants Facing Deportation*, CNN, (Nov. 24, 2020, 1:42 PM), <https://www.cnn.com/2020/11/24/politics/immigration-justice-department/index.html> (explaining a new policy requiring immigrants to file stays for their deportation on short notice, which was not explained to the immigration judges, according to Judge Ashley Tabbador: “The judges are finding out that the cases have been pulled behind their back and orders have gone out. And it’s not clear what’s going to happen next.”).

C. *Reform for Immigration Courts*

In the short term, some immigration scholars propose that the new administration should consolidate the immigration adjudicative bodies into a single tribunal “protected from political interference by executive order or regulation.”³⁰⁵ Such a step could be accomplished without Congress and would immediately begin to protect judicial integrity, ideally leading to more consistent, apolitical adjudication nationwide and simultaneously increasing public confidence in the legitimacy of the system.

However, the most obvious and long-term solution to the ongoing political interference and lack of judicial independence is for Congress to establish Article I immigration courts, a move many have championed.³⁰⁶ As former immigration judge Jeff Chase noted, the four years of the Trump administration have shown us the “worst-case scenario of what happens when an enforcement agency realizes that it controls the courts that exist to keep that same agency’s worst impulses in check.”³⁰⁷ In December 2020, nearly 120 organizations submitted a petition to Representative Zoe Lofgren asking her to introduce legislation creating an Article I immigration court before the end of the 116th Congress or at the beginning of the 117th Congress.³⁰⁸ This request joins a long line of proposals for such a reform dating back to at least 1999.³⁰⁹ Of all the measures discussed above, an Article I immigration court would have perhaps the most positive, long-term systemic impact as the most effective check on the Executive’s otherwise largely unfettered immigration power.

CONCLUSION

President Trump and his administration used numerous executive tools to push an extreme anti-immigrant agenda, effectively reworking the operation of the immigration system on every level. While splashy policies like the Muslim Ban and family separation, along with criminalizing rhetoric, set the tone and had sweeping impacts, these alone would not have accomplished change at such a deep level. Indeed, the regulations, both massive and minute; the series of executive orders and memos; and the unseen, quotidian bureaucratic policies were essential to this executive overhaul.

305. Paparelli & Yale-Loehr, *supra* note 204.

306. See Chase, *supra* note 300; see David J. Bier, *Reforming the Immigration System: A Brief Outline*, CATO INST. (Nov. 11, 2020), <https://www.cato.org/publications/e-publications/reforming-immigration-system-brief-outline#legal-immigrants-us-system>.

307. Chase, *supra* note 140.

308. See Letter from AILA and Partners to Zoe Lofgren, Chairwoman, Subcomm. on Immigr. & Citizenship, Comm. on the Judiciary (Dec. 14, 2020), https://www.aila.org/advo-media/aila-correspondence/2020/aila-and-partners-send-letter-requesting-intro?utm_source=AILA+Mailing&utm_campaign=a405366415-AILA8-12-15-2020&utm_medium=email&utm_term=0_3c0e619096-a405366415-292005157.

309. See Bill McCollum, *Immigration Courts Need an Upgrade*, WASH. TIMES (June 17, 2013), <https://www.washingtontimes.com/news/2013/jun/17/immigration-courts-need-an-upgrade/>.

Further, these changes routinely pushed the bounds of law passed by Congress, such as through unfaithful reinterpretation of asylum law, SIJS regulations, and the public charge statute. Time and again, courts responded by enjoining rules—the asylum transit ban, the H-1B limitations—and calling out the Administration for improper exercise of executive power, such as in the DACA case. Yet, even when courts have checked the Trump administration’s power, the conversation is nevertheless moved towards normalizing a dangerously increased executive power.

In light of the way Trump’s anti-immigrant rhetoric and policies have impacted immigrants’ lives, shaped the immigration system, and ultimately shifted more power into the executive branch, the next four years are especially critical for the United States. Are we a country that supports human rights, fulfills our international treaty obligations, and is proud of our legacy as a nation of immigrants? Or will we continue down a path of scapegoating immigrants and promulgating executive-driven ideological policies?

Professor Bill Quigley exhorts those pursuing justice: “We must never confuse law and justice. What is legal is often not just. And what is just is often not at all legal.”³¹⁰ The next administration, along with Congress, must work to restore protections for immigrants and ensure that the executive branch does not overstep its delegated power, and bring the legal closer to the just.³¹¹

310. William P. Quigley, *Letter to A Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 15 (2007).

311. Many scholars and activists agree that Trump immigration policies must be formed. *See, e.g.*, WADHIA, *supra* note 11, at 116–127 (laying out reforms for the next administration to take); Harris, *supra* note 9 (outlining fixes for the asylum system); Jorge Loweree, *How Biden Can Reform Immigration Enforcement and Detention*, IMMIGR. IMPACT (Jan. 4, 2021), https://immigrationimpact.com/2021/01/04/biden-immigration-reform-enforcement-detention/#.X_t9yelKjKY; Chase, *supra* note 140; Austin Kocher, *The Swamp That Needs Draining Now: It’s the Immigration Backlog ICE Created through Indiscriminate Deportations*, N.Y. DAILY NEWS (Dec. 3, 2020), <https://www.nydailynews.com/opinion/ny-oped-the-swamp-that-needs-draining-now-20201203-ujj2d6slkja3jfmho2ldafg7nq-story.html> (suggesting how to fix the enormous immigration court backlog); The Editorial Board, *Opinion, Biden Needs to Overhaul Our Immigration System. Because of Trump, It Won’t Be Easy*, WASH. POST (Nov. 27, 2020), https://www.washingtonpost.com/opinions/biden-needs-to-overhaul-our-immigration-system-because-of-trump-it-wont-be-easy/2020/11/26/52a82c9e-22b7-11eb-952e-0c475972cfc0_story.html; Angelo A. Paparelli & Stephen Yale-Loehr, *Big-Picture, Clean-Slate Immigration Reforms for the Biden-Harris Administration*, THINK IMMIGR. (Nov. 19, 2020), <https://thinkimmigration.org/blog/2020/11/19/big-picture-clean-slate-immigration-reforms-for-the-biden-harris-administration/>; David J. Bier, *Reforming the Immigration System: A Brief Outline*, CATO INST. (Nov. 11, 2020), <https://www.cato.org/publications/e-publications/reforming-immigration-system-brief-outline#legal-immigrants-us-system>.