

Law as a Tool of Terror

*Stella Burch Elias**

ABSTRACT: The immigration laws and policies of the United States from January 2017 through January 2021 serve as a cautionary example of what may happen when the rule of law and the equitable administration of justice are subverted by policymakers pursuing an extreme and coercive political agenda. For four years the Trump Administration used its lawmaking powers to isolate and terrorize immigrant communities. Simply put, the Trump Administration used immigration law as a tool of terror.

The same administrative structures and legal provisions that were originally created in the aftermath of 9/11 to combat terrorism and protect human rights were weaponized and turned against refugees, migrants, and naturalized U.S. citizens. The Department of Homeland Security was transformed from an organization dedicated to combatting terrorism to an organization that instead inspired terror in immigrant communities, particularly among immigrants of color. Inflammatory rhetoric, denigrating specific groups of migrants on the basis of their race, religion, and/or national origin shaped anti-immigrant legal measures, with catastrophic results. At the border and in the interior of the United States, immigration laws were reinterpreted, regulations were amended, executive decrees were issued, and terrifying rumors about potential new initiatives were perpetuated on a daily basis. In the shadow of the COVID-19 pandemic and in the absence of stable and settled law, immigrant communities that were already living in extreme precarity experienced heightened and crushing uncertainty; in short, they were living in a state of constant terror.

The Biden Administration is now embarking on the project of reversing these damaging initiatives, rebuilding trust in immigrant communities, and restoring the global reputation of the United States. But the harm that has

* Professor and Chancellor William Gardiner Hammond Fellow in Law, University of Iowa College of Law. J.D. 2009, Yale Law School; M.A. 2006, Oxford University; B.A. 1998, Oxford University. I am very grateful to Bram Elias, Daria Fisher Page, Emily Hughes, Kit Johnson, Elizabeth Keyes, and participants in the 2018 Central States Law Schools Association Annual Scholarship Conference, the 2019 Emerging Immigration Scholars and Teachers Conference, and the 2019 Maine Law Summer Workshop for their thoughtful comments on earlier iterations of this project, to Victoria Velazquez for her excellent research assistance, and to Barbara Rodriguez, Jared Favero, David Salmon, and the editors of the *Iowa Law Review* for their many contributions to this piece.

been done—to individuals, to communities, and to the law itself—will likely persist for many years. The Trump Administration’s changes to U.S. immigration law and policy illustrate the inherent fragility and malleability of existing legal protections for vulnerable and marginalized immigrant communities. Policymakers, legislators, jurists, and legal scholars must therefore work together in the months and years ahead to ensure that the tragedy of last four years is never repeated, by meaningfully reforming our immigration laws and restructuring the agencies charged with their administration.

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I. INTRODUCTION

In July 2020, over one hundred heavily-armed federal agents in camouflaged military fatigues were deployed to the streets of Portland, Oregon as part of “Operation Diligent Valor,” purportedly with the goal of protecting federal buildings during Black Lives Matter demonstrations.¹ The officers from the Department of Homeland Security (“DHS”) “Rapid Deployment Force,” including members of the Customs and Border Protection (“CBP”) elite BORTAC SWAT team, had reportedly no experience or training in handling mass demonstrations by civilians.² Over the course of several nights, reports emerged of those officers ranging far from the federal buildings they were tasked with protecting, shooting protesters in the head with “less lethal” munitions, launching tear gas, beating peaceful demonstrators, and pulling protestors off the streets and bundling them into unmarked vehicles.³ As events unfolded, media commentators and legal scholars expressed their outrage at the “unprecedented” and “unconstitutional” violence directed at unarmed and predominantly peaceful civilians.⁴ But, the officers’ actions were not “unprecedented.” They were,

1. See Marissa J. Lang, Josh Dawsey, Devlin Barrett & Nick Miroff, *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/national/portland-protests-operation-diligent-valor/2020/07/24/95f21ede-cc09-11ea-89cc-ac7d5e4a5a38_story.html [https://perma.cc/2VVC-SM7Q].

2. See Complaint at 23, *Don’t Shoot Portland v. Wolf*, No. 20-cv-02040 (D.D.C. July 27, 2020), 2020 WL 4334857. (“BORTAC agents are trained to use weapons ranging from pistols to sniper rifles, but they are not trained to police mass protests protected by the First Amendment.”).

3. See Tim Elfrink, *Federal Officers Severely Wounded a Portland Protester. Local Leaders Blame Trump*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/nation/2020/07/13/portland-protester-injured-federal> [https://perma.cc/QH2Q-7J28]; Katie Shepherd & Mark Berman, *It Was Like Being Preyed Upon’: Portland Protesters Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests> [https://perma.cc/P8L6-CUP3].

4. See, e.g., Evan Gerstmann, *Federal Law Enforcement Is Making Unconstitutional Arrests in Portland*, FORBES (July 18, 2020, 7:01 PM), <https://www.forbes.com/sites/evangerstmann/2020/07/18/federal-law-enforcement-is-making-unconstitutional-arrests-in-portland> [https://perma.cc/6XV9-RRBH]; Michael C. Dorf, *Portland Is the New Crimea: Trump’s Little Green Men*, DORF ON L. (July 20, 2020, 7:00 AM), <http://www.dorfonlaw.org/2020/07/portland-is-new-crimea-trumps-little.html> [https://perma.cc/S7L7-HK6P]; Gillian Flaccus, *Constitutional Crisis Looms Over Federal Agents in Portland*, BOS. GLOBE (July 21, 2020, 12:41 PM), <https://www.bostonglobe.com/2020/07/20/nation/federal-agents-are-being-deployed-portland-apparently-chicago-creating-possible-constitutional-crisis> [https://perma.cc/DG4F-5TTR] (“Constitutional law experts said federal officers’ actions in the progressive city are a ‘red flag’ in what could become a test case of states’ rights as the Trump administration expands federal policing.”); Jenni Fink, *Federal Agents Used Tactics Designed for ‘War Zones’ Against Portland Protesters, Lawsuit Alleges*, NEWSWEEK (Aug. 25, 2020, 10:50 AM), <https://www.newsweek.com/portland-protests-trump-admin-lawsuit-federal-agents-unconstitutional-1527500> [https://perma.cc/6BP5-MNAP] (describing a lawsuit alleging “unprecedented, sustained violence and intimidation on the people of Portland”); Alex Ward, *Trump’s Deployment of Federal Agents in Portland Is Exactly How Not to Police Protests*, VOX (July 23, 2020, 2:10 PM), <https://www.vox.com/2020/7/23/21334645/portland-protest-police-federal-maguire> [https://perma.cc/Y4VY-7PT7].

instead, entirely consistent with the changes that the Trump Administration had been making to immigration law and policy since 2017. From its very first week in office, the Trump Administration used its lawmaking authority to transform DHS—an agency that was, ironically, established to combat terrorism in the wake of the Al Qaeda attacks on the World Trade Center in New York City on September 11, 2001—into a robust system of governance for immigrants and naturalized citizens that was suffused, top to bottom, with an ethos of terror.

The Homeland Security Act of 2002, passed in the wake of 9/11, provides the paradigmatic definition of “terrorism” in modern U.S. law.⁵ The Act defines “terrorism” as:

any activity that— (A) involves an act that— (i) is dangerous to human life . . . and (ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and (B) appears to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.⁶

This definition is consistent with what jurists⁷ and legal theorists⁸ have identified as widespread colloquial usage of the terms “terrorism” and “terror.” As one prominent scholar of national security law noted: “At the origin of terrorism stands *terror* – instilled fear, dread, panic or mere anxiety – spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – its shocking brutality, lack of discrimination [and] dramatic or symbolic quality.”⁹ This mirrors the standard dictionary definitions of “terror” and “terrorism.” The Merriam-Webster dictionary, for example, defines terror as either “a state of intense or overwhelming fear,” or “violence or the threat of violence used as a weapon of intimidation or coercion.”¹⁰ Similarly, the Oxford English Dictionary defines “terrorism” as “[a] policy intended to strike with terror

5. There is some debate about differing interpretations of the term “terrorism” in domestic and international law. See generally ALEX P. SCHMID, *THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH* 86–87 (2011) (defining terrorism according to academic consensus); GREGORY E. MAGGS, *TERRORISM AND THE LAW: CASES AND MATERIALS* (2d ed. 2010) (considering the legal landscape surrounding counterterrorism enforcement).

6. Homeland Security Act of 2002, Pub. L. No. 107-296, § 2, 116 Stat. 2135, 2141 (2002).

7. See, e.g., *United States v. Yousef*, 327 F.3d 56, 106–08 (2d Cir. 2003) (describing differing definitions of terrorism in domestic and international law).

8. See, e.g., Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249–50 (2004).

9. SCHMID, *supra* note 5, at 86–87.

10. *Terror*, MERRIAM-WEBSTER DICTIONARY (2021), <https://www.merriam-webster.com/dictionary/terror> [<https://perma.cc/7S3D-C4KY>].

those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized.”¹¹

The tragic irony of the events in Portland—the use of instruments that were originally created to protect U.S. citizens from “violence or the threat of violence used as a weapon of intimidation or coercion” repurposed with the express aim of “intimidat[ing] or coerc[ing] a civilian population”—has a years-long pedigree in immigration regulation. For the four years that the Trump Administration held power in the United States, immigration laws, and the government actors tasked with enforcing those laws, were pitted against refugees, immigrants, and naturalized citizens traveling to or residing in the United States. Additionally, one of the most remarkable aspects of the Trump Administration’s use of its lawmaking power to terrorize immigrant communities was that it was even able to terrorize immigrants and refugees without enacting meaningful longstanding changes to the law itself—merely announcing that such changes were forthcoming, or even announcing that such changes *might be* forthcoming, proved enough to terrify vulnerable refugees and migrants.

The administration’s frequent and repeated reinterpretation of its statutory and regulatory authority, and its pronouncements in executive orders, presidential proclamations, press releases, and even tweets, upended our long-settled understandings of the parameters of immigration law. Longstanding interpretations of the provisions of the Immigration and Nationality Act (“INA”) and the Code of Federal Regulations were overturned, ranging from those pertaining to interviewing arriving asylum seekers¹² or holding children in detention,¹³ to those governing due process in removal proceedings,¹⁴ or the assessment of the economic resources of aspiring green-card holders,¹⁵ or even the circumstances in which an American citizen could be denaturalized.¹⁶ The sheer number of the changes wrought by the Trump Administration was unprecedented in recent history, and the breakneck speed at which the government sought to implement them increased immigrant communities’ fear and insecurity.

At the same time, the administration’s communication strategy involved confusing and unclear messages about what actions it was actually taking and

11. *Terrorism*, OXFORD ENGLISH DICTIONARY (2d ed., 1989), <https://www.oed.com/oed2/00249602jsessionid=A14CBC89A41317E966650528756F5841> [<https://perma.cc/CA7G-5A3F>].

12. *Grace v. Barr*, 965 F.3d 883, 908–09 (D.C. Cir. 2020).

13. *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be codified at 8 C.F.R. pts. 212, 236); *Flores v. Barr*, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019).

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

15. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, & 248).

16. See Amy Taxin, *APNewsBreak: US Launches Bid to Find Citizenship Cheaters*, AP NEWS (June 11, 2018), <https://apnews.com/1da389a535684a5f9doda74081c242f3>.

who it was truly targeting. One explanation for this confusion and uncertainty was that federal court injunctions curtailed some of the Administration's most egregious attempted actions.¹⁷ Another explanation is that the Administration was plagued by internal disagreements and institutional dysfunction.¹⁸ But perhaps the most compelling, and alarming, explanation was simply that permanent uncertainty was a goal, not an unwanted side-effect, of the government's failure to fully implement its threatened initiatives.¹⁹ Whatever the reasons for the administration's strategy, the effects were devastating. Many immigrants reported that they were living in a state of permanent uncertainty and fear about whether or not they are or would be affected by emergent policies.²⁰ This ensured that even those immigrants who were not actually subject to new restrictions were nonetheless convinced that they were, or feared that they would be in the near future.²¹ Countless immigrants, whether seeking entry at the border, or already resident in the United States, experienced pervasive psychological and sometimes even physical harm as a direct consequence of the administration's proposed or existing law and policy initiatives.²²

A government's use of public policy for the express purpose of coercion and intimidation of vulnerable minority groups is, of course, hardly unprecedented, as the compelling scholarly literature on the longstanding

17. See, e.g., Press Release, White House, *Activist Judicial Rulings Block the Administration from Enforcing Our Nation's Immigration Laws* (Oct. 11, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/activist-judicial-rulings-block-administration-enforcing-nations-immigration-laws> [<https://perma.cc/2H7A-RHYE>] ("One shocking judicial ruling after another has barred the Administration from enforcing the immigration laws passed by Congress.").

18. See Michael D. Shear & Julie Hirschfeld Davis, *Trump's Way: Stoking Fears Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> [<https://perma.cc/7KND-NA2Y>] ("Like many of [Trump's] initiatives, his effort to change American immigration policy has been executed through a disorderly and dysfunctional process that sought from the start to defy the bureaucracy charged with enforcing it, according to interviews with three dozen current and former administration officials, lawmakers and others close to the process. . . .").

19. See, e.g., Dara Lind, *Trump's Administration is a Horrifying Success at Terrorizing Immigrants*, VOX (May 3, 2017, 8:40 AM), <https://www.vox.com/policy-and-politics/2017/5/3/15478548/trump-immigration-record> (arguing that "[i]n other realms of the Trump administration, this sort of uncertainty is a sign of ineffectiveness at best — or a total absence of leadership at worst. But when it comes to . . . immigration enforcement . . . the Trump administration's bugs become features.").

20. See, e.g., Rania Awaad, *We're Seeing Confusion, Despair and Even Suicide After Trump Rule on Aid to Immigrants*, USA TODAY (Mar. 17, 2020, 3:26 PM), <https://www.usatoday.com/story/opinion/2020/03/17/trump-public-aid-rule-risks-immigrants-mental-health-column/4905563002> [<https://perma.cc/38NM-NC9V>] (describing the confusion surrounding one new initiative and how "even those who are exempt from its application have started disenrolling from Medicaid and food benefits due to fear, language barriers, and a lack of clarity regarding the policy's stipulations.").

21. *Id.*

22. See, e.g., William D. Lopez, Nicole L. Novak, Melanie Harner, Ramiro Martinez & Julia S. Seng, *The Traumatogenic Potential of Law Enforcement Home Raids: An Exploratory Report*, 24 TRAUMATOLOGY 193, 195–96 (2018).

over-policing of communities of color demonstrates clearly.²³ And there were certainly parallels to that phenomenon in the scale of the Trump Administration's assault on immigrant communities, the speed with which radical changes were proposed or made, and the attendant extreme precarity of those communities, especially in light of the COVID-19 pandemic.²⁴ But what made the use of immigration law as a tool of terror different is that anti-terrorism provisions—expansive legal powers with scant oversight and few, if any, constitutional checks—were being used to terrorize civilian populations.

In July 2020, the DHS officers deployed to the streets of Portland clearly violated the expected norms of behavior for law enforcement officials keeping the peace. The ensuing public outcry reflected the fact that the DHS agents had acted out of step with both well-established constitutional and statutory provisions governing policing procedures and the policy guidelines interpreting those procedures.²⁵ Commentators at the time speculated as to how or why this could possibly have happened.²⁶ What they failed to note was that from 2017 to 2020, DHS officers were immersed in an environment where preexisting legal structures had been ripped away and longstanding legal frameworks, including canonical interpretations of foundational sources of law, had been overturned. Under the Trump Administration, DHS did not hesitate to take steps that were previously unthinkable, such as caging children seeking asylum,²⁷ denying safe haven to refugees,²⁸ and deporting DREAMers, i.e., young people who had been brought to the United States as

23. See, e.g., Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 872 (2020); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2117 (2017); Fanna Gamal, Note, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 982 (2016); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1715–16 (2006) (discussing how overpolicing is popularly understood and perceived); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997).

24. See OECD, *What is the Impact of the COVID-19 Pandemic on Immigrants and Their Children?* (Oct. 19, 2020), <https://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de> [<https://perma.cc/K5NR-WTK4>]; see also Eva Clark, Karla Fredricks, Laila Woc-Colburn, Maria Elena Bottazzi & Jill Weatherhead, *Disproportionate Impact of the COVID-19 Pandemic on Immigrant Communities in the United States* (July 13, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357736> [<https://perma.cc/NAW9-3USG>].

25. See Andrew Selksy & Gillian Flaccus, *Oregon Officials Decry Federal Agents After Protest Clashes*, ASSOCIATED PRESS NEWS (July 18, 2020), <https://apnews.com/article/police-brutality-donald-trump-us-news-ap-top-news-wa-state-wire-f273a11675373e10630e657383c915be> [<https://perma.cc/6N-T9-gXX4>] (“The agents’ actions have prompted outrage from elected officials and civil liberties groups, with Mayor Ted Wheeler demanding at a news conference Friday: ‘Keep your troops in your own buildings, or have them leave our city.’”).

26. See Ward, *supra* note 4.

27. See *Kids in Cages: Inhumane Treatment at the Border Before the U.S. House Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties*, 116th Cong. (July 10, 2019), (written testimony of Clara Long).

28. See REFUGEE COUNCIL USA, WHERE ARE THE REFUGEES? DRASTIC CUTS TO REFUGEE RESETTLEMENT HARMING REFUGEES, COMMUNITIES, AND AMERICAN LEADERSHIP 19–20 (2019), <https://rcusa.org/wp-content/uploads/2019/07/RCUSA-Report-1.pdf> [<https://perma.cc/2Y7Z-9ABZ>].

minors.²⁹ Alongside these actions, the consistent use of rhetorical devices designed to dehumanize migrants—whether describing undocumented immigrants as “animals”³⁰ or suggesting that green card holders joining their family members were “gaming the system” with “chain migration”³¹—further marginalized noncitizens living in the United States. By taking a series of actions against *some* immigrants, the Trump administration effectively terrorized *all* immigrants, and the consequences have been far-reaching. Even before the COVID-19 pandemic, international students had stopped enrolling in U.S. universities.³² Victims of domestic violence had stopped contacting the police.³³ DREAMERS had dropped out of college.³⁴ Migrant workers, fearing raids, turned to day laboring, rather than regular employment.³⁵ Immigrant parents with legal status withdrew their children from school lunch programs and did not apply for food stamps, for fear that they might be labeled a “public charge” and placed in deportation proceedings.³⁶ At the height of the COVID-19 crisis, undocumented immigrants were afraid to go to the emergency room, even when they feared they were seriously ill with the coronavirus.³⁷ And relatives of children held in detention at the border feared that if they tried to pick them up, they would

29. Bob Ortega, *ICE Reopening Long-Closed Deportation Cases Against Dreamers*, CNN (Dec. 21, 2019, 6:01 AM), <https://www.cnn.com/2019/12/21/us/ice-reopening-dreamer-deportation-cases-invs/index.html> [<https://perma.cc/4HX4-8KBW>].

30. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html> [<https://perma.cc/5HHB-LKG2>].

31. Meghan Keneally, *8 Times Trump Slammed ‘Chain Migration’ Before It Apparently Helped Wife’s Parents Become Citizens*, ABC NEWS (Aug. 10, 2018, 12:56 PM), <https://abcnews.go.com/US/times-trump-slammed-chain-migration-apparently-helped-wives/story?id=57132429> [<https://perma.cc/MP9T-PV8D>].

32. See Elizabeth Redden, *Number of Enrolled International Students Drops*, INSIDE HIGHER ED, (Nov. 18, 2019), <https://www.insidehighered.com/admissions/article/2019/11/18/international-enrollments-declined-undergraduate-graduate-and> [<https://perma.cc/7KK7-76MN>].

33. See Lind, *supra* note 19 (“When Irvin Gonzalez was arrested in an El Paso courthouse, where she’d gone to pick up a restraining order for a domestic abuser, police departments around the US started noticing that Hispanic women had stopped coming in as often to report domestic violence.”).

34. *On News of DACA’s End, College Dreamer Turns College Drop-Out*, NEW AM. ECON. (Feb. 22, 2018), <https://www.newamericaneconomy.org/feature/on-news-of-dacas-end-college-dreamer-turns-college-drop-out> [<https://perma.cc/CJX3-QWK2>].

35. See Caitlin Dickerson, Nick Corasaniti & Edgar Sandoval, *ICE Launches Raids Targeting Migrant Families*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/ice-immigration-raids.html> [<https://perma.cc/5GMM-AVSV>]; Catherine E. Shoichet, *ICE Raids Are Looming. Panicked Immigrants Are Skipping Work, Hiding Out and Bracing for the Worst*, CNN (July 12, 2019, 5:58 AM), <https://www.cnn.com/2019/07/12/us/immigration-ice-raids-fear/index.html> [<https://perma.cc/5HFL-RRJU>].

36. See Lind, *supra* note 19.

37. *New York v. U.S. Dep’t of Homeland Sec.*, 475 F. Supp. 3d 208, 226–27 (S.D.N.Y. 2020); *Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 270 (S.D.N.Y. 2020).

be placed in detention and deported themselves.³⁸ These developments, individually and cumulatively had a profound effect on immigrant communities, particularly communities of color, that were already facing disproportionate levels of material deprivation, social marginalization, and poor psychological wellbeing.³⁹ In short, the law itself, combined with the threat of future legal actions, was used to intimidate and coerce immigrant communities throughout the United States.

This Article proceeds as follows. Part II discusses the inception of DHS and its evolution, under the Trump Administration, from a branch of government focused on responding to external threats of terrorist activity to an agency focused on inspiring terror in immigrant communities. Part III discusses the rhetorical invocation of terrorist threats and the repurposing of the powers granted the Executive under the Homeland Security Act to target specific groups of migrants on the basis of their race, gender, religion, and/or national origin. Part IV discusses terror at the Southwest border and the measures taken by the Trump Administration to deter incoming migrants. Part V discusses terror in the interior and the measures taken to systematically destabilize immigrant communities residing in the United States. Part VI addresses the potential long-term implications of this use of immigration law as a tool of terror, and the challenges that the Biden Administration now faces in rebuilding trust in immigrant communities and reinstating just and equitable laws and policies.

II. THE DEPARTMENT OF HOMELAND SECURITY: RESPONDING TO AND INSPIRING TERROR

On September 11, 2001, nineteen men associated with the international terrorist group Al Qaeda hijacked four commercial airplanes bound for the West Coast of the United States.⁴⁰ The hijackers crashed two of those planes into the north and south towers of the World Trade Center in Lower Manhattan, in New York City, a third plane into the Pentagon, in Washington, D.C., and the fourth plane crash-landed in Pennsylvania.⁴¹ The consequences were devastating. In total, 2,977 people were killed in what constituted the deadliest attack on U.S. soil since the Pearl Harbor bombing that led the United States to join the Allied Powers in World War II.⁴² In the years that

38. See Elvia Malagón, *Children Held By Border Protection at O'Hare Were to Be Placed in DCFS Custody*, CHI. TRIB. (July 19, 2019, 8:47 PM), <https://www.chicagotribune.com/news/ct-children-detained-chicago-ohare-20190720-1257rd2ljh6fi7dbwdwledry-story.html> (reporting that a “mother . . . feared she could be detained if she arrived to pick up her daughters.”).

39. See *New York*, 475 F. Supp. 3d at 222.

40. See generally MITCHELL ZUCKOFF, *FALL AND RISE: THE STORY OF 9/11* (2019) (detailing the events of the 9/11 terrorist attacks).

41. *September 11 Terror Attacks Fast Facts*, CNN (Sept. 3, 2021, 10:40 AM), <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> [<https://perma.cc/3JFL-XYBR>].

42. *Id.*

followed the 9/11 attacks, the U.S. government introduced sweeping new measures to combat the threat of terrorism at home and abroad. This Part of the Article discusses the evolution of DHS, from an agency focused on thwarting terrorist attacks in the wake of 9/11, to an agency fulfilling an increasingly militarized immigration enforcement remit under the Trump Administration.

A. *THE CREATION OF DHS IN RESPONSE TO TERRORIST ATTACKS*

On October 26, 2001, the Senate passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“PATRIOT Act”).⁴³ The preamble to the PATRIOT Act stated that it was promulgated in order “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”⁴⁴ One year later, in furtherance of the goals of the PATRIOT Act, the Homeland Security Act was passed.⁴⁵ This Act created DHS, whose “primary mission” was to “prevent terrorist attacks within the United States” and “reduce the vulnerability of the United States to terrorism.”⁴⁶ As a key part of that mission, the newly-created DHS assumed all responsibility for securing U.S. borders and enforcing U.S. immigration laws, replacing the Immigration and Naturalization Service, an agency within the Department of Justice, which had performed those roles since 1940.⁴⁷

The creation of DHS was not without controversy. When the House of Representatives initially voted on the precursor bill to the Homeland Security Act, 132 members of the House, including 10 Republicans, opposed the department’s creation.⁴⁸ Legal scholars, journalists, and other commentators were also critical of the creation of a “super department,” which merged 22 existing federal agencies into one entity—a department whose mission was never clearly articulated beyond the vague and ambiguous language of the

43. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered U.S.C. titles 8, 12, 15, 18, 20, 31, 42, 47, 49, and 50).

44. *Id.* at 272.

45. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

46. 6 U.S.C. § 111(b)(1)(A)–(B) (2018). Representative Dick Armey (R-Tex.), joined by 112 original cosponsors, introduced House Bill 5005 on June 24, 2002. 148 CONG. REC. H3859 (June 24, 2002). Following its introduction, House Bill 5005 was amended to add new duties to DHS’s mission, including “ensur[ing] that the overall economic security of the United States is not diminished by” homeland security efforts and monitoring “connections between illegal drug trafficking and terrorism.” *See* H.R. 5005, 107th Cong. § 101(b)(1)(E)–(G) (2002).

47. *See* Jonathan Thessin, *Recent Developments: Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 515–16 (2003).

48. The bill passed the House on July 26, 2002, by a vote of 295 to 132. *Roll Call 367, Bill Number: H. R. 5005*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (July 26, 2002, 9:41 PM), <https://clerk.house.gov/Votes/2002367> [<https://perma.cc/UPR3-SVD8>]. House Bill 5005 was then received in the Senate. *See* 148 CONG. REC. S8036 (Sept. 3, 2002).

Act of Congress that created it.⁴⁹ Others argued that the creation of the new department was a knee-jerk reaction to the failures of existing actors to anticipate and prevent the 9/11 attacks, and those failures would have been better addressed by additional funding, training, and review of the existing structures.⁵⁰ But none of these critiques prevailed.

B. THE TRANSFORMATION OF DHS INTO AN ORGANIZATION INSPIRING TERROR

Since 2002, DHS has grown significantly, expanding its personnel, increasing its budget, and growing and redefining its role. In 2003, the department was initially staffed by 180,000 employees from the U.S. Customs Service, the Federal Emergency Management Agency and other federal offices.⁵¹ Today, DHS has over 240,000 employees, predominantly working for CBP and Immigration and Customs Enforcement (“ICE”).⁵² It is now the federal government’s third-biggest department, behind Defense and Veterans Affairs. As its staff has grown, so has its budget. DHS is made up of 22 separate agencies, and three of those agencies, CBP, ICE, and the Office of Biometric Identity Management (which provides biometrics services to CBP and ICE) have received significantly more money in federal appropriations than all the other federal criminal-law enforcement agencies combined.⁵³ In Fiscal Year 2020, CBP and ICE received over 29 billion dollars in federal funds⁵⁴ According to a recent report by the Migration Policy Institute, the arguments put forward to justify this level of funding for Homeland Security have

49. See STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 73–74 (2003); Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 727 (2006).

50. See Wendy Haynes, *Seeing Around Corners: Crafting the New Department of Homeland Security*, 21 REV. POL’Y RSCH. 369, 376 (2004); Dara Lind, *The Department of Homeland Security is a Total Disaster. It’s Time to Abolish It*, VOX (Feb. 17, 2015, 9:29 AM), <https://www.vox.com/2015/2/17/8047461/dhs-problems> [<https://perma.cc/W27K-AQTK>].

51. See DEP’T OF HOMELAND SEC., PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2003, at 11 (2003), <https://www.dhs.gov/xlibrary/assets/PerformanceAccountabilityReportFY03.pdf> [<https://perma.cc/AB6W-YRQD>].

52. See U.S. CUSTOMS & BORDER PATROL, U.S. BORDER PATROL FISCAL YEAR STAFFING STATISTICS (FY 1992-FY 2019) 3 (2020), <https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-staffing-statistics-fy-1992-fy-2019> [<https://perma.cc/YV33-SAMT>].

53. See Muzaffar Chishti & Jessica Bolter, *As #DefundThePolice Movement Gains Steam, Immigration Enforcement Spending and Practices Attract Scrutiny*, MIGRATION POL’Y INST.: POL’Y BEAT (June 25, 2020), <https://www.migrationpolicy.org/article/defundthepolice-movement-gains-steam-immigration-enforcement-spending-and-practices-attract> [<https://perma.cc/9UX6-GBB8>]; see also *Fact Sheet: The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [<https://perma.cc/8X95-WXP5>].

54. U.S. DEP’T OF HOMELAND SEC., FY 2020 BUDGET IN BRIEF 24 (2020), https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf [<https://perma.cc/WU6M-3U2Z>]; U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, BUDGET OVERVIEW FISCAL YEAR 2021, at 29 (2021), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf [<https://perma.cc/R4RA-2CAK>].

incentivized even more expansive use of immigration enforcement powers by the agencies, creating a vicious circle of “an ever more muscular immigration enforcement presence in U.S. life.”⁵⁵

The choice made by legislators in 2002 to place immigration regulation within the purview of a government department dedicated to combatting terrorism and defending the homeland, instead of a government department whose mission is “[t]o enforce the law . . . and to ensure fair and impartial administration of justice,”⁵⁶ reflected and, in turn, has contributed to, a significant shift in popular attitudes towards refugees and migrants. Rather than being perceived as “Americans in waiting” navigating a civil legal process, immigrants became seen as potential “threats to the homeland.”⁵⁷ Most immediately, immigrants from the Middle East, particularly those who either self-identified as or were perceived to be Muslim, were viewed with increasing levels of distrust and suspicion.⁵⁸ But from 2003 to 2016, anti-immigrant animus against all newcomers, not just those from Muslim-majority countries, rose markedly.⁵⁹ Immigrant communities that were previously perceived as contributing to the U.S. labor market and applauded for pursuing the “American Dream” were instead viewed with suspicion as potential “job stealers” by some of their U.S.-born neighbors.⁶⁰ Refugees fleeing persecution in Muslim-majority countries were (mis)identified as “Islamic extremist terrorists.”⁶¹ Latinx children risking their lives to cross the Southwest border were (mis)characterized as dangerous “gang members” or “drug runners.”⁶² And the DHS officials working in CBP, ICE, and even the U.S. Citizenship and Immigration Service (“USCIS”) increasingly viewed their task of “protecting

55. See Chishti & Bolter, *supra* note 53.

56. See *About DOJ*, U.S. DEP’T JUST. (2021), <https://www.justice.gov/about> [<https://perma.cc/3NZJ-6NSR>].

57. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION & CITIZENSHIP IN THE UNITED STATES* (2006) (exploring the shifts in perception of immigration to the United States).

58. See generally RACHEL GILLUM, *MUSLIMS IN A POST-9/11 AMERICA: A SURVEY OF ATTITUDES & BELIEFS & THEIR IMPLICATIONS FOR U.S. NATIONAL SECURITY POLICY* (2018) (examining the public perceptions of Muslims in America following the 9/11 attacks).

59. See *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, ANTI-DEFAMATION LEAGUE (2018), <https://www.adl.org/the-anti-immigrant-movement-in-the-us> [<https://perma.cc/JK84-WY6X>].

60. See *On Immigration Policy, Partisan Differences but Also Some Common Ground*, PEW RSCH. CTR: U.S. POL. & POL’Y (Aug. 25, 2016), <https://www.pewresearch.org/politics/2016/08/25/on-immigration-policy-partisan-differences-but-also-some-common-ground> [<https://perma.cc/N4Z6-3G66>].

61. See generally GILLUM, *supra* note 58 (describing the identification and misidentification of suspected terrorists).

62. See Jenny Rivera, *The Continuum of Violence Against Latinas and Latinos*, 12 N.Y.C. L. REV. 399, 402 (2009); Steven W. Bender, *Old Hate in New Bottles: Privatizing, Localizing, and Bundling Anti-Spanish and Anti-Immigrant Sentiment in the 21st Century*, 7 NEV. L.J. 883, 883–84 (2007).

the homeland” as one that pitted them in direct opposition to immigrant communities.⁶³

Anti-immigrant animus became even more prevalent during the campaign of Republican presidential candidate Donald J. Trump, who swept to office in November 2016 on a platform based, in large part, on building a wall along the United States-Mexico Border and closing the borders of the United States to immigrants of color.⁶⁴ During his election campaign, candidate Trump received strong endorsements from both the National Immigration and Customs Enforcement Council, the ICE officers’ union,⁶⁵ and from its CBP counterpart, the National Border Patrol Council.⁶⁶ Given that support, it was perhaps unsurprising that when Mr. Trump assumed office as the forty-fifth President of the United States, he tasked his administration with the transformation of US immigration law, beginning with broadening the powers of the enforcement branches of DHS.⁶⁷ In February 2017, one early analysis of the new administration noted that: “Under the Trump Administration, the relationships between anti-immigrant stalwarts and Border Patrol are being strengthened, and formalized, as never before.”⁶⁸ Indeed, Thomas Homan, who served as the Acting Director of ICE under President Trump told a journalist that the new President was “taking the handcuffs off” his officers.⁶⁹ “When Trump won, [some officers] thumped their chest as if they had just won the Super Bowl,” the same journalist reported.⁷⁰ One of the earliest results of this strengthening and formalization was a new enforcement policy predicated upon inspiring terror in immigrant communities.

63. See Jonathan Blitzer, *The Border Patrol Was Primed for President Trump*, NEW YORKER (Feb. 17, 2017), <https://www.newyorker.com/news/news-desk/the-border-patrol-was-primed-for-president-trump> [<https://perma.cc/TZL4-QRQJ>].

64. See Julie Hirschfeld Davis, David E. Sanger & Maggie Haberman, *Trump to Order Mexican Border Wall and Curtail Immigration*, N.Y. TIMES, (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/wall-border-trump.html> [<https://perma.cc/4JXZ-XUCU>] (“The border wall was a signature promise of Mr. Trump’s campaign, during which he argued it is vital to gaining control over the illegal flow of immigrants into the United States.”). Mr. Trump also insisted that Mexico would pay for the border wall. See Michael D. Shear & Emmarie Huetteman, *Trump Insists Mexico Will Pay for Wall After U.S. Begins the Work*, N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/us/politics/trump-wall-mexico.html> [<https://perma.cc/M3L4-9CU7>]. Mexico did not pay.

65. See *ICE Union Endorses Trump*, POLITICO (Sept. 26, 2016, 8:12 AM), <https://www.politico.com/story/2016/09/immigration-customs-enforcement-union-endorses-trump-228664> [<https://perma.cc/9QXD-B2JU>].

66. See Blitzer, *supra* note 63.

67. *Id.*

68. *Id.*

69. See Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772> [<https://perma.cc/H5X8-N3QS>].

70. *Id.*

In its first few days in office, the Trump Administration abandoned the Obama Administration's immigration Priority Enforcement Program ("PEP").⁷¹ This government program provided a clear and predictable hierarchy of individuals who would be subject to immigration enforcement operations by ICE or CBP. Noncitizens involved in terrorist activity or convicted for committing serious crimes, recent border-crossers, and those with recent removal orders were prioritized for arrest, detention, and removal from the United States.⁷² Other immigrants—most notably those who had overstayed their visas, or entered without inspection years ago, but had otherwise lived quietly and unremarkably in the United States—were not.⁷³ Immigration law scholars and advocates disagree about the efficacy and fairness of the Obama PEP program.⁷⁴ Nonetheless, even critics of the program concur that it did provide a degree of security and predictability for law-abiding, long-term, foreign-born residents of the United States and their families—which often included individuals who held U.S. citizenship or lawful immigration status, in addition to any undocumented family members.

On January 25, President Trump issued an order instructing U.S. immigration authorities to crack down on undocumented immigrants living in the United States.⁷⁵ In the order, he announced that the Obama Administration's PEP had been scrapped and that henceforth all unauthorized immigrants, including those with longstanding residency in the United States and those with no criminal history, could be subject to arrest and detention at any time and at the complete discretion of DHS officers.⁷⁶ Chaos and panic ensued. Although resource constraints meant that, as a practical matter, it was impossible for ICE and CBP to target all 11.4 million immigrants living in the United States without authorization, many undocumented community members living in the country reportedly feared that they might become a target of opportunity at any time.⁷⁷ In February

71. See *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T (last updated Feb. 9, 2021), <https://www.ice.gov/pep> [<https://perma.cc/DJP4-V8YR>].

72. *Id.*

73. See *id.*; see also Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir. of U.S. Immigr. & Customs Enf't, R. Gil Kerlikowske, U.S. Comm'r of Customs & Border Prot., Leon Rodriguez, Director of U.S. Citizenship & Immigr. Servs., and Alan D. Bersin, Acting Assistant Sec'y for Pol'y (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/8T9K-54AQ>].

74. See, e.g., Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 109–34 (2016); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 698–713 (2015); Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 109, 144–68 (2014).

75. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

76. *Id.*

77. See, e.g., Lisa Rein, Abigail Hauslohner & Sandhya Somashekhar, *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST (Feb. 11, 2017), <https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least->

2017, ICE conducted home and workplace raids in “Atlanta, Chicago, New York, the Los Angeles area, North Carolina and South Carolina,” arresting hundreds of immigrants, many of whom had lived in the United States for years and had minor or no criminal records.⁷⁸ Stories of further raids began circulating, particularly in non-English-language media, with an emphasis on the “collateral arrests” of immigrant bystanders who happened to be in the wrong place at the wrong time.⁷⁹ ICE’s own data shows the immediate effect of this increased, indiscriminate enforcement activity. Its annual report shows that ICE made thirty percent more arrests in Fiscal Year 2017 than in Fiscal Year 2016, including 146 percent more arrests of immigrants with no criminal convictions.⁸⁰

The feelings of uncertainty, fear, and outright terror that these actions against a small and seemingly randomly-selected group of immigrants evoked in millions of others was, quite clearly, a major goal of these operations. A longtime Trump campaign adviser on immigration, former Kansas Secretary of State Kris Kobach, dubbed this approach, which he had championed for over a decade, “Attrition through Enforcement.”⁸¹ Kobach argued that by terrorizing immigrant communities, and by “making an example” of individual immigrants to inspire fear in others, even those who were not themselves subject to enforcement operations would become so afraid that they would no longer be able to bear living in the United States and would return voluntarily to their countries of origin.⁸² There is, however, no indication that the new Trump-era enforcement regimen had this desired approach, because even when the enforcement operations increased, the number of undocumented immigrants living in the United States remained

6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html [https://perma.cc/J5VJ-CGYX] (“Hiba Ghalib, an immigration lawyer in Atlanta, said the ICE detentions were causing ‘mass confusion’ in the immigrant community. . . . ‘People are panicking,’ Ghalib said. ‘People are really, really scared.’”).

78. See *id.*

79. See Hamed Aleaziz, ‘Collateral’ Immigration Arrests Threaten Key Crime Alliances, S.F. CHRON. (Apr. 29, 2017, 5:16 P.M.), <https://www.sfchronicle.com/bayarea/article/Collateral-immigration-arrests-threaten-key-11106426.php> [https://perma.cc/6VRE-M3CM]. For further analysis of the phenomenon of collateral arrests, see Andrea Castillo, ‘Collateral Arrests’ by ICE Amount to Racial Profiling, Violate Immigrants’ Rights, Lawyers Say, L.A. TIMES (Feb. 4, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-ice-collateral-arrests-20180204-story.html> [https://perma.cc/PAD8-VN8E].

80. See U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, (last updated Jan. 26, 2021) <https://www.ice.gov/removal-statistics/2017> [https://perma.cc/3MDG-MHQ3].

81. See Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMPAR. & INT’L L. 155, 156 (2007).

82. *Id.* at 160–62.

relatively stable.⁸³ But, this did not deter ICE officials from continuing these randomized enforcement operations through 2017, 2018, 2019, and 2020.

In January 2020, the federal Office of Personnel Management re-designated CBP as a “security agency,” reducing the range of oversight to which it is subject and giving it greater powers to act within the interior of the United States.⁸⁴ Within a month, CBP confirmed that, pursuant to its new powers, it would send one-hundred Border Patrol agents to ten U.S. cities—reportedly Atlanta, Boston, Chicago, Detroit, Houston, Los Angeles, New Orleans, New York, Newark, and San Francisco—to support ICE’s interior enforcement operations.⁸⁵ In June 2020, ICE was granted the same “security agency” designation, similarly reducing the range of transparency measures with which it must comply.⁸⁶ Alongside their CBP colleagues, ICE agents wearing unmarked uniforms were subsequently deployed to Portland, Oregon, to quell the Black Lives Matter protests. Thus, even as the COVID-19 pandemic swept the nation, ICE raids continued in major cities and in rural communities.⁸⁷ Because of the ever-present specter of home or workplace raids, members of immigrant communities throughout the United States described themselves as living permanently in a heightened state of uncertainty, fear, and terror.⁸⁸

83. See *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/hispanic/interactives/unauthorized-trends> [<https://perma.cc/WG26-XQXF>]. Although note that the number of temporary residents on nonimmigrant visas did decline—between 2017 and 2018 the number of noncitizens in the United States declined, with more than half of this drop attributable to Latin American immigrants, due to both their decreased inflows into the United States and greater outflows from the country. Similarly, between Fiscal Year 2016 and Fiscal Year 2019, applications for green cards decreased by 17 percent, to the lowest number in half a decade, and the number of foreign nationals outside of the country applying for temporary visas fell, also by 17 percent over the same period.

84. Ken Klippenstein, *Exclusive: Customs and Border Protection Gains an Extra Layer of Secrecy*, NATION (Feb. 4, 2020), <https://www.thenation.com/article/politics/cbp-security-agency> [<https://perma.cc/HZ4A-DEY5>].

85. Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> [<https://perma.cc/B7RZ-ZAW4>].

86. Ken Klippenstein, *ICE Just Became Even Less Transparent*, NATION (July 2, 2020), <https://www.thenation.com/article/politics/ice-security-agency> [<https://perma.cc/Z6UJ-ZSWE>].

87. Caitlin Dickerson, Zolan Kanno-Youngs & Annie Correal, *Flood the Streets: ICE Targets Sanctuary Cities with Increased Surveillance*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/us/ICE-BORTAC-sanctuary-cities.html> [<https://perma.cc/633C-A7NJ>].

88. See, e.g., Mary Lehman Held, *Why Undocumented Immigrants Still Fear the 2020 Census*, CONVERSATION (Apr. 2, 2020, 8:33 AM), <https://theconversation.com/why-undocumented-immigrants-still-fear-the-2020-census-132842> [<https://perma.cc/PXR8-JRNP>] (discussing the fact that immigrants are afraid to participate in the 2020 census); see also Giulia McDonnell Nieto Del Rio, Molly Hennessy-Fiske & Cindy Carcamo, *Hiding from ICE Raids: ‘People Are Terrified To Go Out on the Streets’*, L.A. TIMES (July 15, 2019, 8:36 AM), <https://www.latimes.com/local/lanow/la-me-ice-raids-immigrant-communities-20190715-story.html> [<https://perma.cc/EDK6-AgZ4>] (reporting that many immigrants stayed at home after Trump’s threatened ICE raids); Caitlin Dickerson, Jose A.

III. THE RHETORIC OF TERROR AND IMMIGRANTS' IDENTITIES

The Trump Administration's use of terror-based tactics extended far beyond its guidance documents outlining the parameters of the powers of the immigration enforcement agencies. The administration did not merely change its interpretation of existing legal provisions pertaining to DHS operations, it also changed the legal system within which DHS operates. As the Migration Policy Institute noted in 2020, in less than four years, the Trump administration made over 400 changes to US immigration law and policies.⁸⁹ Those changes were brought about through an intricate and overlapping series of regulatory, policy, and programmatic initiatives affecting almost every area of immigration rulemaking.

Attacking immigrants based on their identity was arguably the cornerstone of the Trump Administration's approach to immigration regulation. During his presidential campaign, Donald Trump used hateful and degrading rhetoric to demonize Muslims (whom he described as "radical Islamic terroris[ts]"),⁹⁰ Mexican migrants (whom he characterized as drug-smugglers and rapists),⁹¹ and African and Haitian immigrants (whom he later suggested had left "shithole countries" to move to the United States.)⁹² He argued repeatedly on the campaign trail that "those people" should not be allowed to enter the United States. This denigration of the "other"—i.e., individuals with identity characteristics that set them apart from white, Christian, native-born US citizens—undoubtedly played to his electoral base in 2016.⁹³ But, more insidiously, it also created a blueprint of sorts for the

Del Real & Julie Bosman, *With ICE Raids Looming, Immigrants Worry: 'Every Time Someone Knocks, You Get Scared'*, N.Y. TIMES (July 13, 2019), <https://www.nytimes.com/2019/07/13/us/ice-raids.html> [<https://perma.cc/NM76-BYM3>] (providing an example of how the ICE raids interrupt immigrants' daily lives); Joe Garofoli, *Even Immigrants in US Legally Deal with Fear and 'Chaos' as ICE Raids Loom*, S.F. CHRON. (July 11, 2019, 9:17 PM), <https://www.sfchronicle.com/politics/article/Even-immigrants-in-U-S-legally-deal-with-fear-14089655.php> [<https://perma.cc/8UNH-J8XY>] (discussing the fear of ICE deporting undocumented relatives).

89. SARAH PIERCE & JESSICA BOLTER, MIGRATION POL'Y INST., *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 1* (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [<https://perma.cc/Eg8Z-GDG6>].

90. See Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/YD78-HGP5>].

91. See Alexander Burns, *Choice Words from Donald Trump, Presidential Candidate*, N.Y. TIMES: FIRST DRAFT (June 16, 2015, 2:01 PM), <https://www.nytimes.com/politics/first-draft/2015/06/16/choice-words-from-donald-trump-presidential-candidate> [<https://perma.cc/Y8KV-PC5A>].

92. See Eli Watkins & Abby Phillip, *Trump Decries Immigrants from 'Shithole Countries' Coming to US*, CNN (Jan. 12, 2018, 9:53 AM), <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html> [<https://perma.cc/4BS3-GP4A>].

93. See Shear & Davis, *supra* note 18 ("He's basically saying, 'You people of color coming to America seeking the American dream are a threat to the white people'. . . . 'His objectification and demonization of people who are different has festered for decades.'").

Trump Administration's policy choices, which led to a series of Presidential Proclamations and Executive Orders closing the U.S. borders to an extent that was hitherto unimaginable, with rules barring the admission of immigrants based on their identity characteristics—namely their religious affiliations, nationalities, and gender identities.

It is not possible, in one Article, to address all the ways in which the Trump Administration amended immigration laws and policies to inspire terror in immigrant communities, or to discuss the even more numerous ways in which mere rumors of changes to those laws and policies had similarly devastating effects. So, the discussion that follows necessarily provides a handful of illustrative examples, intended to shed light on this phenomenon, rather than a comprehensive analysis of each of the changes to the law. This Part of the Article provides examples of the Administration's use of its legal authority (grounded in the antiterrorism provisions of the Homeland Security Act), to target specific groups of migrants on the basis of their gender, race, religion, and/or national origin, with specific reference to the travel bans based on nationality and/or religion and the bars to asylum-seekers based on their gender and/or nationality.

A. *TERRORIZING IMMIGRANTS BASED ON RELIGION*

The Trump Administration also took unprecedented steps to exclude immigrants based on their (non-Christian) religious beliefs—whether those beliefs were sincerely held or merely imputed by DHS officials based upon the immigrants' race, ethnicity, or country of origin. This Section will discuss the two principal mechanisms used by the Trump Administration to bar non-Christians from entering the United States. First, it will address the so-called "Travel Bans." Then, it will describe the decimation of the United States' longstanding commitments to refugee resettlement.

The Executive Actions comprising the original "Travel Bans"—or, as they were dubbed by many scholars and advocates, the "Muslim Bans"⁹⁴—were perhaps the most well-known example of these exclusionary policies. The first version of the Travel Ban, an Executive Order titled "Protecting the Nation from Terrorist Attacks by Foreign Nationals," was issued on January 27, 2017.⁹⁵ It barred all refugee admissions globally and banned all citizens and nationals of Iran, Iraq, Somalia, Syria, Sudan, or Yemen from entering the United States.⁹⁶ The administration issued a second Executive Order in March 2017, extending the suspension of the refugee admissions program for 120 days, suspending the entry of nationals from six Muslim-majority countries

94. See Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1483 (2018); see also Avidan Y. Cover, *Quieting the Court: Lessons from the Muslim Ban Case*, 23 J. GENDER RACE & JUST. 1, 13 (2020).

95. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

96. *Id.*

(Iran, Libya, Somalia, Sudan, Syria, Yemen) to the United States, and imposing heightened screening and vetting requirements from nationals from a seventh Muslim-majority country (Iraq).⁹⁷

A series of high-profile lawsuits challenged the Executive Orders, with immigrants' advocates arguing that the Travel Bans discriminated impermissibly on the basis of immigrants' religion.⁹⁸ A number of federal courts found these arguments convincing and issued temporary injunctions.⁹⁹ In response, in September 2017, the Administration issued a Presidential Proclamation, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."¹⁰⁰ This proclamation barred the entry of nationals of Chad, Libya, Yemen, Iran, North Korea, Syria, Somalia, and barred government officials and their family members from Venezuela.¹⁰¹ The government argued that the addition of North Korea and Venezuela to the list of banned countries demonstrated that anti-Muslim animus was not the sole motivation behind the initiative.¹⁰² In *Trump v. Hawaii*, a majority of the U.S. Supreme Court held that this assertion was not facially implausible, and therefore and found that this third version of the Travel Ban was not constitutionally impermissible.¹⁰³ It remained in effect, along with additional restrictions on new permanent immigrants from "Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania,"¹⁰⁴ until President Trump left office.

As with the other anti-immigrant measures discussed in this Article, the Muslim Ban was only possible because of the Trump Administration's novel interpretation of the extraordinarily broad anti-terrorism powers granted to the Executive Branch in the PATRIOT Act and Homeland Security Act. Indeed, as noted above, the first versions of the Muslim Ban were framed as "Protecting the Nation From *Foreign Terrorist Entry* Into the United States," and they began by explaining that: "It is the policy of the United States to protect

97. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (implementing revisions to the first Muslim Ban executive order).

98. For a listing of the nearly fifty legal challenges filed against the first two iterations of the Muslim Ban in federal courts, see *Special Collection: Civil Rights Challenges to Trump Travel Ban Orders*, U. MICH. L. SCH.'S CIV. RTS. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?%20searchSpecialCollection=44> [<https://perma.cc/J8WN-LVTK>].

99. See *Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 606 (4th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017).

100. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (2017).

101. *Id.*

102. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10 (2018). While the majority appeared convinced by this argument, Justice Sotomayor was not. See *id.* at 2438–40 (Sotomayor, J., dissenting) ("Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus . . .").

103. See *id.* at 2408–10.

104. Proclamation No. 9,983, 85 Fed. Reg. 6,699, 6701–02 (Feb. 5, 2020).

its citizens from terrorist attacks.”¹⁰⁵ The iterations that followed, in presidential proclamations, bore similar titles, namely; “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by *Terrorists* or Other Public-Safety Threats” in September 2017,¹⁰⁶ “Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by *Terrorists* or Other Public-Safety Threats” in April 2018,¹⁰⁷ and “Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by *Terrorists* or Other Public-Safety Threats” in January 2020.¹⁰⁸ In each instance, the specter of “terrorism” or “terrorist threats” was invoked by the Administration in order to justify a policy that actively terrorizes the immigrant communities that it excludes.

The conflation of nationals of Muslim-majority countries with “terrorists” and “terrorism” also led to the implosion of the U.S. global refugee admissions program. The volume of refugees admitted to the United States for resettlement dropped precipitously under President Trump, and the profile of refugees who were admitted changed radically. From the passage of the Refugee Act in 1980 to 2018, the United States led the world in refugee admissions, and committed each year to admitting tens of thousands of refugees.¹⁰⁹ During its last year in office, the Obama Administration set the refugee admissions ceiling at 110,000 and announced that it was committed to providing safe haven for individuals and families displaced by conflict in the Middle East and Afghanistan.¹¹⁰ In Fiscal Year 2016, 84,994 refugees were admitted to the United States, and many of those admitted were Muslims from the Middle East.¹¹¹

The Trump Administration, in contrast, announced its intention to radically reduce and reshape refugee admissions, both through its 2017 suspension of all refugee admissions, and through its subsequent revision to

105. Exec. Order 13,769, *supra* note 95 (emphasis added); Exec. Order 13,780, *supra* note 97.

106. Proclamation No. 9645, *supra* note 100, at 45,161 (emphasis added); Muzaffar Chishti, Sarah Pierce & Laura Plata, *In Upholding Travel Ban, Supreme Court Endorses Presidential Authority While Leaving Door Open for Future Challenges*, MIGRATION POL'Y INST. (June 29, 2018), <https://www.migrationpolicy.org/article/upholding-travel-ban-supreme-court-endorses-presidential-authority-while-leaving-door-open> [<https://perma.cc/2NWZ-C6NV>].

107. Proclamation No. 9723, 83 Fed. Reg. 15,937, 15,937 (Apr. 13, 2018) (emphasis added).

108. Proclamation No. 9983, 85 Fed. Reg. 6,699, 6,699 (Feb. 5, 2020) (emphasis added).

109. See Jynnah Radford & Phillip Connor, *Canada Now Leads the World in Refugee Resettlement, Surpassing the U.S.*, PEW RSCH. CTR. (June 19, 2019), <https://www.pewresearch.org/fact-tank/2019/06/19/canada-now-leads-the-world-in-refugee-resettlement-surpassing-the-u-s> [<https://perma.cc/PL3U-3W7X>].

110. See Juliet Eilperin, *White House Raises Refugee Target to 110,000*, WASH. POST (Sept. 14, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/14/white-house-plans-to-accept-at-least-110000-refugees-in-2017> [<https://perma.cc/UX92-QL3E>].

111. Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, PEW RSCH. CTR. (Oct. 5, 2016), <https://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016> [<https://perma.cc/82PH-6XEE>].

the criteria that it applied to applications for resettlement.¹¹² Invoking national security concerns, once again, the Administration formally deprioritized resettlement applications from “high risk” countries “(reportedly Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen) while the government further reviewed these security risks.”¹¹³ At the same time, it introduced additional screening criteria for any applicants from those nations, that required an insurmountable degree of documentation and access to electronically stored information that was inaccessible for individuals living in refugee camps, which essentially ensured that any applications for resettlement would be denied.¹¹⁴

In FY 2018, just 22,491 refugees were resettled in the United States, and the majority of those individuals were Christians from Africa.¹¹⁵ By December 2019, Muslim refugee admissions had effectively ground to a halt.¹¹⁶ In FY 2020, almost all other refugee admissions followed suit. The Administration announced that the refugee admission ceiling for 2020 was 18,000, but from January 1 through June 30, 2020, just 7,754 refugees in total were admitted.¹¹⁷ In less than four years, the United States has gone from offering safe haven to 110,000 refugees, to sheltering less than a tenth of that number.

B. TERRORIZING IMMIGRANTS BASED ON NATIONALITY

In its briefs to the Supreme Court in *Trump v. Hawaii*, the Trump Administration asserted repeatedly that its goal was not to exclude immigrants based on their religion, but merely their nationality.¹¹⁸ As the discussion in the previous Section explains, despite the inclusion of Venezuela and North Korea on the list of banned countries, it is hard to argue that anti-Muslim animus did not inform the Trump Administration’s Travel Bans. By 2020, however, nationality (and race and ethnicity, which are frequently linked to that nationality) had become an unquestioned basis for immigrant exclusion—to an extent that had not been seen in U.S. immigration law since the Hart–Celler Act of 1965 abolished national origin quotas.¹¹⁹

When President Trump left office, in large part because of the COVID-19 pandemic, foreign nationals from 31 different countries were barred from entering the United States. Using the plenary powers granted to the Executive Branch under the PATRIOT Act and the Homeland Security Act, the

112. See PIERCE & BOLTER, *supra* note 89, at 67 (describing “historic reductions in refugee admissions”).

113. *Id.* at 65.

114. *See id.*

115. *See id.* at 3.

116. *See id.* at 65.

117. *See id.* at 3.

118. Reply Brief for the Petitioners at 27–28, *Trump v. Hawaii*, 138 S. Ct. 2392 (2017) (No. 16-1436, No. 16-1540).

119. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

Administration declared the global pandemic a threat to national security and issued presidential proclamations to close the country's borders to individuals perceived as posing a threat. On January 31, 2020, President Trump issued the first of this set of Presidential Proclamations, barring foreign nationals who were in mainland China during the fourteen days preceding their intended entry to the United States from entering the country. Foreign nationals subject to the ban were not allowed to receive visas from U.S. embassies and were barred from boarding airplanes destined for the United States, as well as from entering at U.S. ports of entry.¹²⁰ This ban was followed in February 29, by a similar proclamation banning the entry of foreign nationals who had been in Iran during the fourteen days preceding their intended entry to the United States.¹²¹ On March 1, a further proclamation was issued barring travel from the European Union's Schengen Zone.¹²² On March 14, an almost-identical proclamation barred travelers from the United Kingdom and Ireland.¹²³ Then, on May 24, President Trump issued a proclamation barring the entry of foreign nationals who were in Brazil during the fourteen days preceding their intended entry to the United States.¹²⁴

These nationality-based travel bans were all framed, in the texts of the proclamations, as "color-blind" precautionary measures to prevent the spread of the COVID-19. Yet, even that framing was infused with xenophobic rhetoric, exemplified by President Trump's consistent reference to COVID as "the China virus" and his repeated invocation of the importance of his action on banning travel to the United States from China.¹²⁵ Indeed, from April through July 2020, the Trump Administration both attempted to push the theory that COVID-19 was a "bioweapon" that had emerged from a Wuhan laboratory,¹²⁶ and, simultaneously, introduced several additional adverse

120. Proclamation No. 9984, 85 Fed. Reg. 6,709, 6709-12 (Feb. 5, 2020).

121. Proclamation No. 9992, 85 Fed. Reg. 12,855 (Mar. 4, 2020). The administration also restricted all flights carrying travelers from the banned countries to landing at eleven designated airports. See Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People's Republic of China or the Islamic Republic of Iran, 85 Fed. Reg. 12,731 (Mar. 4, 2020).

122. Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 16, 2020); see also Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Countries of the Schengen Area, 85 Fed. Reg. 15,059 (Mar. 17, 2020).

123. Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 18, 2020).

124. Proclamation No. 10042, 85 Fed. Reg. 32,291 (May 28, 2020).

125. Stephen Braun, Hope Yen & Calvin Woodward, *AP Fact Check: Trump and the Virus-Era China Ban That Isn't*, AP NEWS (July 18, 2020), <https://apnews.com/article/asia-pacific-anthony-fauci-pandemics-politics-ap-fact-check-d227b34b168e576bf5068b92a03c003d> [<https://perma.cc/Q47S-Z826>]; see also Hope Yen, *AP Fact Check: Trump's Inaccurate Boasts on China Travel Ban*, AP NEWS (Mar. 26, 2020), <https://apnews.com/odc271ad7f7917374a5a0cfb49273783> [<https://perma.cc/BQE3-TAAJ>].

126. See Mark Mazzetti, Julian E. Barnes, Edward Wong & Adam Goldman, *Trump Officials Are Said to Press Spies to Link Virus & Wuhan Labs*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes>

immigration measures against Chinese nationals, including entry restrictions for Chinese journalists,¹²⁷ students and researchers,¹²⁸ government officials,¹²⁹ and technology company employees.¹³⁰ As several contemporary commentators noted, it appeared that the Administration opportunistically used the global pandemic to advance its racially exclusionary policies, and to curtail immigration to the United States by immigrants of color, in particular immigrants from mainland China.¹³¹ This is further borne out by the fact that the exclusionary measures against nationals of European countries were introduced briefly and then lifted, and yet they remained in place against travelers from China,¹³² even though, according to the World Health Organization, the reported incidences of new COVID-19 infections were significantly lower in China than they were in Europe during the same period of time.¹³³

C. TERRORIZING IMMIGRANTS BASED ON SEX AND GENDER

Asylum-seekers arriving at the Southwest border during the Trump Administration included a significant number of women and children fleeing gender-based violence and domestic abuse. Yet, arriving asylum seekers were often portrayed by the Trump Administration as a homogenous group of hardened (male) criminals, who posed a threat to the national security. On

.com/2020/04/30/us/politics/trump-administration-intelligence-coronavirus-china.html [https://perma.cc/68SQ-TVWA].

127. Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking to Enter the United States, 85 Fed. Reg. 27,645 (May 11, 2020) (to be codified at 8 C.F.R. pt. 214).

128. Proclamation No. 10043, 85 Fed. Reg. 34,353 (June 4, 2020).

129. See Exec. Order No. 13,936, 85 Fed. Reg. 43,413 (July 17, 2020).

130. Press Release, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, U.S. Imposes Visa Restrictions on Certain Employees of Chinese Technology Companies that Abuse Human Rights (July 15, 2020), <https://www.state.gov/u-s-imposes-visa-restrictions-on-certain-employees-of-chinese-technology-companies-that-abuse-human-rights/index.html> [https://perma.cc/6TMT-8CWA].

131. See, e.g., Shannon Dooling, *Trump's COVID-19 Visa Bans Hit Hard for Diversity Visa Lottery Recipients*, NPR (July 18, 2020, 7:58 AM), <https://www.npr.org/2020/07/18/892579286/trumps-covid-19-visa-bans-hit-hard-for-diversity-visa-lottery-recipients> [https://perma.cc/N6HA-2MSL] ("I think absolutely, this is an example of the administration using the pandemic in a way to further goals that it's had a long time . . ."); Zolan Kanno-Youngs & Maggie Haberman, *Trump Administration Moves to Solidify Restrictive Immigration Policies*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/06/12/us/politics/coronavirus-trump-immigration-policies.html> [https://perma.cc/G7W5-V6GS] ("Under the cloak of a pandemic . . . the Trump administration continues to advance its policies to restrict legal immigration, halting the flow of foreign workers and raising the bar for asylum seekers hoping for sanctuary.").

132. See *Travel Bans Imposed Due to COVID19 and NIES*, BACK2BU (July 7, 2021), <https://www.bu.edu/isso/2021/07/07/travel-from-china-banned-temporarily> [https://perma.cc/S3MY-T933].

133. See CORONAVIRUS DISEASE (COVID-19) SITUATION REPORT – 198, WORLD HEALTH ORG. (Aug. 5, 2020), <https://apps.who.int/iris/handle/10665/333735> [https://perma.cc/TUP3-EEAH].

the campaign trail, Donald Trump referred frequently to “bad hombres,”¹³⁴ literally “bad men,” and conflated Mexican Americans and Latino immigrants with “dangerous” Central American gang members, drug-smugglers, and rapists.¹³⁵ The deep irony was that many of the women seeking asylum at the Southwest border at this time were fleeing abuse at the hands of such figures, and were ultimately denied protection in the United States because of this widespread mischaracterization of their identity characteristics.

In office, the Trump Administration embraced his campaign rhetoric to justify the significant changes that it made to the U.S. asylum system. By overturning longstanding and settled interpretations of the provisions of the INA pertaining to asylum, the Trump administration significantly narrowed the populations that were eligible. The Administration attempted to block all migrants—but particularly nationals of El Salvador, Honduras, and Guatemala—from seeking asylum if they transited through any other countries, including Mexico, during their journeys to the United States.¹³⁶ Moreover, successive Trump Administration Attorneys General used their (hitherto rarely-employed) self-referral and review power¹³⁷ to intervene in cases pending before the Board of Immigration Appeals (“BIA”) in order to unilaterally make sweeping changes to the grounds on which asylum-seekers could be granted protection.¹³⁸ In one of the most significant of these self-referral cases, *Matter of A-B*,¹³⁹ former Attorney General Jeff Sessions announced that gender-based violence would no longer be recognized as

134. See Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments> [https://perma.cc/G8XL-KN4Y].

135. *Id.*

136. See *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 3 (2019) (staying a district court’s grant of a preliminary injunction against President Trump’s immigration ban). *But see* *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 877–78 (S.D. Cal. 2019) (granting a preliminary injunction brought by asylum-seekers against the government). The Ninth Circuit Court of Appeals has since denied the administration’s motion to stay this injunction. See *Al Otro Lado v. Wolf*, 952 F.3d 999, 1016 (9th Cir. 2020).

137. The Board of Immigration Appeals (“BIA”) is the highest administrative body within the immigration adjudication system, and it serves as the appellate body for the immigration Courts. The BIA’s decisions are binding on immigration judges and other Department of Homeland Security officers and adjudicators. However, the Attorney General has the power to modify or overrule decisions of the BIA through a self-referral and review process. See Stella Burch Elias & Paul Gowder, *Lawless Lawmaking: Attorney General Self-Referral and the Rule of Law* (unpublished manuscript) (on file with author).

138. See *PIERCE & BOLTER*, *supra* note 89, at 60–63, describing the 15 Attorney-General self-referrals that have been made so far during the Trump Administration. (“The Trump administration has made unprecedented use of the attorney general’s ability to self-refer immigration cases for review.”).

139. *Matter of A-B*, 27 I. & N. Dec. 316, 317, 346 (A.G. 2018) (interim decision), *abrogated* by *Grace v. Whitaker*, 344 F. Supp. 3d 96, 115–17 (D.D.C. 2018), and *vacated*, *Matter of A-B*, 28 I. & N. Dec. 307, 307 (A.G. 2021).

persecution, and in so doing effectively eliminated the most common basis for asylum for women from Central America.¹⁴⁰

For many years, the availability of asylum on the basis of gender-based persecution, including intimate partner violence and or gang violence had been somewhat contested, but during the last term of the Obama Administration, the BIA, the immigration courts, and individual USCIS adjudicators began to routinely recognize and grant gender-based asylum claims.¹⁴¹ From 1999 to 2009, one case, *Matter of R-A*,¹⁴² languished in the immigration adjudication system, with a series of rulings by the BIA and Attorneys General Reno, Ashcroft, and Mukasey, all considering whether the horrific physical and sexual abuse that the Guatemalan respondent, Ms. Rodi Alvarado, had suffered at the hands of her husband should rightly be considered “persecution” as it is defined in the INA, so that she would be eligible for asylum in the United States.¹⁴³ Eventually, DHS stipulated that the harm Ms. Alvarado had suffered was “persecution” and she was granted asylum in December 2009.¹⁴⁴ In a companion case, *Matter of L-R*, DHS also stipulated that a Mexican woman seeking asylum to escape twenty years of physical, sexual, and mental abuse from her partner was eligible for asylum.¹⁴⁵ Then, five years later, in *Matter of A-R-C-G*,¹⁴⁶ the BIA recognized that a woman who feared persecution in the form of intimate partner violence may meet the requirements to be granted asylum. In its published opinion, the BIA established the precedent that Mexican and Central American women who

140. See Chris Gelardi, *Jeff Session’s Legacy Will Be Catastrophic for Asylum Seekers*, NATION (Nov. 8, 2018), <https://www.thenation.com/article/archive/jeff-sessionss-legacy-will-be-catastrophic-for-asylum-seekers> (noting that “[o]vernight, Sessions delegitimized the two most common reasons Central American migrants seek legal asylum”); See Jeffrey Hallock, Ariel G. Ruiz Soto & Michael Fix, *In Search of Safety, Growing Numbers of Women Flee Central America*, MIGRATION POL’Y INST. (May 30, 2018), <https://www.migrationpolicy.org/article/search-safety-growing-numbers-women-flee-central-america> [<https://perma.cc/Z6AE-HY9V>].

141. Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 L. & ETHICS HUM. RTS. 109, 111–12 (2013); Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. 46, 49 (2010); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 783–84 (2003).

142. *Matter of R-A*, 24 I. & N. Dec. 629, 629 (A.G. 2008) (interim decision); *Matter of R-A*, 22 I. & N. Dec. 906, 906 (A.G. 2001) (interim decision); *Matter of R-A*, 22 I. & N. Dec. 906, 906 (B.I.A. 1999).

143. For a detailed history of *Matter of R-A*, see Barbara R. Barreno, Note, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 234–38 (2011).

144. *Id.* at 248.

145. Dep’t of Homeland Sec.’s Supplemental Brief at 11, *Matter of L-R* (B.I.A., Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [<https://perma.cc/Z6VH-KDNA>].

146. *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014) (interim decision), *overruled by Matter of A-B*, 27 I. & N. Dec. 316, 316 (A.G. 2018).

suffered intimate partner violence and were unable to leave their relationships with their violent partners, had experienced persecution and had a credible fear of future persecution, because they were members of a particular social group.¹⁴⁷

On June 11, 2018, Attorney General Sessions issued his opinion in *Matter of A-B* explicitly overruling and vacating the BIA's decision in *Matter of A-R-C-G*. In the opinion, he stated that the BIA's decision in *Matter of A-B* and two other opinions treated *A-R-C-G* as establishing a new category of cognizable, particular social groups eligible for asylum, namely Central American domestic violence victims.¹⁴⁸ He stated this was wrong because intimate partner violence, and other forms of physical or sexual assault constituted a "private" or "personal" matter resulting solely from the relationship of the parties.¹⁴⁹ In the same opinion, Attorney General Sessions stated that women who had been raped, abused, or otherwise harmed by gang members would also be ineligible for asylum, because gang violence was mere ordinary criminal behavior and did not constitute "persecution" under the INA.¹⁵⁰ He concluded that "few" asylum claims based on domestic-violence or gang-related violence—the claims most frequently brought by Central American women seeking asylum—"would satisfy the legal standard to determine whether an alien has a credible fear of persecution."¹⁵¹

Following Attorney General Sessions's decision, USCIS issued a Policy Memorandum instructing asylum adjudicators that claims based on membership in a putative "particular social group" defined by the members' vulnerability to harm of domestic violence "when a private actor inflicts violence based on a personal relationship with the victim" will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.¹⁵² Several federal courts addressed the uncertainty created by this guidance interpreting *Matter of A-B*, with some stating that it operated as an outright bar to granting asylum on gender-based grounds and others suggesting that such grants should be rare, but still possible.¹⁵³ Nevertheless, the practical effect was the virtual elimination of this basis for asylum.

147. *A-R-C-G*, 26 I. & N. Dec. at 388–89.

148. *Matter of A-B*, 27 I. & N. Dec. 316, 317, 346 (A.G. 2018) (interim decision), *abrogated* by *Grace v. Whitaker*, 344 F. Supp. 3d 96, 115–17 (D.D.C. 2018), and *vacated*, *Matter of A-B*, 28 I. & N. Dec. 307, 307 (A.G. 2021).

149. *See A-B*, 27 I. & N. Dec. at 317.

150. *See id.* at 320.

151. *Id.* at 320 n.1.

152. U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B* (2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF> [<https://perma.cc/MFB9-ASM7>].

153. *See, e.g., Grace v. Barr*, 965 F.3d 883, 905–06 (D.C. Cir. 2020) (ruling that the Attorney General's Opinion in *A-B* does not categorically preclude USCIS adjudicators from granting

Soon after the *A-B*-ruling, asylum officers at the Southwest border began categorically finding that female asylum applicants had no credible fear of persecution if they had previously been victims of gang violence.¹⁵⁴ Six months later, USCIS introduced new bureaucratic and procedural measures affecting women seeking asylum based on intimate partner violence.¹⁵⁵ Within a year of *A-B*-, asylum adjudicators working with women at the detention center in Dilley, Texas, who had previously found that 97 percent of asylum applicants had a credible fear of future persecution based on the abuse that they had previously suffered, were finding that under the new rules, less than 10 percent had a credible claim.¹⁵⁶ The women who were found to not have a credible fear of persecution were held in immigration detention pending further proceedings or sent back to their countries of origin to face further abuse.¹⁵⁷

Once again, the Executive Branch's expansive immigration lawmaking powers, which exist to protect our national security—in this case the unilateral referral and review power of the Attorney General in immigration cases—were used to overturn settled legal principles with the express goal of harming a discrete immigrant group. Mr. Sessions himself acknowledged that one of the primary goals in this opinion was to deter Central American women experiencing intimate partner or gang violence from traveling to the United States to seek safe haven, in contrast with the Obama Administration, which, he argued, had “created ‘powerful incentives’ for people to ‘come here illegally and claim a fear of return.’”¹⁵⁸ Mr. Sessions explained on a separate occasion—when discussing the Administration's mandatory detention and family separation policies for Central American asylum-seekers—that the purpose of the interlocking policies was to scare Central American women into not making the perilous journey north to the United States with their children, stating that “hopefully people will get the message.”¹⁵⁹ The very

asylum to women who have experienced gender-based violence on an individualized, case by case basis); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019).

154. See Tal Kopan, *Impact of Sessions' Asylum Move Already Felt at Border*, CNN (July 14, 2018, 8:09 AM), <https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html> [https://perma.cc/M88E-8TZS].

155. See *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11–14, (D.D.C. 2020).

156. Amanda Holpuch, *Asylum: 90% of Claims Fall at First Hurdle After US Process Change, Lawsuit Alleges*, GUARDIAN (Nov. 13, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/nov/13/asylum-credible-fear-interview-immigration-women-children-lawsuit> [https://perma.cc/86Z8-TE3N].

157. See *id.*

158. Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [https://perma.cc/PHZ7-4LK7].

159. Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent> [https://perma.cc/E3EA-4PNS].

purpose of this policy was to instill fear in a group of immigrants who were already traumatized and deeply afraid. In other words, the legal mechanisms intended for use against terrorist threats was instead used to instill terror in these female asylum seekers from Central America.

As the three examples in this Part of the Article have demonstrated, the Trump Administration repeatedly used the rhetoric of terror to justify legal interpretations and policy initiatives targeting immigrant groups based on their identity characteristics. President Trump invoked fear of “radical Islamic terrorism” to justify banning the entry of Muslim refugees.¹⁶⁰ He characterized COVID-19 as “the Chinese virus,”¹⁶¹ encouraging the theory that it was a biological weapon originating in a Wuhan lab, which could be thwarted by closing the U.S. borders to Chinese immigrants.¹⁶² And he expressed concerns about gang warfare and “invasion,”¹⁶³ which became the basis for turning away women seeking asylum at the Southwest border.¹⁶⁴ In each instance, as new executive orders were penned and new presidential proclamations were issued, the Trump administration relied upon the broad and flexible powers that were initially granted to the Executive Branch in the PATRIOT Act and the Homeland Security Act in order to combat terrorism, and they used those powers to inflict their own version of terror on these vulnerable immigrant groups.

IV. TERROR AT THE BORDER

Concerns about the border that the United States shares with Mexico shaped candidate Trump’s presidential election campaign.¹⁶⁵ In office, his administration sought to reshape the Southwest border itself. This transformation was physical, through the much-publicized construction of portions of a wall.¹⁶⁶ It was also cultural, signaling a shift toward a greater

160. See Johnson & Hauslohner, *supra* note 91.

161. Allyson Chiu, *Trump Has No Qualms About Calling Coronavirus the ‘Chinese Virus.’ That’s a Dangerous Attitude, Experts Say.*, WASH. POST. (Mar. 20, 2020), <https://www.washingtonpost.com/nation/2020/03/20/coronavirus-trump-chinese-virus> [<https://perma.cc/NJ8B-24CS>].

162. See Mazzetti et al., *supra* note 126.

163. See Eugene Scott, *Trump’s Most Insulting—and Violent—Language is Often Reserved for Immigrants*, WASH. POST. (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants> [<https://perma.cc/7VPM-623N>] (stating that “the president characterized individuals crossing the border and seeking asylum as violent criminals terrorizing law enforcement and others on their way to wreak havoc in the United States.”).

164. See Ross, *supra* note 134.

165. See Sarah Pierce & Randy Capps, *As Trump Takes Office, Immigration Enforcement and Policy Poised to Undergo Major Changes*, MIGRATION POL’Y INST. (Dec. 19, 2016), <https://www.migrationpolicy.org/article/trump-takes-office-immigration-enforcement-and-policy-poised-undergo-major-changes> [<https://perma.cc/3R3Q-HFKE>].

166. See *The Wall*, USA TODAY NETWORK (2018), <https://www.usatoday.com/border-wall> [<https://perma.cc/M8VH-JW4E>]; see also Press Release, Remarks by President Trump During Border Wall Construction and Operational Update, Yuma, Ariz. (Aug. 18, 2020), <https://trumpwhite>

“fortress America” mentality, exemplified by the deployment of military personnel to “secure the border.”¹⁶⁷ But, perhaps the most significant—albeit least visible—change that the Trump Administration wrought at the border was legal.

The United States is party to several international human rights treaties that establish its obligations to refugees and asylum-seekers. For decades, those obligations governed the treatment of migrants apprehended at the Southwest border. The most significant of these commitments are found in the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”),¹⁶⁸ by which the United States became bound when it acceded to the 1967 Protocol Relating to the Status of Refugees.¹⁶⁹ The United States incorporated many of the Refugee Convention’s provisions directly into U.S. law with the passage of the Refugee Act of 1980.¹⁷⁰ For example, Article 31 of the Refugee Convention provides that signatory “[s]tates shall not impose penalties . . . on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization” if “they present themselves without delay . . . and show good cause for their illegal entry or presence.”¹⁷¹ The INA incorporates this standard by providing that: “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum”¹⁷² Similarly, Article 33 of the Refugee Convention codifies the principle of *non-refoulement* (non-expulsion) by prohibiting states parties from removing an asylum-seeker “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,

house.archives.gov/briefings-statements/remarks-president-trump-border-wall-construction-operational-update-yuma-az [https://perma.cc/SF7Q-PBAV] (celebrating that “in two weeks, we will have hit 300 miles of wall.”).

167. See Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, Securing the Southern Border of the United States (Apr. 4, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-attorney-general-secretary-homeland-security> [https://perma.cc/CWG5-FJEZ]; Press Release by Lisa Ferdinando, U.S. Dep’t of Def., DoD, DHS Outline National Guard Role in Securing Border (Apr. 16, 2018), <https://www.defense.gov/Explore/News/Article/Article/1494860/dod-dhs-outline-national-guard-role-in-securing-border> [https://perma.cc/UZ6B-6KNV]; Ellen Mitchell, *Trump Administration to Extend Troops at the Border Through 2021*, HILL (June 25, 2020, 8:24 PM), <https://thehill.com/policy/defense/504650-trump-administration-to-extend-troops-at-the-border-through-2021> [https://perma.cc/EA6E-JPMW].

168. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

169. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. When it acceded to the Protocol, the U.S. became bound by articles 2 through 34 of the 1951 Convention.

170. U.S. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (Mar. 17, 1980), *codified as amended* at 8 U.S.C. ch. 12.

171. Refugee Convention, *supra* note 168, art. 31.

172. 8 U.S.C. §1158(a)(1) (2018).

religion, nationality, membership of a particular social group or political opinion.”¹⁷³ The INA incorporates this standard by assuring that when individuals qualify for asylum on any of these enumerated grounds the government may “not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien’s last habitual residence.”¹⁷⁴ Until 2017, these international and domestic legal principles were the basis for U.S. policy governing the treatment of refugees, asylum-seekers and other unauthorized immigrants arriving at the Southwest border.

However, from January 2017 to January 2021, the Trump Administration disregarded these legal obligations. This Part of the Article provides a few illustrative examples of ways in which the Trump Administration used the emergency powers that were originally granted to the Executive Branch to protect the homeland in wartime, or combat terrorism in peacetime, to overturn decades of law, policy, and practice at the border with the express intention of shutting off access to asylum and terrorizing civilian men, women, and children. First, it discusses measures taken to deter incoming migrants, including the COVID-19-related border closures. Second, it examines the Migrant Protection Protocols (“MPP”). Third, it considers family separation and detention. Fourth, and finally, it analyzes “zero tolerance” criminal prosecution and expedited removal.

A. BORDER CLOSURES

The COVID-19 global pandemic provided the Trump Administration with the opportunity to fulfill one of its most oft-repeated policy goals—stringent restrictions on entry to the country at the Southwest border. Once again, the Administration used powers granted to the Executive Branch for use in exigent circumstances to terrorize a discrete group— asylum seekers arriving at the border. On March 20, 2020, the Director of the Centers for Disease Control and Prevention (“CDC”) issued an order mandating that all foreign nationals attempting to enter the United States without prior authorization, including persons seeking asylum, be sent immediately back to Mexico or otherwise returned their countries of origin.¹⁷⁵ The legal basis for this directive, invoked in the order itself, was the wartime authority granted “to

173. Refugee Convention, *supra* note 168, art. 33.

174. 8 U.S.C. § 1158(c)(1)(A). Protection from *refoulement* is also available for migrants who are ineligible for asylum but whose life or freedom would, nonetheless, be at risk on account of race, religion, nationality, membership of a particular social group or political opinion through statutory withholding of removal, 8 U.S.C. § 1231(b)(3), or withholding or deferral of removal under the Convention Against Torture. 8 C.F.R. § 208.16–18 (2021).

175. While many countries have blocked asylum claims at their borders during the pandemic, the CDC order is in effect until the CDC director determines that processing unauthorized migrants is not a risk to public health—a period not tied to any public-health metrics. For more on pandemic-related policies affecting the asylum system, see Section II.B.

the surgeon general in 1944 to block the entry of foreign nationals who pose a public-health risk.”¹⁷⁶ In March and April, the number of individuals seeking asylum at the Southwest border halved.¹⁷⁷ By the end of June 2020, 69,210 foreign nationals had been expelled pursuant to this order.¹⁷⁸ Under the order, CBP officers stopped screening asylum seekers to discover if they had credible fears of persecution if they were returned to Mexico or their countries of origin. As a consequence, asylum claims plummeted to hitherto unseen lows, “with just 622 initial asylum screenings taking place in June 2020, compared to 10,847 in June 2019.”¹⁷⁹

In July 2020, the Trump Administration proposed new regulations designed to supersede the CDC Director’s orders.¹⁸⁰ After a period of notice and comment, those regulations were published in December 2020 and entered into effect in January 2021.¹⁸¹ The new rules, which remain in place as of this writing, allow immigration officers, including both those involved in final adjudication of asylum claims and those conducting initial “credible fear” intake interviews “to consider emergency public health concerns when determining whether there are reasonable grounds for regarding . . . an alien to be a danger to the security of the United States[] and, thus, ineligible to be granted asylum or withholding of removal” in the United States.¹⁸²

The scope of this regulation is breathtakingly broad. It allows adjudicators to not only deny asylum to individuals suffering from a disease, such as COVID-19, but also to deny asylum to those who “exhibit[] symptoms,” such as a cough or a fever, or those “coming from a country . . . where such disease is prevalent or epidemic,” or even those who have “come into contact with the disease” at any time.¹⁸³ For the asylum seekers held in U.S. immigration centers where, according to medical experts, conditions for COVID-19 contagion are endemic, simply being held in detention by the U.S. government in a congregate setting—which is mandatory as they seek asylum—may, in turn, make them ineligible for

176. See PIERCE & BOLTER, *supra* note 89, at 2.

177. *Southwest Border Migration FY 2020*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020> (last updated Nov. 19, 2020) [<https://perma.cc/788F-8WN6>].

178. *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020> (last updated Nov. 20, 2020) [<https://perma.cc/G65A-PD8Z>].

179. See PIERCE & BOLTER, *supra* note 89, at 13 n.53 (citing MPI analysis of data from USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions.”).

180. 85 Fed. Reg. 41,201 (proposed July 9, 2020).

181. 85 Fed. Reg. 84,160 (Dec. 23, 2020).

182. *Id.* at 84,180.

183. *Id.* at 84,190.

asylum under this new rule.¹⁸⁴ There is no apparent way for an asylum seeker to avoid this Catch-22. There is also no indication in the text of the Rule itself that it will be revoked after the COVID-19 pandemic ends, indeed it is designed to apply to public health emergencies generally, not just the current crisis. Once again, the emergency powers granted the federal government to safeguard national security were used by the Trump Administration in pursuit of a permanent policy goal—this time shutting down the asylum system.

B. MIGRANT PROTECTION PROTOCOLS

Before the COVID-19 pandemic functionally closed the Southwest border, an earlier attempt by the Trump Administration to curtail asylum-seekers' access to the United States was embodied in the MPP, which were sometimes referred to (more accurately) as the "Remain in Mexico" policy. In January 2019, the Trump Administration, in cooperation with the government of Mexico, announced the inception of MPP.¹⁸⁵ The MPP were just one of several interlocking policies designed to significantly limit access to asylum at the border. These policies included a regulation making migrants ineligible for asylum if they failed to apply for it elsewhere during their journey to the United States¹⁸⁶ and Asylum Cooperation Agreements with Central American countries allowing the United States to send asylum-seekers abroad.¹⁸⁷ But it was the MPP that most effectively served to instill terror in asylum-seekers while practically blocking access and/or eligibility for the vast majority of asylum-seekers at the Southwest border.

184. *New Asylum Ban, Recycled Pretext: Proposed Rule Would Illegally, Unjustly Bar Many Asylum Seekers on Public Health Grounds*, HUM. RTS. FIRST (July 29, 2020), <https://www.humanrightsfirst.org/resource/new-asylum-ban-recycled-pretext-proposed-rule-would-illegally-unjustly-bar-many-asylum> [https://perma.cc/4D6R-GWLD].

185. See Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Ronald D. Vitiello, Deputy Dir. & Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf't, Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot. 1-4 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/GY3U-V26W].

186. See *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 4 (2019) (Sotomayor, J., dissenting). But see *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 858 (S.D. Cal. 2019) (granting preliminary injunction to plaintiffs such that "the Asylum Ban by its terms does not apply to them"). The 9th Circuit Court of Appeals has since denied the administration's motion to stay this injunction. See *Al Otro Lado v. Wolf*, 952 F.3d 999, 1016 (9th Cir. 2020).

187. See, e.g., Peter J. Meyer, *U.S. Strategy for Engagement in Central America: An Overview*, CONG. RSCH. SERV. (Feb. 16, 2021), <https://fas.org/sgp/crs/row/IF10371.pdf> [https://perma.cc/WSFC-T5QK]; Lesley Wroughton & Patricia Zengerle, *As Promised, Trump Slashes Aid to Central America Over Migrants*, REUTERS (June 17, 2019, 1:01 PM), <https://www.reuters.com/article/us-usa-immigration-trump/as-promised-trump-slashes-aid-to-central-america-over-migrants-idUSKCN1T12C7> [https://perma.cc/KT7A-BYE8]; Press Release, Michael R. Pompeo, Sec'y of State, United States Continues U.S. Foreign Assistance for El Salvador, Guatemala, and Honduras (Apr. 13, 2020), <https://gt.usembassy.gov/united-states-continues-u-s-foreign-assistance-for-el-salvador-guatemala-and-honduras> [https://perma.cc/L9SC-99TE].

Under the MPP, migrants presenting themselves at a U.S. port of entry to seek asylum were barred entry to the United States and were instructed to remain in Mexico, with their names placed on a “waitlist” to await processing.¹⁸⁸ The U.S. government referred to this practice as “metering” or “queue management.”¹⁸⁹ But, in practice, nongovernmental organizations (“NGOs”) working with asylum-seekers reported that informal waitlist systems developed in border towns operated by Mexican government officials, private citizens, NGOs or asylum seekers themselves.¹⁹⁰ Corrupt local officials and criminal gangs often operated as gatekeepers for access to the lists, making the very process of applying to enter the United States fraught with fear and uncertainty.¹⁹¹

Those asylum-seekers who eventually received formal processing by the U.S. authorities, including an interview determining whether they have a credible fear of future persecution that would warrant a grant of asylum, were issued with a Notice to Appear for an immigration court hearing in the United States at a future date and time, often months later, and were then returned to Mexico. NGOs working with asylum-seekers in 2019 reported that U.S. government officials did not inquire into whether asylum-seekers would be at risk while waiting in Mexico before returning them.¹⁹²

This restriction on access to asylum forced asylum-seekers awaiting processing by the U.S. asylum system to live in dangerous and unstable conditions in camps in northern Mexico.¹⁹³ In 2019, even before the COVID-19 pandemic, the U.S. State Department had travel warnings for Mexico’s northern border states,¹⁹⁴ urging U.S. citizens not to travel to the region or to

188. *Barred at the Border: Wait “Lists” Leave Asylum Seekers in Peril at Texas Ports of Entry*, HUM. RTS. FIRST (Apr. 22, 2019), <https://www.humanrightsfirst.org/resource/barred-border-wait-lists-leave-asylum-seekers-peril-texas-ports-entry> [<https://perma.cc/74QQ-M7ZA>].

189. *See Oversight of Customs and Border Protection’s Response to the Smuggling of Persons at the Southern Border: Before the Senate Committee on the Judiciary*, 116th Cong. (Mar. 6, 2019) (written testimony of Kevin K. McAleenan, Comm’r, U.S. Customs and Border Protection).

190. *See* HUM. RTS. FIRST, *supra* note 186.

191. *See id.*

192. *See* Kennji Kizuka, *The Trump Administration’s Migrant Persecution Protocols*, HUM. RTS. FIRST (June 12, 2019), <https://www.humanrightsfirst.org/blog/trump-administration-s-migrant-persecution-protocols> [<https://perma.cc/9BXC-YUXA>] (“No one ever asked if I was afraid of being in Mexico,” Blanca said. “They just gave me papers to sign. That’s it.”) (quoting an individual fleeing Guatemala)).

193. For example, two young Honduran men traveling with the migrant caravan in the fall were murdered in Tijuana in December 2018. *See* Adam Isacson, Maureen Meyer & Adeline Hite, *New “Migrant Protection Protocols” Ignore U.S. Legal Obligations to Asylum Seekers and Exacerbate Humanitarian Border Crisis*, WOLA (Jan. 25, 2019), <https://www.wola.org/analysis/trump-asylum-seekers-wait-in-mexico-border-crisis> [<https://perma.cc/YJK6-RZSH>].

194. Of the six northern Mexican states, Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon and Tamaulipas, the State Department instructs its citizens “do not travel” to Tamaulipas, “reconsider travel” to Sonora, Chihuahua, Coahuila, and Nuevo Leon, and “exercise . . . caution” for travel to Baja California. Julia Jacobo, *Department of State Issues Travel Advisory to Mexico Due to Risk of Crime and Kidnapping*, ABC NEWS (Dec. 18, 2019, 11:19 AM), <https://abc>

reconsider traveling there. It nonetheless insisted that vulnerable asylum-seekers remained there pending the outcome of their proceedings.¹⁹⁵ As a consequence, families with children, pregnant women, persons with serious medical conditions and other vulnerable individuals were forced to live in unstable camps or on the streets in northern Mexican cities while awaiting the eventual adjudication of their asylum claims in the United States.¹⁹⁶ According to one NGO report, none of the crimes against migrants and asylum seekers waiting in limbo at Mexico's northern border were adequately investigated by the Mexican authorities and the majority of victims did not even want to file a police report.¹⁹⁷

Faced with this dire situation—exactly as the Trump Administration intended and anticipated—many of the asylum-seekers at the border abandoned their attempts to seek asylum in the United States. Indeed, so many migrants stranded at the border in 2019 relinquished their attempts to enter that the United States and Mexico, together with the International Organization for Migration, extended Mexico's assisted voluntary return program to asylum-seekers at the border.¹⁹⁸ However, NGOs working with asylum-seekers at the border reported that many returning to their country of origin through this program were provided with inadequate information about their legal options and the impact of return to their countries of origin on their pending proceedings in U.S. immigration court, so that these returns were not fully voluntary and in many instances led to *refoulement* to danger.¹⁹⁹ According to human rights advocates working with asylum-seekers in both the

news.go.com/International/departement-state-issues-travel-advisory-mexico-due-risk/story?id=67800569 [https://perma.cc/6ELL-HHCF].

195. See Isacson et al., *supra* note 193.

196. See, e.g., Memorandum from Acting Inspector Gen. Jennifer L. Costello on Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley to Acting Sec. Dep't of Homeland Sec. Kevin K. McAleenan 3–7 (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf [https://perma.cc/BR4X-JLB8].

197. LATIN AMERICA WORKING GROUP, WASHINGTON OFFICE ON LATIN AMERICA, KINO BORDER INITIATIVE, SITUATION OF IMPUNITY AND VIOLENCE IN MEXICO'S NORTHERN BORDER REGION, WOLA 2 (Mar. 2017), <https://www.wola.org/wp-content/uploads/2017/04/Situation-of-Impunity-and-Violence-in-Mexicos-northern-border-LAWG-WOLA-KBI.pdf> [https://perma.cc/54UX-5V6E].

198. See Mica Rosenberg, Kristina Cooke & Daniel Trotta *Thousands of Central American Migrants Take Free Rides Home Courtesy of U.S. Government*, REUTERS (Aug. 21, 2019, 5:21 AM), <https://www.reuters.com/article/us-usa-immigration-returns/thousands-of-central-american-migrants-take-free-rides-home-courtesy-of-us-government-idUSKCN1VBoZJ> [https://perma.cc/33V8-SAPK].

199. See, e.g., Letter from ACLU et al., Request for Comprehensive *In Loco* Visit to the United States and Mexico to Consider Human Rights Violations Impacting Migrants and Request for Ongoing Robust Monitoring of the Regional Human Rights Situation Relating to Migrants to the Inter-American Comm'n on Hum. Rts. 5–6 (July 23, 2019), <https://www.aclu.org/letter/civil-society-request-comprehensive-loco-visit-us-and-mexico-address-situation-migrants> [https://perma.cc/B9EN-M3H4].

United States and Mexico, the MPP effectively barred tens of thousands of asylum-seekers from pursuing their valid legal claims.²⁰⁰

According to DHS, between January 28, 2019, and May 1, 2020, approximately 65,000 asylum-seekers were returned to Mexico under the MPP.²⁰¹ Several lawsuits challenging the legality of the MPP and seeking to prevent the return of asylum-seekers to Mexico were filed by nonprofits working with asylum-seekers. None of those lawsuits was successful, and initial attempts to obtain a preliminary injunction to halt the operation of the policy during the pendency of the suits were similarly unavailing.²⁰² Government filings in those lawsuits, justifying the continued operation of the MPP, explained that the MPP were designed, in large part, to serve a deterrent purpose.²⁰³ DHS's own press release states that the MPP are intended to "discourage" asylum-seekers.²⁰⁴ Immigration Judge Ashley Tabaddor, the President of the National Association of Immigration Judges characterized the twin goals of the MPP as "speeding up the process of dehumanizing the individuals who are before the court and deterring anyone from the right to seek protection."²⁰⁵

Harrowing accounts of the experiences of asylum-seekers stranded in limbo in camps at the border, included their experiences of violence and/or the omnipresent threat of violence prompted acting DHS Secretary Kevin McAleenan to order "an internal 'Red Team' review of the program."²⁰⁶ While this review was under way, Human Rights First "documented at least 816 publicly reported cases of kidnapping, rape, torture, assault, and other violent

200. Letter from Al Otro Lado et al., Request for a Thematic Hearing on the Human Rights Implications of the United States's "Remain in Mexico" (formally referred to as "Migrant Protection Protocols"). Policy of Returning Asylum Seekers to Mexico to Paulo Abrão, Exec. Secretary, Inter-American Comm'n on Hum. Rts. 2 (July 11, 2019), <https://www.humanrightsfirst.org/sites/default/files/IACHR-Thematic-Hearing.pdf> [<https://perma.cc/E6HY-EWYg>].

201. See Ted Hesson, *Border Chief Credits Trump Policies for July Drop in Migrants Caught Crossing*, POLITICO (Aug. 8, 2019, 6:55 PM), <https://www.politico.com/story/2019/08/08/border-arrests-july-recede-1647376> [<https://perma.cc/BM4R-L4RV>]; Mimi Dwyer, Ted Hesson & Laura Gottesdiener, *U.S. Unwinds Trump 'Remain in Mexico' Program, Mulls Flights for Asylum Seekers*, U.S. NEWS (Feb. 19, 2021), <https://www.usnews.com/news/top-news/articles/2021-02-19/us-begins-admitting-asylum-seekers-blocked-by-trump-with-thousands-more-waiting>.

202. *Innovation L. Lab v. McAleenan* 924 F.3d 503, 510 (9th Cir. 2019).

203. See *id.*

204. See Press Release, U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/W7D4-PMZT>].

205. Fernanda Echavari, "A *Fucking Disaster That Is Designed to Fail*": How Trump Wrecked America's Immigration Courts, MOTHER JONES (Feb. 6, 2020), <https://www.motherjones.com/politics/2020/02/trump-immigration-court-backlog-migrant-protection-protocols> [<https://perma.cc/QJS7-F8N3>] (quoting Immigration Judge Ashley Tabaddor).

206. See Q&A: *The Trump Administration's "Remain in Mexico" Program*, HUM. RTS. WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/TG24-KJWF>].

attacks against asylum seekers and migrants returned to Mexico.”²⁰⁷ A separate study undertaken by the U.S. Immigration Policy Center at the University of California at San Diego, surveyed 607 asylum seekers returned to Mexico under the MPP. One quarter of those “reported being threatened with physical violence while waiting in Mexico, with over half of those threats coming to fruition including beatings, extortion, kidnappings, and robbery.”²⁰⁸

As Judge Tabaddor asserted, the dire circumstances experienced by the asylum-seekers in Mexico appears to be a goal of the program. As noted above, when asked about the effect of the interlocking series of border policies, including the MPP, former Attorney General Jeff Sessions, said that “hopefully people will get the message.”²⁰⁹ It is clear that here, as with the other Trump Administration policies discussed in this Article, the MPP operationalized “violence or the threat of violence . . . as a weapon of intimidation or coercion.”²¹⁰

C. FAMILY SEPARATION AND DETENTION

From 2018 to 2020, the United States pursued another policy designed to intimidate and coerce potential asylum seekers—the policy of separating immigrant children from their parents and guardians upon their arrival at the Southwest border. During the summer of 2018, the Trump Administration announced that it had adopted a formal policy of “zero tolerance” toward migrants attempting to cross the border at places other than ports of entry.²¹¹ Under the policy, all adults entering the United States without inspection at the Southwest border would face criminal prosecution and, if they were accompanied by a minor child, that child would be separated from the parent.²¹²

In June 2018, the U.S. District Court for the Southern District of California had granted a preliminary injunction to end, at least temporarily, the practice of family separation.²¹³ But the preliminary injunction carved out an exception for families where the adult caregiver had a criminal history (not including immigration violations). Between the June 2018 termination of family separations and March 2020, more than 1,150 children, including babies and toddlers, were separated from their family members based on criminal history or allegations of unfitness, and this pattern and practice

207. *Id.*

208. *Id.*

209. Bump, *supra* note 159.

210. *See supra* notes 10–11 and accompanying text.

211. Press Release, U.S. Dep’t of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/gGGZ-9W5G>] [hereinafter Zero-Tolerance Announcement].

212. Aric Jenkins, *Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated*, TIME (May 7, 2018, 7:00 PM), <https://time.com/5268572/jeff-sessions-illegal-border-separated> [<https://perma.cc/3R5Q-GGKD>].

213. *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

continues.²¹⁴ According to a DHS memorandum, even minor offenses such as traffic violations, misdemeanor property damage, and disorderly conduct; and incidents that took place many years ago served as a basis for family separation.²¹⁵ NGOs working with separated families reported that even when children were ultimately able to reunify with their family members it was “often after a significant delay of six months or longer.”²¹⁶

Once separated, families members “confront[ed] extreme difficulties in initiating and maintaining communication with their” children.²¹⁷ Moreover, NGOs claimed that many separations resulted from the discriminatory treatment of indigenous families, based on lack of language capacity in indigenous languages “and lack of familiarity with” indigenous cultural practices among the DHS officials working at the border.²¹⁸ The trauma experienced by these children and parents has been widely documented in legal challenges²¹⁹ and medical literature.²²⁰ According to President Trump himself, this visible pain and suffering was a valuable tool in deterring other families with children from seeking asylum in the United States: “‘If they feel there will be separation, they don’t come,’ he said of migrants during comments to reporters at the White House.”²²¹ He later tweeted, “[I]f you don’t separate, FAR more people will come.”²²²

According to statements made by U.S. government officials in October 2019, over 3,000 migrant children were separated from their parents in accordance with the “zero tolerance” and family separation policies.²²³ By May

214. See Memorandum in Support of Motion to Enforce Preliminary Injunction at 2, Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-cv00428-DMS-MDD), 2019 WL 3493903; Jeremy Stahl, *Why Did the Government Separate This Family?*, SLATE (May 7, 2020, 5:50 AM), <https://slate.com/news-and-politics/2020/05/family-separation-salvadorosita.html> [<https://perma.cc/66Y8-gLWH>].

215. Memorandum in Support of Motion to Enforce Preliminary Injunction *supra* note 214 at 7–8.

216. Letter from ACLU et al., *supra* note 199, at 6.

217. *Id.*

218. *Id.*

219. See, e.g., Memorandum in Support, *supra* note 214, at 3–6.

220. See, e.g., Melissa Jenco, *AAP Renews Call for End to Family Separation at the Border*, AAP NEWS (Jan. 18, 2019), <https://www.aapublications.org/news/2019/01/18/immigration011819> [<https://perma.cc/Q9VY-KK2U>]; Laura C N Wood, *Impact of Punitive Immigration Policies, Parent-child Separation and Child Detention on the Mental Health and Development of Children*, 2 BRIT. MED. J. PAEDIATRICS OPEN 1, 1 (2018).

221. David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018, 7:44 PM), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO0oC> [<https://perma.cc/SUS7-ESH4>].

222. Steve Benen, *Trump Points to Renewed Interest in Family Separations at the Border*, MSNBC (Dec. 17, 2018, 11:31 AM), <https://www.msnbc.com/rachel-maddow-show/trump-points-renewed-interest-family-separations-the-border-msna1175841> [<https://perma.cc/U2CP-T72V>] (emphasis in original).

223. DHS Office of Inspector General (OIG), *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* (Washington, DC: DHS, 2019), <https://>

2020, the government identified at least 1,134 additional children who were separated and released from the Department of Health and Human Services custody.²²⁴ In other words, an estimated total of 3,900 to 4,100 children were separated from their parents by U.S. government officials.²²⁵

Beyond family separation, another Trump Administration policy intended to intimidate and coerce asylum-seekers into abandoning their legal claims was that of indefinite detention, including detention of family units. Asylum-seekers were routinely held in detention at the border, not as “a measure of last resort,” but as a standard practice.²²⁶ The practice was one of categorical detention, not based on individualized circumstances, and not limited to circumstances where there was a showing of absolute necessity.²²⁷ In March 2018, a lawsuit was filed in the U.S. District Court of the District of Columbia, arguing that this widespread practice of routinely detaining asylum seekers was unlawful.²²⁸ The court issued a preliminary injunction, barring ICE from denying parole to any detained, arriving asylum seeker who had shown a credible fear of returning to their country of origin, “absent an individualized determination, through the parole process, that [the person] presents a flight risk or a danger to the community.”²²⁹ But, Compliance Discovery undertaken by the plaintiffs suggested that following the preliminary injunction, no such individualized determinations had been made.²³⁰

U.S. government officials and NGOs alike described the conditions of confinement reported in these immigration detention centers as terrifying and unsanitary, with reports of freezing temperatures, inadequate medical care, and a lack of access to basic necessities including water, food, soap, and toothbrushes.²³¹ The conditions in which children were held, in particular,

www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf [<https://perma.cc/EMR2-25D5>].

224. Joint Status Report at 18 n.12, *Ms. L. v. U.S. Immigr. & Customs Enf't*, No. 3:18-cv-00428-DMS-DDD (S.D. Cal. May 27, 20).

225. *Id.*; see also Myah Ward, *At Least 3,900 Children Separated from Families Under Trump 'Zero Tolerance' Policy, Task Force Finds*, POLITICO (JUNE 8, 2021, 6:00 AM), <https://www.politico.com/news/2021/06/08/trump-zero-tolerance-policy-child-separations-492099> [<https://perma.cc/74K5-436V>].

226. See Anjali Mehta, Ashley Miller & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SEC. (Mar. 15, 2019), <https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation> [<https://perma.cc/GS84-7EK5>].

227. See *id.* (“[T]he United States routinely detains asylum seekers without individualized findings that they pose a flight risk or a danger to the community, and without affording them an opportunity for independent judicial review of their custody.”).

228. *Damus v. Nielsen*, No. 1:18-cv-00578-JEB, 2019 WL 1003440, at *2 (D.D.C. Feb. 28, 2019).

229. *Id.*

230. Plaintiffs’ Motion and Supporting Memorandum for a Finding of Civil Contempt at 3–5, *Damus v. Nielsen*, No. 1:18-cv-00578-JEB (D.D.C. Apr. 11, 2019).

231. See Memorandum from John V. Kelly, Acting Inspector Gen. to Mark A. Morgan, Acting Dir., U.S. Immigr. & Customs Enf’t, on Concerns About ICE Detainee Treatment and Care at

was a cause for grave concern.²³² A number of children died in detention,²³³ and others reported experiencing sexual assault and other forms of physical and psychological trauma.²³⁴

Government officials asserted that the blanket policy of detention was specifically intended to deter intending migrants, including asylum-seekers.²³⁵ In an interview with NPR, White House Chief of Staff John Kelly justified the policy of keeping asylum-seekers indefinitely detained in squalid conditions of confinement while separated from their children by explaining that: “[A] big name of the game is deterrence . . . It could be a tough deterrent — would be a tough deterrent[.]”²³⁶ Once again, the immigrants held in detention were traumatized with the express intention of dissuading other victims of persecution to refrain from seeking asylum in the United States.²³⁷

In August 2019, the Trump Administration also attempted to publish a new regulation that would have enabled it to detain migrant children indefinitely.²³⁸ This rule was intended to effectively end the operation of the Stipulated Settlement Agreement in the 1997 case, *Flores v. Reno*,²³⁹ which together with Homeland Security Act of 2002²⁴⁰ and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,²⁴¹ places limits on the amount of time minor children can spend in detention and requires

Four Detention Facilities (June 3, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/WX9P-N69F>]; Adam Serwer, *A Crime by Any Name*, ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239> [<https://perma.cc/2MW2-FSJM>].

232. Nicole Austin-Hillery & Clara Long, *We Went to a US Border Detention Center for Children. What We Saw Was Awful*, HUM. RTS. WATCH (June 24, 2019), <https://www.hrw.org/news/2019/06/24/we-went-us-border-detention-center-children-what-we-saw-was-awful> [<https://perma.cc/PM89-YMS8>].

233. See Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC NEWS (May 29, 2019, 3:44 PM), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-us-custody-n1010316?fbclid=IwAR38n79Vu1jBLEjqEPL8NCeCJ7qaGinN2TJOuTfEkVI1BKJdyISX3Jee7Rs> [<https://perma.cc/RM5X-2ZGA>].

234. See Rhitu Chatterjee, *Lengthy Detention of Migrant Children May Create Lasting Trauma, Say Researchers*, NPR (Aug. 23, 2019, 1:48 PM), <https://www.npr.org/sections/health-shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers> [<https://perma.cc/7FYJ-YU8V>].

235. See *id.*

236. Bump, *supra* note 159.

237. See Adam Cox & Ryan Goodman, *Detention of Migrant Families as “Deterrence”: Ethical Flaws and Empirical Doubts*, JUST SEC. (June 22, 2018), <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts> [<https://perma.cc/5MHS-CHX8>].

238. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019).

239. Stipulated Settlement Agreement at 3–4, *Flores v. Reno* (C.D. Cal. 1997) (No. CV 85-4544-RJK).

240. Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279 (2006)).

241. William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074 (codified as amended at 8 U.S.C. § 1232).

that those children be held in the least restrictive setting permissible. The new rule, in contrast, purported to authorize the indefinite detention of migrant children with their guardians in “family residential centers.” The new rule was immediately challenged by a coalition of states Attorneys General, led by California Attorney General Xavier Becerra and Massachusetts Attorney General Maura Healey.²⁴² In the complaint filed before the U.S. District Court for the Central District of California, the coalition argued that the prolonged detention risked by the rule would cause irreparable harm to children, their families, and the communities that accept them upon their release from federal custody.²⁴³ In September 2019, the court issued a permanent injunction barring the new rule from going into effect on the grounds that it would violate the *Flores* Agreement.²⁴⁴ The Trump Administration’s response was to announce that families apprehended at the Southwest border would no longer be detained within the United States, but would instead be immediately returned to Mexico or, if they wished to seek asylum, would follow the MPP and be returned to the tent camps in Mexico to await adjudication of their claims. Faced with the terrifying prospect of life in the camps and the threats of violence to their children, many families chose to abandon their asylum claims.²⁴⁵

D. “ZERO TOLERANCE” CRIMINAL PROSECUTION AND EXPEDITED REMOVAL

In international human rights law and in domestic U.S immigration law, there is a rich body of precedent recognizing that, although ordinarily criminal prosecution in one’s home country will not be considered “persecution” for asylum purposes, there is an exception for prosecution when it is used as a form of persecution, i.e., when it is used as a tool to disproportionately punish individuals or to deter them from seeking to vindicate their rights.²⁴⁶ In this way, a country’s domestic criminal legal system can be understood by asylum adjudicators to be a tool for terrorizing specific groups. The Trump Administration’s policies of “zero tolerance” criminal

²⁴². Complaint for Declaratory and Injunctive Relief at 1, *California v. McAleenan* (C.D. Cal., Aug. 26, 2019) (No. 2:19-cv-07390).

²⁴³. *Id.* at 2.

²⁴⁴. *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019).

²⁴⁵. See Ashoka Mukpo, *Asylum Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face> [<https://perma.cc/QKqJ-ARN2>] (last visited July 19, 2021) (“Not surprisingly, many are choosing to abandon bona fide asylum claims. Instead, they are returning home to face certain danger rather than remaining in limbo in cities where they are unable to support themselves financially and are at risk of being preyed on by criminals.”); see also DHS OIG Formal Complaint Regarding “Remain in Mexico”, HUM. RTS. WATCH (June 2, 2020, 10:00 AM), <https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico> [<https://perma.cc/H879-HWAN>].

²⁴⁶. See *Matter of Izatula*, 20 I. & N. Dec. 149, 152–53 (BIA 1990).

prosecution of unauthorized border-crossers and of expedited removal of asylum-seekers at the Southwest border is a clear example of this phenomenon.

In April 2018, the Department of Justice issued a memorandum instructing federal prosecutors to expand federal court prosecutions of immigration violations nationwide.²⁴⁷ Then, in April 2018, it issued a second memorandum instructing federal prosecutors working in offices along the Southwest border to prosecute all “illegal entry” cases referred to them by DHS.²⁴⁸ In May 2018, the Department of Justice announced that DHS would refer 100 percent of individuals illegally crossing the Southwest border for prosecution.²⁴⁹ Illegal entry is a simple misdemeanor offense. Until the issuance of the May 2018 memorandum, the Department of Justice had followed a policy of using its prosecutorial discretion to refrain from bringing criminal charges against unauthorized entrants, concentrating its resources on more serious crimes, such as felony offences.²⁵⁰ In Fiscal Year 2019, however, after the new policy went into effect, U.S. attorneys working on the Southwest border prosecuted more people for the misdemeanor of entering the United States without inspection—81,000—than in any year since record-keeping began more than twenty-five years prior.²⁵¹ NGOs working with immigrants at the Southwest border stated that federal immigration officials routinely used the threat of criminal prosecutions to deceive, intimidate, and coerce asylum-seekers into abandoning their valid claims.²⁵²

In the summer of 2019, as criminal prosecutions for immigration offenses swelled to fill the dockets of federal district courts along the Southwest border, federal immigration courts in the same locations faced an unprecedented backlog of cases on their dockets. To address this challenge, the Executive Office for Immigration Review set up “tent courts” in Brownsville and Laredo, Texas, to enable hearings via videoconference for asylum seekers stranded in the camps across the border pursuant to the MPP.²⁵³ For immigrants physically present in the United States, “expedited”

247. See Zero-Tolerance Announcement, *supra* note 211.

248. See *id.*

249. See Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/D5Z3-C7CV>].

250. See *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, ACLU, <https://www.aclu.org/other/operation-streamline-issue-brief> [<https://perma.cc/4ZL6-SHZP>] (last visited August 25, 2021).

251. See Press Release, U.S. Dep’t of Just., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), <https://www.justice.gov/opa/pr/departement-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year> [<https://perma.cc/4LBN-CEYK>].

252. Letter from ACLU et al., *supra* note 199, at 4–6.

253. See Molly Hennessy-Fiske, *Tent Courts Open as Latest Hurdle for Migrants Seeking Asylum in the U.S.*, L.A. TIMES (Sept. 16, 2019, 7:08 PM), <https://www.latimes.com/world-nation/story/2019-09-16/secretive-tent-courts-latest-hurdle-for-asylum-seekers> [<https://perma.cc/Y5KM-MU7W>].

removal hearings were held for multiple respondents at the same time.²⁵⁴ Groups of up to 80 asylum-seekers were charged with unlawful entry in the same hearing, without any individualized counseling or opportunity to present the facts of their cases to judges.²⁵⁵ Defense attorneys characterized this practice as “coercive” because of the pressure it placed on the respondents, many of whom appeared within days of their arrest, to concede removability before they had a chance to consider whether they might be eligible for any form of relief from removal.²⁵⁶ In December 2019, the U.S. Court of Appeals for the Ninth Circuit found that such practices denied the immigrant respondents due process of law, but nonetheless these mass hearings continued until the COVID-19 global pandemic effectively closed the border and suspended the operation of the immigration courts.

V. TERROR IN THE INTERIOR

Many of the legal changes and new policy measures described in Parts II and III of this Article were designed to intimidate, coerce, and dissuade individuals overseas who intended to immigrate to the United States. This Part of the Article describes the use of legal tools—or the threat of the use of such tools—to terrorize communities already settled here. As the discussion that follows will show, the Trump Administration deliberately and systematically used its legal powers to destabilize immigrant communities residing in the United States. Examples of this phenomenon include the threatened rescission of Deferred Action for Childhood Arrivals (“DACA”), the introduction of a new public charge doctrine, and the establishment of a denaturalization taskforce. Because of these and several other new policy measures, in the shadow of the COVID-19 pandemic and in the absence of stable and settled law, immigrant communities already living in extreme precarity experienced crushing uncertainty; in short, as the discussion that follows will show, during the four years of the Trump Administration, they lived in a state of constant terror.

A. *THE RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS*

During his presidential campaign, Donald Trump announced that if he were elected, he would “immediately” end Deferred Action for Childhood Arrivals (“DACA”).²⁵⁷ The DACA program, which was introduced by the

254. See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409–14 (July 23, 2019).

255. See *id.*

256. See note 246.

257. See *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015, 2:32 PM), <https://time.com/3923128/donald-trump-announcement-speech> [<https://perma.cc/NQ6L-TFXF>] (“I will immediately terminate President Obama’s illegal executive order on immigration, immediately”); *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> [<https://perma.cc/J4SB-MTPN>] (“We will immediately terminate

Obama Administration, allowed DREAMERS to receive a two-year grant of temporary protection from deportation and work authorization during that two-year period.²⁵⁸ DACA did not grant any affirmative immigration status, or provide a path to lawful permanent residency or citizenship.²⁵⁹ Instead, DACA was an exercise of prosecutorial discretion, under which the recipients were assured that they were not unlawfully present in the United States and would not be placed in removal proceedings to deport them from the country.²⁶⁰ On September 5, 2017, the Trump Administration announced the rescission of DACA.²⁶¹ Starting immediately on the date of the announcement, USCIS stopped accepting all new DACA applications. Then, in October 2017, USCIS stopped accepting all DACA renewal applications. The rescission of DACA led to chaos and terror among the “DACAmended.”²⁶² As one DACA recipient explained: “It is not empty rhetoric that the lives of hundreds of thousands of DACA recipients were thrown into mayhem as the shaky ground on which

President Obama’s two illegal executive amnesties, in which he defied federal law and the constitution to give amnesty to approximately 5 million illegal immigrants.”).

258. See Memorandum from Janet Napolitano to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir. U.S. Immigr. & Customs Enf’t, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/T3PE-4UWL>].

259. See *id.*

260. For a comprehensive history of DACA and how it fits more generally into the doctrine of prosecutorial discretion in immigration proceedings, see generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION – THE ROLE OF PROSECUTORIAL DISCRETION* (2015) (exploring the wider use of prosecutorial discretion in immigration proceedings and summarizing the events that led to the DACA program); Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action and the DREAM Act*, 91 TEX. L. REV. 59 (2013) (underscoring the commonalities between DACA and prior administrations’ exercise of prosecutorial discretion in the immigration context).

261. Memorandum from Elaine C. Duke, Acting Sec’y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs, Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, Kevin K. McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Joseph B. Maher, Acting Gen. Counsel, Ambassador James D. Nealon, Assistant Sec’y, Int’l Engagement & Julie M. Kircher, Citizenship & Immigr. Servs. Ombudsman on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/SZR3-ETJ7>]; Antonio Olivo, *GOP Officials in 10 States Push Trump Administration to End DACA Program*, WASH. POST (June 30, 2017), https://www.washingtonpost.com/local/immigration/officials-in-10-states-push-trump-administration-to-end-daca-program/2017/06/30/5bd05ec4-5da1-11e7-a9f6-7c3296387341_story.html [<https://perma.cc/67V4-NNAW>].

262. See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [<https://perma.cc/M5JV-F7VG>] (“Protests broke out in front of the White House and the Justice Department and in cities across the country soon after Mr. Sessions’s announcement.”).

they'd long stood got even shakier.”²⁶³ Losing their grants of DACA would have left these young people without authorization to work in the United States and without lawful presence in the country. They therefore faced the prospect of losing their jobs or their ability to continue their educations and being left in poverty.²⁶⁴ Without the protections of DACA—the guarantee that their immigration prosecution would be deferred for two years—they also faced the possibility of being detained by ICE and deported from the United States. Soon after the announcement of the rescission of DACA, reports began to circulate that DACA recipients were being targeted for deportation by ICE.²⁶⁵

A series of lawsuits were filed challenging the rescission of DACA. Federal district courts in New York, Washington D.C., and California issued nationwide preliminary injunctions blocking its termination.²⁶⁶ The plaintiffs in the lawsuits did not assert that the Executive Branch was legally obligated to create, or even maintain, a program of deferred action for childhood arrivals. Instead, they argued that the Trump Administration's decision to terminate DACA was unlawful because it had not been supported by reasoned arguments and therefore was “not in accordance with law” under the Administrative Procedure Act.²⁶⁷ The plaintiffs in the suits also brought Equal Protection claims, based on the racist and xenophobic statements that President Trump had made to justify the termination of DACA.²⁶⁸ These Equal Protection claims underscored that the DACA rescission was an integral part of the Administration's systemic attempt to coerce, intimidate, and isolate immigrant communities, especially communities of color.

In June 2020, the U.S. Supreme Court issued its decision in *Department of Homeland Security v. Regents of the University of California*,²⁶⁹ upholding the district court injunctions preventing the rescission of DACA. Chief Justice Roberts, writing for the majority declined to consider the Equal Protection arguments in the case, stating merely that: “We do not decide whether DACA or its rescission are sound policies. ‘The wisdom’ of those decisions ‘is none

263. Julissa Arce, *Two Years After DACA Was Rescinded, Hundreds of Thousands of Dreamers Remain in Limbo. Even the Supreme Court Can't Fix the Problem*, TIME (Sept. 5, 2019, 2:17 PM), <https://time.com/5670018/daca-rescinded-dreamers> [<https://perma.cc/T2T8-TK7E>].

264. See Aimee Picchi, “We are all scared”: “Dreamers” Face Job Risk and Worse, CBS NEWS (Sept. 6, 2017, 10:47 AM), <https://www.cbsnews.com/news/dreamers-face-job-risk-and-worse-we-are-all-scared> [<https://perma.cc/P3NF-SA9A>] (“We are all scared about what’s going to happen in six months and about our ability to keep working, going to school and driving . . .”).

265. See Bob Ortega, *ICE Reopening Long-Closed Deportation Cases Against Dreamers*, CNN (Dec. 21, 2019, 6:01 AM), <https://www.cnn.com/2019/12/21/us/ice-reopening-dreamer-deportation-cases-invs/index.html> [<https://perma.cc/9BS2-K7T8>].

266. *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1050 (N.D. Cal. 2018), *aff’d*, 908 F.3d 476, 520 (9th Cir. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018); *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

267. 5 U.S.C. § 706(2)(A) (2018).

268. See *id.*

269. *Dep’t of Homeland Sec. v. Regent of Univ. of Cal.*, 140 S. Ct. 1891, 1891 (2020).

of our concern.’ We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action.”²⁷⁰ The Court ruled that the Trump Administration had not provide a sufficiently reasoned explanation for the DACA termination.²⁷¹ The Court noted that the Administration might have the power to end the DACA program, but before it did so it needed to consider, among other issues, existing DACA recipients’ reliance on and expectations of continued benefits.²⁷² Although the June 2020 ruling allowed individuals with existing grants of DACA to renew their DACA grants and maintain their status, in July 2020 the Acting Secretary of DHS immediately implemented a new policy instructing USCIS officials to deny all new applications and to grant renewals in one-year increments only.²⁷³ Advocates for DREAMERS filed suit successfully challenging this policy memorandum in the U.S. District Court for the Eastern District of New York,²⁷⁴ and in December 2020, USCIS once again began accepting initial DACA applications, DACA renewal requests, and applications for advance parole from DACA recipients.²⁷⁵

Despite the tenacity and litigation successes of the DREAMERS and their allies, significant damage has been done. In common with many other immigrant communities in the United States, DREAMERS spent the four years of the Trump Administration living in a permanent state of fear and anxiety.²⁷⁶ One young DACA recipient explained at that time that: “We are all afraid . . . because come January if . . . [Trump’s] policies are enacted, people fear for their safety, parents fear for their children and children fear for their parents.”²⁷⁷ This increased fear and anxiety was particularly noteworthy, because DACA recipients had previously experienced some degree of stability—at school, at work, and in their personal lives. After the election of President Trump, however, they were forced to confront the possibility that everything they had could be taken away and they could be subject to arrest,

270. *Id.* at 1916 (citation omitted).

271. *Id.* at 1914–15.

272. *See id.*

273. Memorandum from Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Sec. to Mark Morgan, Senior Off. Performing the Duties of Comm’r, U.S. Customs & Border Prot., Matthew Albence, Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf’t & Joseph Edlow, Deputy Dir. of Pol’y, U.S. Citizenship & Immigr. Servs., on Reconsideration of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” 1, 4 (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf [<https://perma.cc/2E/R2-VU33>].

274. *See* *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 131–33 (E.D.N.Y. 2020).

275. *See* *DACA*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/issues/daca> [<https://perma.cc/PFT6-Y26Q>].

276. *See* Rosa Flores, *DREAMERS Fear Nightmare Scenario in Trump’s America*, CNN (Nov. 12, 2016 7:15 AM), <https://www.cnn.com/2016/11/11/politics/dreamers-fear-deportation-under-trump/index.html> [<https://perma.cc/75KN-Y4QV>].

277. *Id.* (alteration in original).

detention, and removal from the United States at any time.²⁷⁸ Some DREAMERS reported that the precariousness of their situations—not knowing when, or indeed if, they might be subject to adverse immigration enforcement actions—was particularly anxiety-inducing.²⁷⁹

The precarity experienced by DREAMER communities has been exacerbated by the confusing, mixed messages from the Trump Administration about DACA. In 2017, the year that the administration initially announced its intention to rescind DACA, both President Trump and former Attorney General Jeff Sessions argued that DACA recipients were lawbreakers, who were injuring hurt native-born Americans by usurping their jobs and suppressing their wages. President Trump released a statement claiming that he was terminating the DACA program to support “the millions of Americans victimized by this unfair system” and Mr. Sessions said the program had “denied jobs to hundreds of thousands of Americans by allowing those same illegal aliens to take those jobs.”²⁸⁰ Contradicting himself, however, President Trump also noted on a separate occasion that: “They are here illegally. They shouldn’t be very worried. I do have a big heart. We’re going to take care of everybody.”²⁸¹ Then, several months later, he tweeted: “Make no mistake, we are going to put the interest of AMERICAN CITIZENS FIRST! The forgotten men & women will no longer be forgotten[.]”²⁸² In the months and years that followed, as the legal challenges proceeded through the federal courts, the Trump Administration continued to make contradictory and inconsistent statements—sometimes indicating support for DACA recipients and at other times insisting that they would be stripped of their status and placed in removal proceedings—leaving the DREAMERS increasingly uncertain and afraid.²⁸³ Attorney Karen Tumlin, who was a member of the

278. See Julia Carrie Wong, *‘The Fear is Great’: ‘Dreamers’ on Edge as Trump Threatens to End DACA Program*, GUARDIAN (Sep. 1, 2017 3:40 PM), <https://www.theguardian.com/us-news/2017/sep/01/trump-daca-dreamers-immigration-fear> [<https://perma.cc/FgYK-QFLE>].

279. Kate Sweeny, *For Dreamers, Fear of Deportation is Scary — But Waiting is Even Worse*, WASH. POST (Apr. 27, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/04/27/for-dreamers-fear-of-deportation-is-scary-but-waiting-is-even-worse> [<https://perma.cc/FD3G-9E5H>].

280. Shear & Davis, *supra* note 262.

281. Transcript, *ABC News Anchor David Muir Interviews President Trump*, ABC NEWS (Jan. 25, 2017, 10:25 PM), <https://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602> [<https://perma.cc/9RAH-VPZU>].

282. Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017, 12:00 PM), <https://time.com/4927100/donald-trump-daca-past-statements> [<https://perma.cc/BHQ2-5SUG>].

283. See Anita Kumar, *‘Whiplash’: Trump and his Team Face an Internal Struggle Over Dreamers*, POLITICO (July 24, 2020, 8:00 AM), <https://www.politico.com/states/california/story/2020/07/24/whiplash-trump-and-his-team-face-an-internal-struggle-over-dreamers-1303371> [<https://perma.cc/H8NX-qJFB>] (“Every few days, the White House seemingly adopts, then abandons, a new strategy.”).

litigation team for *Batalla Vidal v. Trump*,²⁸⁴ suggested that the Administration's "whiplash" on DACA may have been a consequence of internal disagreements and institutional dysfunction.²⁸⁵ But, a more compelling explanation, offered by Dan Stein, President of the conservative Federation for American Immigration Reform, was simply that: "The president seem[ed] to be trying to send intentionally conflicting signals."²⁸⁶ If this destabilization of DREAMER communities, plunging young people into prolonged uncertainty and precarity,²⁸⁷ was indeed a deliberate policy choice by the Trump Administration to terrorize immigrants, it was highly effective.²⁸⁸ Moreover, the rescission of DACA served as yet another example to all immigrants, whether lawfully present or undocumented, that any immigration benefits they currently enjoy could be taken away with little or no notice.²⁸⁹ Once again, the Administration made targeted use of its immigration rulemaking powers against a specific group, with the purpose and effect of inspiring fear in that group and in the broader immigrant community.

B. THE 2019 PUBLIC CHARGE RULE

In August 2019, the Trump Administration announced its intention to overhaul a longstanding rule governing eligibility for admission to the United States as a lawful permanent resident (green card holder). The rule, which has been part of U.S. immigration law since 1882, states that "any person unable to take care of himself or herself without becoming a public charge" can be denied entry to the United States.²⁹⁰ The original rule was designed to

284. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 401 (E.D.N.Y. 2018), *vacated and remanded sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020).

285. Kumar, *supra* note 283; *see also* Shear & Davis, *supra* note 18 ("Like many of [Trump's] initiatives, his effort to change American immigration policy has been executed through a disorderly and dysfunctional process that sought from the start to defy the bureaucracy charged with enforcing it, according to interviews with three dozen current and former administration officials, lawmakers and others close to the process.").

286. Kumar, *supra* note 283.

287. *See* Arce, *supra* note 263 (arguing that "Dreamers need a solution that takes them out of this anxiety-riddled maze.").

288. *See* Lind, *supra* note 19 (arguing that "[i]n other realms of the Trump administration, this sort of uncertainty is a sign of ineffectiveness at best — or a total absence of leadership at worst. But when it comes to . . . immigration enforcement . . . the Trump administration's bugs become features.").

289. *See* Amanda Holpuch, 'I Live In Fear': Under Trump, Life for America's Immigrants Can Change In a Flash, *GUARDIAN* (Oct. 18, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/oct/18/immigration-ice-deportation-undocumented-trump> [<https://perma.cc/6EPQ-AHPQ>] ("The idea is to try to send the message to communities that everybody is at risk of deportation by arresting all sorts of people who are no kind of threat and who very well may be productive members of their communities with US citizen family members and people who rely on them and all that sort of thing," said Omar Jadwat, director of the ACLU's Immigrants' Rights Project. "None of that matters to the administration is very much the message they very much want to send.").

290. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

prevent indigency and to reduce the likelihood that penniless immigrants would resort to criminality or prostitution in order to support themselves.²⁹¹ The modern iteration of the rule is found in Section 212(a)(4) of the INA of 1952, and in the regulations interpreting that statutory provision.²⁹² It had been essentially unchanged for over thirty years, with the most recent guidance for USCIS officers on how to interpret the rules set forth in the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds.²⁹³

In August 2019, the Trump Administration issued an Interim Final Rule changing the regulations defining what it meant for a potential immigrant to be likely to become a “public charge.”²⁹⁴ The previous regulation was narrow and specific. The new 2019 regulations for both DHS and the Department of State, and the accompanying guidance document, which was hundreds of pages long, were exceptionally broad. Under the 2019 regulations, USCIS officers were required to use a complicated formula to weigh a number of factors, including the applicant’s income, credit history, level of educational attainment, skills, health records, family size, and past receipt of any form of public benefits.²⁹⁵ Instead of focusing on whether a potential immigrant was likely to become primarily dependent on governmental support for basic subsistence, the immigration officer was charged with determining an applicant’s likelihood of becoming a public charge “at any time in the future” based on the totality of circumstances relevant to whether the person was “more likely than not at any time in the future to receive one or more public benefits.”²⁹⁶ Those “one or more public benefits” included many that were previously excluded from the public charge analysis, including health, housing, and nutrition programs, such as federally-funded Medicaid, SNAP (formerly food stamps) benefits, and Section 8 housing benefits.²⁹⁷

A series of nine legal challenges before the U.S. Courts of Appeal for the Second, Seventh, and Ninth Circuits led to preliminary injunctions that delayed the planned implementation of the 2019 rule.²⁹⁸ However, the U.S. Supreme Court lifted those injunctions and allowed the rule to go into effect in February 2020.²⁹⁹ Five months later, in July 2020, a judge on the U.S. District Court for the Southern District of New York issued two preliminary

291. *See id.*

292. Immigration and Nationality Act, 8 U.S.C. 1182(a)(4) (2018).

293. 64 Fed. Reg. 28,689 (Mar. 21, 1999).

294. 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts 103, 212, 213, 214, 245 & 248).

295. *Id.*

296. 8 C.F.R. § 212.22.

297. 8 C.F.R. § 212.21(b).

298. *See* Amir Khafagy, *Trump’s ‘Public Charge’ Rule Change is Facing Legal Challenges*, BLOOMBERG CITYLAB (Sept. 24, 2019, 1:20 PM), <https://www.bloomberg.com/news/articles/2019-09-24/-public-charge-rule-change-faces-legal-challenges> [https://perma.cc/6NG5-T2W6].

299. *See* *Wolf v. Cook Cty.*, 140 S.Ct. 681, 681 (2020) (lifting the final injunction).

injunctions blocking the operation of the 2019 Department of State public charge regulations.³⁰⁰ In both instances, the court noted that ensuring adherence to public health measures to combat the COVID-19 pandemic was in direct “conflict with the federal government’s new ‘public charge’ policy, a policy which is intended to discourage immigrants from utilizing government benefits and penalizes them for receipt of financial and medical assistance.”³⁰¹ In its order, the court found that there was “ample evidence that the Rule deters immigrants from seeking testing and treatment for COVID-19”³⁰² and that “[a]s a direct result of the Rule, immigrants are forced to make an impossible choice between jeopardizing public health and personal safety or their immigration status.”³⁰³ The court found that it was necessary to enjoin the operation of the Rule nationwide because: “When individuals with a high percentage of public exposure are fearful of receiving medical care for a deadly, contagious disease, the health and security of communities across the country is jeopardized.”³⁰⁴

Even though the practical operation of the 2019 regulation was short-lived, as with so many other Trump Administration immigration law initiatives, irreparable damage was done. According to the Migration Policy Institute, which studied the early effects of announcements in 2017 and 2018 that the Trump Administration was considering unspecified changes to the public charge regulation, the mere consideration of such changes by itself significantly changed the face of U.S. immigration.³⁰⁵ A different study by the Urban Institute found that in 2018, before the new public charge rule was formally proposed, 20.7 percent of adults in low-income immigrant families did not participate in public benefits programs for which they were eligible because they feared that they would lose their immigration status.³⁰⁶ The same survey found that that 62.9 percent of adults in immigrant families were aware to some degree of the proposed rule and that those “who had heard ‘a lot’ about [it] were the most likely to report chilling effects [on] their famil[y].”³⁰⁷

300. *New York v. U.S. Dep’t of Homeland Sec.*, 475 F. Supp. 3d 208, 231 (S.D.N.Y. 2020); *Make the Rd. New York v. Pompeo*, 475 F. Supp. 3d 232, 271 (S.D.N.Y. 2020).

301. *New York*, 475 F. Supp. 3d at 216.

302. *Id.* at 226.

303. *Id.* at 227.

304. *Id.*

305. See Jeanne Batalova, Michael Fix & Mark Greenberg, *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule That Is Also Likely to Reshape Legal Immigration*, MIGRATION POL’Y INST. (Aug. 2019), <https://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary> [<https://perma.cc/8RYN-FKCH>].

306. Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URBAN INST. (May 22, 2019), <https://www.urban.org/research/publication/one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018> [<https://perma.cc/5MBB-MVYE>].

307. *Id.*

Nonprofit organizations working with immigrant communities reported that in 2017, 2018, and 2019, immigrant families, including those with U.S. citizen children, slowly disenrolled from Medicaid, SNAP, and other benefits programs, explaining that they were doing so because they were afraid of being deported because of their receipt of public benefits.³⁰⁸ Assurances from immigration advocates, attorneys, and other trusted professionals that the law had not yet changed, or that as lawfully present nonimmigrant visa holders or permanent residents they were not subject to removal if they received the benefits to which they were entitled, failed to persuade these terrified immigrants.³⁰⁹ Even before it became law, the proposed Rule created a climate of fear and terror for all immigrants, changing the behavior of both those who would be affected directly if the Rule went into effect, and those who would not.³¹⁰ As with other Trump Administration immigration initiatives, the new restrictions which only technically applied to a small group of immigrants, instilled fear in, and changed the behavior of, hundreds of thousands.³¹¹

C. THE DENATURALIZATION TASKFORCE

As the examples of the rescission of DACA and the 2019 public charge rule demonstrate, a primary purpose of the Trump Administration's approach to immigration law and policy was to create profound fear and uncertainty about the future in immigrant communities. All immigrants—documented and undocumented—were left with the impression that previously settled immigration laws could be changed without notice, and the status that they held could be taken away at any time. The Trump Administration even inspired similar fears in a community that previously enjoyed stability: naturalized U.S. citizens.

308. See, e.g., Alexandra Olgin, *Fear, Confusion About Immigration Change Leads Some to Forego Medical Benefits*, WFAE 90.7 (Feb. 22, 2019, 6:09 PM), <https://www.wfae.org/post/fear-confusion-about-immigration-change-leads-some-forego-medical-benefits> [https://perma.cc/DH4F-L4ZL] (“This we see as a slow, insidious threat and one you can’t even quantify . . . We don’t know how many people have disenrolled from Medicaid or SNAP because of this.”).

309. See *id.* (“[Pediatrician Julie] Linton said this mom’s immigration status wouldn’t put her at risk even if this rule was enacted. But Linton said it was clear she was still afraid.”).

310. See Sarah Holder, *How Rule Changes About Public Benefits Could Affect Immigrants*, BLOOMBERG CITYLAB, (Aug. 13, 2019, 4:09 PM), <https://www.bloomberg.com/news/articles/2019-08-13/new-rules-to-scare-immigrants-off-public-services> [https://perma.cc/3SE8-UPNL] (“Researchers estimate that regardless of eligibility, 26 million immigrants could drop out of benefits programs rather than risk deportation. Many families have already made that choice, driven by anxieties that the rule would be revised.”).

311. See *id.*; see also Miriam Jordan, *We’re Petrified: Immigrants Afraid to Seek Medical Care for Coronavirus*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html> [https://perma.cc/JSW4-WEKG] (“Even after learning that seeking medical help for the virus would not jeopardize her chances of qualifying for a green card, she did not feel reassured. ‘This president says one thing one day and does another the next,’ she said.”).

From the passage of the INA in 1952 to the late 2000s, the federal government very rarely pursued revocation of naturalization.³¹² Under Section 340(a) of the INA, individuals who “illegally procured” their U.S. citizenship or “procured [it] by concealment of a material fact or by willful misrepresentation” may be subject to revocation proceedings in federal district court.³¹³ In such cases, federal prosecutors must demonstrate by “clear, unequivocal, and convincing” evidence that the U.S. citizen subject to the proceedings obtained their citizenship illegally.³¹⁴ Denaturalization was traditionally seen as a measure that should only be taken in pursuit of foreign policy and national security goals. Indeed, until the Trump administration took office, revocation proceedings were almost exclusively brought against Nazi war criminals, terrorism suspects, or others deemed to pose a threat to national security.³¹⁵

The Trump Administration, in contrast, made denaturalization an enforcement priority. Once again, it took the immigration powers granted the Executive Branch to safeguard national security and used those powers in furtherance of its nativist policy objectives. In June 2018, L. Francis Cissna, the Director of USCIS announced the formation of a new intergovernmental taskforce focused on denaturalization.³¹⁶ Invoking national security concerns, Joseph H. Hunt, the head of the Justice Department’s civil division, released a statement claiming that the establishment of this joint initiative “underscore[d] the department’s commitment to bring justice to terrorists, war criminals, sex offenders and other fraudsters who illegally obtained naturalization.”³¹⁷ However, despite this claim, the team undertook denaturalization investigations that had no connection to national security concerns or counter-terrorism operations.³¹⁸ They reportedly focused, in particular, on individuals who failed to disclose minor criminal offenses that occurred before they naturalized, which could have led an adjudicator to conclude that they lacked the requisite “good moral character” to become a

312. See Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 779–80 (2020).

313. 8 U.S.C. § 1451(a) (2018).

314. *Kungys v. United States*, 485 U.S. 759, 768 (1988).

315. See, e.g., *Kungys v. United States*, 485 U.S. 759, 764 (1988) (a case involving a Lithuanian-born Nazi war criminal).

316. See Taxin, *supra* note 16.

317. See Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html> [https://perma.cc/Z9SE-BMD4].

318. See Cassandra Burke Robertson & Irina D. Manta, *Trump Administration Seeks to Strip More People of Citizenship*, ACS: EXPERT FORUM (Feb. 28, 2020), <https://www.acslaw.org/expertforum/trump-administration-seeks-to-strip-more-people-of-citizenship> [https://perma.cc/C7UA-PPCG] (“[T]he Trump administration’s tougher stance on immigration means enforcement has expanded beyond cases involving serious crimes or terrorist threats. This tougher enforcement risks sweeping in mere clerical errors. Cases are being filed against individuals with no criminal history or connections to terror groups.”).

U.S. citizen.³¹⁹ In its 2019 budget request to Congress, the Trump Administration requested, and ultimately received, hundreds of millions of dollars in additional funds specifically to support the investigation and prosecution of these kinds of denaturalization cases.³²⁰ As a consequence, from 2017 to 2019 the number of cases referred to the Department of Justice's Office of Immigration Litigation for possible prosecution increased 600 percent. In February 2020, the Department of Justice Office of Immigration Litigation added a Denaturalization Section to handle this greatly increased number of denaturalization referrals.³²¹

Legal scholars and other commentators questioned the role of the denaturalization taskforce.³²² They pointed out that although the number of denaturalization actions brought by the federal government increased exponentially, the actual number of denaturalization cases that were filed was very small, in the thousands, rather than the hundreds of thousands.³²³ These scholars and commentators argued convincingly that the administration could not possibly hope to discover and then denaturalize and deport every naturalized U.S. citizen who failed to disclose potentially relevant information on their applications for naturalization.³²⁴ But, as with all of the other legal measures discussed in this Article, the purpose of the denaturalization taskforce was not just to bring the full force of the law against the individual U.S. citizens subjected to revocation proceedings. Rather, the very existence of the taskforce served an important expressive function.

Some legal scholars and popular commentators argued that these revocation of naturalization prosecutions serve primarily as “cudgels,” i.e., “tools for attacking the legal immigration process as riddled with fraud, as pathways for criminals and terrorists to enter the United States.”³²⁵ Former Attorney General Jeff Sessions certainly intimated as much in a press release about denaturalization cases brought against a Somali family in Minnesota, who had allegedly made false statements about their family relationships

319. See Cassandra Burke Robertson & Irina D. Manta, (*Un*)civil Denaturalization, 94 N.Y.U. L. REV. 402, 406 (2019).

320. See Maryam Saleh, *Trump Administration is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, INTERCEPT (Apr. 4, 2019, 5:00 AM), <https://theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan> [<https://perma.cc/95FM-B68Q>].

321. See *Featured Issue: Denaturalization Efforts by USCIS*, AM. IMMIGR. LAWS. ASS'N (Sept. 4, 2020), <https://www.aila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis> [<https://perma.cc/8YFN-XZ4L>] (discussing trends and collecting sources).

322. See Robertson & Manta, *supra* note 319, at 461.

323. See Stephanie deGooyer, *Why Trump's Denaturalization Task Force Matters*, NATION, (July 10, 2018), <https://www.thenation.com/article/archive/trumps-denaturalization-task-force-matters>.

324. See *id.*

325. Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html> [<https://perma.cc/RF5B-WPQR>] (“The prosecution of naturalized United States citizens . . . is a sign, immigrant advocates fear, of a new and gathering storm for immigration policy in the Trump era.”).

when applying for immigration benefits. “The current immigration system is easily abused by fraudsters and nefarious actors.”³²⁶ Mr. Sessions stated, “[i]f the fraud is not detected and swift enforcement actions are not taken, chain migration only multiplies the consequences of this abuse.”³²⁷ Professor Mae Ngai characterizes this framing of denaturalization as: “trying to make a crisis out of an issue that is not by any measure a crisis . . . an attempt to call the larger systems into question.”³²⁸

For naturalized U.S. citizens, a further effect of the taskforce’s existence was that it demonstrated that even those of us who have gone through the lengthy and bureaucratic process to become U.S. citizens may not enjoy permanent safety and security of status.³²⁹ One naturalized U.S. citizen, the journalist Masha Gessen, wrote in *The New Yorker* that: “Indeed, the creation of the task force itself is undoing the naturalization of the more than twenty million naturalized citizens in the American population by taking away their assumption of permanence. All of them—all of us—are second-class citizens now.”³³⁰ As with the Trump Administration’s rescission of DACA, or the 2019 Public Charge Rule, hundreds of thousands of immigrants who could not possibly be subjected to prosecution or deportation by the denaturalization taskforce, nonetheless felt threatened and afraid.³³¹

VI. TURNING FROM TERROR TO IMMIGRATION REFORM

It would be tempting to regard the “Trump Era” as an anomaly, seeing this four-year period during which refugees and immigrants were terrorized by the administration as an exception to the United States’ longstanding commitments to the values of inclusion, non-discrimination, and the equitable administration of justice. But immigration rulemaking during the four years of the Trump Administration serves as a stark reminder of just how fragile the legal protections are for vulnerable and isolated immigrant communities living in the United States, and how ephemeral the promise of protection can be for refugees and individuals seeking asylum here.

326. *Id.*

327. *Id.*

328. *Id.*

329. See Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence> [<https://perma.cc/QV7S-G8ZA>].

330. *Id.*

331. See deGooyer, *supra* note 323 (“Even if USCIS’s new office closes up shop after handling a few thousand cases of clear-cut lying, cheating, and fraud, the threat of denaturalization now hangs over the heads of America’s immigrant population, and its effects will be far-reaching and long-standing . . . After the immigration agency’s announcement, many naturalized citizens were left questioning the validity of an immigration status they assumed would always be safe.”).

Since the Chinese Exclusion Act of 1882,³³² the U.S. Supreme Court has emphasized the plenary powers that the federal government enjoys in immigration rulemaking, a doctrine that has persisted well into the Twenty-First Century. In 2012, in *Arizona v. United States*, for example, the Court stressed that the federal government enjoyed “broad, undoubted . . . fundamental . . . and complex” power over immigration regulation, based on its inherent power as the national sovereign to control and conduct foreign relations, in which the migration of foreign nationals to the United States is implicated.³³³ Six years later, in *Trump v. Hawaii*, the Court reiterated that the U.S. President has “broad discretion” in almost all aspects of immigration rulemaking, and particularly so when national security concerns are at stake.³³⁴ In this context, there will always be a risk that a presidential administration motivated by anti-immigrant animus might weaponize the tools of governance to persecute immigrant communities. It is therefore essential to act now to reverse the harmful Trump Administration policies, to mitigate the harm that has been done to immigrant communities, and to introduce new measures designed to constrain any future administrations from using immigration law as a tool of terror.

This Part will begin with an overview of the initial steps that the Biden Administration is taking to begin to reverse the harmful policies of its predecessor. Then, it will continue with recommendations for reforms to DHS, to address the challenges described in Part II of this Article. Finally, it will conclude with recommendations for more far-reaching reforms of our current immigration laws and policies that are necessary to address the legacy caused by the Trump Administration’s use of our immigration system as an instrument of terror.

A. REVERSING TRUMP-ERA RULEMAKING

From its first day in office, the Biden Administration has been committed to reversing its predecessor’s immigration rules and policies. On January 20, 2021, President Biden took four executive actions to reverse key Trump Era initiatives. First, President Biden issued a “Proclamation on Ending Discriminatory Bans on Entry to The United States.”³³⁵ This proclamation rescinded the “Travel Ban” barring the admission of immigrants and nonimmigrants from majority-Muslim and African nations.³³⁶ President Biden stated that the bans had been a “stain on our national conscience and [] inconsistent with our long history of welcoming people of all faiths and no

332. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

333. *Arizona v. United States*, 132 S. Ct. 2492, 2498–99 (2012).

334. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10 (2018).

335. Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021).

336. *Id.*

faith at all.”³³⁷ It is worth noting, however, that advocates for Muslim immigrant communities argued that rescinding the bans was merely the first of many steps that need to be taken to address the “very deep human impact” of this discriminatory rule.³³⁸

Second, President Biden issued an “Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities.”³³⁹ This order revoked the Trump Administration’s punitive actions against so-called “sanctuary cities” and announced that the new administration would return to a priority-based approach to interior immigration enforcement, with a focus on individuals with serious criminal records.³⁴⁰ Third, President Biden published a “Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals.”³⁴¹ This memo reinstated the full DACA program.³⁴² Fourth, and finally, President Biden issued a “Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction.”³⁴³ The proclamation sought to normalize relations between the United States and Mexico and halt construction of the controversial border wall.³⁴⁴

Since then, the Biden Administration has taken a number of discrete actions to reverse harmful Trump-era policies, including vacating the 2019 Public Charge Rule,³⁴⁵ raising the Refugee Admissions cap from 15,000 to 62,500,³⁴⁶ and establishing a taskforce to reunite immigrant children with the family members from whom they had been separated at the border.³⁴⁷

DHS has also terminated the MPP.³⁴⁸ On January 20, 2021, on his first day in office, then-Acting Secretary of Homeland Security David Peksoke

337. *Id.*

338. *Biden Has Overturned Trump’s ‘Muslim Travel Ban.’ Activists Say That’s Not Enough*, NPR (Mar. 6, 2021, 7:58 AM), <https://www.npr.org/2021/03/06/974339586/biden-has-overturned-trumps-muslim-travel-ban-activists-say-thats-not-enough> [<https://perma.cc/78AJ-KB2N>].

339. Exec. Order No. 13,993, 86 Fed. Reg. 7,051 (Jan. 20, 2021).

340. *Id.*

341. Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7,053 (Jan. 20, 2021).

342. *Id.*

343. Proclamation No. 10,142, 86 Fed. Reg. 7,225 (Jan. 20, 2021).

344. *Id.*

345. *See* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (to be codified at 8 C.F.R. pts 103, 106, 212, 213, 214, 245 & 248).

346. Press Release, Statement by President Joe Biden on Refugee Admissions (May 3, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/03/statement-by-president-joe-biden-on-refugee-admissions> [<https://perma.cc/3X8Z-3FWJ>].

347. Exec. Order No. 14011, 86 Fed. Reg. 8,273 (Feb. 2, 2021).

348. Memorandum from Alejandro N. Mayorkas, Sec’y of Homeland Sec., to Troy A. Miller, Acting Comm’r, U.S. Customs & Border Prot., Dae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enft & Tracy L. Renaud, Acting Dir., U.S. Citizenship & Immigr. Servs., on Termination of the Migrant Protection Protocols (June 1, 2021), <https://www.dhs.gov/>

issued a memorandum suspending new enrollments in the MPP,³⁴⁹ and the program was formally terminated by Secretary Alejandro Mayorkas on June 1, 2021.³⁵⁰ By that point, however, 68,039 vulnerable asylum seekers had been returned to Mexico under the program.³⁵¹ The harm that those individuals experienced was profound and irreversible, and they are doubtlessly continuing to suffer from its effects. The damage wrought by the MPP on the administration of the asylum system at the Southwest border also remains ongoing. Although the program itself has been terminated, its implementation denuded the infrastructure at the Southwest border that is necessary to process arriving asylum-seekers, providing them with timely adjudication of their legal claims, access to counsel, and adequate procedural and other safeguards. The Biden Administration must therefore consider how to address the problems created by the MPP and the existing deficiencies that were exacerbated by the program to truly begin to repair the system and protect the vulnerable.

Moreover, as of this writing, the administration has not yet rescinded “Title 42,” the controversial public health order that closed the U.S.-Mexico border and authorized the immediate return of attempted border-crossers to Mexico, but commentators anticipate that the measure will be terminated shortly in the face of increased pressure from immigrants’ advocates, legal scholars, and lawmakers.³⁵²

Attorney General Merrick Garland has also taken steps to address the excesses of his recent predecessors. Notably, in June 2021, Attorney General Garland vacated the Trump Administration’s Attorney General rulings that gutted asylum protections for vulnerable women and children.³⁵³ However, for the women and girls who languished in immigration detention, or were

sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [https://perma.cc/3Q7C-RN2M].

349. *DHS Suspends New Enrollments in the MPP Program*, AM. IMMIGR. LAWS. ASS’N (Jan. 20, 2021), <https://www.aila.org/infonet/dhs-suspends-new-enrollments-mpp> [https://perma.cc/2NGM-CASU].

350. Memorandum on *Termination of the Migrant Protection Protocols Program*, *supra* note 348.

351. See DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS METRICS AND MEASURES 2 (Jan. 21, 2021).

352. See Claire Hansen, *Pressure Amps Up on Biden to Rescind Title 42 Border Order*, U.S. NEWS (June 3, 2021), <https://www.usnews.com/news/national-news/articles/2021-06-03/pressure-amps-up-on-biden-to-rescind-title-42-border-order>.

353. See *Matter of A-B*, 28 I. & N. Dec. 307, 307 (A.G. 2021) (vacating *Matter of A-B*, 27 I. & N. Dec. 316 (A.G. 2018) (“A-B-I”) and *Matter of A-B*, 28 I. & N. Dec. 199 (A.G. 2021) (“A-B-II”) and instructing that immigration judges and the BIA should no longer follow A-B-I or A-B-II when adjudicating pending or future cases and instead, pending forthcoming rulemaking, immigration judges and the Board should follow pre-A-B-I precedent, including *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (BIA 2014)); *Matter of L-E-A*, 28 I. & N. Dec. 304, 304 (A.G. 2021) (ruling that *Matter of L-E-A*, 27 I. & N. Dec. 581 (A.G. 2019) (“L-E-A-II”), “is vacated in its entirety so as to return the immigration system to the preexisting state of affairs pending completion of the ongoing rulemaking process and the issuance of a final rule addressing the definition of “particular social group”).

turned away at the border, this reversal is arguably too little, and too late. Merely vacating the harmful rule and reinstating the *status quo ante* does not go far enough to protect vulnerable asylum-seekers. Concrete rulemaking, by regulation or legislation, is now needed to create clear rules and protections that cannot be overturned arbitrarily by the next political appointee to hold the office of Attorney General.

In sum, these measures to reverse the Trump Administration's policies are clearly necessary—but alone they are not sufficient. Each step to reverse the prior administration's excesses has been reactive, not innovative, and each step has been limited to measures that lie wholly within the purview of the Executive Branch, leaving open the possibility that a future administration could once again change tack and reinstate the Trump-era initiatives. Reversing the Trump Administration's policies must therefore be the first step in a multi-step path to meaningful and comprehensive reform of our immigration laws and the agencies that administer those laws.

B. REFORMING THE DEPARTMENT OF HOMELAND SECURITY

In order to address the ethos of terror fostered by the Trump Administration, the Biden Administration must introduce meaningful reforms to the structure, operational practice and mission of DHS. Section II.B of this Article describes the myriad ways in which the Trump Administration transformed DHS and its enforcement agencies, ICE and CBP, into organizations inspiring terror in immigrant communities.³⁵⁴ The remit of USCIS, the agency within DHS charged with providing services to nonimmigrants, immigrants, and naturalizing U.S. citizens, also shifted during the Trump Administration, with the agency adopting an increasingly enforcement-oriented, rather than service-oriented, mandate.³⁵⁵

The Biden Administration has taken initial steps to restore confidence in DHS. The appointment of Secretary Alejandro Mayorkas,³⁵⁶ and the proposed appointment of members of a new leadership team for the Department, including John Tien, Jen Easterly, Ur Jaddou, and Chris Magnus,³⁵⁷ signal a

354. In particular, the transformation of these two agencies into "security agencies." See Klippenstein, *supra* note 84; Klippenstein, *supra* note 86.

355. See, e.g., USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 5, 2018), <https://www.uscis.gov/news/news-releases/uscis-updates-notice-to-appear-policy-guidance-to-support-dhs-enforcement-priorities> [https://perma.cc/7Fg7-QNSB]; Joshua Breisblatt, *USCIS Is Slowly Being Morphed Into an Immigration Enforcement Agency*, IMMIGR. IMPACT (July 9, 2018), <https://immigrationimpact.com/2018/07/09/uscis-guidance-immigration-benefit> [https://perma.cc/XM8W-ULV3].

356. See Sabrina Rodriguez, *Mayorkas Confirmed as Secretary of Homeland Security*, POLITICO (Feb. 2, 2021, 6:40 PM), <https://www.politico.com/news/2021/02/02/mayorkas-confirmed-homeland-security-465036> [https://perma.cc/NXY9-UJYL] (noting that "Mayorkas is the first Latino and first immigrant to lead the department").

357. Press Release, President Biden Announces His Intent to Nominate Key Members for the U.S. Department of Homeland Security (April 12, 2021), <https://www.whitehouse.gov/briefing->

commitment to increasing diversity amongst decision-makers at the highest levels. President Biden also appointed several taskforces to review Trump-era policies, including child separation, the MPP, and “regulations, policies, and guidance that have set up barriers to our legal immigration system.”³⁵⁸ Further, in April 2021, Secretary Mayorkas announced that DHS would conduct an internal review into the prevalence of white extremist ideology within its agencies.³⁵⁹ There have, however, been very few concrete changes to the daily operations or the ethos of the Department, and the Administration’s 2022 budget request, which includes \$52 billion for DHS, envisages funding tens of thousands of immigration detention beds and increasing joint enforcement operations with state and local law enforcement.³⁶⁰

For many immigrants and their allies, the new administration’s failure to reform DHS has been deeply disheartening.³⁶¹ It is perhaps unsurprising that President Biden has not embraced the calls from immigrants’ advocacy groups to “Abolish ICE.”³⁶² In addition to the fact that Congress is unlikely to vote to amend the Homeland Security Act to remove the agency responsible for immigration enforcement in the interior of the United States, abolishing ICE would be a mammoth undertaking at a time when the federal government’s resources are focused elsewhere. Moreover, even if it were possible to successfully dismantle ICE, and even if doing so successfully addressed concerns about pervasive anti-immigrant animus among the agency’s leadership and rank and file, other agencies within DHS would likely then take on ICE’s current responsibilities—including its personnel—with the risk that those preexisting issues would be deferred and not resolved. Instead of abolishing ICE, the Biden Administration should, therefore, overhaul the structure of the Department as a whole and redefine its mission.

room/statements-releases/2021/04/12/president-biden-announces-his-intent-to-nominate-key-members-for-the-u-s-department-of-homeland-security [https://perma.cc/H69Y-RgK7].

358. See Jasmine Aguilera, *Biden’s New Immigration Executive Orders Include Creating a Task Force to Reunify Families. Here’s What to Know*, TIME (Feb. 3, 2021, 12:29 PM), <https://time.com/5935254/bidens-immigration-executive-orders-task-force-family-separation> [https://perma.cc/KW6R-VKT5].

359. See Zolan Kanno-Youngs, *Homeland Security Will Assess How It Identifies Extremism in Its Ranks*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/04/26/us/politics/homeland-security-extremism-white-supremacy.html> [https://perma.cc/HTZ2-PBF5].

360. See Nick Miroff & Maria Sacchetti, *Biden Budget Reflects Shift in U.S. Immigration Policy and Border Enforcement*, WASH. POST (May 28, 2021, 9:42 PM), https://www.washingtonpost.com/national/biden-border-wall-immigration-budget/2021/05/28/18836084-bff0-11eb-9bae-5a86187646f_e_story.html [https://perma.cc/SJ58-UGH6].

361. See, e.g., Jacob Silverman, *Biden’s Homeland Security is Just as Bad as Trump’s*, NEW REPUBLIC: THE SOAPBOX (Apr. 13, 2021), <https://newrepublic.com/article/162031/ice-dhs-border-wall-deportations> [https://perma.cc/U4WQ-WLVB] (“The administration’s policies on the border wall, asylum, and deportation are hardly a break from the last president’s.”).

362. See Rachel Levinson-Waldman, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained> [https://perma.cc/HX75-TT5A].

H.R. 8791, the failed Department of Homeland Security Reform Act of 2020,³⁶³ provides a blueprint for a potential restructuring of DHS. The bill proposed introducing increased oversight of all DHS immigration enforcement operations and enhanced protections for the privacy and civil liberties of immigrants and U.S. citizens.³⁶⁴ The text of the bill also targeted specific areas of concern that arose during the Trump Administration, including USCIS's increased enforcement functions, the lack of coordination amongst DHS agencies to protect immigrant's personal data, the increased politicization of DHS daily operations, and the overreliance on political appointees.³⁶⁵ Restructuring DHS to create a team tasked with oversight and accountability would be one significant step toward restoring its legitimacy. Providing for streamlined Congressional oversight of the Department, by the House Committee on Homeland Security, would be another.³⁶⁶

It is not, however, merely the institutional structure of DHS that needs reform, but also its core mission. The focus of DHS during the Trump Era was on border security and immigration enforcement, and the ethos of the department calcified around the tropes of immigrant exclusion and anti-immigrant animus. But, the overarching purpose of the department, as set forth in the Homeland Security Act,³⁶⁷ is to "secur[e] the homeland."³⁶⁸ In the years since the passage of the Homeland Security Act, it has become increasingly clear that the greatest threats the country faces are not posed by foreign nationals engaged in terrorist activity, but rather stem from the activities of native-born white supremacist extremists.³⁶⁹ And the greatest challenges to our national infrastructure today include cybersecurity breaches, global pandemics, and pernicious effects of climate change.³⁷⁰ It is therefore time to revisit and revise the focus of DHS operations, reduce the

363. Department of Homeland Security Reform Act of 2020, H.R. 8791, 116th Cong. (2020).

364. *Id.* § 115(a)(2).

365. *Id.*

366. See Adam Comis, *Chairman Thompson Urges House Rules Change to Streamline Homeland Security Jurisdiction*, COMM. ON HOMELAND SEC. (Oct. 1, 2020), <https://homeland.house.gov/news/press-releases/chairman-thompson-urges-house-rules-changes-to-streamline-homeland-security-jurisdiction> [<https://perma.cc/6E7T-9KZ5>].

367. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat 2135 (2002).

368. *Id.* §101(b)(1)(E) (codified as amended 6 U.S.C. § 111).

369. See, e.g., Eileen Sullivan & Katie Benner, *Top Law Enforcement Officials Say the Biggest Domestic Terror Threat Comes from White Supremacists*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/05/12/us/politics/domestic-terror-white-supremacists.html> [<https://perma.cc/S2HZ-SVZE>] ("Attorney General Merrick B. Garland and Homeland Security Secretary Alejandro N. Mayorkas told senators on Wednesday that the greatest domestic threat facing the United States came from what they both called 'racially or ethnically motivated violent extremists.'").

370. See, e.g., Carrie Cordero & Katrina Mulligan, *Modernizing the Department of Homeland Security*, LAWFARE (Dec. 9, 2020, 8:21 AM), <https://www.lawfareblog.com/modernizing-department-homeland-security> [<https://perma.cc/4EKH-9ZDC>] ("[P]andemics, climate change and cybersecurity pose threats to the country's way of life on a scale that was once the primary domain of terrorism.").

resources devoted to the (over) policing of immigrant communities, and channel those resources into areas that are truly mission-critical.

C. *REBUILDING TRUST THROUGH COMPREHENSIVE IMMIGRATION REFORM*

Finally, and perhaps most significantly, the most meaningful step that the Biden Administration could take to combat the fears pervading immigrant communities would be to work successfully with Congress to deliver comprehensive immigration reform. On his first day in office, President Biden announced his proposed U.S. Citizenship Act of 2021.³⁷¹ The key provisions of the proposed bill include a path to permanent residency (and ultimately to citizenship) for undocumented immigrants, DACA recipients and TPS holders; reforms to simplify and streamline family-based migration; reforms to simplify and streamline employment-based migration; funding for immigrant and refugee integration programs; increased funding for immigration courts, including funds to appoint counsel for children and vulnerable individuals; and the replacement of the word “alien” in U.S. immigration laws with the less pejorative term “noncitizen.”³⁷² The Bill was formally introduced to Congress by its lead sponsors Senator Bob Menendez (D-NJ) and Representative Linda Sanchez (D-CA) in February 2021.³⁷³ If successful, it would be the most ambitious and far-reaching reform to the INA since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.³⁷⁴

Progress toward the passage of the U.S. Citizenship Act of 2021 appears, however to be stalled, yet again, because of a lack of bipartisan consensus in support of immigration reform.³⁷⁵ As a consequence, democratic legislators in the House of Representatives proposed adopting piecemeal immigration reform, including two related bills, the American Dream and Promise Act and the Citizenship for Essential Workers Act. These bills, which the House passed in March 2021, would grant citizenship to an estimated 2.7 million

371. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system> [<https://perma.cc/8MFV-822Y>].

372. *Id.*

373. See Michael D. Shear, *Congressional Democrats Roll Out Biden’s Immigration Plan, Offering an Eight-Year Path to Citizenship*, N.Y. TIMES (May 18, 2021, 11:02 AM), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news#congressional-democrats-roll-out-bidens-immigration-plan-offering-an-eight-year-path-to-citizenship> [<https://perma.cc/5JF7-6BAW>].

374. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

375. See, e.g., Maria Sacchetti, *‘It’s Time’: As Congress Debates Citizenship Legislation Yet Again, a DACA Recipient Grows Frustrated*, WASH. POST (Apr. 11, 2021, 8:00 AM), https://www.washingtonpost.com/immigration/congress-citizenship-legislation/2021/04/09/eof32e4c-8dbd-11eb-9423-04079921c915_story.html [<https://perma.cc/MRV4-gFAV>].

DREAMers, and lawful permanent resident status to 1.1 million farmworkers.³⁷⁶ President Biden signaled his support for these initiatives at a joint session of Congress in April 2021, when he urged senators to support any measure that would grant DACA recipients permanent status, stating that: “If you don’t like my plan, let’s at least pass what we all agree on.”³⁷⁷

For the approximately 11 million undocumented immigrants living in the United States, as well as their documented peers and their U.S. citizen family members, however, partial action is not enough. The precarity that immigrant communities experienced under the Trump Administration, including the attempted cancellation of the DACA program and the revocation of longstanding TPS grants, has made immigrants’ advocates deeply committed to ensuring that there is concrete reform to the INA itself. In other words, to restore faith in the nation’s immigration system, there needs to be a pathway to permanent relief for undocumented and other marginalized immigrants—put simply, they need the security offered by access to an immigration status that cannot be taken away by the executive branch with the stroke of a pen.

VII. CONCLUSION

When the anonymous federal agents were deployed to Portland, Oregon in July 2020, many legal scholars and other commentators were shocked.³⁷⁸ Immigration law experts were not. The central irony of the events in Portland—the way in which officers from DHS, tasked with protecting civilians from a terrorist threat, had themselves become a threat inspiring terror in civilians—was the central irony of immigration lawmaking from January 2017 to January 2021.

Indeed, in the immigration law world, the federal agents’ actions in Portland, which rightly shocked the conscience of many concerned Americans, were wholly consistent with the continuum of measures that the Trump Administration took, using its broad national security powers, to terrorize immigrant communities. In some respects, the deployment of the federal officers was analogous to the formation of the denaturalization task force. It was a small and limited action, taken against very few individuals, designed to draw broad attention and dissuade other people from engaging in similar lawful conduct (i.e., protesting or naturalizing).

376. See John Wagner, Colby Itkowitz & Amy B. Wang, *House Passes Bills to Open Path to Citizenship for Young Undocumented Immigrants, Legal Status for Farmworkers*, WASH. POST (Mar. 18, 2021, 9:42 PM), <https://www.washingtonpost.com/politics/2021/03/18/joe-biden-live-updates> [https://perma.cc/2GK5-P72R].

377. Cindy Carcamo, *As Biden Narrows Immigration Focus, Dreamers Try to Stay Optimistic*, L.A. TIMES (June 15, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-06-15/comprehensive-immigration-reform-is-likely-dead-so-what-happens-next> [https://perma.cc/TC5Z-TLWK].

378. See *supra* note 4.

If witnessing the federal officers' presence and actions in Portland had led to a shutdown of protests across the country, with would-be protestors deciding that protesting was too risky, it would have been analogous to the changes made in 2019 to the public charge doctrine. There, too, a minor change to law and policy, that actually affected very few people, but was highly visible and well-publicized, had the effect of terrifying thousands of people into changing their conduct.

And if, following the protests in Portland, instead of capturing and detaining random individual protestors at the scene, the federal government had developed a systematic enforcement operation, whereby every single person present at the protests were arrested, it would have been analogous to the "zero tolerance" and family detention policies that the Trump Administration deployed at the Southwest border.

The irony identified by legal scholars and other commentators following the Portland protests is not that federal officers charged with combatting terrorism can sometimes be used to terrorize civilian populations. The true irony is that for four years the Trump Administration built a robust system of governance for immigrants, refugees, and even naturalized U.S. citizens, that was suffused top to bottom with an ethos of terror.

In July 2020, in Portland, Oregon, officers of a federal agency that was originally founded to combat terrorism, but was steeped for years in a legal culture of terrorizing immigrants, trained its ethos and its methods on native-born U.S. citizens. This conduct may have been abhorrent, but for those of us paying attention to immigration law and policy under the Trump Administration, it was not shocking. It simply surfaced what we knew to be a broader and deeper problem.

The Biden Administration is now embarking on the project of reversing the changes that President Trump made to immigration laws and federal agencies charged with administering those laws. But simply reinstating the *status quo ante* will not be enough. The harm that has been done—to individuals, to communities, and to the law itself—will persist for many years, and the only way to address this harm is to engage in meaningful and durable reform of our national immigration laws and policies. Policymakers, legislators, jurists, and legal scholars must work together in the months and years ahead to ensure that the federal government is never again able to use its lawmaking powers to terrorize immigrant communities.