



How the Biden Administration’s Immigration Proposals Risk Undoing the Successes of the Trump Administration

Republican Staff Report

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February 8, 2021

EXECUTIVE SUMMARY

President Donald Trump and his Administration enhanced U.S. border security and returned the rule of law to U.S. immigration policy. Despite constant obstruction from Democrats and unprecedented interference by activist federal courts, the Trump Administration succeeded in improving border security and immigration enforcement nationwide. Now, with President Joe Biden's promises and actions to end the Trump Administration immigration policies, the Biden Administration appears poised to return to the radical left-wing policies that will incentivize illegal immigration and promote an unending flood of foreign nationals into the United States.

In 2016, almost 63 million Americans voted for President Trump in part due to his pledge to address the crisis of border insecurity and illegal immigration. President Trump kept his promise to the American people. For example, in just four years:

- The Trump Administration completed over 450 miles of border wall along the southwest border, fencing that will assist U.S. Customs and Border Protection in its mission to keep illegal aliens and dangerous drug traffickers out of the country.
- The Trump Administration rolled back the unconstitutional executive actions by the Obama-Biden Administration that incentivized illegal immigration. President Trump sought to end other unwise executive policies started by the Obama-Biden Administration—such as Deferred Action for Childhood Arrivals—but was hamstrung by activist judges.
- The Trump Administration's immigration policies prioritized safety and security of Americans. President Trump ended the dangerous Obama-Biden practice of "catch and release" that allowed criminal aliens to roam American neighborhoods. President Trump prioritized the quick and safe removal of illegal aliens through the expanded use of expedited removal.
- The Trump Administration cracked down on asylum abuse in part by working with neighboring countries so that aliens seeking asylum do so in the first safe country they enter—rather than waiting until they reach the U.S.

President Biden's immigration policies will rehash the failed policies of the Obama-Biden Administration and will only make Americans less safe. These radical ideas will not only affect border communities, but they will also lead to the release of dangerous criminal aliens into neighborhoods around the country. For example:

- President Biden has proposed ending or rolling back President Trump’s immigration successes, pledged to reinstitute “catch and release,” and has implemented a 100-day moratorium on removals of deportable aliens.¹
- President Biden has promised to reverse Trump Administration funding restrictions on far-left sanctuary jurisdictions that ignore federal immigration law and refuse to cooperate with immigration authorities.
- President Biden has proposed legislation to grant amnesty to the millions of illegal immigrants currently in the United States. This proposal would repeat the mistakes of the 1986 amnesty, which only made illegal immigration worse by encouraging more people to come into the country illegally.
- President Biden has pledged to undo the Trump Administration’s public charge regulation, which assesses an alien’s likelihood of needing U.S. taxpayer-funded benefits upon arrival in the U.S.
- President Biden’s radical approach to immigration policy ignores the hard truths of the current state of migration. With an open borders policy, criminals are incentivized to cross the border illegally. In light of recent activist court rulings, criminal aliens are incentivized to bring children with them because they know immigration authorities must release them.

Hidden underneath left-wing criticism of the Trump Administration’s immigration policies is the reality that the Trump Administration made the U.S. safer. The Trump Administration took specific and concrete steps to end the pull factors that incentivize illegal immigration into the U.S. and to implement immigration policy that puts the safety and security of Americans first.

As President Biden begin his presidency, his Administration would be wise to retain the Trump Administration’s immigration policies. If the Biden Administration continues to undo President Trump’s immigration policy successes and implement a radical immigration agenda, it will result in less security at the border, reduced interior enforcement, and an increased risk from criminal and other aliens who want to do us harm. Those most hurt by the Biden Administration’s radical immigration agenda will be U.S. citizens and lawful permanent residents.

¹ On January 26, 2021, a federal judge in the Southern District of Texas issued a 14-day temporary restraining order blocking implementation of the Biden Administration’s 100-day moratorium on removals. *Texas v. U.S., et al.*, No. 6:21-cv-00003 (S.D. Tex. Jan. 26, 2021).

FINDINGS

Administrative Amnesty:

- After taking office, President Trump focused on ending the unconstitutional administrative amnesty programs from the Obama-Biden Administration that caused a border surge and harmed legal immigrants. He rescinded the unconstitutional Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs and ended *de facto* amnesties like Temporary Protected Status.
- On his first day in office, President Biden took steps to reverse President Trump's action and continue administrative amnesty programs, even with a caravan of migrants traveling to the southern border.

The Border Wall:

- Throughout the duration of the 2016 presidential campaign, then-candidate Donald Trump promised to protect the nation and ensure greater security by constructing an adequate wall along the southwest border. During President Trump's time in office, the U.S. built more than 450 miles of physical border wall along the southwest border.
- On President Biden's first day in office he signed an executive order halting construction of the border wall. His decision ignores the requests of Border Patrol agents on the ground and the necessity of the border wall in keeping the illegal border crossings down.
- President Trump also implemented Migrant Protection Protocols (MPP), pursuant to statutory authority, to send the message to foreign nationals that simply because they make it to the U.S. and claim asylum, they will not be released into the U.S. while awaiting their immigration court proceedings.
- President Biden promised to end the MPP and to allow asylum-seekers to remain in U.S. while their immigration cases are pending, even though most asylum claims are without merit and take many years to make it through the process. The Biden Administration has already announced that aliens arriving at the border will no longer be enrolled in MPP, effectively ending the program.

Interior Security:

- President Trump promised during his 2016 campaign that he would end the dangerous process of "catch and release"—the process that stems from the government's legal inability to hold illegal immigrants for an extended period. Under President Trump, foreign nationals arriving illegally at the border were no longer released into the interior of the U.S. Instead they were transferred to ICE custody for processing, a process that deters illegal immigration and fraudulent asylum claims.

- The Trump Administration removed nearly one million deportable aliens from the U.S. The Trump Administration also made certain federal funding provided to states and localities contingent upon cooperation with federal immigration authorities.
- President Biden instituted a 100-day moratorium on removals, which will send criminals and unvetted aliens into U.S. communities.²

National Security and Rule of Law:

- President Trump took early action in his presidency to protect the national security of the U.S. and enhance the rule of law. On January 27, 2017, President Trump signed Executive Order 13769, which suspended the travel of certain foreign nationals from specific countries traveling to the U.S. and aliens seeking to enter the U.S. as refugees pursuant to section 212(f) of the Immigration and Nationality Act (INA). In 2019, the Trump Administration issued a regulation aimed at ensuring that aliens who cannot support themselves financially, and who are thus likely to be reliant on federal taxpayer-funded benefits, are inadmissible.
- The Trump Administration took a realistic approach to determining the refugee ceiling. This approach of “humanitarian immigration benefits programs” resulted in lower numbers of refugee spots available for U.S. resettlement, and in resources normally used for refugees being utilized to reduce asylum case backlogs.
- The Trump Administration’s Attorneys General certified decisions of the Board of Immigration Appeals to reverse the holdings and make the new holdings binding on the immigration courts. Decisions regarding asylum eligibility grounds, the effects of criminal convictions such as DUI on the removal of criminal aliens, and criminal sentencing for purposes of removability have provided fairness in the law, adherence to the statute, and clarity to immigration judges.
- Due to these necessary efforts by the Trump Administration to reduce illegal immigration and by instituting reforms to make the courts more efficient, immigration case times were significantly reduced.
- President Biden has already signed a proclamation rescinding Executive Order 13780, the subsequent Order to 13769, and has signaled that he will raise the refugee ceiling. These actions, along with his other open border policies, will result in even more insecurity in the immigration system.

² *Id.*

TABLE OF CONTENTS

EXECUTIVE SUMMARY 1

FINDINGS 3

TABLE OF CONTENTS..... 5

ADMINISTRATIVE AMNESTY 6

 1. *Deferred Action for Childhood Arrivals* 6

 2. *Deferred Action for Parents of Americans and Lawful Permanent Residents* 9

 3. *Temporary Protected Status* 10

BORDER SECURITY 12

 1. *The Border Wall*..... 12

 2. *Title 42 Order* 13

 3. *Asylum Reforms* 15

 4. *Migrant Protection Protocols*..... 17

 5. *Expedited Removal*..... 18

INTERIOR SECURITY 19

 1. *Catch and Release*..... 19

 2. *Removals and Arrests*..... 21

 3. *Sanctuary Cities* 23

NATIONAL SECURITY and RULE OF LAW 24

 1. *Executive Orders 13769 and 13780*..... 24

 2. *Executive Office of Immigration Review Reforms*. 26

 3. *Public Charge Regulation* 28

 4. *Refugee Ceiling*..... 30

 5. *Immigration Cases Certified by the Attorney General* 30

CONCLUSION 31

ADMINISTRATIVE AMNESTY

In immigration policy, amnesty refers to the federal government’s pardoning of illegal immigrants for their unlawful status in the country. The government has provided amnesty by statute—such as the 1986 Immigration Reform and Control Act—and by unilateral administrative fiat—such as the Obama-Biden Administration’s Deferred Action for Childhood Arrivals (DACA) program. When the federal government provides amnesty to large segments of illegal immigrants, whether administratively or by statute, there are adverse consequences to U.S. citizens and legal immigrants. Widespread amnesty damages the integrity of the U.S. Constitution, results in subsequent surges in illegal immigration, and creates application processing delays for those seeking legal immigration benefits.

President Trump sought to reign in the out-of-control use of administrative amnesty in U.S. immigration policy. He attempted to undo the Obama-Biden Administration’s unconstitutional DACA program, which led to a crisis of unaccompanied alien children (UACs) at the southwest border. President Trump ended the designation of Temporary Protected Status (TPS)—meant to allow immigrants to remain in the U.S. if conditions in their home country are unsafe for return—for certain populations where conditions in their home countries had improved such that TPS was no longer necessary.

President Biden, however, has signaled his intention to return to the radical administrative amnesty policies of the Obama-Biden Administration. President Biden campaigned on his leadership in “the creation and expansion” of the DACA program and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).³ He has pledged to fully reinstate the DACA program and to “explore all options to protect [Dreamers]’ families”⁵ In addition, President Biden has pledged to review and overturn the Trump Administration’s termination of TPS for certain populations and to “offer” those TPS holders “a path to citizenship.”⁶ If the Biden Administration is successful in re-instituting these programs, a large number of illegal immigrants could receive lawful status in the United States, eroding the rule of law and harming the millions of aliens who entered the country through legal channels.

1. Deferred Action for Childhood Arrivals

President Trump sought to end the Obama-Biden Administration’s unconstitutional DACA program, a radical policy that incentivized UACs to illegally enter the country in hopes of receiving amnesty. DACA caused a surge of illegal immigration and harmed legal immigrants. President Trump understood that the DACA program was outside the Executive Branch’s constitutional authority and should properly fall to Congress to implement as a permanent, statutory change. When the Trump Administration tried to end DACA in the same

³ Biden Harris Campaign, *The Biden Plan For Securing Our Values As A Nation Of Immigrants*, <https://joebiden.com/immigration/> [hereinafter “The Biden Plan”].

⁴ The term “Dreamers” commonly refers to illegal aliens who were brought to the United States at a young age by their parents. However, no Democrat-led legislation specific to providing legal immigration status for Dreamers has contained a provision requiring that the aliens must show they were brought to the U.S. by their parents.

⁵ The Biden Plan, *supra* note 3.

⁶ *Id.*

manner that the Obama-Biden Administration created it, activist courts stepped in to block its termination. The Supreme Court, however, never reached a decision on the constitutionality of DACA.⁷

DACA began as one of the many executive overreaches by the Obama-Biden Administration. On June 15, 2012, the Obama-Biden Administration announced an unprecedented administrative amnesty program that sanctioned illegal immigration, deferred removal action for illegal aliens who met certain criteria, and allowed these aliens to work in the United States.⁸ The DACA program was aimed at illegal aliens “who were brought to this country as children.”⁹

- As of June 30, 2020, U.S. Citizenship and Immigration Services (USCIS) received over 960,000 initial DACA applications and approved nearly 827,000 of these applications.¹⁰ USCIS has approved nearly 2 million of the 2.1 million renewal applications.¹¹
- With DACA’s implementation, the message was clear: Young illegal aliens in the United States could live and work here legally without repercussion or removal.
- Predictably, the number of UACs entering the country illegally grew significantly following the implementation of DACA. According to the Congressional Research Service, the number of UAC apprehensions by year increased over 400 percent in just four years—from 16,067 in Fiscal Year (FY) 2011 to 68,541 in FY 2014.¹²

The Obama-Biden Administration acknowledged that DACA was incentivizing UACs to make the dangerous trip to the southwest border.

- In 2014, the Obama-Biden Administration launched a “public messaging campaign in Central America, highlighting the dangers of the journey, and correcting the misinformation the coyotes are putting out about supposed ‘free passes’ if you come to the United States.”¹³
- DACA implementation overwhelmed U.S. Citizenship and Immigration Services (USCIS), the federal agency responsible for processing the DACA applications, because USCIS did not have the staff in place to adjudicate the large volume of incoming

⁷ U.S. Dep’t of Homeland Sec. v. Regents of the University California, 591 U.S. ____ (2020).

⁸ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Security, to David Aguilar, Acting Comm’r, CBP, et al., “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (June 15, 2012).

⁹ *Id.*

¹⁰ U.S. Citizenship and Immigration Services, Number of Form I-821D, Consideration for Deferred Action for Childhood Arrivals, Status, by Fiscal Year, Quarter, and Case Status: Aug. 15, 2012 – Jun. 30, 2020 (Nov. 16, 2020); available at https://www.uscis.gov/sites/default/files/document/reports/DACA_performancedata_fy2020_qtr3.pdf.

¹¹ *Id.*

¹² William A. Kandel, Congressional Research Service, Unaccompanied Alien Children: An Overview (Oct. 9, 2019).

¹³ Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec., Remarks by the Secretary of Homeland Security Jeh Johnson: Border Security in the 21st Century, (Oct. 9, 2019).

applications. The *New York Times* reported in 2014 that legal immigration and lawful permanent residents suffered as a result of DACA processing delays:

Many thousands of Americans seeking green cards for foreign spouses or other immediate relatives have been separated from them for a year or more because of swelling bureaucratic delays at a federal immigration agency in recent months. The long waits came when [USCIS] shifted attention and resources to a program President Obama started in 2012 to give deportation deferrals to young undocumented immigrants, according to administration officials and official data.¹⁴

The Obama-Biden Administration’s implementation of DACA plainly violated Article I, Section 8 of the U.S. Constitution, which gives Congress—not the President—the authority “to establish an uniform Rule of Naturalization.”¹⁵

- While the Supreme Court has indicated on several occasions that the President has some measure of “inherent” power over immigration,¹⁶ the Court has settled on the view that the formation of immigration policy “is entrusted exclusively to Congress,”¹⁷ and that “[t]he plenary authority of Congress over aliens . . . is not open to question.”¹⁸
- The Obama-Biden Administration created DACA despite the Constitutional constraints and despite President Obama’s own admission that “democracy” prevented him from being able to “just bypass Congress and change the [immigration] law myself”¹⁹

Instead of opposing the Obama-Biden Administration’s hijacking of Congressional authority, House Democrats hailed DACA’s creation and urged its use. In fact, not long after DACA’s creation, Zoe Lofgren, the then-Ranking Member of the Subcommittee on Immigration and Border Security, noted that she “applauds” the program “and wants to make sure every eligible DREAMer receives the information they need.”²⁰

President Biden promises to continue and expand DACA. In fact, on his first day in office, Biden signed an executive order aimed at “preserving and fortifying” DACA.²¹ The continuation of this program will have the same effects as its initial implementation during the Obama-Biden Administration.

¹⁴ Julie Preston, *Program Benefiting Some Immigrants Extends Visa Waits for Others*, N.Y. TIMES, Feb. 8, 2014.

¹⁵ U.S. Const. art. I, § 8, cl. 4.

¹⁶ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

¹⁷ *Galvan v. Press*, 347 U.S. 522, 531 (1954).

¹⁸ *INS v. Chadha*, 462 U.S. 919, 940–41 (1983).

¹⁹ Barack Obama, President, United States, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas, (May 10, 2011).

²⁰ Website of United States Congresswoman Zoe Lofgren, Deferred Action, *available at* <https://lofgren.house.gov/issues/immigration/deferred-action>.

²¹ Executive Order, Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (Jan. 20, 2021).

- In fact, U.S. Customs and Border Protection (CBP) has recently seen an increase in the number of UACs apprehended on the southwest border.²²
- According to CBS News on November 26, 2020, “within the next 120 days, CBP projects border crossings by unaccompanied alien minors to increase by 50%”²³ The surge will only keep growing with the continued promise of additional Biden Administration amnesty for illegal immigrants.

2. Deferred Action for Parents of Americans and Lawful Permanent Residents

On June 15, 2017, The Trump Administration rescinded the Obama-Biden Administration’s unconstitutional memorandum implementing DAPA.²⁴ The Obama-Biden Administration had announced this administrative amnesty in November 2014 to prevent the removal of illegal aliens who have “a son or daughter who is a U.S. citizen or lawful permanent resident.”²⁵ This amnesty would reward the illegal-immigrant parents of U.S.-citizen children and lawful permanent residents for their illegal behavior.

The Obama-Biden Administration never implemented DAPA due to a court-ordered injunction;²⁶ however, millions of illegal aliens were potentially affected.

The Migration Policy Institute estimated in 2014 that 3.71 million illegal aliens would have been potentially eligible to apply for DAPA at the time.²⁷ The Obama-Biden Administration similarly estimated the number to be 4.1 million illegal aliens.²⁸ The number of illegal aliens who are potentially eligible for a DAPA-like amnesty today is likely higher.

Resurrecting DAPA today will have serious adverse consequences to national immigration policy and will continue the left-wing erosion of Congress’s constitutional authority over immigration law. DAPA will also hurt those immigrants who came to the United States through lawful channels by overwhelming USCIS operations and resulting in higher processing wait times for those seeking immigration benefits.

²² Camilo Montoya-Galvez, *U.S. Agents Apprehend 1,000 Migrant Children in 6 Days as Crossings Along Mexican Border Rise*, CBS NEWS (Nov. 26, 2020), <https://www.cbsnews.com/news/migrant-children-detained-ice-agents-mexican-border-crossing/>.

²³ *Id.*

²⁴ Memorandum from John F. Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm., CBP, et al., “Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)” (June 15, 2017).

²⁵ Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al., “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents” (Nov. 20, 2014).

²⁶ *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

²⁷ Press Release, Migration Policy Institute, *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program* (Nov. 19, 2014).

²⁸ Elise Foley, *Obama Moves to Protect Millions from Deportation*, HUFFINGTON POST (Nov. 20, 2014).

3. *Temporary Protected Status*

Under U.S. immigration law, Temporary Protected Status (TPS) allows aliens already in the U.S. from certain countries where conditions are unsafe for return to live and work in the United States legally. The left has used TPS as a *de facto* amnesty program to open the flood gates to any and all immigrants. The Trump Administration sought to end TPS for several countries, consistent with statute, where domestic conditions were safe to allow for aliens to return home. However, activist federal courts blocked the Administration's efforts by enjoining the terminations.

U.S. law allows the Secretary of the Department of Homeland Security (DHS) to designate a foreign country for TPS, normally for eighteen-month increments.²⁹ The Secretary may then grant TPS to eligible nationals of that country.³⁰

- TPS permits aliens in the United States (regardless of immigration status) from countries where “there is an ongoing armed conflict within the state,” where “there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,” or where “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety” to remain in the United States and work legally during the designated period.³¹
- By law, and after a review of the circumstances, if the Secretary determines that the foreign country no longer meets the conditions for the TPS designation, the Secretary must terminate the designation.³²

What was intended by Congress to be a temporary measure has, over time, become a permanent, automatically renewed designation—with some countries even being designated for TPS for decades.³³

- For instance, Honduras and Nicaragua were initially designated for TPS in 1999 due to Hurricane Mitch, which struck the country in October 1998. Similarly, El Salvador was initially designated in March 2001 based on a series of earthquakes. All three countries still are designed for TPS—decades after these natural disasters.
- There are currently over 400,000 TPS recipients in the United States.³⁴ According to the Pew Research Center, illegal immigrants with TPS accounted for “about 3% of the 11

²⁹ 8 U.S.C. § 1254a(b)(1).

³⁰ See 8 U.S.C. § 1254a(a)(1)(A).

³¹ See INA § 244(b).

³² 8 U.S.C. § 1254a(b)(3).

³³ Arthur, Andrew R., *‘Temporary’ Protected Status: The Biggest Misnomer in Immigration*, Center for Immigration Studies (October 31, 2017).

³⁴ Information Provided by U.S. Citizenship and Immigration Services.

million unauthorized immigrants living in the U.S. in 2015”³⁵ Pew also noted its assumption that “nearly all immigrants with TPS are in the U.S. without authorization,” and that only “a small number may be in the U.S. on a valid temporary visa, especially from countries granted TPS in the past few years.”³⁶

Consistent with statute, the Trump Administration’s DHS Secretary determined that the temporary conditions existing at the time of the initial designation were no longer in effect for Sudan, Nicaragua, Haiti, and El Salvador, and announced plans to terminate those TPS designations.³⁷

- Despite the DHS findings, a nationwide federal court injunction has prohibited the DHS from ending TPS for nationals of these countries.³⁸ Therefore, these TPS holders continue to live and work in the U.S. under a *de facto* amnesty.
- Once these individuals have been in the United States for many years, Democrats claim that it is immoral to terminate TPS and make them return home. In fact, Democrats often seek to pass legislation to provide green cards to TPS holders.³⁹
- Activist judges in the federal court system have also ensured a path to citizenship for certain TPS holders—even those who came to the U.S. illegally—thereby making what Congress intended as a temporary program into a permanent immigration benefit.⁴⁰

President Biden has pledged to “protect” TPS holders from “being returned” to their home countries and has promised to offer them a path to citizenship.⁴¹ In fact, President Biden’s own immigration bill grants lawful permanent resident status to TPS holders.⁴² If his Administration is successful in extending TPS beyond its purpose in law, these decisions will continue to incentivize illegal immigration and erode the rule of law from the country’s immigration policies.

³⁵ Pew Research Center, *More than 100,000 Haitian and Central American Immigrants Face Decision on Their Status in the U.S.* (Nov. 18, 2017), available at <http://www.pewresearch.org/fact-tank/2017/11/08/more-than-100000-haitian-and-central-american-immigrants-face-decision-on-their-status-in-the-u-s/>.

³⁶ *Id.*

³⁷ Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228 (Oct. 11, 2017); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018); and Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654 (Jan. 18, 2018).

³⁸ Ramos, et al v. Nielsen, et al., No. 18-cv-01554 (N.D. Cal. Oct 3, 2018); *see also* CASA de Maryland v. Trump, No. 18-cv-00845 (D. Md. Nov. 29, 2018) (enjoining the government from terminating TPS for Salvadorans).

³⁹ The American Promise Act of 2019, H.R. 2821, 116th Cong. (2019).

⁴⁰ *See* Flores v. USCIS, 718 F.3d 548, 553–54 (6th Cir. 2013); Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017); Velasquez v. Barr, Nos. 19-1148, 19-2130, 2020 WL 6290677.

⁴¹ The Biden Plan, *supra* note 3.

⁴² The White House, President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our immigration System, (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/>.

BORDER SECURITY

President Trump promised to secure our southwestern border by building a wall and enforcing the immigration laws as enacted. He delivered on that promise by completing 450 miles of border wall, implementing policies aimed at reducing frivolous asylum claims, and instituting a program to make those border crossers who claim asylum wait in Mexico for the duration of their immigration court proceedings, among other things. Doing away with any of these policies will make the U.S. less secure and will send the message that we have returned once again to the open borders policies of the Obama-Biden Administration. President Biden has indicated that he and his Administration do not take seriously the concerns and requests of the men and women of Border Patrol who asked for the construction of the border wall system. President Biden signed an executive order within the first hours of taking office to halt all border wall construction.⁴³

1. The Border Wall

President Trump was elected to office with a promise to protect the nation and to improve national security by constructing an adequate wall along the southwest border.⁴⁴ He understood that a sovereign nation must protect its borders for the health and security of its people.

President Trump succeeded in carrying out his promise to construct a border wall. The wall has improved border security and assisted the law-enforcement officers at the southern border in their mission.

- Since President Trump took office, the U.S. has built more than 450 miles of physical border wall along the southwest border.⁴⁵
- The border wall system uses a “mix of personnel, technology, and [physical] infrastructure . . . to achieve operational control of the border.”⁴⁶
- The border wall system at the southwest border serves as a substantial deterrent to illegal immigrants, drug traffickers, human traffickers, and other criminals.
- The law-enforcement officers who serve at the southern border use the border wall to funnel any individuals seeking to cross to official ports of entry. This funneling method keeps the law-enforcement officers safe as well as keeping an accurate track of individuals who enter the country. The border wall system helps “secure the Southern

⁴³ Bo Erickson, *Biden signs executive actions on COVID, climate change, immigration and more*, CBS NEWS (Jan 21, 2021), <https://www.cbsnews.com/news/biden-signs-executive-orders-day-one/>.

⁴⁴ *Trump doubles down on ‘impenetrable physical’ wall during immigration speech*, FOX NEWS (Sept. 1, 2016), <https://www.foxnews.com/politics/trump-doubles-down-on-impenetrable-physical-wall-during-immigration-speech>.

⁴⁵ Rafael Carranza, *Here’s where US-Mexico border wall construction stands as Trump wraps up presidency*, USA TODAY (Jan. 12, 2021), <https://www.usatoday.com/story/news/nation/2021/01/12/trump-visits-alamo-texas-where-does-border-wall-construction-stand/6638315002/>

⁴⁶ Press Release, U.S. Dep’t of Homeland Sec., *The Border Wall System is Deployed, Effective, and Disrupting Criminals and Smugglers* (Oct. 29, 2020), <https://www.dhs.gov/news/2020/10/29/border-wall-system-deployed-effective-and-disrupting-criminals-and-smugglers>.

border from illicit cross border activity and [encourages] lawful entry in a safe and legal manner through available ports of entry.”⁴⁷

During the campaign, President Biden pledged to stop border wall construction despite its proven track record of helping to slow down and prevent illegal immigration, human trafficking, and drug trafficking.⁴⁸ Instead, President Biden promised to reallocate the money from the border wall construction to improve screening at ports of entry.⁴⁹ This naïve approach ignores the fact that criminals do not cross at ports of entry like law-abiding individuals. Most crossings by criminals, coyotes with children, and UACs happen in between ports of entry where there is no physical structure or border wall system to prevent the crossing.

The goal of any Administration—Democrat or Republican—should be to uphold the sanctity of our national border and encourage fewer illegal crossings. Unfortunately, President Biden made stopping border wall construction one of his first actions upon taking office.⁵⁰ He signed an executive order to reverse course on the Trump Administration’s successful implementation of new border wall system. In doing so, President Biden signaled to migrants that the border is wide open and that an illegal crossing is possible. In fact, new caravans of Central Americans are already on their way to the southwest border with the goal of crossing into the U.S.⁵¹

2. Title 42 Public Health Order for the COVID-19 Pandemic

Immigration and other travel to the U.S. can pose a significant threat during a pandemic. Title 42 of the U.S. Code allows the Director of the Centers for Disease Control and Prevention (CDC) to suspend, for public health purposes, the entry to the U.S. of individuals from a country in which there is a communicable disease outbreak, if there is a serious threat of introduction of that disease to the U.S.⁵²

Pursuant to those emergency authorities in Title 42, and in close cooperation with the governments of Mexico and Canada, President Trump issued an executive order in March 2020 that CBP would use to restrict entry from the southern and northern borders due to the ongoing COVID-19 public health emergency.⁵³ This order allows for expulsion of aliens during times of a national health emergency.⁵⁴ The Trump Administration’s DHS announced that to “prevent the introduction of COVID-19 into our border facilities and into our country, aliens subject to the

⁴⁷ Press Release, U.S. Dep’t of Homeland Sec., DHS and CBP Celebrate 400 Miles of New Border Wall System (Oct. 29, 2020), <https://www.dhs.gov/news/2020/10/29/dhs-and-cbp-celebrate-400-miles-new-border-wall-system>.

⁴⁸ The Biden Plan, *supra* note 3.

⁴⁹ *Id.*

⁵⁰ Bo Erickson, *Biden signs executive actions on COVID, climate change, immigration and more*, CBS NEWS (Jan 21, 2021), <https://www.cbsnews.com/news/biden-signs-executive-orders-day-one/>.

⁵¹ Emily Jacobs, *New Migrant Caravan En Route to U.S. from Honduras*, N.Y. POST, Dec. 10, 2020, <https://nypost.com/2020/12/10/honduran-migrants-headed-to-us-border-after-countrys-natural-disasters/>.

⁵² 42 U.S.C. § 365.

⁵³ Press Release, U.S. Dep’t of Homeland Sec., Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus (Mar. 23, 2020), <https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>.

⁵⁴ *Id.*

order will not be held in congregate areas for processing by CBP and instead will immediately be turned back.”⁵⁵

As the pandemic wears on and the shutdowns in other countries continue, the number of illegal crossings at the southern border have continued to rise.

- Nearly 120,000 migrants were encountered by CBP along the southwest border and expelled during just the first two months of FY 2021.⁵⁶
- Over 197,000 migrants were encountered by CBP along the southwest border and expelled from March through September of 2020.⁵⁷

However, with the successful agreements between the U.S. and Mexico, the U.S. is able to quickly and safely return Mexican nationals and Central Americans back to Mexico while reducing the risk of COVID-19 in border facilities.

- Based on the agreement with Mexico, Mexican officials agreed to immediately accept any migrants who were Mexican or Central American, with the U.S. Border Patrol handling the other nationalities.⁵⁸
- This agreement allowed the U.S. to dramatically reduce the number of individuals in Border Patrol custody and to safely process the other individuals.

President Biden and far-left open borders advocates have repeatedly denounced the Trump Administration’s border security measures in the face of the COVID-19 pandemic. Rescinding the Title 42 order would be detrimental to the health and safety of Americans during the global pandemic and would cause a crush of illegal immigrants at the border. In a preview of the adverse consequences of rescinding the order, in November 2020, a federal judge ruled that UACs could no longer be expelled pursuant to the Title 42 order.⁵⁹ In just six days following this decision, CBP apprehended nearly 1,000 UACs on the southwest border.⁶⁰

President Biden’s policies will continue to needlessly fill CBP facilities with illegal immigrants apprehended at the border and risk spreading COVID-19 in these facilities. If he chooses, like President Obama did, to release all illegal immigrants into the interior of the United

⁵⁵ *Id.*

⁵⁶ U.S Customs and Border Protection, U.S. Border Patrol Monthly Enforcement Encounters 2021: Title 42 Expulsions and Title 8 Apprehensions, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

⁵⁷ U.S Customs and Border Protection, U.S. Border Patrol Monthly Enforcement Encounters 2020: Title 42 Expulsions and Title 8 Apprehensions, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020>

⁵⁸ Alexandra Kelly, *Illegal Border Crossings Drop by Half Amid Coronavirus Pandemic DHS Says*, THE HILL (Mar. 23, 2020), <https://thehill.com/changing-america/resilience/refugees/489034-illegal-border-crossings-drop-by-half-amid-coronavirus>.

⁵⁹ P.J.E.S. v. Wolf, 1:20-cv-02245 – Document 80 (D.D.C. 2020).

⁶⁰ Camilo Montoya-Galvez, *U.S. Agents Apprehend 1,000 Migrant Children in 6 Days as Crossings Along Mexican Border Rise*, CBS NEWS (Nov. 26, 2020), <https://www.cbsnews.com/news/migrant-children-detained-ice-agents-mexican-border-crossing/>.

States, this action will only further endanger the American people and risk additional spread of COVID-19 throughout the country.

3. *Asylum Reforms*

Hundreds of thousands of migrants have traveled to the U.S. to claim a credible fear of persecution and seek asylum in recent years. In fact, during FY 2019 alone, USCIS officers received over 105,000 new credible fear cases.⁶¹ Human smuggling organizations tell migrants that if they claim asylum upon entering the U.S. they will not be deported—even if their claim does not meet the legal standard for asylum—and that they will likely be released into the United States and allowed to work legally while the asylum case proceeds.⁶² Most asylum claims are ultimately denied because they do not meet the statutory standard for asylum.⁶³

- In fact, from FY 2008 through the fourth quarter of FY 2019, USCIS referred 81 percent of aliens who claimed a credible fear of returning to their home country to the Executive Office for Immigration and Review (EOIR) for adjudication, but only 14 percent were ultimately granted asylum by an immigration judge.⁶⁴
- According to the Heritage Foundation, “[i]n many cases, the abuses are flagrant. For example, the U.S. government rejects about 90% of asylum claims after review. Even when cases are resolved, if they result in a deportation order, many do not report for deportation.”⁶⁵
- Many times illegal aliens are “coached on how to make asylum claims” and “human smugglers have been discovered assembling fake families that then claim refugee status.”⁶⁶

To prevent abuses of the asylum process and ensure that those seeking to enter and remain in the U.S. do so in accordance with the rule of law, the Trump Administration

⁶¹ Andrew R. Arthur, *Astounding Asylum Number in DOS Refugee Report for FY 2021*, Center for Immigration Studies (Oct. 26, 2020), <https://cis.org/Arthur/Astounding-Asylum-Numbers-DOS-Refugee-Report-FY-2021>.

⁶² *Unprecedented Migration at the U.S. Southern Border: The Exploitation of Migrants through Smuggling, Trafficking, and Involuntary Servitude: Hearing before S. Comm. On Homeland Security and Governmental Affairs*, 116th Cong. (2019) (statement of Brian S. Hastings, Chief, Law Enforcement Operations, U.S. Border Patrol, U.S. Customs and Border Protection and Randy Howe, Exec. Dir. For Operations, Office of Field Operations, U.S. Customs and Border Protection), [https://www.hsgac.senate.gov/imo/media/doc/Testimony-Hastings%20and%20Howe-2019-06-26.pdf?utm_source=google&utm_medium=google&utm_term=\(not%20provided\)&utm_content=undefined&utm_campaign=\(not%20set\)&gclid=undefined&dclid=undefined&GAID=74095436.1606326571](https://www.hsgac.senate.gov/imo/media/doc/Testimony-Hastings%20and%20Howe-2019-06-26.pdf?utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&dclid=undefined&GAID=74095436.1606326571).

⁶³ Executive Office for Immigration Review Adjudication Statistics, Asylum Decision and Filing Rates in Cases Originating With a Credible Fear Claim, <https://www.justice.gov/eoir/page/file/1062976/download>.

⁶⁴ Executive Office for Immigration Review Adjudication Statistics, Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, <https://www.justice.gov/eoir/file/1216991/download>.

⁶⁵ Lora Ries, *Securing the Border and Fixing Our Broken Immigration System*, THE HERITAGE FOUND. (Sept. 21, 2020), <https://www.heritage.org/immigration/commentary/securing-the-border-and-fixing-our-broken-immigration-system>.

⁶⁶ *Id.*

announced several new asylum policies. These policies were aimed at reducing abuse of the U.S. asylum system and encouraging migrants to claim asylum in the first safe country they enter.

- The Trump Administration issued policies to ensure that aliens with certain criminal convictions, including illegal reentry, are ineligible for asylum,⁶⁷ and to prevent those aliens who entered the U.S. illegally from obtaining asylum.⁶⁸ The Trump Administration issued a final rule to limit the ability of asylum applicants to obtain employment authorization.⁶⁹
- The Trump Administration also worked to prevent migrants who have transited through a safe third country on their way to the U.S. from being eligible for asylum upon arrival in the U.S., incentivizing the migrants to claim asylum in the first safe country they entered.⁷⁰
- To discourage abuse of U.S. asylum laws, the Trump Administration executed “Safe Third Country” agreements between July and September of 2019 with Guatemala, Honduras, and El Salvador.⁷¹ These agreements are necessary so that illegal aliens seeking asylum are incentivized to apply for asylum in the first safe country in which they arrive instead of traveling through several countries to apply for asylum in America.⁷² The agreements permit repatriation of certain asylum seekers to these countries where they can seek protection instead of the United States.⁷³
 - The Administration executed agreements with these three countries in particular because “[d]uring Fiscal Year 2019, more than 71% of migrants apprehended at the U.S. Southwest border were nationals of El Salvador, Guatemala, and Honduras.”⁷⁴
 - On December 15, 2020, El Salvador began implementation of its asylum cooperative agreement. Then-Acting Secretary DHS Chad Wolf stated that “[i]mplementation of the Asylum Cooperative Agreement between the United States and El Salvador is a critical step in the establishment of a truly regional approach to migration, and, more specifically, to the offer of protection to those migrants who are victims of persecution.”⁷⁵

⁶⁷ Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67,202 – 67,260 (Oct. 21, 2020).

⁶⁸ Aliens Subject to a Bar on Entry Under Certain Presidential Proclamation; Procedures for Protection Claims, 83 Fed. Reg. 55,934 – 55,953 (Nov. 9, 2019).

⁶⁹ Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 – 38,628 (June. 26 2020)

⁷⁰ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 – 33,845 (July 16, 2019).

⁷¹ U.S. Dep’t. of Homeland Sec., FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Press Release, U.S. Dep’t. of Homeland Sec., El Salvador Begins Implementation of Asylum Cooperative Agreement, (Dec. 15, 2020), <https://www.dhs.gov/news/2020/12/15/el-salvador-begins-implementation-asylum-cooperative-agreement>.

⁷⁵ *Id.*

- The Trump Administration worked with these host countries and other international organizations “to expand [the countries’] systems for offering humanitarian protections.”⁷⁶ Under these agreements, the Trump Administration sought to ensure the integrity of the U.S. asylum process and deter abuses that clog the asylum system.

President Biden has promised to “end” the Trump Administration policies that restrict asylum for those who travel through a third country on their way to the U.S.⁷⁷ President Biden’s plan specifically calls to “[e]nd the Asylum Cooperative Agreements the U.S. has signed with Honduras, El Salvador, and Guatemala.”⁷⁸ On February 6, 2021, the Biden Administration announced the suspension and initiation of action to terminate these agreements.⁷⁹ This action is a mistake. It will only further encourage migrants to make the dangerous journey to the southwest border where they may enter and remain in the U.S. based on a claim of asylum—whether or not they a credible fear of returning home.

To further preserve the integrity of the U.S. asylum process, on December 10, 2020, the Trump Administration published a final rule regarding procedures for asylum and withholding of removal pursuant to authorities under the Immigration and Nationality Act.⁸⁰ Specifically, this final rule enables the Departments of Justice and Homeland Security “to more effectively separate baseless claims [of asylum] from meritorious ones” and “ensure groundless claims do not delay or divert resources from deserving claims.”⁸¹ These reforms are necessary and reasonable, largely codifying existing law to ensure its uniform application. It would be a mistake for the Biden Administration to roll them back.

4. Migrant Protection Protocols

The Obama-Biden Administration’s immigration policy was a dramatic failure and left behind humanitarian crises at the border and pervasive abuse in the U.S. asylum system. President Trump implemented Migrant Protection Protocols (MPP), pursuant to statutory authority, to send the message to foreign nationals that simply because they make it to the U.S. and claim asylum, they will not be released into the U.S. while awaiting their immigration court proceedings. Under MPP, aliens seeking asylum at the southwest border are processed and then wait in Mexico for the duration of their immigration court process.

- The overwhelming majority of migrants claim asylum when they reach the U.S. In order to be considered for asylum, a migrant must only have to claim a “credible fear of

⁷⁶ *Id.*

⁷⁷ The Biden Plan, *supra* note 3.

⁷⁸ Biden-Sanders Unity Task Force Recommendations at 103, <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> [hereinafter “Biden-Sanders Unity Recommendations”].

⁷⁹ Statement of U.S. Sec’y of State Anthony Blinken, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021).

⁸⁰ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020).

⁸¹ Press Release, U.S. Dep’t of Justice, The Departments of Justice and Homeland Security Publish Final Rule on Procedures for Asylum and Withholding of Removal, (Dec. 10, 2020), <https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-publish-final-rule-procedures-asylum-and>.

persecution or torture” in his or her home country.⁸² This extremely low bar leads to many migrants to make an asylum claim and to have the opportunity to make their case before an immigration judge. As a result, asylum cases start to backlog, and—before MPP—those migrants had to be detained or released inside the U.S.

- To address this problem, the Trump Administration used the authority delegated by Congress in 1996 to implement an agreement through which these migrants can wait in Mexico for their U.S. immigration court date.⁸³ No prior administration had ever sought to use the statutory authority to implement such an agreement.⁸⁴ Although an activist federal court enjoined the MPP agreement, the Supreme Court eventually stayed the injunction in March 2020.⁸⁵
- As of October 1, 2020, nearly 70,000 aliens were enrolled in MPP.⁸⁶ According to DHS, MPP has helped decrease “the volume of inadmissible aliens arriving in the United States on land from Mexico”⁸⁷

President Biden immediately ended MPP by announcing that there would be no new enrollees into the program.⁸⁸ In doing so, President Biden now ensures that migrants who enter the United States and claim asylum may await their immigration court dates while living and working in the U.S. regardless of whether their claim has merit.⁸⁹ This radical plan will only incentivize more illegal entry into the U.S. and clog the asylum system with meritless claims for relief. Simply put, the Biden Administration’s termination of MPP signals to foreign nationals that they can once again take advantage of U.S. asylum policy.

5. *Expedited Removal*

Federal law allows DHS to quickly and safely remove certain aliens who are apprehended at the border or on the interior of the U.S. through an authority known as expedited removal.⁹⁰ Specifically, if an illegal alien apprehended along the border or on the interior cannot prove a continuous two-year period of presence in the U.S. immediately prior to the date of apprehension, by statute, the alien could be subject to expedited removal. However expedited removal has historically not been applied so broadly. The Trump Administration expanded the use of expedited removal in part to address the onslaught of illegal immigration into the U.S. during the Obama-Biden Administration.

⁸² Questions and Answers: Credible Fear Screening, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.

⁸³ Pub. No. L. 104-208 (1996).

⁸⁴ 8 U.S.C. § 1225(b)(2)(C).

⁸⁵ Ariane de Vogue, *U.S. Supreme Court Lets ‘Remain in Mexico’ Policy Stay In Place*, CNN, (Mar. 11, 2020) <https://www.cnn.com/2020/03/11/politics/supreme-court-remain-in-mexico/index.html>.

⁸⁶ Migrant Protection Protocols Metrics and Measures. U.S. Dep’t of Homeland Sec., https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_measures_1.pdf.

⁸⁷ *Id.*

⁸⁸ Jose Luis Gonzalez, *‘The nightmare is over’: Optimism in Mexico as Biden rolls back Trump’s immigration policies*, REUTERS (Jan 21, 2021), <https://www.reuters.com/article/us-usa-immigration-mexico-biden-idUSKBN29Q2T9>

⁸⁹ The Biden Plan, *supra* note 3.

⁹⁰ 8 U.S.C. § 235(b)(1).

- Typically, expedited removal is used to remove an illegal alien inside the interior of the United States who been apprehended within 14 days of their illegal entry.⁹¹
- On July 23, 2019, then-Acting DHS Secretary Kevin McAleenan expanded the use of expedited removal to include any illegal alien apprehended within two years of his or her illegal entry.⁹² This new change did not apply to UACs or to any alien claiming asylum.⁹³
- Acting Secretary McAleenan explained that “we are past the breaking point and must take all appropriate action to enforce the law, along the U.S. borders and within the country’s interior.”⁹⁴

President Biden will likely end the expanded use of expedited removal, claiming that this quick and safe return of illegal immigrants to their home country is inhumane because it does not afford them the ability to go through immigration proceedings.⁹⁵ The result of ending expedited removal, however, will be the release of additional unvetted illegal aliens into the interior of the country.

INTERIOR SECURITY

Border security is always a focus of immigration law and policy, but the security of the interior of the United States is, and should be, equally important. Interior security policies include those aimed at arresting visa overstayers and aliens who have otherwise violated the terms of their visa, worksite enforcement to ensure employers do not hire and employ illegal aliens, and the arrest and removal of deportable aliens. Where President Trump enhanced immigration enforcement on the interior of the U.S., President Biden has pledged to reduce interior enforcement, a move that will only endanger American citizens and legal immigrants.

1. Catch and Release

President Trump promised during the 2016 campaign that he would end the dangerous Obama-Biden process of “catch and release.” The process of catch and release, especially in the case of family units, stems from the government’s inability to hold illegal immigrants in custody for an extended period.

- Under catch and release, aliens apprehended at the border are released into the interior of the U.S. during the pendency of their immigration court proceeding—which can

⁹¹ Press Release, U.S. Dep’t of Homeland Sec., Acting Secretary McAleenan Announces a New Designation of Aliens Subject to Expedited Removal (July 23, 2019), <https://www.dhs.gov/news/2019/07/23/acting-secretary-mcaleenan-announces-new-designation-aliens-subject-expedited>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See The White House, Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border § 4(b)(ii) (Feb. 2, 2021).

sometimes take years. Many released aliens never even attend required court proceedings, and even if they do and are ordered removed, many will never leave.

- In part, the problem of catch and release exists due to a 1997 settlement agreement in *Reno v. Flores*, entered into by the Clinton Administration, in which the government agreed to set standards for the care and release of minors in the custody of the Immigration and Naturalization Service.⁹⁶ The agreement created a policy favoring release over detention.⁹⁷
- Initially the *Flores* agreement was interpreted to apply only to unaccompanied alien minors. However, in 2015, an activist federal judge in California reinterpreted the agreement to apply to accompanied alien minors too and the U.S. Court of Appeals for the Ninth Circuit upheld that reinterpretation.⁹⁸
- The *Flores* reinterpretation meant that immigration authorities must release a child brought to the U.S. by a parent or other family member pursuant to the agreement. Due to limited family detention space, the government is forced to release the entire family when releasing the child, given the obvious dangers of releasing a child without an adult.
- The reinterpretation thus created an incentive for aliens to come to the U.S. illegally with children, converting these children into a guarantee of release into the interior of the U.S.

Under President Trump, foreign nationals arriving illegally at the border were no longer simply released into the interior of the U.S. as a matter of course. On September 23, 2019, then-Acting Secretary McAleenan announced the end of “catch and release” of Central American families arriving at the southwest border.⁹⁹ Instead, illegal immigrants were enrolled in the MPP program, repatriated to another country as part of a safe third country agreement, or transferred to ICE custody to the maximum extent possible during any required legal proceedings. These reforms to end “catch and release” deterred illegal immigration and avoided fraudulent or frivolous asylum claims.

President Biden’s immigration policy suggest that he will restart the Obama-Biden Administration’s failed “catch and release” policies by reducing ICE detention, ending safe third country agreements and ending the MPP program.¹⁰⁰ He has also implemented a 100-day

⁹⁶ Stipulated Settlement Agreement, *Flores v. Reno*, No.CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

⁹⁷ *Id.* at 9.

⁹⁸ *Flores v Lynch*, 828 F.3d 898 (9th Cir. 2016).

⁹⁹ Press Release, U.S. Dep’t of Homeland Sec., Acting Secretary McAleenan Announces End to Widespread Catch and Release (Sept. 23, 2019), www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release.

¹⁰⁰ The Biden Plan, *supra* note 3.

moratorium on removals,¹⁰¹ making it clear that removing illegal aliens from the interior of the U.S is not a priority for his Administration.¹⁰²

2. *Removals and Arrests*

Democrats have loudly promised to “Abolish ICE,” the federal immigration agency responsible for arresting and removing illegal aliens.¹⁰³ The Trump Administration emphasized that removing foreign nationals who have no legal right or claim to be in the U.S. is a laudable and necessary function of the federal government. These removals ensure the safety and security of American citizens and legal immigrants.

Contrary to Democrat claims that the aliens apprehended at the southern border or arrested in the interior are all deserving of entry into the U.S., the fact is that federal immigration authorities arrest and remove large numbers of dangerous criminal aliens.

- During FY 2020, ICE removed over 185,000 deportable aliens to their home countries despite the worldwide travel shutdowns caused by the COVID-19 pandemic.¹⁰⁴ Of the aliens removed, 64 percent had criminal convictions or pending criminal charges—totaling 399,235 overall convictions or charges.¹⁰⁵
- During FY 2019, ICE removed more than 267,000 deportable aliens.¹⁰⁶ More than 86 percent of the illegal aliens arrested in FY 2019 by ICE had criminal convictions or pending charges.¹⁰⁷ According to ICE, these arrests included:
 - “More than 1,900 convictions and charges for homicide;
 - More than 1,800 convictions and charges for kidnapping;
 - Over 12,000 sex offenses, with more than 5,000 convictions and charges for sexual assault;
 - More than 45,000 convictions and charges for assault;
 - More than 67,000 convictions and charges for crimes involving drugs;
 - Over 10,000 convictions and charges for weapons offenses; and
 - More than 74,000 convictions and charges for Driving Under the Influence.”¹⁰⁸

¹⁰¹ On January 26, 2021, a federal judge in the Southern District of Texas issued a 14-day temporary restraining order blocking implementation of the Biden Administration’s 100-day moratorium on removals. *Texas v. U.S.*, et al., No. 6:21-cv-00003 (S.D. Tex. Jan. 26, 2021).

¹⁰² Franco Ordenez, *On Immigration, Activists’ Demands May Exceed Biden Realities*, NPR, (Dec. 13, 2020) <https://www.npr.org/2020/12/13/944791054/on-immigration-activists-demands-may-exceed-biden-realities>.

¹⁰³ Daniela Diaz, *These Democrats Want to Abolish ICE*, CNN (July 3, 2018)

<https://www.cnn.com/2018/07/02/politics/abolish-ice-democrats-list/index.html>.

¹⁰⁴ Immigration and Customs Enforcement, *ICE Annual Report, Fiscal Year 2020* (Dec. 2020) at 4.

¹⁰⁵ *Id.*

¹⁰⁶ ICE Statistics, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/statistics>.

¹⁰⁷ ICE details how border crisis impacted immigration enforcement in FY 2019, U.S. Immigration and Customs Enforcement (Feb. 24, 2020), www.ice.gov/features/ERO-2019.

¹⁰⁸ *Id.*

- In addition, ICE removed criminal aliens, terrorists, and human rights abusers from the U.S., such as:
 - Honduran national Jose Elias Jovel-Castro, “a three-time previously deported criminal alien who [was] wanted for homicide in Honduras”;¹⁰⁹
 - Gilberto Jordan, a former member of the Guatemalan military wanted for his participation in the 1982 massacre of 200 men, women, and children in Las Dos Erres, Guatemala;¹¹⁰ and
 - Iraqi national Yassin Muhiddin Aref, who was convicted of “seven counts relating to material support of terrorism and weapons of mass destruction.”¹¹¹

Within hours of taking the oath of office on January 20, 2021, President Biden implemented a 100-day moratorium¹¹² on all removals.¹¹³ This shortsighted action will inevitably result in the release of criminal aliens into U.S. neighborhoods and a surge in illegal crossings at the border. The Supreme Court has held that immigration authorities cannot detain aliens with final order of removal unless there is a significant likelihood of removal in the reasonably foreseeable future.¹¹⁴ Thus, the 100-day moratorium will also provide those aliens scheduled to be removed with an avenue to file *habeas corpus* petitions in federal court to challenge their continued detention, and likely force their release on to the streets of American cities.

Also on January 20, President Biden signed an executive order to “reset the policies and practices for enforcing civil immigration laws.”¹¹⁵ Later that day the Acting DHS Secretary issued a memo outlining those new priorities.¹¹⁶ The memo effectively guts immigration enforcement. It flagrantly disregards the immigration enforcement laws passed by Congress and signed into law by Republican and Democrat presidents alike. The new policies effectively preclude the arrest and removal of many dangerous and other criminal aliens, including gang members, domestic abusers, certain sex offenders, those with state law firearms offenses, and those with multiple criminal convictions.¹¹⁷

¹⁰⁹ Press Release, U.S. Immigration and Customs Enforcement, ICE Removes Honduran National Wanted for Murder (Oct. 9, 2020).

¹¹⁰ Congressional Notification, U.S. Immigration and Customs Enforcement, ICE Removes Former Member of Guatemalan Army Linked to 1982 Massacre, (Mar. 3, 2020).

¹¹¹ Press Release, U.S. Immigration and Customs Enforcement, ICE Removes Iraqi Man Convicted of Terrorism Related Charges (June. 10, 2019).

¹¹² On January 26, 2021, a federal judge in the Southern District of Texas issued a 14-day temporary restraining order blocking implementation of the Biden Administration’s 100-day moratorium on removals. *Texas v. U.S.*, et al., No. 6:21-cv-00003 (S.D. Tex. Jan. 26, 2021).

¹¹³ Franco Ordonez, *On Immigration, Activists Demands May Exceed Biden Realities*, NPR (Dec. 13, 2020), www.npr.org/2020/12/13/944791054/on-immigration-activists-demands-may-exceed-biden-realities.

¹¹⁴ *Zadvydas v Davis*, 533 U.S. 678 (2001).

¹¹⁵ Executive Order, Executive Order on the Revisions of Civil Immigration Enforcement Policies and Priorities, (Jan. 20, 2021).

¹¹⁶ Memorandum from David Pekoske, Acting Sec’y, Dep’t of Homeland Sec., to Troy Miller, Sen. Off. Performing the Duties of the Comm., CBP, et al., “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021).

¹¹⁷ *See id.*

3. *Sanctuary Jurisdictions*

A “sanctuary jurisdiction” is one that refuses, to one extent or another, to cooperate with federal immigration authorities in enforcing federal immigration law regarding unlawful and criminal aliens. Sanctuary jurisdictions pose a significant risk of harm to the community and to the immigration officers who must apprehend dangerous criminal aliens.

After President Trump took office and began to tackle the threat of illegal immigration, the Trump Administration made certain federal funding provided to states and localities contingent upon their cooperation with federal immigration authorities. Far-left cities and states responded by strongly resisting the Trump Administration’s effort to crack down on sanctuary jurisdictions.

- A growing number of local law-enforcement agencies refused to honor ICE detainers, which are standard requests to a local law-enforcement agency to detain an alien for up to 48 hours after their release from local custody to allow ICE an opportunity to take custody and initiate removal proceedings. According to DHS, “some jurisdictions do not honor ICE detainer requests to hold or provide adequate notice of release of criminal aliens who are already in custody.”¹¹⁸
- Illegal aliens make up significant portion of the federal criminal cases filed in U.S. district courts.¹¹⁹ These cases are referred to DHS so that the alien can be removed after serving their sentence.¹²⁰
- Many Americans have been victimized at the hands of criminal aliens who were allowed to go free when law enforcement refused to honor ICE’s detainer.

Sanctuary jurisdictions endanger the health and safety of the communities in which the aliens are released and any federal immigration officer who must enter a sanctuary jurisdiction to apprehend an alien to be removed.¹²¹

- Democrats often complain about armed teams of ICE officers who must go into communities to apprehend dangerous criminal aliens. Former Acting DHS Secretary Chad Wolf explained, however, that these teams would be unnecessary if local officials aided ICE officials with enforcement.¹²²

¹¹⁸ To Make America Safe Again, We Must End Sanctuary Cities and Remove Criminal Aliens, U.S. Dep’t of Homeland Sec. (Feb 15, 2018), <https://www.dhs.gov/news/2018/02/15/make-america-safe-again-we-must-end-sanctuary-cities-and-remove-criminal-aliens>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Justin Coleman, *DHS chief: Swat-like teams wouldn’t be needed if sanctuary cities would help ICE*, THE HILL (Feb 18, 2020), thehill.com/policy/national-security/department-of-homeland-security/483430-dhs-chief-swat-like-teams-to-back-up.

President Biden opposes funding restrictions for sanctuary jurisdictions.¹²³ The sad truth is that based on President Biden’s promises to reverse the Trump Administration’s course on immigration enforcement, the entire country will likely become a sanctuary jurisdiction. This dangerous, far-left approach to interior enforcement will only encourage more illegal immigration and make our communities and neighborhoods less safe.

NATIONAL SECURITY AND RULE OF LAW

Foreign nationals seeking to do us harm have exploited, and will continue to exploit, U.S. immigration laws in order to enter the country and carry out their plans. The September 11th terrorists are the starkest example of this fact. To prevent bad actors from entering our country, immigration law and policy must be created and implemented with a focus on national security. In addition, U.S. immigration policy must emphasize the rule of law, and immigration agencies must execute the law as passed by Congress. Where the Trump Administration succeeded on both these points, the Biden Administration’s actions and rhetoric suggest a return to the failures of the Obama-Biden Administration.

1. Executive Orders 13769 and 13780, Suspending Travel of Certain Foreign Nationals

On January 27, 2017, President Trump signed Executive Order 13769, exercising his broad authority to suspend the travel of certain foreign nationals from specific countries traveling to the U.S. pursuant to section 212(f) of the Immigration and Nationality Act (INA).¹²⁴

- This authority provides the President wide-ranging latitude to impose restrictions on the entry of aliens or classes of aliens to the United States when the entry “would be detrimental to the interests of the United States.”¹²⁵
- Relying on this provision to implement a travel ban is not new. The authority was actually used by multiple Presidents—including Ronald Reagan, Bill Clinton, George W. Bush, and Barack Obama.¹²⁶ In fact, President Obama invoked the authority 19 times to suspend the entry of certain aliens into America.¹²⁷

President Trump’s Executive Order 13769 temporarily halted immigration from certain countries of particular concern for terrorism to ensure that those countries were providing the U.S. government with the information necessary to ensure adequate vetting of their nationals seeking to enter the U.S.

¹²³ Jonathan Easley, *Biden Once Called for a Ban on Sanctuary Cities; Where Does He Stand Now?*, THE HILL, (Aug. 8, 2019) <https://thehill.com/homenews/campaign/456638-biden-once-called-for-a-ban-on-sanctuary-cities-where-does-he-stand-now>.

¹²⁴ Executive Order 13780, Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States, (Mar. 6, 2017), superseded by Executive Order 13780.

¹²⁵ 8 U.S.C. § 1182(f).

¹²⁶ Proclamation 8693 of July 24, 2011, 125 STAT. 2048; Congressional Research Serv., Kate M. Manuel, Executive Authority to Exclude Aliens: In Brief at 6-8, (Jan. 23, 2017).

¹²⁷ *Id.*

- Prolific and accurate vetting of foreign nationals seeking to enter the United States is essential to national security and the integrity of the U.S. immigration system.
- Despite intense misinformation about Executive Order 13769—known to the far left as a “travel ban”—it has resulted in the most thorough vetting process for foreign nationals that the U.S. has ever had.

President Trump required the Secretary of DHS and the Secretary of State, along with the Director of National Intelligence, to determine which countries failed to meet international standards of information-sharing or identity management, or were at a high risk of terrorism or public safety concern, and to report their findings.¹²⁸ President Trump then imposed visa restrictions on foreign nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia.¹²⁹

- Each of the countries from which travel was banned presented heightened risks to the security of the U.S. and elsewhere for various reasons, such as failing to cooperate with the U.S. on public-safety and terrorism-related information.
- Some of the countries have been on the State Department’s list of state sponsors of terrorism for years or are considered safe havens where terrorists operate freely. For instance, Iran has been designated a state sponsor of terrorism since 1984,¹³⁰ Syria since 1979, and North Korea since 2017.¹³¹ Somalia, Libya, Yemen, and Venezuela have all been identified by the State Department as safe havens for terrorist groups to operate.¹³²
- Safe havens are essentially locations that are “ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both.”¹³³
- Other countries like Libya and Somalia have failed to cooperate with the U.S. on sharing public-safety and terrorism-related information that is vitally important for the vetting and screening of foreign nationals seeking to travel to America.¹³⁴
- Collectively, the conditions in these countries increase the risk of mistakenly allowing the entry of a foreign national who may commit a terrorist act or attempt to undermine the security of the U.S.

¹²⁸ Executive Order 13780, Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States, (Mar. 6, 2017).

¹²⁹ Presidential Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats, (Sept. 27, 2019) at Sec. 2.

¹³⁰ U.S. Dep’t. of State, State Sponsors of Terrorism, <https://www.state.gov/state-sponsors-of-terrorism/>.

¹³¹ *Id.*

¹³² U.S. Dep’t. of State, Chapter 5: Terrorist Safe Havens (Update to 7120 Report), <https://2009-2017.state.gov/j/ct/rls/crt/2015/257522.htm>.

¹³³ *Id.*

¹³⁴ *Id.*; *see also* Executive Order 13780, Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States, (Mar. 6, 2017).

- Based on the proclamations issued pursuant to Executive Order 13769 and subsequent Executive Order 13780, some of the countries initially designated for travel restrictions were removed from the list because they complied with U.S. requests. Other countries were added to the list.

Immediately upon taking office, President Biden signed a Presidential Proclamation rescinding the travel ban and its subsequent proclamations.¹³⁵ His actions make Americans less safe from certain foreign nationals seeking to gain entry into the U.S. without appropriate security checks in place. President Biden has also claimed that “there is no intelligence that suggests it [the executive order] makes our nation more secure.”¹³⁶ That claim is simply wrong.

- The U.S. national security is improved any time that foreign nations provide access to information about their nationals seeking to enter the U.S.
- DHS’s Assistant Secretary for Threat Prevention and Security Policy testified to the Committee in 2019 the President’s executive order forced some countries to improve their security systems. She said:
 - “[O]ne country reinstated a dormant program to help identify convicted criminals”;
 - “[T]hree countries have adopted more secure e-passports”;
 - “Two countries obtained access to Interpol databases for the first time”; and
 - “[E]ight countries began reporting lost and stolen passports to Interpol for the first time, or improved the regularity of that reporting.”¹³⁷
- If foreign countries believe that there are no repercussions for failure to share vetting information with the U.S., the country will be at greater risk for terrorism and other activity detrimental to public safety.

2. Executive Office of Immigration Review Reforms

In June 2017, the Government Accountability Office (GAO) issued a report finding that the Executive Office of Immigration Reform’s (EOIR) “case backlog. . . more than doubled from fiscal years 2006 through 2015 primarily due to declining cases completed per year.”¹³⁸ The GAO also found that the median pending time for a case went from 198 days in FY 2006 to 404 days in FY 2015.¹³⁹ For any given case currently in the system, the wait time has already been

¹³⁵ Proclamation on Ending Discriminatory Bans on Entry to The United States, The White House (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/>.

¹³⁶ The Biden Plan, *supra* note 3.

¹³⁷ “Oversight Hearing on Trump Administration Travel Ban”: Hearing before the H. Comm. on the Judiciary, 116th Cong. (2019) (statement of Ms. Elizabeth Neumann).

¹³⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (2017).

¹³⁹ *Id.*

849 days on average.¹⁴⁰ Primarily driven by the southern border crisis, the EOIR backlog currently sits at over 1.2 million cases.¹⁴¹

In addition, the GAO found that judge-issued continuances also contributed to the delay in addressing immigration cases. The GAO found that from FY 2006 to FY 2015, “use of all types of continuances increased by 23 percent” and “immigration judge-related continuances increased by 54 percent. . . .”¹⁴²

The Trump Administration, following the GAO’s recommendations, instituted reforms designed to make the immigration courts efficient. The Trump Administration has taken reasonable and practical steps to restore efficient adjudication of immigration cases by reducing the abuses of continuances, establishing performance metrics for immigration, and by fostering a culture of completing cases.

- The former EOIR Director instituted a case completion goal of 700 cases per year per immigration judge in an effort to ensure that immigration courts were operating efficiently and appropriately.¹⁴³ Previous administrations, including the Obama-Biden Administration, had used similar goals.
- The Attorney General issued a precedential immigration decision directly addressing continuances.¹⁴⁴ The decision emphasized that continuances must only be granted “for good cause shown,” and reiterated that the good-cause standard is a substantive requirement limiting the discretion of immigration judges.¹⁴⁵ It also provided that when an alien requests a continuance to pursue immigration relief collateral to the proceedings, the immigration judge must consider the likelihood that collateral relief will be granted and whether it would materially affect the outcome of removal proceedings.¹⁴⁶
- The Trump Administration hired additional immigration judges, bringing the total to 520 nationwide.¹⁴⁷

The Trump Administration reforms are working. According to the former EOIR Director, “EOIR is transforming its institutional culture to emphasize the importance of completing cases

¹⁴⁰ Syracuse University, Transactional Records Access Clearinghouse (TRAC) Data Research, “Average Time Pending Cases Have Been Waiting In Immigration Courts as of November 2021,” https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

¹⁴¹ Syracuse University, Transactional Records Access Clearinghouse (TRAC) Data Research, “Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts,” <http://trac.syr.edu/immigration/reports/405/>.

¹⁴² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 68 (2017).

¹⁴³ Memorandum from James R McHenry III, Dir. Executive Office for Immigration Review, to The Office of the Chief Immigration Judge, et al., “Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018).

¹⁴⁴ *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

¹⁴⁵ *Id.*, see also 8 C.F.R. 1003.29.

¹⁴⁶ *Id.*

¹⁴⁷ Executive Office of Immigration Review, U.S. Dep’t. of Justice., Adjudication Statistics: Immigration Judge (IJ) Hiring, <https://www.justice.gov/eoir/page/file/1242156/download> (accessed Dec. 17, 2020).

and to reduce instances of defensive judging in which immigration judges make decisions based on a fear of sanction or reversal, rather than based on the law and the facts of the case.”¹⁴⁸

- EOIR completed more than 276,000 cases for FY 2019, the highest number of case completions in EOIR’s history, and an increase of 80,000 case completions from FY2018.¹⁴⁹
- During FY 2020, EOIR completed over 231,000 cases, even as some courts were closed due to the pandemic.¹⁵⁰ During that same period, EOIR recorded 504,848 new cases filed by DHS, much higher than the historical average of approximately 225,000 from FY2009 to FY2016,¹⁵¹ and the highest number in a single year in EOIR’s history.¹⁵² Apprehensions and inadmissibility determinations along the southern border skyrocketed in late 2018 through May of 2019.

President Biden has pledged to “roll back” the immigration judge performance metrics that have helped lead to record numbers of immigration cases being completed.¹⁵³ The Biden plan will reverse the Trump Administration’s successful reforms and return to a *status quo* that disincentivizes immigration judges to adjudicate cases. It will do nothing to solve the root causes of the backlog of immigration cases and is only likely to make matters worse.

3. *Public Charge Regulation*

In 2019, the Trump Administration issued a regulation aimed at ensuring that existing laws relating to public charge grounds of inadmissibility were adhered to and aliens who cannot support themselves financially and who are therefore likely to utilize taxpayer-funded federal benefits are inadmissible for entry into the U.S.¹⁵⁴ As USCIS noted at the time, “self-sufficiency has long been a basic principle of U.S. immigration law.”¹⁵⁵ For that reason, “the public charge ground of inadmissibility has been a part of the U.S. immigration law for more than 100 years.”¹⁵⁶ However, the Trump Administration recognized that an alien’s likelihood of receiving public benefits was not often employed automatically to consider the alien a public charge.¹⁵⁷

¹⁴⁸ “Overview of the Executive Office for Immigration Review”: Hearing before the H. Comm. on the Judiciary, 115th Cong. (2017) (Testimony of James McHenry).

¹⁴⁹ Executive Office for Immigration Review Adjudication Statistics: New Cases and Total Completions (Jan. 23, 2020); *see also* Press Release, U.S. Dep’t. of Justice, Office of Public Affairs, Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019.

¹⁵⁰ Executive Office for Immigration Review Adjudication Statistics: New Cases and Total Completions (Oct. 13, 2020).

¹⁵¹ *Id.*

¹⁵² “Unprecedented Migration at the U.S. Southern Border: The Year in Review”: Hearing before the S. Comm. on Homeland Sec., and Gov’t. Affairs, 116th Cong. (2019) (Testimony of James McHenry).

¹⁵³ Biden-Sanders Unity Recommendations, *supra* note 78, at 104.

¹⁵⁴ Public Charge Fact Sheet, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/news/public-charge-fact-sheet>.

¹⁵⁵ Public Charge, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

- USCIS published a final rule on August 14, 2019, which, for the first time ever, provided regulatory direction regarding the determination of whether an immigrant is likely to become a public charge.
- The final rule applied to two types of applicants: (1) applicants for admission or adjustment of status to that of a lawful permanent resident, and (2) applicants for extension of nonimmigrant stay or change of nonimmigrant status.¹⁵⁸
- According to DHS, “[t]he final rule require[d] that most aliens seeking to extend their nonimmigrant stay or change their nonimmigrant status to show that, since obtaining the nonimmigrant status they seek to extend or change, they have not received public benefits (as defined by the rule) for more than 12 months, in total, within any 36-month period.”¹⁵⁹
- Congress has always maintained exemptions to the public charge ground of inadmissibility including refugees, asylees, certain nonimmigrant visa applicants, and self-petitioners under the Violence Against Women Act.¹⁶⁰
- Despite activist courts enjoining the new public charge rule early on,¹⁶¹ in September 2020, the Second Circuit issued a decision allowing DHS to implement the rule nationwide.¹⁶²

Although being a public charge has been a long-standing statutory ground of inadmissibility, no Administration had ever promulgated the final regulation necessary to fully implement the ground.¹⁶³ In fact, the only guidance on point was a Clinton Administration-era Immigration and Naturalization Service (INS) memo.¹⁶⁴ The Trump Administration’s regulation was a necessary product of good governance that provided direction to USCIS adjudicators.

President Biden has pledged to reverse the commonsense regulation.¹⁶⁵ He claims that “allowing immigration officials to make an individual’s ability to receive a visa or gain permanent residency contingent on their use of government services” is discriminatory and “undermines America’s character.”¹⁶⁶ If he unwinds the Trump Administration’s reform, however, the U.S. will likely bear the burden of additional illegal immigrants petitioning for taxpayer-funded federal benefits.

¹⁵⁸ *Id.*

¹⁵⁹ Press Release, U.S. Dep’t of Homeland Sec., DHS Implements Inadmissibility on Public Charge Grounds Final Rule, (Feb 24, 2020), <https://www.dhs.gov/news/2020/02/24/dhs-implements-inadmissibility-public-charge-grounds-final-rule>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Public Charge Fact Sheet, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/news/public-charge-fact-sheet>.

¹⁶³ 8 U.S.C. § 1182(a)(4).

¹⁶⁴ Memorandum for All Regional Directors From Michael A. Pearson, Executive Associate Comm., Office of Field Operations, Public Charge: INA Sections 212(a)(4) and 237(a)(5) (May 20, 1999).

¹⁶⁵ The Biden Plan, *supra* note 3.

¹⁶⁶ *Id.*

4. Refugee Ceiling

Each fiscal year, the Administration sets a ceiling for the number of refugees who may be resettled in the U.S. during that year. The Trump Administration took an honest and realistic approach to determining the refugee ceiling.

- In its determination of the number of refugees the U.S. should welcome each year, the Trump Administration considered the enormous number of asylum claims and grants.
- This approach to consider the “humanitarian immigration benefits programs” has resulted in lower numbers of refugee spots available for U.S. resettlement. It has also left resources normally used for refugees to be utilized to reduce the asylum case backlogs.

President Biden promised to set the refugee ceiling at 125,000 refugees initially and to raise it annually.¹⁶⁷ This arbitrary number is nothing more than virtue signaling to the radical left. At a time when Americans are suffering from a global pandemic and the American people are trying to jump start the economy, admitting high numbers of refugees is a poor decision that will only exacerbate economic challenges.

Reflecting his promise, on February 5, 2021, President Biden notified Congress of his intent to use the “emergency” authority provided by statute¹⁶⁸ to raise the refugee ceiling set for fiscal year 2021 by former President Trump from 15,000 to 62,500.¹⁶⁹

5. Immigration Cases Certified by the Attorney General

The Attorney General has the authority to establish immigration case precedent through a process known as certification, in which a case already acted upon by the Board of Immigration Appeals (BIA) is referred to the Attorney General for review and decision.¹⁷⁰ During the Trump Administration, Attorneys General used this certification authority to reverse extreme BIA decisions and set a unified policy on immigration.

The three types of cases that can be certified by the Attorney General are:

1. Cases that the Attorney General directs be referred to him;
2. Cases that the BIA refers to the Attorney General for consideration; and
3. Cases that DHS refers to the Attorney General for review.¹⁷¹

¹⁶⁷ The Biden Plan, *supra* note 3.

¹⁶⁸ 8 U.S.C. § 1157(b).

¹⁶⁹ U.S. Dep’t of State, Report to the Comms. on the Judiciary of the House of Representatives and the Senate, *Proposed Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021* (Feb. 5, 2021).

¹⁷⁰ 8 C.F.R. § 1003.1(h).

¹⁷¹ Andrew R. Arthur, *AG Certification Explained, A legal way for the AG to set immigration policy and guide IJ and BIA discretion*, Center for Immigration Studies (Nov. 5, 2019), <https://cis.org/Arthur/AG-Certification-Explained>.

During the Trump Administration, the Attorneys General certified cases in the interest of national security, cases regarding the uniform application of asylum law, cases about the removal effect of criminal convictions such as DUI on the removal of criminal aliens, cases to improve the efficiency of immigration court proceedings, and cases about criminal sentencing. The certifications have provided fairness in the law, adherence to the statute, and clarity to Immigration Judges. President Biden and his Attorney General will likely undo these decisions,¹⁷² and in doing so will return to the failed policies of the Obama-Biden Administration.

CONCLUSION

The Biden Administration has already begun pursuing radical and dangerous immigration policies that will make Americans less safe. President Biden has been open about his pledge to help ensure illegal immigrants stay in the United States regardless of legal status. The Biden Administration will pursue amnesty for illegal aliens who have disregarded U.S. law, even those who have previously been deported. President Biden will reinstitute “catch and release” policies that will allow dangerous criminal aliens to roam free in American neighborhoods. President Biden has already started to reverse the work that President Trump did to improve the U.S. border security and interior enforcement.

President Trump’s immigration policies made America safer and prioritized legal immigration over illegal immigration. President Biden’s return to setting immigration policy through executive action—apart from Congress and outside of constitutional norms—seems to be a second coming of the failed Obama-Biden approach to immigration. President Biden and his Administration would be wise not to succumb to the pressure of the radical left in reversing the Trump Administration’s successes.

Some of President Trump’s immigration successes will have long-term benefits for our safety and security. The border wall system will continue to aid CBP in controlling the flow of illegal aliens across the southern border. The flow of trafficked humans and drugs will be drastically reduced thanks to this effort. Similarly, the precedent set by “safe third country” agreements and MPP will likely continue to have lasting effects well into a Biden Administration. The officials in the Biden Administration would be wise to continue the policies that bring dramatic improvements to U.S. national security. In addition, although left-wing activists decry restricted travel from dangerous countries, the resulting information sharing from these countries has greatly improved and President Biden would be wise to build on this success.

President Trump ran for office in 2016 in part on a message of improving border security and reforming the failed immigration policies of the Obama-Biden Administration. In large part, President Trump has succeeded in this effort. He has done what he said he would do. The consequences for reversing the Trump Administration’s immigration policy successes will be severe.

¹⁷² See The Biden Plan, *supra* note 3 (explaining how the Biden Administration will “end” certain Trump Administration immigration policies, including some policies that were established through certified Attorney General decisions).