

## ESSAY

### KEYS TO THE KINGDOM: IMMIGRATION CONTROL AND THE ACCRETION OF EXECUTIVE POWER

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#### INTRODUCTION

In his campaign for the presidency in 2024, then-candidate Donald Trump focused particular attention on immigration policy.<sup>1</sup> Differentiating his proposed approach from that of the Biden Administration,<sup>2</sup> Trump promised that if he were elected, he would “close the border” to migrants entering without authorization.<sup>3</sup> In the interior of the country, he pledged to oversee “the largest deportation operation in the history of our country.”<sup>4</sup>

One year in, the Trump Administration claims victory on both counts.<sup>5</sup> In describing the southern border, the Trump Administration points to reports of a sharp decline in encounters between Border Patrol

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<sup>1</sup> Priscilla Alvarez & Phil Mattingly, *Mass Detention and Returning Migrants to Mexico: Donald Trump's Plans on Immigration Are Coming into Focus*, CNN (Nov. 16, 2024, at 13:30 ET), <https://www.cnn.com/2024/11/16/politics/donald-trump-immigration-plans> [<https://perma.cc/9TUM-Z539>] (“President-elect Donald Trump made immigration a central element of his 2024 presidential campaign . . .”).

<sup>2</sup> President Joseph R. Biden’s policies included “narrow[ing] the categories of unauthorized immigrants targeted for arrest” and removal from the interior of the country; stopping construction on the border wall; suspending the first Trump Administration’s policy requiring asylum seekers at the southern border to remain in Mexico until their U.S. asylum hearing date; and exempting unaccompanied minor children from the Title 42 entry ban enacted by President Trump during the COVID-19 pandemic (a ban that was otherwise continued by President Biden through May 2023). Christopher Flavelle, *How Biden Ignored Warnings and Lost Americans’ Faith in Immigration*, N.Y. TIMES (Dec. 7, 2025), <https://www.nytimes.com/2025/12/07/us/politics/biden-immigration-trump.html> [<https://perma.cc/ENJ6-LHBM>]. For a historically and demographically grounded analysis of Biden-era immigration policies, see Muzaffar Chishti et al., *Biden’s Mixed Immigration Legacy: Border Challenges Overshadowed Modernization Advances*, MIGRATION POL’Y INST. (Dec. 10, 2024), <https://www.migrationpolicy.org/article/biden-immigration-legacy> [<https://perma.cc/NC2F-7EDL>].

<sup>3</sup> *Promises Made, Promises Kept — One Year Later*, WHITE HOUSE (Nov. 5, 2025) [hereinafter *Promises Made, Promises Kept*] (quoting President Trump), <https://www.whitehouse.gov/articles/2025/11/promises-made-promises-kept-one-year-later> [<https://perma.cc/C585-8927>] (“We will close the border. We will stop the invasion of illegals into our country.”).

<sup>4</sup> *Id.* (quoting President Trump).

<sup>5</sup> *Id.*

agents and unauthorized entrants.<sup>6</sup> Removals from the interior also have increased substantially.<sup>7</sup> The Administration claims that more than 675,000 individuals were “deport[ed]” and that another 2.2 million individuals departed the United States in the first year of President Trump’s term.<sup>8</sup>

This Essay analyzes the means that the Trump Administration has used to achieve its ends. Certain elements of the Trump Administration’s immigration policies differ in intensity or focus rather than in kind from the policies of past administrations. Past U.S. presidential administrations have relied on racial profiling in interior immigration enforcement,<sup>9</sup> have used the threat of immigration detention to deter migrants

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<sup>6</sup> *Id.* (citing Jeff Abbott et al., *For the First Time in Decades, The US-Mexico Border Is Silent. Here’s Why*, AZCENTRAL (June 9, 2025, at 05:01 MT), <https://www.azcentral.com/story/news/politics/immigration/2025/06/09/us-mexico-border-immigrants/83824441007> [<https://perma.cc/6ZUR-GG38>]). The Administration relies on data compiled by U.S. Customs and Border Protection (CBP), which supports the Administration’s claim. *See, e.g., id.* (citing Avery Lotz & Stef W. Kight, *Border Crossings Plunge to Lowest Levels in Decades: New Data*, AXIOS (Mar. 4, 2025), <https://www.axios.com/2025/03/04/illegal-border-crossings-february-decline-trump> [<https://perma.cc/Z6MK-TL2L>]) (sourcing data from CBP). For graphic visualizations of CBP data pertaining to encounters, drug seizures, and other border enforcement metrics, see *Visualizations of Data Related to U.S. Border Governance and Migration*, WOLA BORDER OVERSIGHT, <https://borderoversight.org/category/infographics> [<https://perma.cc/8YUC-78QY>]. To my knowledge, there is no third-party verification of this data.

<sup>7</sup> GRAEME BLAIR & DAVID HAUSMAN, DEPORTATION DATA PROJECT: IMMIGRATION ENFORCEMENT IN THE FIRST NINE MONTHS OF THE SECOND TRUMP ADMINISTRATION 1 (2026), <https://deportationdata.org/analysis/immigration-enforcement-first-nine-months-trump.pdf> [<https://perma.cc/Y6TA-CUPK>] (finding that in the first nine months of the second Trump Administration, “[i]nterior deportations surged to more than four and a half times their pre-inauguration level”).

<sup>8</sup> *DHS Sets the Stage for Another Historic, Record-Breaking Year Under President Trump*, DHS (Jan. 20, 2026), <https://www.dhs.gov/news/2026/01/20/dhs-sets-stage-another-historic-record-breaking-year-under-president-trump> [<https://perma.cc/RBK5-M2B8>]. The government statistics regarding removal are higher than those of independent tracking services like the Transactional Records Access Clearinghouse (TRAC), which recorded the entry of 500,972 deportation orders from February to December 2025. *Outcomes of Immigration Court Proceedings: By State, Court, Hearing Location, Year, Charge, Nationality, Language, Age, and More*, TRAC: IMMIGR., <https://tracreports.org/phptools/immigration/closure> [<https://perma.cc/EC3W-NX8D>] (choose “Removals” for Outcome Type; “All-Removal Order” for Immigration Court State). Data collected by the Deportation Data Project, as analyzed by the *New York Times*, also suggest slightly lower numbers. Raj Saha et al., *Inside the Deportation Machine*, N.Y. TIMES (Dec. 22, 2025), <https://www.nytimes.com/interactive/2025/12/22/us/trump-immigration-deportation-network-ice-arrests.html> [<https://perma.cc/DN9F-3F56>] (“An analysis of less detailed data on deportations shows that their pace accelerated after July; as of December, ICE is on track to deport about 390,000 people in Mr. Trump’s first year.”). The same reporting recorded an average monthly volume of about 23,000 removals during the first half of 2025. *Id.* (showing a monthly average of 11,400 removals pursuant to standard procedures and 11,500 expedited removals). I have not found any independent data sources to verify the Administration’s claimed number of “self-deportations,” DHS, *supra*, though it is surely the case that these numbers have increased when compared to prior administrations, *see* BLAIR & HAUSMAN, *supra* note 7, at 1, for reasons discussed in greater detail below.

<sup>9</sup> *See, e.g.,* *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 & n.16 (1976); *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006).

from attempting to enter the country and to encourage their departure,<sup>10</sup> and have detained immigrants (sometimes for extended periods of time) to avoid their release into the country during the pendency of their administrative proceedings.<sup>11</sup> Every President from Ronald Reagan onward has relied upon Immigration and Nationality Act<sup>12</sup> (INA) section 212(f)<sup>13</sup> to bar certain foreign nationals otherwise qualified to enter the United States from doing so.<sup>14</sup> Since the 1990s (and sporadically in the decades before), every presidential administration, regardless of party affiliation, has overseen the deportations of tens of thousands of individuals per year.<sup>15</sup> Families have been separated, sometimes forever, under these policies.<sup>16</sup>

All of these things continue to be true under President Trump. But the continuities in immigration enforcement strategies are vastly outstripped by the differences.<sup>17</sup> Even when the Administration is using

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<sup>10</sup> See Stephanie J. Silverman & Amy Nethery, *Understanding Immigration Detention and Its Human Impact*, in IMMIGRATION DETENTION: THE MIGRATION OF A POLICY AND ITS HUMAN IMPACT 1, 5 (Amy Nethery & Stephanie J. Silverman eds., 2015) (describing how the U.S. government used immigration detention to deter Haitian migration starting in the 1990s with the detention center at Guantanamo); Maureen A. Sweeney et al., *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 GEO. IMMIGR. L.J. 291, 294–97 (2021) (describing the increase of detention under both the Obama and first Trump Administrations, *id.* at 294–96, and the “deter[rence]” effect such “prolonged detention” creates, *id.* at 297).

<sup>11</sup> See *Demore v. Kim*, 538 U.S. 510, 513 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); Ahilan Arulanantham, *Four Years Frozen in ICE*, HUFFPOST (Apr. 8, 2012, at 13:48 ET), [https://www.huffpost.com/entry/immigrant-detention-mental-illness\\_b\\_1260363](https://www.huffpost.com/entry/immigrant-detention-mental-illness_b_1260363) [<https://perma.cc/Y9LN-2VD3>] (discussing the case of Jose Franco, who was held in immigration detention for four years); see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45–46 (2010) (describing “extended periods” of detention, *id.* at 45); César Cuahtémoc García Hernández, *Immigration Imprisonment’s Failures*, 36 IMMIGR. & NAT’Y L. REV. 37, 38–39 (2015) (explaining the traditional justifications for detention pending removal proceedings: “flight risk, public safety threat, [and] deterrence,” *id.* at 39).

<sup>12</sup> Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

<sup>13</sup> 8 U.S.C. § 1182(a)(4).

<sup>14</sup> BEN HARRINGTON & THERESA A. REISS, CONG. RSCH. SERV., LSB10458, PRESIDENTIAL ACTIONS TO EXCLUDE ALIENS UNDER INA § 212(F) 2 (2020) (explaining that “[s]ince 1981, every President has invoked § 212(f) at least once” “to authorize Department of State regulations restricting alien entry”); see, e.g., Proclamation No. 10,773, 89 Fed. Reg. 48487, 48490–91 (June 3, 2024) (President Biden relying on § 212(f) to suspend and limit “entry of any noncitizen into the United States across the southern border,” *id.* at 48491); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (describing President Trump’s use of this authority during his first term to institute the so-called “Muslim ban,” *id.* at 2417).

<sup>15</sup> See *1991–NOW: Deportation Nation*, MAPPING DEPORTATIONS, <https://mappingdeportations.com/timeline-1991-now> [<https://perma.cc/U6FB-VNHB>].

<sup>16</sup> See generally BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO (2019) (chronicling the experiences of individuals removed from the United States and separated from their U.S.-based family members).

<sup>17</sup> See, e.g., Nadine Yousif, *Six Big Immigration Changes Under Trump — And Their Impact So Far*, BBC (Jan. 27, 2025), <https://www.bbc.com/news/articles/clyn2p8x2eyo> [<https://perma.cc/A5J2-PAG2>] (explaining major changes in immigration policy under the second Trump Administration, including mass deportations, fortification of the United States-Mexico border, and cancellations of existing CBP appointments).

familiar tools, such as racial profiling,<sup>18</sup> immigration detention,<sup>19</sup> and entry bans,<sup>20</sup> it is doing so in ways that look and feel like substantial breaks with practices of presidential administrations in recent history.<sup>21</sup>

This Essay explores the novel immigration policy choices this Administration has made in order to effectuate its agenda and explains the broader implications of these choices for U.S. democracy. Part I explores four broad subcategories of change. Section I.A describes the significant expansion of immigration policing and arrests in the interior of the United States, unguided by meaningful enforcement priorities, and undergirded by a heavy reliance on racial profiling and violence. Section I.B discusses the Administration's expansive use of coercive immigration detention, including as against longtime and lawful U.S. residents. Section I.C tackles the Administration's exertion of substantial political control over immigration adjudication, combined with significant gamesmanship in federal judicial proceedings. Section I.D illuminates the Administration's discriminatory reconfiguration (and outright elimination) of lawful immigration pathways.

Part II evaluates the broader context and meaning of these policy shifts. Section II.A explains how these changes in immigration policy are part of a larger break with the nation's formal post-Civil Rights era rejection of racially discriminatory laws. Section II.B discusses how these changes are part of a broader reconfiguration of executive authority through the erosion of separation of powers principles. Section II.C demonstrates that recent developments in immigration policy are a part of the Trump Administration's broader rejection of a rule-based system of international law. This Essay concludes with some reflections on how developments in immigration policy during the first year of the second Trump Administration constitute both a microcosm and a staging ground for broader antidemocratic shifts in the Trump Administration's governance strategy.

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<sup>18</sup> See *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 3 (2025) (Kavanaugh, J., concurring in the grant of the application for stay).

<sup>19</sup> See AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION EXPANSION IN TRUMP'S SECOND TERM 4 (2026), <https://www.americanimmigrationcouncil.org/wp-content/uploads/2026/01/immigration-detention-report.pdf> [<https://perma.cc/SQ4R-CT8L>]. Immigration detention is also being deployed in punitive ways. See Note, *Protecting Noncitizens' Liberty When the Executive Seeks to Punish*, 139 HARV. L. REV. 753, 773–74 (2026) (analyzing the use of “Alligator Alcatraz” as a form of punishment, *id.* at 773).

<sup>20</sup> Proclamation No. 10,998, 90 Fed. Reg. 59717, 59719–20 (Dec. 16, 2025).

<sup>21</sup> AM. IMMIGR. COUNCIL, MASS DEPORTATION: ANALYZING THE TRUMP ADMINISTRATION'S ATTACKS ON IMMIGRANTS, DEMOCRACY, AND AMERICA 40 (2025), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/07/mass\\_deportation\\_trump\\_attacks\\_democracy.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/07/mass_deportation_trump_attacks_democracy.pdf) [<https://perma.cc/GR79-5YVG>] (explaining how “the first six months of the Trump administration's enforcement agenda is unprecedented”).

## I. NEW DIRECTIONS IN IMMIGRATION POLICY

Despite certain continuities in immigration policy and enforcement practices, the Trump Administration has made a number of significant breaks from the past in its immigration enforcement efforts. This is evident in the Administration's approach to interior immigration enforcement, its use of immigration detention, its elimination of decisional independence in immigration adjudication, and its reconfiguration of U.S. admission policy. Some of the differences between this Administration and those of past Presidents can be explained as the unsurprising and logical result of differing policy preferences.<sup>22</sup> The Trump Administration promised mass deportations.<sup>23</sup> Such efforts necessarily entail a significant increase in arrests in the United States, largely of noncitizen residents who were not priorities for removal under previous Presidents.<sup>24</sup> But the Administration has chosen not only to accelerate the deployment of lawful (if novel and sometimes jarring) tactics to achieve its goals, but also to ignore the clear requirements of domestic and international law in ways that signal a new approach to presidential power.

*A. The Significant Expansion of Immigration Policing  
and Arrests in the Interior of the Country Unguided  
by Meaningful Enforcement Priorities*

For decades, U.S. Presidents have confronted the reality that congressional appropriations for immigration enforcement have not been sufficient to achieve full enforcement of the nation's immigration laws.<sup>25</sup>

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<sup>22</sup> AM. IMMIGR. COUNCIL, *supra* note 19, at 10 ("At its core, these changes [in immigration policy] rest on the Trump administration's implicit view that immigration enforcement should be the most important law enforcement priority of the entire federal government.")

<sup>23</sup> *Promises Made, Promises Kept*, *supra* note 3 (promising "the largest deportation operation in the history of our country").

<sup>24</sup> Compare Julia Ainsley et al., *A Sweeping New ICE Operation Shows How Trump's Focus on Immigration Is Reshaping Federal Law Enforcement*, NBC NEWS (June 4, 2025, at 07:45 ET), <https://www.nbcnews.com/politics/justice-department/ice-operation-trump-focus-immigration-reshape-federal-law-enforcement-rcna193494> [<https://perma.cc/E6MV-C4EY>] ("Immigration status is now question No. 1 in terms of charging decisions," an assistant U.S. attorney said. "Is this person a documented immigrant? Is this person an undocumented immigrant? Is this person a citizen? Are they somehow deportable? What is their immigration status? And the answer to that question is now largely driving our charging decisions."), with Muzaffar Chishti et al., *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deportee-chief-or-not> [<https://perma.cc/X3QV-32S3>] (describing the Obama Administration's focus on recent arrivals and individuals with criminal convictions), and HILLEL R. SMITH, CONG. RSCH. SERV., LSB10578, *THE BIDEN ADMINISTRATION'S IMMIGRATION ENFORCEMENT PRIORITIES: BACKGROUND AND LEGAL CONSIDERATIONS* 3 (2022) (describing the Biden Administration's focus on individuals with serious criminal convictions or who posed national security or border-security threats).

<sup>25</sup> See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 147 n.125 (2015). This is not a new phenomenon. See, e.g., Immigr. &

Annual congressional appropriations for immigration enforcement increased substantially beginning in the mid-1990s, and those spending increases accelerated after the creation of DHS.<sup>26</sup> But in the fall of 2024, the American Immigration Council estimated that it would take over a decade and cost nearly \$1 trillion to remove all unlawfully present noncitizens<sup>27</sup> — if the government could remove undocumented immigrants at the one-million-per-year rate then suggested by Vice President JD Vance.<sup>28</sup>

The second Trump Administration benefited from the same trend of increased immigration enforcement appropriations experienced by prior administrations.<sup>29</sup> On July 4, 2025, the Administration also received another boost in funding for immigration enforcement when Congress passed and the President signed a reconciliation bill that provided an additional \$170.7 billion in funding “for immigration- and border enforcement-related activities” for fifty-one months through the end of fiscal year (FY) 2029<sup>30</sup> — representing, on an annualized basis, more than double the appropriations for U.S. Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and the Executive Office for Immigration Review (EOIR) in the FY 2024 budget.<sup>31</sup> These funds, which have magnified DHS’s enforcement capabilities, were approved by Congress through the reconciliation process.<sup>32</sup>

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Naturalization Serv. v. Delgado, 466 U.S. 210, 240 (1984) (Brennan, J., concurring in part and dissenting in part) (noting that the immigration regulation system had broken down with respect to Mexican migration as a “result of our failure to commit sufficient resources to the border patrol effort”).

<sup>26</sup> See AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2, 4–5 (2024), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/cost\\_of\\_immigration\\_enforcement\\_factsheet\\_2024.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/cost_of_immigration_enforcement_factsheet_2024.pdf) [<https://perma.cc/3JBZ-MWAQ>].

<sup>27</sup> AM. IMMIGR. COUNCIL, MASS DEPORTATION: DEVASTATING COSTS TO AMERICA, ITS BUDGET AND ECONOMY 2 (2024), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/mass\\_deportation\\_report\\_2024.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/mass_deportation_report_2024.pdf) [<https://perma.cc/8F39-SZY7>] (estimating a total cost of \$967.9 billion over more than a decade to remove approximately 80% of the unlawfully present population at a rate of one million removals per year, assuming 20% would self-deport).

<sup>28</sup> *Id.* at 1 & 43 n.4 (citing Ivan Pereira, *JD Vance Says Mass Deportations Should “Start with 1 Million,” Defends “Thought Experiment” Giving Parents Extra Votes*, ABC NEWS (Aug. 11, 2024, at 09:00 ET), <https://abcnews.go.com/Politics/jd-vance-mass-deportations-start-1-million-defends/story?id=112739447> [<https://perma.cc/B5TP-SHAX>] (“I think it’s interesting that people focus on, well, how do you deport 18 million people? Let’s start with 1 million.” (quoting Vice President Vance))).

<sup>29</sup> WILLIAM L. PAINTER, CONG. RSCH. SERV., R48189, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS: FY2025 STATE OF PLAY 10–11 & tbl. 2 (2025); AM. IMMIGR. COUNCIL, *supra* note 26, at 6 (documenting spending for fiscal year 2024, including a “record level” of detention bed funding).

<sup>30</sup> AM. IMMIGR. COUNCIL, ANALYSIS OF H.R. 1: SPENDING PROVISIONS RELATED TO IMMIGRATION ENFORCEMENT AND THE BORDER 1 (2025), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/07/analysis\\_big\\_beautiful\\_bill.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/07/analysis_big_beautiful_bill.pdf) [<https://perma.cc/3EUA-BYY8>].

<sup>31</sup> Compare AM. IMMIGR. COUNCIL, *supra* note 26, at 7 fig. 3 (reporting an FY 2024 budget of \$17.71 billion across those three entities), with AM. IMMIGR. COUNCIL, *supra* note 30, at 1 (“H.R. 1 provides \$170.7 billion in additional funding for immigration- and border enforcement-related activities.” (emphasis omitted)).

<sup>32</sup> AM. IMMIGR. COUNCIL, *supra* note 30, at 1.

That procedure limited deliberation over legislation that meaningfully changed the capabilities of immigration enforcers yet passed with bare majorities — the threshold normally reserved for fiscal legislation.<sup>33</sup>

Even with this substantial budget increase, the Administration still could not remove every removable noncitizen within the next three years.<sup>34</sup> Instead, a White House official announced an aggressive target of 3,000 arrests per day<sup>35</sup> (or just over 1 million removals per year<sup>36</sup>), though Department of Justice officials later declined to confirm this quota.<sup>37</sup> So, like previous administrations, the second Trump Administration faces choices about how to allocate enforcement resources.

The Administration's enforcement priorities clearly diverge from those of past administrations, though they bear some resemblance to the approach taken by the first Trump Administration. President Barack Obama's Administration prioritized the removal of noncitizen residents with criminal legal system contacts, including criminal convictions, and of recent arrivals.<sup>38</sup> The Obama Administration articulated these

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<sup>33</sup> See, e.g., TORI GORMAN, CONG. RSCH. SERV., R48444, *THE RECONCILIATION PROCESS: FREQUENTLY ASKED QUESTIONS*, at summary (2025) ("Once a reconciliation bill is on a chamber's calendar, the House and Senate consider it under the rules and expedited procedures enumerated in the Budget Act."); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 264 (2013) (discussing the characteristics of the reconciliation process, including its limits on debate and simple majority rule, in explaining how "a small budgetary mechanism is transformed into a critical procedural weapon for Senate majorities to use against minoritarian tactics"); Daniel A. Farber et al., *Workarounds in American Public Law*, 103 TEX. L. REV. 503, 528 (2025) (noting that reconciliation is used for nonfiscal purposes and that doing so constitutes a "workaround" to building supermajorities); Jonathan S. Gould, *The Senate's Shadow Doctrine*, 61 HARV. J. ON LEGIS. 317, 326 (2024).

<sup>34</sup> The estimated cost for removing everyone who is removable in accordance with existing procedures is "at least \$315 billion," if done through a "one-time mass deportation operation." AM. IMMIGR. COUNCIL, *supra* note 27, at 1.

<sup>35</sup> Brittany Gibson & Stef W. Kight, *Scoop: Stephen Miller, Noem Tell ICE to Supercharge Immigrant Arrests*, AXIOS (May 28, 2025), <https://www.axios.com/2025/05/28/immigration-ice-deportations-stephen-miller> [<https://perma.cc/5FYP-PU93>]; Jasmine Garsd, *In Recorded Calls, Reports of Overcrowding and Lack of Food at ICE Detention Centers*, NPR (June 6, 2025, at 10:33 ET), <https://www.npr.org/2025/06/05/nx-s1-5413364/concerns-over-conditions-in-u-s-immigration-detention-were-hearing-the-word-starving> [<https://perma.cc/NC3C-9G2S>].

<sup>36</sup> See AM. IMMIGR. COUNCIL, *supra* note 27, at 1 & 43 n.4. Among other problems, the funding increases do not fully address the insufficient capacity of the immigration courts that process removal proceedings. *Id.* at 17 (estimating that removing 13 million removable noncitizens in accordance with existing procedures would require the government to spend "\$138.9 billion, or an average of \$12.6 billion per year" over ten years after accounting for inflation). Some of the ways that the current Administration has sought to work around these constraints include aggressive use of immigration detention, threats of fines, and promises of small payments for "voluntary departures." See Martha Bellisle, *Feeling Hopeless in Custody, Many Drop Claims to Remain in the US, Leave Voluntarily*, AP NEWS (Oct. 12, 2025, at 09:24 ET), <https://apnews.com/article/immigration-ice-deport-88ba75d220094ed64dco306334f780fb> [<https://perma.cc/DRN7-DNSC>]; see also 8 C.F.R. pt. 281 (2026) (simplifying the process for fine imposition on noncitizens who entered unlawfully or failed to depart).

<sup>37</sup> See Josh Gerstein & Kyle Cheney, *Judges Press Trump Administration on Deportation Quotas*, POLITICO (July 28, 2025, at 20:29 ET), <https://www.politico.com/news/2025/07/28/judges-trump-administration-deportation-quotas-00480899> [<https://perma.cc/NC42-F5T7>].

<sup>38</sup> Chishti et al., *supra* note 24.

priorities through ICE enforcement guidance memos.<sup>39</sup> These priorities were reinforced by the rollout of Deferred Action for Childhood Arrivals<sup>40</sup> (DACA) and the attempted rollout of Deferred Action for Parents of Americans and Lawful Permanent Residents<sup>41</sup> (DAPA) — programs that aimed to remove the immediate threat of deportation from a segment of the undocumented population that had no disqualifying criminal legal system contacts. The Biden Administration took a similar approach, prioritizing the removal of noncitizens with criminal records and attempting to create discretionary pathways to allow other longtime residents without lawful status to remain in the United States.<sup>42</sup>

<sup>39</sup> See, e.g., John Morton & M. Patricia Smith, Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), [https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf) [<https://perma.cc/M22E-LJ3M>]; Memorandum from John Morton, Assistant Sec’y, U.S. Immigr. & Customs Enf’t, to Peter S. Vincent, Principal Legal Advisor, and James Chaparro, Exec. Assoc. Dir., Enf’t & Removal Operations 2 (Aug. 20, 2010), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/handling-removal-proceedings.pdf> [<https://perma.cc/49P4-XFH8>]; Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t, to All ICE Emps. 1–2 (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/N5ZS-5BYW>]; Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t, to All Field Off. Dirs., All Special Agents in Charge, and All Chief Couns. 2, 4–5 (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/2MTQ-JQU6>]; Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t, to All Field Off. Dirs., All Special Agents in Charge, and All Chief Couns. 1 (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> [<https://perma.cc/4R47-ZF6T>]; see also JENNIFER M. CHACÓN, SUSAN BIBLER COUTIN & STEPHEN LEE, LEGAL PHANTOMS: EXECUTIVE ACTION AND THE HAUNTING FAILURES OF IMMIGRATION LAW 63–66, 69–71 (2024) (discussing the Morton memos, their goals, and their inadequacies); MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT & DACA 70–80 (2020) (describing the effect of the Morton memos on ICE agents and immigration courts); SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 111–18 (2015) (illustrating the effects of the Morton memos’ focus on discretion).

<sup>40</sup> Memorandum from Janet Napolitano, Sec’y, DHS, to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf’t (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/4U87-6D5V>]; see CHACÓN, COUTIN & LEE, *supra* note 39, at 9; OLIVAS, *supra* note 39, at 91–92; WADHIA, *supra* note 39, at 64–66.

<sup>41</sup> Memorandum from Jeh Charles Johnson, Sec’y, DHS, to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 4 (Nov. 20, 2014), <https://www.ice.gov/doclib/foia/policy/deferredActionForChildrenParentsUSCitizens11202014.pdf> [<https://perma.cc/5KJP-DVHH>]; see also CHACÓN, COUTIN & LEE, *supra* note 39, at 9–10 (discussing DAPA and subsequent litigation); OLIVAS, *supra* note 39, at 92–93 (same).

<sup>42</sup> For a discussion of the Biden Administration’s priorities, see SMITH, *supra* note 24, at 3–4. For a discussion of one of its signature deferred action programs — Deferred Action for Labor Enforcement (DALE) — see Memorandum from Alejandro N. Mayorkas, Sec’y, DHS, to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, Ur M. Jaddou, Dir., U.S. Citizenship & Immigr. Servs., & Troy A. Miller, Acting Comm’r, U.S. Customs & Border Prot., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual 3 (Oct. 12, 2021), <https://www.dhs.gov/sites/default>

Between these two Administrations, the first Trump Administration turned away from an immigration enforcement strategy that prioritized noncitizens for removal based on their criminal legal system contacts.<sup>43</sup> The first Trump Administration unsuccessfully attempted to rescind DACA<sup>44</sup> and rescinded and revised many of the memos that had guided enforcement discretion during the Obama Administration.<sup>45</sup> The vast majority of those removed during Trump's first administration lacked serious or violent criminal convictions.<sup>46</sup> But the overall number of removals was also lower when compared to both the preceding Obama Administration and the succeeding Biden Administration.<sup>47</sup> While removals took on a more random character, and the tone of the first Trump Administration toward noncitizens took a sharply negative turn,<sup>48</sup> the threat of removal did not notably increase as a statistical matter.<sup>49</sup>

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files/publications/memo\_from\_secretary\_mayorkas\_on\_worksite\_enforcement.pdf [https://perma.cc/7ATV-RCGX]. *But see* Salvador G. Sarmiento, *The Uses of the Border*, 61 SAN DIEGO L. REV. 957, 987 (2024) (criticizing the Biden Administration for failing to provide sufficient support for the DALE program).

<sup>43</sup> See Jennifer M. Chacón, Essay, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 256 (2017).

<sup>44</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020) (explaining the timeline of DHS's rescission of DACA, on the Attorney General's advice that it "shared the same legal . . . defects" as DAPA and "was likely to meet a similar fate" (internal quotation marks omitted) (alteration in original) (quoting Letter from Jefferson B. Sessions III, U.S. Att'y Gen., to Elaine C. Duke, Acting Sec'y of Homeland Sec. (Sep. 4, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf) [https://perma.cc/K63F-Z5B2])).

<sup>45</sup> See Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigr. & Customs Enf't, to All ERO Emps. (Feb. 21, 2017), <https://assets.aila.org/files/8204878c-3dae-4343-abco-139481ff3ae6/17070730.pdf> [https://perma.cc/8ST6-77DD]; Memorandum from John Kelly, Sec'y, DHS, to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [https://perma.cc/FT4V-FULF].

<sup>46</sup> See GUILLERMO CANTOR ET AL., AM. IMMIGR. COUNCIL, CHANGING PATTERNS OF INTERIOR IMMIGRATION ENFORCEMENT IN THE UNITED STATES, 2016–2018, at 3, 19 (2019), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/changing\\_patterns\\_of\\_interior\\_immigration\\_enforcement\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/changing_patterns_of_interior_immigration_enforcement_in_the_united_states.pdf) [https://perma.cc/4ANP-DAQT]; AM. IMMIGR. COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION 2 (2018), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the\\_end\\_of\\_immigration\\_enforcement\\_priorities\\_under\\_the\\_trump\\_administration.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf) [https://perma.cc/SYC9-T3LN]; *Fewer Immigrants Face Deportation Based on Criminal-Related Charges in Immigration Court*, TRAC: IMMIGR. (July 28, 2022), <https://tracereports.org/immigration/reports/690> [https://perma.cc/U94M-BR2P].

<sup>47</sup> See Dan Gooding, *Trump Migrant Deportation Numbers Compared to Obama, Biden*, NEWSWEEK (Feb. 11, 2025, at 09:01 ET), <https://www.newsweek.com/immigrant-deportations-removals-trump-biden-obama-compared-chart-2026835> [https://perma.cc/3F9T-NJ5W] (citing *Immigration Enforcement and Legal Processes Monthly Tables*, DHS OFF. OF HOMELAND SEC. STAT. (Jan. 16, 2025), <https://ohss.dhs.gov/topics/immigration/immigration-enforcement/monthly-tables> [https://perma.cc/4V5Q-ULHG]).

<sup>48</sup> See Chacón, *supra* note 43, at 244.

<sup>49</sup> Maria Sacchetti, *Trump Is Deporting Fewer Immigrants than Obama, Including Criminals*, WASH. POST (Aug. 10, 2017), <https://www.washingtonpost.com/local/immigration/trump-is->

During the second Trump Administration, officials have made clear that, once again, rather than prioritizing for detention and removal individuals with criminal legal system contact, they will treat as a potential enforcement priority any noncitizen they encounter, including those appearing for their immigration court proceedings.<sup>50</sup> The statistics bear this out. By November 2025, about 74% of the noncitizens in immigration detention had no criminal convictions,<sup>51</sup> reflecting the Administration's shift toward detaining individuals with no criminal record.<sup>52</sup> Similarly, the Administration is not prioritizing removals on criminal grounds. Only 1.6% of the deportation cases filed in fiscal year 2025 "sought deportation orders based on any alleged criminal activity of the immigrant, apart from possible illegal entry."<sup>53</sup> In other words, rather than prioritizing for detention and removal noncitizens with criminal records (as then-candidate Trump had promised to do throughout the campaign<sup>54</sup>), the Administration has used its expanded enforcement capacity to sweep in as many noncitizens as it has capacity to detain and remove. Administration officials have also removed most noncitizens on the basis of their unlawful presence, rather than pursuing more complicated and consequential removal charges on the basis of criminal legal system contact.<sup>55</sup> In at least some cases, individuals

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deporting-fewer-immigrants-than-obama-including-criminals/2017/08/10/d8fa72e4-7e1d-11e7-9d08-b79f191668ed\_story.html [https://perma.cc/G8K3-PM9J].

<sup>50</sup> Mike Levine & Meghan Mistry, *Trump's Border Czar: "If You're in the Country Illegally, You Got a Problem,"* ABC7 (Jan. 26, 2025), <https://abc7.com/post/donald-trumps-border-czar-tom-homan-if-youre-country-illegally-problem-fears-ice-raids/15838467> [https://perma.cc/4T3L-99AY]; Laura Romero et al., *Trump Vowed to Deport the "Worst of the Worst" — But New Data Shows a Shift to Also Arresting Non-Criminals*, ABC NEWS (July 1, 2025, at 05:15 ET), <https://abcnews.com/US/trump-vowed-deport-worst-worst-new-data-shows/story?id=123287810> [https://perma.cc/UC45-FJZ8].

<sup>51</sup> *Taking Stock: Trump Administration Record on Detention and Removals*, TRAC: IMMIGR. (Nov. 24, 2025), <https://tracreports.org/reports/767> [https://perma.cc/82JM-TD2L].

<sup>52</sup> *Id.* (presenting data showing that ICE's targeting "shifted sharply to individuals without any criminal convictions").

<sup>53</sup> *Immigration Court Quick Facts*, TRAC: IMMIGR., <https://tracreports.org/immigration/quickfacts/eoir.html> [https://perma.cc/JU3G-NVPZ].

<sup>54</sup> See, e.g., *Promises Made, Promises Kept*, *supra* note 3 (promising to focus the Administration's deportation operation on removing violent criminals); Romero et al., *supra* note 50 ("President Donald Trump campaigned for president on the promise of mass deportations that targeted criminals . . .").

<sup>55</sup> The government's burden of establishing removability on criminal grounds can sometimes be difficult to meet because many state criminal convictions do not match federal grounds for removal. For an explanation of some of the reasons for this, and a defense of the outcomes, see generally Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011), and Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012).

are being removed in ways that have actually frustrated their criminal prosecutions.<sup>56</sup>

The choice of prior administrations to prioritize for deportation individuals with criminal convictions is not impervious to critique. Among other things, such prioritization ignores the duration and strength of an individual's familial and community bonds in the United States, replicates and reinforces the race and class biases of the criminal legal system, and undervalues the possibility of rehabilitation and redemption.<sup>57</sup> And, realistically, almost every removal constitutes a family separation. No matter the system of priorities, families and communities often pay a high price when a noncitizen is removed.<sup>58</sup>

But there are three distinctly negative side effects to the chaotic, random, and aggressive nature of this Administration's enforcement efforts, all of which expand federal power at the expense of the power of state and local officials and individual rights. First, the Administration has opened new fronts for enforcement activities in ways that complicate state governance and civic life. One example of this is the Administration's revocation of previously operative "sensitive location" guidelines, allowing immigration agents to conduct arrests in places like state courthouses, hospitals, and school zones.<sup>59</sup> With a rise in arrests

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<sup>56</sup> See, e.g., Brittny Mejia & Richard Winton, *Man Charged in "Largest Jewelry Heist in U.S. History" Avoids Trial by Getting Deported*, L.A. TIMES (Jan. 22, 2026, at 08:15 PT), <https://www.latimes.com/california/story/2026-01-21/jewelry-heist-deportation> [<https://perma.cc/TS7H-KGZN>] (describing the deportation of an Ecuadoran national who was facing prosecution for "the largest jewelry heist in U.S. history").

<sup>57</sup> See Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 598–600 (2016) (advocating "for the necessity of dismantling the category of criminal alien as a vector for the harms of immigration enforcement," *id.* at 598); David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 975 (2022) (explaining how "[t]he administrative law of deportation depends on criminal charges and convictions to determine who is removed from the United States"). See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED: IN DEFENSE OF THE "CRIMINAL ALIEN" (2024) (arguing that the U.S. immigration system should be divorced from the criminal legal system).

<sup>58</sup> See CALDWELL, *supra* note 16, at 1–2; LUIS H. ZAYAS, FORGOTTEN CITIZENS: DEPORTATION, CHILDREN, AND THE MAKING OF AMERICAN EXILES AND ORPHANS 170–79, 190–203 (2015); WILLIAM D. LOPEZ, SEPARATED: FAMILY AND COMMUNITY IN THE AFTERMATH OF AN IMMIGRATION RAID 94–100 (2019); Sofia Avila, *The Effect of Workplace Raids on Academic Performance: Evidence from Texas*, 11 SOCIO. SCI. 258, 285–86, 288 (2024). For a collection and discussion of studies on the effects of immigration enforcement on families and children, see Emily Ryo et al., *Criminalization of Immigration*, RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Oct. 2025, at 282, 314–23.

<sup>59</sup> Memorandum from Benjamine C. Huffman, Acting Sec'y, DHS, to Caleb Vitello, Acting Dir., U.S. Immigr. & Customs Enf't, & Pete R. Flores, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Enforcement Actions in or near Protected Areas (Jan. 20, 2025), [https://www.dhs.gov/sites/default/files/2025-03/25\\_0120\\_S1\\_enforcement-actions-in-near-protected-areas.pdf](https://www.dhs.gov/sites/default/files/2025-03/25_0120_S1_enforcement-actions-in-near-protected-areas.pdf) [<https://perma.cc/MJ3N-RTA8>]; Rebecca Santana, *Trump Administration Throws Out Policies Limiting Migrant Arrests at Sensitive Spots like Churches*, AP NEWS (Jan. 21, 2025, at 20:01 ET), <https://apnews.com/article/immigration-enforcement-sensitive-locations-trump-abod2d2652e9df696f14410ebb52a1fc> [<https://perma.cc/57GZ-UHGU>].

near schools,<sup>60</sup> including arrests of students,<sup>61</sup> school officials have noted drops in attendance,<sup>62</sup> impeding their mission (and legal mandate) to educate all children.<sup>63</sup> Similarly, state courthouse arrests have complicated the ability of state court officials to manage their courthouses.<sup>64</sup> The arrests of noncitizens in these spaces have spurred some resistance by state and local officials.<sup>65</sup> The arrest and conviction of a state court judge on obstruction charges crystallized the extent to which federal immigration enforcement can displace state officials' exercise of their own authority.<sup>66</sup>

A second side effect of the Administration's approach is that it decreases the ability of some state and local officials to influence federal immigration enforcement priorities. During previous administrations, clearly articulated federal priorities enabled state and local governments to craft policies that responded to the perceived inadequacies of those priorities.<sup>67</sup> So, for example, in response to federal prioritization of the removal of individuals with criminal legal system contacts, states and localities could adjust their own arrest policies, information-collection

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<sup>60</sup> Madeleine Ngo, *ICE Arrests Disrupt Schools, Prompting Fear Among Families*, N.Y. TIMES (Dec. 17, 2025), <https://www.nytimes.com/2025/12/17/us/politics/ice-arrests-schools.html> [<https://perma.cc/7BEU-W7BB>].

<sup>61</sup> See, e.g., Reg Chapman, *5-Year-Old and Father Detained by ICE in Columbia Heights, Shaking Community*, CBS NEWS (Jan. 22, 2026, at 18:02 CT), <https://www.cbsnews.com/minnesota/news/minnesota-school-children-ice-arrests-columbia-heights> [<https://perma.cc/A4V5-2QNJ>].

<sup>62</sup> Ngo, *supra* note 60; Arthur Jones II, *Here's How Immigration Enforcement Is Affecting School Enrollment in Some Districts*, ABC NEWS (Dec. 8, 2025, at 05:05 ET), <https://abcnews.go.com/Politics/heres-immigration-enforcement-affecting-school-enrollment-districts/story?id=128057477> [<https://perma.cc/3A3U-VMTW>] (noting uneven drops in attendance nationwide).

<sup>63</sup> See Avila, *supra* note 58, at 285–86. The Equal Protection Clause requires states to provide education to all students, regardless of federal immigration status. See *Plyler v. Doe*, 457 U.S. 202, 224–26, 230 (1982).

<sup>64</sup> See Nigel Duara, *California Law Forbids ICE from Making Arrests at Courthouses. Officers Are Showing Up Anyway*, CALMATTERS (Sep. 23, 2025), <https://calmatters.org/justice/2025/09/ice-courthouse-arrests> [<https://perma.cc/8Y6T-TZN5>]; see also Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, BRENNAN CTR. FOR JUST. (Nov. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests> [<https://perma.cc/9W9F-VVHL>] (describing similar strategies and effects during the first Trump Administration).

<sup>65</sup> See, e.g., Cayla Mihalovich & Jeanne Kuang, *Newsom Signs Laws to Resist Trump's Immigration Crackdown, Including Ban on Masks for ICE Agents*, CALMATTERS (Sep. 20, 2025), <https://calmatters.org/justice/2025/09/newsom-new-immigration-laws> [<https://perma.cc/UL2G-8YFD>] (describing California's 2025 package of laws restricting immigration enforcement access to schools and health facilities); CAL. CIV. CODE § 43.54 (West 2026) (prohibiting arrests in courthouses of persons attending court proceedings or having legal business there). *But see* Duara, *supra* note 64 (reporting that ICE has conducted courthouse arrests in California notwithstanding this prohibition).

<sup>66</sup> See Jury Verdict, *United States v. Dugan*, No. 25-CR-89 (E.D. Wis. Dec. 18, 2025), Dkt. No. 96; Jennifer M. Chacón, *State Courthouses in the ICE Age*, STATE CT. REP. (May 22, 2025), <https://statecourtreport.org/our-work/analysis-opinion/state-courthouses-ice-age> [<https://perma.cc/8AGW-DML6>].

<sup>67</sup> See Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1706–07, 1738 (2018).

and data-sharing practices, and even their criminal laws to protect certain noncitizens from being identified as federal enforcement priorities in the first place.<sup>68</sup> In the latter half of President Obama's second term, Administration officials claimed to have created affirmative mechanisms for state and local governments to communicate their enforcement preferences and to have shaped federal policies in ways that were somewhat responsive to those preferences.<sup>69</sup>

The Trump Administration's approach to enforcement, in contrast, appears deliberately designed to thwart the immigration policy preferences of democratically elected leaders, at least in jurisdictions led by Democrats.<sup>70</sup> The Trump Administration has deployed large numbers of ICE and CBP agents to several jurisdictions to conduct immigration raids in workplaces and public venues over the objections of local officials.<sup>71</sup> Administration officials magnified these efforts with the deployment of National Guard and Marine forces, purportedly to support

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<sup>68</sup> *Id.* at 1737; Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 545 (2017).

<sup>69</sup> See AM. IMMIGR. COUNCIL, IMMIGRATION DETAINERS UNDER THE PRIORITY ENFORCEMENT PROGRAM 1 (2017), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/immigration\\_detainers\\_under\\_the\\_priority\\_enforcement\\_program.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/immigration_detainers_under_the_priority_enforcement_program.pdf) [https://perma.cc/YA3U-LZXX]; see also CHACÓN, COUTIN & LEE, *supra* note 39, at 36, 57–58 (briefly discussing the Priority Enforcement Program and its limitations, including through the words of an immigrant resident in Southern California); MARC R. ROSENBLUM, MIGRATION POL'Y INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 15 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/ExecAction-Removals-SCOMM.pdf> [https://perma.cc/823N-ZC3X] (“[T]he Priority Enforcement Program (PEP)[] appears designed to retain the most important features of Secure Communities, including information-sharing between ICE and the Federal Bureau of Investigation (FBI), while addressing key concerns by allowing for more local control and imposing limits on the use of immigration detainees.”).

<sup>70</sup> See Rebecca Falconer & Russell Contreras, *Trump Orders ICE to Step Up Deportation Efforts in Democrat-Run Cities*, AXIOS (June 16, 2025), <https://www.axios.com/2025/06/16/trump-ice-democrat-cities-immigration-deport> [https://perma.cc/TC6D-R8TV].

<sup>71</sup> This phenomenon has taken place in New York City, Los Angeles, Chicago, Minneapolis, New Orleans, Charlotte, and other cities around the country. Marlene Lenthang, *Here Are the Cities Where ICE Raids Are Taking Place*, NBC NEWS (Jan. 29, 2025, at 16:58 ET), <https://www.nbcnews.com/news/us-news/are-cities-ice-raids-are-taking-place-rcna189390> [https://perma.cc/HZ7M-XTBB]; Caitlin McTiernan, *Immigration Enforcement Could Come to Your Town. Here's What You Can Do to Prepare.*, AM. IMMIGR. COUNCIL (Feb. 5, 2026), <https://www.americanimmigrationcouncil.org/blog/what-to-do-if-ice-immigration-enforcement-comes-to-town> [https://perma.cc/NF4Z-38SP]. This approach is a much more aggressive version of tactics that were also used in the first Trump Administration. See, e.g., AM. IMMIGR. COUNCIL, UNDERSTANDING ICE RAIDS AT AMERICAN WORKPLACES 2–4 (2025), <https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/10/Worksite-Enforcement-Factsheet-2025.pdf> [https://perma.cc/SAD9-PFXY] (noting that raids under the second Trump Administration target a wider variety of “businesses with a high concentration of noncitizen workers,” *id.* at 3, and involve a broader range of federal agencies, *id.* at 4). Some states and cities are responding with lawsuits challenging ICE deployments. See, e.g., Mitch Smith, *Minnesota and Illinois Sue Trump Administration over ICE Deployments*, N.Y. TIMES (Jan. 12, 2026), <https://www.nytimes.com/2026/01/12/us/minnesota-illinois-lawsuit-ice-trump-administration.html> [https://perma.cc/4UAS-ZU5X].

immigration enforcement.<sup>72</sup> Even after the Supreme Court declared limits on the use of the National Guard for such purposes,<sup>73</sup> the Administration continued deploying DHS agents to jurisdictions that had specifically and repeatedly asked them not to do so.<sup>74</sup> This included a proliferation of DHS agents in cities like Minneapolis and Portland, where ICE and CBP agents have injured and killed unarmed civilians.<sup>75</sup>

A final effect of the Administration's approach to enforcement is that it has increased official reliance on racial profiling as an immigration enforcement tool.<sup>76</sup> Racial profiling has been part of immigration policing throughout U.S. history.<sup>77</sup> In 1975, the Supreme Court explicitly legitimated reliance on racial appearance as one factor (though not the sole factor) in determining reasonable suspicion of an immigration violation.<sup>78</sup> But, over the past fifty years, some lower courts have imposed legal guardrails on the consideration of race in immigration policing. In 2000, for example, the Ninth Circuit Court of Appeals reasoned that when Immigration and Naturalization Service (INS) agents were investigating activity in a jurisdiction where 73% of residents were

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<sup>72</sup> See Tom Bowman, *Trump Mobilizes Marines and More National Guard Troops for Duty in LA*, NPR (June 9, 2025, at 21:44 ET), <https://www.npr.org/2025/06/09/g-s1-71640/trump-mobilizes-marines-for-duty-in-los-angeles> [<https://perma.cc/4C8G-MZU3>]; Zach Montague, *Appeals Court Allows National Guard to Remain in D.C., For Now*, N.Y. TIMES (Dec. 17, 2025), <https://www.nytimes.com/2025/12/17/us/politics/appeals-court-washington-national-guard.html> [<https://perma.cc/YXD7-79PJ>]. These deployments have also generated lawsuits, including a successful one by the state of Illinois challenging the deployment of the National Guard, *Trump v. Illinois*, 146 S. Ct. 432, 434 (2025), and a thus far unsuccessful effort to challenge the National Guard deployment to D.C., Montague, *supra*.

<sup>73</sup> See *Trump v. Illinois*, 146 S. Ct. at 434 (holding, at the preliminary injunction stage, that the Government failed to identify statutory authority “permit[ting] the President to federalize the Guard in the exercise of inherent authority to protect federal personnel and property”).

<sup>74</sup> See, e.g., Erik Verduzco, *Immigration Enforcement Surge Begins in Charlotte, North Carolina, Officials Confirm*, AP NEWS (Nov. 15, 2025, at 22:46 ET), <https://apnews.com/articlenorth-carolina-charlotte-immigration-federal-33e2339744cd3b2fa3999099c509f90a> [<https://perma.cc/5LBW-36XK>].

<sup>75</sup> See, e.g., *Man Killed by Federal Agents in Minneapolis Was Holding a Phone, Not a Gun*, N.Y. TIMES (Mar. 4, 2026), <https://www.nytimes.com/live/2026/us/minneapolis-shooting-ice> [<https://perma.cc/UR6Z-FBZW>]; Rachel Uranga, *Man Shot in Back by ICE Pleads Not Guilty to Assault Charges*, L.A. TIMES (Nov. 25, 2025, at 14:28 PT), <https://www.latimes.com/california/story/2025-11-25/man-shot-in-back-by-ice-pleads-not-guilt-to-assault-charges> [<https://perma.cc/U3HD-PAQP>].

<sup>76</sup> See Jack Morphet, *Federal Judge Halts Immigration Raid Tactics in Los Angeles*, WALL ST. J. (July 11, 2025, at 23:27 ET), <https://www.wsj.com/us-news/law/federal-judge-halts-immigration-raid-tactics-in-los-angeles-fc8819a8> [<https://perma.cc/32MK-RHYR>].

<sup>77</sup> For a discussion of the use of race in immigration enforcement, see, for example, KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES* 65 (2017) (recording the anti-Chinese animus that resulted in the Geary Act); *id.* at 134–38 (describing the anti-Black and anti-Mexican racism that drove the laws creating the United States's criminal prohibitions on illegal entry); and Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1469 (2022) (explaining how a very violent and “aggressive anti-Chinese movement in California culminated in the passage of the first comprehensive — and unabashedly racist — federal immigration law”). See generally Jennifer M. Chacón, *Immigration and Race*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* (Devon W. Carbado et al. eds., 2022) (discussing the role of racism in shaping U.S. immigration policy throughout the nation's history).

<sup>78</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

Hispanic,<sup>79</sup> “Hispanic appearance” could not serve as any part of a determination of reasonable suspicion of immigration violations.<sup>80</sup> The court reached this conclusion based not only on changes in demography, but also in deference to the Supreme Court’s increasing resistance to the use of race even in benign contexts like affirmative action.<sup>81</sup>

A district court in the Central District of California relied on that Ninth Circuit ruling in 2025 in ordering immigration enforcement agents to refrain from making investigative immigration stops based on the following factors, “alone or in combination”: racial appearance, Spanish language or accent, job, and location.<sup>82</sup> Without providing any reasoning, the Supreme Court stayed that order,<sup>83</sup> thus effectively legitimating immigration stops of, for example, anyone working at a car wash in Los Angeles who appears “Hispanic.”<sup>84</sup> Justice Kavanaugh’s concurrence, which offered the only window into the majority’s possible reasoning, drew heavily on the fifty-year-old *United States v. Brignoni-Ponce*<sup>85</sup> case, without according any apparent weight to intervening demographic and jurisprudential changes.<sup>86</sup>

U.S. citizens, as well as noncitizens, have been targeted by the resulting ramped-up, race-based immigration policing in U.S. cities.<sup>87</sup> These encounters have turned violent, and even deadly.<sup>88</sup> Some of the so-called investigative stops that ICE and other DHS agents have conducted actually look like arrests; they last for hours or even days, and detainees have great difficulty convincing officials that they are not the appropriate targets of enforcement.<sup>89</sup> DHS’s public and official statements, captured in litigation, disturbingly suggest that its agents incorrectly believe that they can conduct full-blown arrests on the basis of race-based suspicion of immigration violations.<sup>90</sup>

<sup>79</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1133 (9th Cir. 2000) (en banc).

<sup>80</sup> *Id.* at 1132, 1134.

<sup>81</sup> *Id.* at 1134 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

<sup>82</sup> *Vasquez Perdomo v. Noem*, 790 F. Supp. 3d 850, 893, 897 (C.D. Cal. 2025).

<sup>83</sup> *See Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 1 (2025) (mem.).

<sup>84</sup> *See Vasquez Perdomo*, 790 F. Supp. 3d at 892 (quoting *Montero-Camargo*, 208 F.3d at 1135).

<sup>85</sup> 422 U.S. 873 (1975).

<sup>86</sup> *See Vasquez Perdomo*, 146 S. Ct. at 1–3 (Kavanaugh, J., concurring in the grant of the application for stay).

<sup>87</sup> Although Justice Kavanaugh was certain that U.S. citizens would be released after a brief conversation with immigration officials during immigration stops, *id.* at 1, this has turned out not to be the case for many citizens, some of whom have ended up in immigration detention. *See Nicole Foy, We Found that More than 170 U.S. Citizens Have Been Held by Immigration Agents. They’ve Been Kicked, Dragged and Detained for Days.*, PROPUBLICA (Oct. 16, 2025, at 12:00 ET), <https://www.propublica.org/article/immigration-dhs-american-citizens-arrested-detained-against-will> [https://perma.cc/6CH4-6EE3].

<sup>88</sup> *See, e.g.*, sources cited *supra* note 75.

<sup>89</sup> *See Foy, supra* note 87.

<sup>90</sup> *See Escobar Molina v. DHS*, No. 25-cv-3417, 2025 WL 3465518, at \*4–6 (D.D.C. Dec. 2, 2025) (summarizing evidence of numerous instances where DHS officials relied upon the incorrect legal standard for arrest).

In *Trump v. Illinois*,<sup>91</sup> the suit that successfully challenged President Trump's deployment of the National Guard in that state,<sup>92</sup> Justice Kavanaugh, in his concurrence, seemed to try to respond to these concerns in a footnote addressing matters not at issue in that case. He wrote:

The Fourth Amendment requires that immigration stops must be based on reasonable suspicion of illegal presence, stops must be brief, arrests must be based on probable cause, and officers must not employ excessive force. Moreover, the officers must not make interior immigration stops or arrests based on race or ethnicity. *Cf. Whren v. United States*, 517 U.S. 806, 813 . . . (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race[.]”).<sup>93</sup>

Though the reminder is welcome, it is in tension with the practices that the Court green-lit months earlier in *Noem v. Vasquez Perdomo*,<sup>94</sup> and there is no indication that federal agents have ceased to rely on race in policing since the issuance of that stay order.<sup>95</sup>

In a memo that DHS initially withheld from public view, the Department also took the position that its agents could enter homes to conduct arrests in the absence of a judicial warrant.<sup>96</sup> The memo states that:

Although the U.S. Department of Homeland Security (DHS) has not historically relied on administrative warrants alone to arrest aliens subject to final orders of removal in their place of residence, the DHS Office of General Counsel has recently determined that the U.S. The [sic] Constitution, the [I]mmigration and Nationality Act, and the immigration regulations do not prohibit relying on administrative warrants for this purpose.<sup>97</sup>

This novel interpretation of the U.S. Constitution conflicts with a great deal of constitutional case law and the weight of authority on the question.<sup>98</sup> The idea that the executive branch can also authorize its

<sup>91</sup> 146 S. Ct. 432 (2025).

<sup>92</sup> *Id.* at 434.

<sup>93</sup> *Id.* at 436 n.4 (Kavanaugh, J., concurring in the judgment) (second alteration in original).

<sup>94</sup> 146 S. Ct. 1 (2025) (mem.).

<sup>95</sup> See Melissa Hellmann, “*It’s Like They’re Hunting*”: *US Citizens and Legal Residents Report Increase in Racial Profiling by ICE*, THE GUARDIAN (Jan. 22, 2026, at 11:36 ET), <https://www.theguardian.com/us-news/2026/jan/22/us-citizens-racial-profiling-ice> [<https://perma.cc/RK56-J9QS>].

<sup>96</sup> WHISTLEBLOWER AID, SECRETIVE DHS MEMO AUTHORIZES ICE TO ILLEGALLY ENTER HOMES WITHOUT A JUDICIAL WARRANT IN VIOLATION OF THE FOURTH AMENDMENT 2 (2026), <https://www.documentcloud.org/documents/26499371-dhs-ice-memo-1-21-26> [<https://perma.cc/SCV8-KZAS>].

<sup>97</sup> *Id.* at 5 (emphasis omitted) (quoting Memorandum from Todd Lyons, Acting Dir., U.S. Migr. & Customs Enf’t, to All ICE Personnel, Utilizing Form I-205, Warrant of Removal (May 12, 2025)).

<sup>98</sup> Professor Orin Kerr observes that DHS’s position may be reliant on a plausible reading of some stray dicta in *Abel v. United States*, 362 U.S. 217, 230 (1960), but notes that “the problem on the merits is that there’s been a lot of water under the bridge since Justice Frankfurter’s opinion in *Abel*.” Orin Kerr, *Can ICE Enter a Home to Make an Arrest with Only an Administrative*

own agents to enter a home to conduct a targeted arrest seems to fly in the face of the purpose of the Fourth Amendment's warrant requirement.<sup>99</sup> But in a world where remedies for Fourth Amendment violations by ICE and CBP are in short supply,<sup>100</sup> Administration officials may simply be banking on the fact that they will get away with these violations on a regular basis.

Taken together, the Administration's interior enforcement policies represent a substantial departure from those of past administrations.

*B. The Expansive Use of Coercive Immigration Detention, Including as Against Longtime and Lawful U.S. Residents*

Many presidential administrations have used immigration detention to deter migrants from entering the country, and to pressure noncitizens residing in the United States to depart.<sup>101</sup> This practice has continued and intensified under President Trump.<sup>102</sup> This Administration is also deploying immigration detention in novel ways.

First, the Administration has increased detention capacity and is detaining people at record levels. The July 2025 budget reconciliation bill included a \$45 billion influx<sup>103</sup> that more than tripled the amount of money available for immigration detention for the next three years.<sup>104</sup> The Administration has used these funds to detain record numbers of

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*Warrant?*, LAWFARE (Jan. 22, 2026, at 09:10 ET), <https://www.lawfaremedia.org/article/can-ice-enter-a-home-to-make-an-arrest-with-only-an-administrative-warrant> [https://perma.cc/2BG7-37PV] (“The standard view has been that administrative warrants can’t authorize home entry because they’re executive branch orders, and the executive branch can’t be in charge of deciding whether to give itself a warrant.”).

<sup>99</sup> See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1188, 1192 (2016).

<sup>100</sup> See Kerr, *supra* note 98. See also Pratheepan Gulasekaram, *The Borderline Constitution*, 135 YALE L.J. (forthcoming 2026) (manuscript at 51) (on file with the Harvard Law School Library) (describing the absence of adequate remedies for Fourth Amendment violations in the context of border-based immigration enforcement); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 147 (2010) (describing other legal impediments to remedies for Fourth Amendment violations in immigration enforcement).

<sup>101</sup> See Silverman & Nethery, *supra* note 10, at 5; Shana Tabak, *Refugee Detention as Constructive Refoulement*, 48 YALE J. INT’L L. 289, 297–98, 327 (2023).

<sup>102</sup> Sarah Wildman, Opinion, “*The System Is Meant to Break You*”: *What ICE Is Doing to People Here Legally*, N.Y. TIMES (Nov. 21, 2025), <https://www.nytimes.com/2025/11/21/opinion/ice-immigration-green-card-detention.html> [https://perma.cc/N3R9-6UJY].

<sup>103</sup> One Big Beautiful Bill Act, Pub. L. No. 119-21, § 90003(a), 139 Stat. 72, 358 (2025). As Professor Ingrid Eagly observes, the FY 2025 budget for the entire federal prison system, by contrast, was \$8.6 billion. Ingrid V. Eagly, *Challenging Mass Immigration Detention Under Trump 2.0*, 50 MICH. ST. L. REV. (forthcoming 2026) (manuscript at 3) (on file with the Harvard Law School Library).

<sup>104</sup> AM. IMMIGR. COUNCIL, *supra* note 30, at 3.

noncitizens<sup>105</sup> (and some citizens<sup>106</sup>). In December 2025, the number of individuals held in immigration detention each day hit 68,000.<sup>107</sup>

The conditions in these facilities have led to lawsuits and orders from judges across the country to improve conditions.<sup>108</sup> Judges have made findings that conditions in these facilities include inadequate food, severe overcrowding, unsanitary cell spaces that sometimes require people to sleep next to toilets, excessive impositions of solitary confinement, and lack of access to hygiene products and medical care.<sup>109</sup> Lawyers have also alleged that officials managing detention facilities have interfered with the ability of detained individuals to access and confer with counsel.<sup>110</sup> A growing number of the individuals in immigration detention facilities are children.<sup>111</sup>

Conditions in immigration detention facilities have never been perfect and have required judicial intervention many times in the past.<sup>112</sup>

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<sup>105</sup> Chris Cameron & Hamed Aleaziz, *Over 60,000 Are in Immigration Detention, a Modern High, Records Show*, N.Y. TIMES (Aug. 11, 2025), <https://www.nytimes.com/2025/08/11/us/politics/immigration-detention-numbers.html> [<https://perma.cc/C7LY-C5C4>].

<sup>106</sup> See *supra* note 87.

<sup>107</sup> Saha et al., *supra* note 8. This is a record high. *Id.*

<sup>108</sup> Santul Nerkar, *Trump-Appointed Judge Flays ICE Over Conditions in Long Island Lockup*, N.Y. TIMES (Dec. 19, 2025), <https://www.nytimes.com/2025/12/19/nyregion/judge-ice-detention-long-island.html> [<https://perma.cc/DGG7-E5D4>]; Ana Ley, *Wrenching Pain, A Severe Infection: An ICE Detainee Is Ordered Released*, N.Y. TIMES (Dec. 9, 2025), <https://www.nytimes.com/2025/12/09/nyregion/ice-detention-facilities-judges-criticism.html> [<https://perma.cc/UL6R-GNEE>]; Miriam Jordan & Jazmine Ulloa, *Concerns Grow Over Dire Conditions in Immigrant Detention*, N.Y. TIMES (July 1, 2025), <https://www.nytimes.com/2025/06/28/us/immigrant-detention-conditions.html> [<https://perma.cc/U3AE-E42B>].

<sup>109</sup> See, e.g., Luis Ferré-Sadurní, *Judge Steps Up Pressure on ICE to Fix Conditions in N.Y.C. Holding Cells*, N.Y. TIMES (Sep. 17, 2025), <https://www.nytimes.com/2025/09/17/nyregion/ice-migrant-cells-judge-ruling.html> [<https://perma.cc/7Q5B-GPGE>] (New York, New York); Bob Egelko, *ICE Ordered to Stop Holding Immigrants in S.F. Until It Improves Facility Conditions*, S.F. CHRON. (Nov. 26, 2025), <https://www.sfchronicle.com/politics/article/san-francisco-ice-detainees-order-21209923.php> [<https://perma.cc/4GFA-ELL9>] (San Francisco, California); *Federal Judge Mandates DHS to Improve Conditions at Illinois Immigration Facility*, LEGAL NEWS FEED (Nov. 6, 2025), <https://legalnewsfeed.com/2025/11/06/federal-judge-mandates-dhs-to-improve-conditions-at-illinois-immigration-facility> [<https://perma.cc/3EVQ-US89>] (Broadview, Illinois).

<sup>110</sup> Matt Rivers et al., *Lawyers Allege Dept. of Homeland Security Is Denying Legal Counsel to Minnesota Detainees*, ABC NEWS (Jan. 18, 2026, at 20:22 ET), <https://abcnews.go.com/US/lawyers-allege-dept-homeland-security-denying-legal-counsel/story?id=129335914> [<https://perma.cc/RCQ9-J9LF>].

<sup>111</sup> Mica Rosenberg et al., *“I Have Been Here Too Long”: Read Letters from the Children Detained at ICE’s Dilley Facility*, PROPUBLICA (Feb. 9, 2026, at 05:25 ET), <https://www.propublica.org/article/ice-dilley-children-letters> [<https://perma.cc/59E8-5N6W>] (noting that the number of children in ICE detention has “increas[ed] sixfold”); see, e.g., TPR Staff, *Pressure Mounts for Release of 5-Year-Old Held at South Texas Family Detention Center; DHS Defends ICE Actions*, TEX. PUB. RADIO (Jan. 23, 2026, at 16:14 CT), <https://www.tpr.org/border-immigration/2026-01-23/headline-pressure-mounts-for-release-of-five-year-old-held-at-south-texas-family-detention-center-as-dhs-disputes-some-accounts> [<https://perma.cc/X9C6-7WHT>].

<sup>112</sup> See Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186, 1196–1216, 1225 (2025). A leading example is the 1997 Flores settlement. See *The Flores Settlement*, IMMIGR. HIST., <https://immigrationhistory.org/item/the-flores-settlement> [<https://>].

However, the proliferation of reports of substandard and dangerous conditions today suggests an agency that is ill-prepared to handle the massive increase in detainees. Last year was the deadliest year on record in immigration detention in two decades;<sup>113</sup> six more people had already died in ICE custody in the first two weeks of 2026.<sup>114</sup>

Second, the Administration is detaining thousands of individuals who would not have been detained in the past. Most notably, it is subjecting longtime residents of the United States to mandatory detention under INA section 235, which generally does not allow for a noncitizen's release in any circumstance, regardless of whether the noncitizen poses a flight risk or danger to the community.<sup>115</sup>

The mandatory detention provision of INA section 235, enacted in 1996, specifies that if they allege a "credible fear of persecution," noncitizens "arriving in," but not admitted to the United States (due to their lack of valid entry documents or authorization) are subject to mandatory detention during the pendency of their expedited removal

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perma.cc/58MG-S3JY]. Another example is the settlement arising out of litigation against family detention facilities in Hutto, Texas. See *In re Hutto Fam. Det. Ctr.*, No. A-07-CA-164, 2007 WL 9757681, at \*1 (W.D. Tex. May 10, 2007); *Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas*, ACLU (Aug. 27, 2007, at 00:00 ET), <https://www.aclu.org/press-releases/landmark-settlement-announced-federal-lawsuit-challenging-conditions-immigrant> [<https://perma.cc/YBR4-TA88>] (describing the litigation challenges to family detention at the Hutto facility that resulted in judicial intervention and a settlement). A third example can be found in litigation brought to challenge the detention of Central American asylum seekers in the 1980s. See *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1490–91 (C.D. Cal. 1988), *aff'd sub nom.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (addressing INS detention conditions including rapid and prejudicial transfer policies; detainee lack of access to legal materials, visitors and counsel; and coercive pressure on detainees to voluntarily return to El Salvador). For additional descriptions of problematic detention conditions that long precede the Trump Administration, see, for example, Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 22–25 (2017); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 604–05 (2010) (cataloguing a "host of recent studies document[ing] the problems with detention conditions and mak[ing] recommendations regarding how to improve such conditions"); Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME (Dec. 12, 2023, at 17:38 ET), <https://time.com/5623148/migrant-detention-centers-conditions> [<https://perma.cc/B6BK-WJQE>].

<sup>113</sup> Maanvi Singh et al., *2025 Was ICE's Deadliest Year in Two Decades. Here Are the 32 People Who Died in Custody*, THE GUARDIAN (Jan. 4, 2026, at 11:27 ET), <https://www.theguardian.com/us-news/ng-interactive/2026/jan/04/ice-2025-deaths-timeline> [<https://perma.cc/QGM7-GHU3>].

<sup>114</sup> Kate Morrissey, *Grandfather Who Died in ICE Custody Had Felt Ill for Weeks, Daughter Says*, TIMES OF SAN DIEGO (Jan. 24, 2026, at 09:00 PT), <https://timesofsandiego.com/immigration/2026/01/24/grandfather-dies-in-ice-custody-at-calexico-facility> [<https://perma.cc/C9Q8-Z8VP>].

<sup>115</sup> 8 U.S.C. § 1225(b)(1)(B)(iii); Kyle Cheney, *Hundreds of Judges Reject Trump's Mandatory Detention Policy, With No End in Sight*, POLITICO (Jan. 5, 2026, at 05:55 ET), <https://www.politico.com/news/2026/01/05/trump-administration-immigrants-mandatory-detention-00709494> [<https://perma.cc/PD9B-VYB3>] (explaining how ICE's revised policy subjects "virtually anyone in the country unlawfully" to mandatory detention "without the possibility of release on bond").

proceedings.<sup>116</sup> In the previous thirty-year history of this provision, it has seldom been applied to people living in the interior of the United States for any significant length of time and never to individuals who had been present for longer than the two-year ceiling contained in the statute.<sup>117</sup> Yet the second Trump Administration has taken the novel legal position that the provision applies to anyone who entered without inspection (EWI),<sup>118</sup> no matter how long they have been in the country, and even if they have, at some point, been granted humanitarian parole or other forms of temporary protections that do not constitute formal “admission.”<sup>119</sup> By the end of 2025, this interpretation of the law had been rejected in more than 1,600 cases decided by judges across the political spectrum.<sup>120</sup> These judges found the plain meaning of the statute to conflict with the Administration’s interpretation.<sup>121</sup> Among other things, these judges noted that if all EWIs are subject to mandatory detention under section 235, there would have been no reason for Congress to enact the provisions of the Laken Riley Act of 2025<sup>122</sup> that expand mandatory detention to certain subsets of EWIs<sup>123</sup> based on

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<sup>116</sup> 8 U.S.C. § 1225(b)(1); *see also* AM. IMMIGR. COUNCIL & LEGAL AID SOC’Y, DETENTION UNDER INA § 235(B): THE STATUTORY SCHEME AND STRATEGIES FOR RELEASE 5 (2025), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/09/Practice\\_Advisory\\_Detention\\_Under\\_INA235.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/09/Practice_Advisory_Detention_Under_INA235.pdf) [<https://perma.cc/ZE4G-6BR2>] (“In July 2025, DHS began taking the novel position that all ‘applicants for admission’ are subject to § 235(b) detention, regardless of how long they have been in the country or where they are apprehended, a policy that drastically extends the reach of the statute.” (quoting *ICE Memo: Interim Guidance Regarding Detention Authority for Applications for Admission*, AM. IMMIGR. LAWS. ASS’N (July 8, 2025), <https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission> [<https://perma.cc/3H2C-XQFG>])).

<sup>117</sup> *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II); Cheney, *supra* note 115 (noting that ICE’s revised mandatory detention policy “reversed 30 years of practice by federal immigration authorities”); AM. IMMIGR. COUNCIL & LEGAL AID SOC’Y, *supra* note 116, at 5.

<sup>118</sup> AM. IMMIGR. COUNCIL & LEGAL AID SOC’Y, *supra* note 116, at 5, 12.

<sup>119</sup> *See* Sanchez v. Mayorkas, 141 S. Ct. 1809, 1812 (2021) (holding that a grant of Temporary Protected Status (TPS) does not constitute an “admission” for purposes of immigration law).

<sup>120</sup> Cheney, *supra* note 115. The two circuit courts to consider the question — the Fifth Circuit and, more recently, the Eighth Circuit — have sided with the very small handful of lower courts that reached the contrary conclusion. *See* Buenrostro-Mendez v. Bondi, 166 F.4th 494, 498 (5th Cir. 2026); Avila v. Bondi, No. 25-3248, 2026 WL 819258, at \*4–6 (8th Cir. Mar. 25, 2026). Federal district courts in other circuits have continued to rule to the contrary, rejecting the Fifth and Eighth Circuits’ reasoning. *See, e.g.,* Cova v. Rose, No. 26-CV-101, 2026 WL 376921, at \*1 (W.D. Pa. Feb. 11, 2026) (“The Court joins the overwhelming majority of district courts in holding that § 1226(a), rather than the mandatory detention provision of § 1225(b), applies to aliens similarly situated to Petitioner, who are not seeking admission at a port of entry but rather are already present in the country. The Court disagrees with the decision of the United States Court of Appeals for the Fifth Circuit in *Buenrostro-Mendez v. Bondi* . . .”).

<sup>121</sup> *See, e.g.,* Chen v. Almodovar, No. 26 Civ. 291, 2026 WL 172883, at \*2 (S.D.N.Y. Jan. 22, 2026); Garcia Pescador v. Dickey, No. 25-6070, 2026 WL 74188, at \*2 (S.D. Tex. Jan. 9, 2026); Rios Porras v. O’Neill, No. 25-6801, 2025 WL 3708900, at \*3 (E.D. Pa. Dec. 22, 2025).

<sup>122</sup> Pub. L. No. 119-1, 139 Stat. 3 (codified in scattered sections of 8 U.S.C.).

<sup>123</sup> *See, e.g.,* Maldonado v. Olson, 795 F. Supp. 3d 1134, 1151–52 (D. Minn. 2025).

alleged criminal activities.<sup>124</sup> Scores of federal judges ordered bond hearings or release for noncitizens they determined were not covered by section 235's mandatory-detention provision.<sup>125</sup>

The Trump Administration's novel, broad interpretation of detention under section 235 helps to explain both why immigration detention figures are skyrocketing and why so few of the detainees have criminal records. The Administration is expanding the application of this detention provision, arresting longtime residents when they attend scheduled ICE check-ins, U.S. Citizenship and Immigration Services (USCIS) interviews, or immigration court hearings.<sup>126</sup> The individuals most likely to be arrested in this manner are precisely those immigrants without recent or severe criminal convictions or other negative equities. They include people whose removal proceedings were administratively closed by prior administrations because, though they lack a pathway to lawful status, the equities in their individual cases favor allowing them to remain.<sup>127</sup> They include individuals who were screened by prior administrations and paroled into the country on humanitarian grounds.<sup>128</sup> They include the spouses of U.S. citizens in the final stages of visa processing who are detained on the basis of having overstayed visas many years earlier.<sup>129</sup> And they include some of the hundreds of thousands of individuals granted Temporary Protected Status (TPS) by prior administrations who have had that status terminated or vacated by this

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<sup>124</sup> The Laken Riley Act added a provision mandating detention for any noncitizen who "is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 212(a); and . . . is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person . . ." Pub. L. No. 119-1, § 2, 139 Stat. 3, 3 (2025) (codified at 8 U.S.C. § 1226(c)).

<sup>125</sup> Cheney, *supra* note 115. One judge has vacated as unlawful the Board of Immigration Appeals (BIA) decision upon which DHS is relying to justify its new interpretation of section 235. *Bautista v. Santacruz*, No. 25-cv-01873, 2026 WL 468284, at \*10 (C.D. Cal. Feb. 18, 2026).

<sup>126</sup> See, e.g., Pedro Camacho, *Immigrants Taken into Custody at Green Card Interviews as ICE Expands Arrest Tactics: Report*, LATIN TIMES (Dec. 23, 2025, at 11:20 ET), <https://www.latintimes.com/immigrants-taken-custody-green-card-interviews-ice-expands-arrest-tactics-report-592884> [<https://perma.cc/6733-TEHW>] (documenting the arrest of noncitizens who went to USCIS green card interviews); Trevor Hughes, *ICE Agents Deploy New Tactic: Arresting People as They Leave Mandatory Court Hearings*, USA TODAY (May 23, 2025, at 13:13 ET), <https://www.usatoday.com/story/news/nation/2025/05/22/ice-arrests-immigration-court-deportation-tactics/83792357007> [<https://perma.cc/3GCW-LG7M>] (documenting ICE arrests when immigrants paroled into the United States to present their asylum cases show up for mandatory check-ins); Emily Bregel, *Deportation Campaign Turns to Courthouses, Re-Opening Closed Cases*, ARIZ. DAILY STAR (Aug. 13, 2025), [https://tucson.com/news/local/subscriber/article\\_4do12be2-277f-455e-a394-6ec17daff320.html](https://tucson.com/news/local/subscriber/article_4do12be2-277f-455e-a394-6ec17daff320.html) [<https://perma.cc/N5RE-PCB2>] (discussing ICE arrests in cases that were previously administratively closed).

<sup>127</sup> See Bregel, *supra* note 126.

<sup>128</sup> Hughes, *supra* note 126.

<sup>129</sup> Miriam Jordan, *Green Card Interviews End in Handcuffs for Spouses of U.S. Citizens*, N.Y. TIMES (Nov. 27, 2025), <https://www.nytimes.com/2025/11/26/us/trump-green-card-interview-arrests.html> [<https://perma.cc/6D5H-NVW2>]; Camacho, *supra* note 126.

Administration.<sup>130</sup> The Administration has chosen the lowest hanging fruit for enforcement by targeting migrants who have tried to comply with the federal government's requirements.

*C. The Exertion of Substantial Political Control over Immigration Adjudication, Combined with Significant Gamesmanship in Federal Judicial Proceedings*

To speed the removal of long-term residents from the interior of the country, the Trump Administration has also focused on overhauling the federal apparatus charged with immigration adjudication. Decisional independence has always been limited for immigration judges, who for many decades now have served within the Department of Justice.<sup>131</sup> Like the Trump Administration, prior administrations also sought to align immigration adjudicators with their own preferences, either through the appointment of immigration judges or the removal of judges who did not share their ideological preferences.<sup>132</sup> Some of these measures have openly politicized the process of civil service appointments.<sup>133</sup> Others have clearly impinged on decisional independence.<sup>134</sup> The actions of the second Trump Administration in reshaping immigration adjudication, however, go far beyond even those problematic prior efforts.

Over the past year, more than a hundred immigration judges have been “fired or pushed out” of office.<sup>135</sup> Entire immigration courts have been closed.<sup>136</sup> The first immigration judges to be targeted were the recent Biden appointees who were still in their probationary period.<sup>137</sup> These appointees were more professionally diverse and thus were also more likely to have experience representing immigrants and criminal

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<sup>130</sup> Verónica Egui Brito & Syra Ortiz Blanes, *Trump Administration Detains Hundreds of Venezuelans with TPS Despite Court Order*, MIA. HERALD (Sep. 30, 2025, at 13:58 ET), <https://www.miamiherald.com/news/local/immigration/article312279987.html> [https://perma.cc/YLG8-SU7D].

<sup>131</sup> Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORN. L. REV. 369, 370 (2006) (arguing that executive reforms to immigration adjudication have discouraged independent decisionmaking).

<sup>132</sup> See, e.g., *id.* at 372–79 (discussing developments during the presidency of George W. Bush).

<sup>133</sup> *Id.* at 373–74.

<sup>134</sup> See, e.g., *id.* at 374.

<sup>135</sup> Alex Woodward, *More Than 100 Immigration Judges Fired or Pushed Out Across Country Since Trump Took Office*, THE INDEPENDENT (Dec. 3, 2025, at 22:24 GMT), <https://www.independent.co.uk/news/world/americas/us-politics/trump-immigration-court-judges-fired-b2877616.html> [https://perma.cc/3EZA-W7JF].

<sup>136</sup> See, e.g., Ximena Bustillo & Anusha Mathur, *Trump Administration to Shutter an Immigration Court, Adding to Judges' Backlog*, NPR (Jan. 13, 2026, at 13:51 ET), <https://www.npr.org/2026/01/13/g-s1-105679/san-francisco-immigration-court-closure> [https://perma.cc/44LH-FGYG].

<sup>137</sup> Ximena Bustillo & Anusha Mathur, *The DOJ Has Been Firing Judges with Immigrant Defense Backgrounds*, NPR (Nov. 6, 2025, at 05:00 ET), <https://www.npr.org/2025/11/06/g-s1-96437/trump-immigration-judges-fired> [https://perma.cc/F97J-ZE4L].

defendants than were the sitting immigration judges.<sup>138</sup> The Trump Administration has additionally fired other immigration court judges with higher-than-average rates of granting relief to the immigrants appearing before them.<sup>139</sup>

This purging and disempowerment of the immigration bench is particularly striking given that it is being done at a time when the immigration courts have a backlog of over 3.3 million cases<sup>140</sup> and the Administration needs to increase the speed of removals to meet its aggressive removal goals.<sup>141</sup> In order to compensate for EOIR's reduced capacity, the Administration has taken two steps. First, the Administration has sought to remove more people through informal channels, avoiding adjudication in immigration courts.<sup>142</sup> Previous administrations have leaned heavily on stipulated removal orders and reinstated removal orders to facilitate process-light removals of noncitizens with outstanding removal orders.<sup>143</sup> Those administrations also used expedited removal — a highly streamlined process with no judicial review beyond the immigration judge — to speed the removal of recent arrivals.<sup>144</sup> In these respects, the second Trump Administration is not an outlier. But the second Trump Administration has been unique in its broad efforts to use expedited removal proceedings against longtime residents.<sup>145</sup>

Second, the Administration has also distinguished itself in how it has attempted to staff immigration courts. After “fir[ing] or forc[ing] out

<sup>138</sup> *Id.* (finding that judges with immigration defense backgrounds made up 44% of those fired in 2025 compared to just 26% of those who remained on the bench); THIS AMERICAN LIFE: *The Hand that Rocks the Gavel*, at 30:25–30:53 (Apple Podcasts, Sep. 19, 2025).

<sup>139</sup> THIS AMERICAN LIFE, *supra* note 138, at 30:25–30:53 (reporting that remaining judges calculated whether fired judges were “more likely to grant asylum than not”); Priscilla Alvarez, *Inside the Trump Administration's Unprecedented Purge of Immigration Judges*, CNN (Oct. 6, 2025), <https://www.cnn.com/2025/10/06/politics/immigration-judges-fired-trump> [<https://perma.cc/NZ2E-HCZK>] (noting that thirty fired judges had asylum “grant rates of 30% or higher”).

<sup>140</sup> *Immigration Court Backlog*, TRAC: IMMIGR., <https://tracreports.org/phptools/immigration/backlog> [<https://perma.cc/PJ25-UJTG>].

<sup>141</sup> *Compare Outcomes of Immigration Court Proceedings*, *supra* note 8 (showing between ~35,000 and ~50,000 monthly removal orders over the last year), with Maria Sacchetti & Jacob Bogage, “One Million.” *The Private Goal Driving Trump's Push for Mass Deportations.*, WASH. POST (Apr. 12, 2025), <https://www.washingtonpost.com/immigration/2025/04/12/one-million-deportations-goal> [<https://perma.cc/929Y-2MQV>] (reporting on the Trump Administration's goal of deporting one million immigrants in a year).

<sup>142</sup> Muzaffar Chishti & Kathleen Bush-Joseph, *Trump Administration's Expansion of Fast-Track Deportation Powers Is Transforming Immigration Enforcement*, MIGRATION POL'Y INST. (Sep. 25, 2025), <https://www.migrationpolicy.org/article/trump-expedited-removal> [<https://perma.cc/SU65-URHE>].

<sup>143</sup> Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 479, 481 n.30 (2013); Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 357 (2018) [hereinafter Koh, *When Shadow Removals Collide*].

<sup>144</sup> See Koh, *When Shadow Removals Collide*, *supra* note 143, at 350.

<sup>145</sup> See *supra* pp. 1569, 1579.

roughly 100 immigration judges<sup>146</sup> and replacing top officials at EOIR,<sup>147</sup> the Administration deployed hundreds of military attorneys, or judge advocates general (JAGs), to work for the Justice Department as temporary immigration judges,<sup>148</sup> raising a whole new set of legal questions.<sup>149</sup> While it is not at all clear that these attorneys will share the Administration's zeal for speedy deportations, it is unfortunately the case that they lack familiarity with immigration law practice.<sup>150</sup> The Administration has also replaced the standard schedule of training, mentorship, and review of immigration judges with a minimal two-week training for reassigned JAGs, worsening the deficit in experience.<sup>151</sup>

The Board of Immigration Appeals (BIA) has also been reshaped by the Trump Administration, which has removed pro-immigrant Board members and reduced the power of the BIA to review decisions favorable to the government.<sup>152</sup> Between January 31, 2025, and February 13, 2026, the BIA published thirty-seven new opinions, and all but one of these opinions favored the government's position.<sup>153</sup>

In addition to firing and replacing judges who do not share the Administration's fervor for streamlined deportation, the Administration is also taking full advantage of the Attorney General's broad power under the immigration laws to determine which unpublished BIA decisions to publish and to exercise referral and review power over decisions of the

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<sup>146</sup> Woodward, *supra* note 135.

<sup>147</sup> Karen Musalo, Opinion, *Immigration Judges Should Be Real Judges, Not Political Pawns*, L.A. TIMES (Jan. 25, 2026, at 03:01 PT), <https://www.latimes.com/opinion/story/2026-01-25/immigration-judges-deportations-military-lawyers> [<https://perma.cc/PE6S-7UUB>].

<sup>148</sup> Ximena Bustillo, *Military Lawyers Called Up to Relieve a Shortfall in Immigration Judges*, NPR (Sep. 2, 2025, at 16:33 ET), <https://www.npr.org/2025/09/02/g-s1-86691/military-lawyers-immigration-judges-jag> [<https://perma.cc/6D35-GW7G>].

<sup>149</sup> For a discussion of the legal questions raised by this deployment, see Mark Nevitt & Margy O'Herron, *Soldiers in Robes: Why Military Lawyers Can Not and Should Not Serve as Immigration Judges*, JUST SEC. (Nov. 17, 2025), <https://www.justsecurity.org/124574/soldiers-in-robos-why-military-lawyers-can-not-and-should-not-serve-as-immigration-judges> [<https://perma.cc/5A4S-DTHQ>].

<sup>150</sup> See *id.*; Musalo, *supra* note 147.

<sup>151</sup> See Margy O'Herron, *Using Military Lawyers as Immigration Judges Is Ill-Advised and Potentially Illegal*, BRENNAN CTR. FOR JUST. (Sep. 29, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/using-military-lawyers-immigration-judges-ill-advised-and-potentially-illegal> [<https://perma.cc/RH59-RHGB>].

<sup>152</sup> Adriel D. Orozco, *DOJ Moves to End Administrative Immigration Appeals to Speed Up Mass Deportations*, AM. IMMIGR. COUNCIL (Feb. 13, 2026), <https://www.americanimmigrationcouncil.org/blog/justice-departments-end-immigration-appeals-deportations> [<https://perma.cc/68SD-V7DX>]; Britain Eakin, *Trump Admin to Nearly Halve Immigration Appeals Board*, LAW360 (Feb. 20, 2025, at 21:27 ET), <https://www.law360.com/articles/2300903/trump-admin-to-nearly-halve-immigration-appeals-board> [<https://perma.cc/NU4R-5739>].

<sup>153</sup> NAT'L IMMIGR. PROJECT, TRUMP 2.0 BIA/AG PRECEDENT DECISIONS (2026), <https://nipnlg.org/sites/default/files/2026-02/BIA-Decisions-Trump-2.0.pdf> [<https://perma.cc/CQB8-MYHA>] (listing thirty-seven "BIA Decision[s]" as having become precedent).

BIA.<sup>154</sup> During her first year in office, Attorney General Pam Bondi — along with Acting Attorney General James McHenry who preceded her — published thirty-seven BIA decisions that were previously unpublished, all of them disfavoring noncitizen litigants.<sup>155</sup> Attorney General Bondi has also used her referral and review power to overturn BIA precedent with which she disagrees, drafting more government-friendly rules and standards with each new decision.<sup>156</sup>

The Administration has coupled its rejection of the decisional independence of administrative courts with resistance to certain forms of Article III judicial oversight. The most dramatic example of this resistance occurred in the course of litigation over the Trump Administration's use of the Alien Enemies Act of 1798<sup>157</sup> to target hundreds of Venezuelan nationals for deportation to a maximum-security facility in El Salvador. In March of 2025, President Trump declared the members of Tren de Aragua, a Venezuelan gang, to be "Alien Enemies."<sup>158</sup> Administration officials then arrested and prepared to transport more than 200 Venezuelan men to a maximum-security prison in El Salvador without any process through which to determine whether they were, in fact, Tren de Aragua members, let alone whether they fell within the statutory meaning of an alien enemy.<sup>159</sup> Chief Judge Boasberg of the United States District Court for the District of Columbia ordered the government to refrain from transporting approximately 137 men out of the country for fourteen days.<sup>160</sup> The Administration disregarded the order, sending those men to El Salvador.<sup>161</sup> Government attorneys took the position that the judge's written order did not apply to already-departed

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<sup>154</sup> 8 C.F.R. § 1003.1(g)(3), (h) (2025). For a discussion of the power, including its extraordinary use in the first Trump Administration, see SARAH PIERCE, *MIGRATION POL'Y INST., OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW* 2, 12–13 (2021), [https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf) [<https://perma.cc/M33E-CAH9>].

<sup>155</sup> NAT'L IMMIGR. PROJECT, *supra* note 153 (listing thirty-seven decisions as having become precedent by designation from Attorney General Bondi).

<sup>156</sup> See, e.g., Maria Sacchetti & Jeremy Roebuck, *Bondi Decisions Limit Asylum for Victims of Domestic Abuse, Gang Violence*, WASH. POST (Sep. 3, 2025), <https://www.washingtonpost.com/national-security/2025/09/03/bondi-immigration-families-women-asylum> [<https://perma.cc/9JTV-3LX3>]. For a critique of this power, see Stella Burch Elias & Paul Gowder, *Against Attorney General Self-Referral in Immigration Law*, 109 MINN. L. REV. 2331, 2382–85, 2385 n.226 (2025).

<sup>157</sup> Ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24).

<sup>158</sup> Proclamation No. 10,903, 90 Fed. Reg. 13033, 13034 (Mar. 14, 2025).

<sup>159</sup> Julie Turkewitz et al., *"You Are All Terrorists": Four Months in a Salvadoran Prison*, N.Y. TIMES (Nov. 8, 2025), <https://www.nytimes.com/2025/11/08/world/americas/el-salvador-prison-migrants.html> [<https://perma.cc/2WNA-2RPR>].

<sup>160</sup> See *J.G.G. v. Trump*, No. 25-766, 2025 WL 825116, at \*1 (D.D.C. Mar. 15, 2025) (minute order); Marianne LeVine et al., *White House Official Says 137 Immigrants Deported Under Alien Enemies Act*, WASH. POST (Mar. 16, 2025), <https://www.washingtonpost.com/immigration/2025/03/16/alien-enemies-act-venezuela-el-salvador-prison> [<https://perma.cc/HY36-PLU7>].

<sup>161</sup> See LeVine et al., *supra* note 160.

planes outside of U.S. airspace.<sup>162</sup> Chief Judge Boasberg has pursued contempt proceedings against the government's lawyers,<sup>163</sup> and the Trump Administration unsuccessfully sought to remove Chief Judge Boasberg from the case.<sup>164</sup>

It turned out that one of the men sent to El Salvador, Kilmar Armando Abrego Garcia, not only was not Venezuelan (he is Salvadoran), but also had an order of protection against being returned to El Salvador.<sup>165</sup> Even after the Administration admitted that it had made a mistake in sending Abrego Garcia to El Salvador, it initially delayed bringing him home, arguing that it had no power to make the Salvadoran government return him.<sup>166</sup> After a good deal of political pressure was brought to bear, the Administration brought Abrego Garcia home, only to file dubious criminal charges against him,<sup>167</sup> and then to seek to remove him to a third country.<sup>168</sup>

The Administration's practice of removing to third countries individuals who have court-ordered withholding of removal or Convention Against Torture (CAT) protections barring their return to their home countries is also unprecedented in its scale.<sup>169</sup> In some cases, third-

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<sup>162</sup> Marc Caputo, *Exclusive: How the White House Ignored a Judge's Order to Turn Back Deportation Flights*, AXIOS (Mar. 16, 2025), <https://www.axios.com/2025/03/16/trump-white-house-defy-judge-deport-venezuelans> [<https://perma.cc/DY32-QC9X>].

<sup>163</sup> See *J.G.G. v. Trump*, 778 F. Supp. 3d 24, 30 (D.D.C. 2025) (finding probable cause for criminal contempt), *mandamus granted and vacated*, 147 F.4th 1044 (D.C. Cir. 2025), *reh'g en banc denied*, 2025 WL 3198891 (D.C. Cir. Nov. 14, 2025), and *admin. stay granted*, 2025 WL 3623076 (D.C. Cir. Dec. 12, 2025).

<sup>164</sup> See *In re* Complaint of Jud. Misconduct, Complaint No. 06-25-90173, 2025 WL 4103506, at \*1, \*3 (6th Cir. Jud. Council Dec. 19, 2025) (Sutton, C.J.) (denying government's judicial misconduct complaint against Chief Judge Boasberg).

<sup>165</sup> Ben Finley, *An "Administrative Error" Sent a Maryland Man to an El Salvador Prison, ICE Says*, AP NEWS (Apr. 1, 2025, at 17:39 ET), <https://apnews.com/article/el-salvador-deportation-maryland-man-trump-error-818a0fa1218de714448edcb5be1f7347> [<https://perma.cc/G8BJ-TZT8>].

<sup>166</sup> See *id.*; Zolan Kanno-Youngs, *El Salvador's Leader Says He Won't Return Wrongly Deported Maryland Man*, N.Y. TIMES (Apr. 15, 2025), <https://www.nytimes.com/2025/04/14/us/politics/trump-bukele-prison-deported-migrants.html> [<https://perma.cc/LK58-PPLG>].

<sup>167</sup> Ximena Bustillo, *Kilmar Abrego Garcia, Wrongly Deported to El Salvador, Is Back in the U.S. to Face Smuggling Charges*, NPR (June 6, 2025, at 18:48 ET), <https://www.npr.org/2025/06/06/nx-si-5425509/kilmar-abrego-garcia-el-salvador-deport-cecot-maryland-ice> [<https://perma.cc/SQR3-MBBR>].

<sup>168</sup> Jordan Fischer & Katie Lusso, *"I Have Seen My Family for the First Time in More Than 160 Days" | Kilmar Abrego Garcia Released, Reunited with Family*, WUSA9 (Aug. 22, 2025, at 23:00 ET), <https://www.wusa9.com/article/news/dmv-immigration/kilmar-abrego-garcia-is-free-wrongfully-deported-maryland-man-el-salvador-cecot-trump-dhs-tennessee-human-smuggling/65-3caf9b36-4a59-4175-b728-16133c6a7b5a> [<https://perma.cc/6ZXL-XQDB>].

<sup>169</sup> See AM. IMMIGR. COUNCIL, *THIRD-COUNTRY REMOVALS IN UNITED STATES IMMIGRATION POLICY* cover page, 2 (2025), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/12/Third-Country-Removals-Factsheet\\_1225.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/12/Third-Country-Removals-Factsheet_1225.pdf) [<https://perma.cc/RTE6-35U9>]. On the "unprecedented" nature of this use of third-party removal, see Matthew Boaz, *Due Process in Third Country Removals*, LAWFARE (Dec. 1, 2025, at 10:56 ET), <https://www.lawfaremedia.org/article/due-process-in-third-country-removals> [<https://perma.cc/SYW8-3PJ3>] ("A report from 2017, the first year of the first Trump administration, found that a mere 21 people with

country recipients of U.S. deportees are returning those individuals to the countries against which they have orders of protection, showing how third-country removals can be used to circumvent CAT and refugee protections.<sup>170</sup> Federal courts are now confronting the question of whether they have the power to reverse these third-country removals.<sup>171</sup>

Administration officials are also defying judges in less extraordinary ways, including through the failure to release immigrant detainees within the United States after federal district court judges have ordered the Administration to release those detainees or provide them bond hearings.<sup>172</sup> It may be because of a lack of administrative capacity to oversee its own ambitious growth of the detention industry;<sup>173</sup> it may be because Administration officials do not think that they must respond to district courts.<sup>174</sup> In either case, it is extraordinary.

*D. The Discriminatory Reconfiguration (and Outright Elimination)  
of Lawful Immigration Pathways*

The Trump Administration has also made fundamental changes to processes governing lawful immigration and citizenship acquisition.

withholding of removal had been removed to a third country. In the first 10 months of the second Trump administration, more than 7,500 individuals have been removed from the United States to a nation of which they are not a national or citizen.” (citations omitted).

<sup>170</sup> See AM. IMMIGR. COUNCIL, *supra* note 169, at 5 (calling this practice “chain refoulement”).

<sup>171</sup> See, e.g., *D.A. v. Noem*, 800 F. Supp. 3d 43, 48 (D.D.C. 2025) (“[D]espite the danger Plaintiffs now face as a result of Defendants’ actions, . . . the court cannot grant Plaintiffs the relief they seek because Plaintiffs have not met their burden to establish that this court has jurisdiction to order such relief.”); Sudhin Thanawala, *Judge Says U.S. Must Help Return Some of the Venezuelans Deported to El Salvador Prison*, PBS NEWS (Feb. 13, 2026, at 14:11 ET), <https://www.pbs.org/newshour/politics/judge-says-u-s-must-help-return-some-of-the-venezuelans-deported-to-el-salvador-prison> [<https://perma.cc/A6WW-P692>].

<sup>172</sup> See, e.g., *T.R. v. Noem*, No. 26-cv-0107, 2026 WL 232015, at \*1 (D. Minn. Jan. 28, 2026); *id.* at \*2–4 (appending a list of ninety-six court orders in which the Administration failed to comply with judicial orders to release immigrant detainees or provide a bond hearing); Nate Raymond, *US Judge “Worried” About Immigration Courts Not Complying with Rulings Requiring Bond Hearings*, REUTERS (Jan. 20, 2026, at 15:55 ET), <https://www.reuters.com/legal/government/us-judge-worried-about-immigration-courts-not-complying-with-rulings-requiring-2026-01-20> [<https://perma.cc/8CEJ-55HB>]; Mitch Smith et al., *Judge Vows to End Trump Administration’s Noncompliance “One Way or Another,”* N.Y. TIMES (Feb. 26, 2026), <https://www.nytimes.com/2026/02/26/us/minnesota-judge-immigration.html> [<https://perma.cc/RP7P-AUT3>].

<sup>173</sup> Chris Geidner, *The Unfathomable Minnesota Transcript that Must Be Read, as It Tells the Reality of America Today*, LAW DORK (Feb. 4, 2026), <https://www.lawdork.com/p/the-minnesota-julie-le-show-cause-transcript> [<https://perma.cc/U356-WX4B>] (relaying an Administration lawyer’s statement that she would like to be held in contempt so that she can get some sleep).

<sup>174</sup> See Transcript of Oral Argument at 63, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (Nos. 24A884, 24A885 & 24A886), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2024/24a884\\_7lhn.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_7lhn.pdf) [<https://perma.cc/6V8F-6RHP>] (“JUSTICE BARRETT: So you would respect the opinions and the judgments of the Supreme Court, and you’re saying you would respect the judgment but not necessarily the opinion of a lower court. GENERAL SAUER: . . . [M]y understanding is that [there] has not been a categorical practice in the way [the government has] respect for the precedents and the judgments of the Supreme Court . . .”).

The second Trump Administration froze the adjudication of many asylum claims.<sup>175</sup> It also reduced the annual refugee admission quota to 7,500, down from the Biden Administration's cap of 125,000.<sup>176</sup> This is "the lowest [cap] since the U.S. refugee program was established in 1980."<sup>177</sup> Tellingly, these doors are closing at the same time that the Administration is opening the door to South African Afrikaners, granting them refugee admission on the basis of alleged discrimination in South Africa,<sup>178</sup> despite controversy over the accuracy of such allegations of discrimination<sup>179</sup> as well as the fact that ordinary discrimination has never sufficed to establish "persecution" under the INA's requirements for refugee designation.<sup>180</sup> These Afrikaners are being admitted as refugees at the very time that Attorney General Bondi is publishing as precedential BIA decisions that make it more difficult for other asylum applicants to qualify for relief. One recent, illustrative opinion of the Attorney General's concluded that targeted death threats on account of political opinion, except by those with the "immediate ability to carry them out,"<sup>181</sup> do not "rise to the level of persecution"<sup>182</sup> necessary for a Peruvian national to establish a basis for asylum protection in the United States.<sup>183</sup>

In general, asylum grants have plummeted under President Trump. Asylum-grant rates fell by half from August 2024 to August 2025, with the overall grant rate dropping to only 19.2%.<sup>184</sup>

The Administration is also imposing travel bans on nationals of numerous countries. This began with entry restrictions that applied to

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<sup>175</sup> Madeleine Ngo, *Here's How Trump Has Made It Harder for Migrants Seeking Asylum and Citizenship*, N.Y. TIMES (Dec. 5, 2025), <https://www.nytimes.com/2025/12/05/us/politics/trump-immigration-changes.html> [<https://perma.cc/TF7B-UKFZ>].

<sup>176</sup> Zolan Kanno-Youngs & Hamed Aleaziz, *Trump Cuts Refugee Admissions and Prioritizes White South Africans*, N.Y. TIMES (Oct. 30, 2025), <https://www.nytimes.com/2025/10/30/us/politics/trump-refugee-admissions-white-south-africans.html> [<https://perma.cc/NLC2-ZGDA>].

<sup>177</sup> Ximena Bustillo, *Trump Administration Sets Lowest-Ever Cap on Refugee Admissions to U.S.*, NPR (Oct. 30, 2025, at 17:19 ET), <https://www.npr.org/2025/10/30/g-s1-95823/trump-administration-sets-lowest-ever-cap-on-refugee-admissions> [<https://perma.cc/DT7L-TJCC>].

<sup>178</sup> Exec. Order No. 14,204, 90 Fed. Reg. 9497, 9497 (Feb. 7, 2025) (directing the Secretary of State and Secretary of Homeland Security to "prioritize" refugee resettlement "for Afrikaners in South Africa who are victims of unjust racial discrimination").

<sup>179</sup> See, e.g., *Government of South Africa Notes the USA Executive Order*, DEP'T OF INT'L RELS. & COOP.: REPUBLIC OF S. AFR. (Feb. 8, 2025), <https://dirco.gov.za/government-of-south-africa-notes-the-usa-executive-order> [<https://perma.cc/9M7J-8Y7C>] ("It is of great concern that the foundational premise of this order lacks factual accuracy and fails to recognise South Africa's profound and painful history of colonialism and apartheid.")

<sup>180</sup> See USCIS, REFUGEE, ASYLUM & INT'L OPERATIONS DIRECTORATE, DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION 16 & n.53 (2025), [https://www.uscis.gov/sites/default/files/document/foia/Persecution\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf) [<https://perma.cc/M3MU-HKC2>].

<sup>181</sup> E-M-F-S-, 29 I. & N. Dec. 379, 384 (B.I.A. 2026).

<sup>182</sup> *Id.* at 386.

<sup>183</sup> *Id.* at 385–86.

<sup>184</sup> *Immigration Court Asylum Grant Rates Cut in Half*, TRAC (Nov. 18, 2025), <https://tracereports.org/reports/766> [<https://perma.cc/9Q2T-9G2E>].

nineteen countries, predominantly affecting countries on the African continent or in the Middle East.<sup>185</sup> These bans relied<sup>186</sup> on the same provision, INA section 212(f),<sup>187</sup> that President Trump had used to ban the nationals of predominantly Muslim countries from entry during his first term in office<sup>188</sup> — a ban the Supreme Court upheld in *Trump v. Hawaii*.<sup>189</sup> The Trump Administration is also citing that same provision as the legal basis for its imposition of \$100,000 fees for each employee for whom a U.S. employer seeks an H-1B visa.<sup>190</sup>

More recently, the State Department suspended visa processing for intending immigrants and nonimmigrants from seventy-five countries, relying on the ground that immigrants who are likely to become public charges are inadmissible.<sup>191</sup> The Administration is applying the INA’s “public-charge” provision, section 212(a)(4),<sup>192</sup> to justify these exclusions.<sup>193</sup> Historically, these grounds have been imposed on a case-by-case basis to individuals who meet the (shifting<sup>194</sup>) regulatory definition of someone likely to become a public charge.<sup>195</sup> But the Administration now seeks to apply the public-charge bar to whole countries based on

<sup>185</sup> See Proclamation No. 10,949, 90 Fed. Reg. 24497, 24499 (June 4, 2025).

<sup>186</sup> See *id.* at 24498.

<sup>187</sup> 8 U.S.C. § 1182(f).

<sup>188</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

<sup>189</sup> 138 S. Ct. 2392 (2018); *id.* at 2408, 2423.

<sup>190</sup> See Proclamation No. 10,973, 90 Fed. Reg. 46027, 46028 (Sep. 19, 2025).

<sup>191</sup> *Immigrant Visa Processing Updates for Nationalities at High Risk of U.S. Public Benefits Reliance*, U.S. DEP’T OF STATE (Feb. 2, 2026), <https://travel.state.gov/content/travel/en/News/visas-news/immigrant-visa-processing-updates-for-nationalities-at-high-risk-of-public-benefits-usage.html> [<https://perma.cc/V2PX-E92A>] [hereinafter *Immigrant Visa Processing Updates*]; see also Madeleine Ngo, *Trump Administration to Halt Immigrant Visa Processing for 75 Countries*, N.Y. TIMES (Jan. 14, 2026), <https://www.nytimes.com/2026/01/14/us/politics/trump-suspends-visa-75-countries.html> [<https://perma.cc/78N3-8FE9>] (reporting on same).

<sup>192</sup> 8 U.S.C. § 1182(a)(4).

<sup>193</sup> See Ngo, *supra* note 191; 8 U.S.C. § 1182(a)(4)(A) (deeming inadmissible any alien “likely at any time to become a public charge”). Even when applied on an individualized basis, exclusions on public-charge grounds have operated in ways that discriminate against individuals with disabilities and have deep nativist and eugenic roots. HIDEAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY 202–04* (2017) (describing the origins of the public-charge rule and plenary executive power over its implementation as a direct result of anti-Irish nativism in the nineteenth century); Tania N. Valdez, *What the “Good Moral Character” Test Reveals About Eugenics in Immigration Law*, 105 B.U. L. REV. 1491, 1499 (2025) (“The ‘public charge’ ground of exclusion was (and is) commonly used to exclude people with disabilities.”); see Angélica Guevara & Tania N. Valdez, *Exclusionary Ableism*, 39 GEO. IMMIGR. L.J. 65, 74 (2024) (quoting Nermeen Arastu & Qudsiya Naqui, *Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. REV. 236, 274 (2024)) (similar).

<sup>194</sup> See Guevara & Valdez, *supra* note 193, at 74.

<sup>195</sup> See *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1979 (2020) (describing a public-charge determination in an individual case as a “pure question of fact”); see also Joseph Daval, Note, *The Problem with Public Charge*, 130 YALE L.J. 998, 1003 (2021) (recording that “[i]n making the determination, agency officers are instructed to consider the ‘totality of [the] circumstances’ to decide whether a person is likely to become a public charge in the future” (second alteration in original) (quoting *Public Charge Fact Sheet*, USCIS (July 31, 2020), <https://www.uscis.gov/news/public-charge-fact-sheet> [<https://perma.cc/EXG3-LUGM>])).

the argument that migrants from these countries are more likely to become public charges.<sup>196</sup> Recent Supreme Court decisions may impede many legal challenges to this new generation of entry bans, since the Court's 2024 decision in *Department of State v. Muñoz*<sup>197</sup> suggests that citizens whose family members are barred from entry have no constitutional basis to challenge their family members' exclusion.<sup>198</sup>

As with the asylum ban, the Administration is simultaneously attempting to increase barriers to entry for some immigrants while creating new legal-entry pathways for groups favored by the Administration. In the case of asylum, the Administration seeks to streamline admission for White South Africans, as previously mentioned,<sup>199</sup> and has also floated the idea of granting asylum to right-wing Europeans.<sup>200</sup> For wealthy prospective immigrants, the Administration has purported to create a "Trump Gold Card" that will allow entry to those who purchase admission for \$1 million and is promising the rollout of a "Trump Platinum Card," which will allow nonnationals to reside in the United States for 270 days a year without paying "U.S. taxes on non-U.S. income."<sup>201</sup>

The combination of closed doors and new pathways presents a disturbing pattern. Immigrants from most countries are routinely being denied access to asylum and other lawful pathways to immigrate into the United States.<sup>202</sup> At the same time, the Administration is bending the rules governing asylum to create new pathways for immigrant populations that the Administration perceives as "White,"<sup>203</sup> and creating new pathways for the admission of hyper-wealthy immigrants upon dubious statutory authority.<sup>204</sup>

For immigrants already lawfully present in the country, the Administration is also creating a new set of barriers to legal status and impeding pathways to citizenship for disfavored groups. The Administration

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<sup>196</sup> See *Immigrant Visa Processing Updates*, *supra* note 191.

<sup>197</sup> 144 S. Ct. 1812 (2024).

<sup>198</sup> See *id.* at 1827.

<sup>199</sup> See *supra* p. 1587.

<sup>200</sup> Zolan Kanno-Youngs & Hamed Aleaziz, *Trump Considers Overhaul of Refugee System that Would Favor White People*, N.Y. TIMES (Oct. 15, 2025), <https://www.nytimes.com/2025/10/15/us/politics/trump-refugee-white-people.html> [<https://perma.cc/BKL4-JRWR>].

<sup>201</sup> *The Trump Gold Card Is Here.*, TRUMP GOLD CARD, <https://trumpcard.gov> [<https://perma.cc/EU63-BS8N>].

<sup>202</sup> AM. IMMIGR. COUNCIL, *supra* note 21, at 10.

<sup>203</sup> Kanno-Youngs & Aleaziz, *supra* note 200.

<sup>204</sup> *The Trump Gold Card is Here.*, *supra* note 201. The program appears to grant EB-1 or EB-2 immigrant visas in exchange for money. Madeleine Ngo, *Trump Administration Opens Applications for Million-Dollar Visas*, N.Y. TIMES (Dec. 10, 2025), <https://www.nytimes.com/2025/12/10/us/politics/trump-gold-card.html> [<https://perma.cc/XFS5-W3JW>]. It is not clear whether the individuals making payments qualify for these visas as required by statute or regulation. It is also not clear how the issuance of the card squares with the statute's system of priorities and caps. See INA § 203(b)(1)–(2), 8 U.S.C. § 1153(b)(1)–(2) (limiting visas to "a number not to exceed 28.6 percent of such worldwide level"); Complaint for Declaratory and Injunctive Relief at 15, *Am. Ass'n of Univ. Professors v. DHS*, No. 26-cv-00300 (D.D.C. filed Feb. 3, 2026).

has reduced the term of work authorization for those asylum seekers previously paroled into the country under President Biden and his predecessors, requiring them to renew their permits every eighteen months rather than every five years.<sup>205</sup> This change is occurring at the very time that reductions in the number of immigration judges,<sup>206</sup> not to mention freezes on asylum processing,<sup>207</sup> are likely to substantially increase processing times for asylum seekers.<sup>208</sup> The Administration is also reopening removal cases that were previously closed administratively,<sup>209</sup> looking for new evidence upon which to revoke previously issued grants of asylum and other forms of status,<sup>210</sup> arresting refugees who fail to naturalize at the very first moment they are eligible to do so,<sup>211</sup> and filing motions to pretermite asylum cases on the ground that the claims should be adjudicated in countries the Administration has designated “safe third countries.”<sup>212</sup>

Hundreds of thousands of immigrants in the United States, including immigrants from Afghanistan, Cameroon, Ethiopia, Haiti, Myanmar, Sudan, Syria, and Venezuela, have had their TPS protections revoked or vacated by the Administration,<sup>213</sup> though these status terminations are still being contested in court.<sup>214</sup> Through these legal changes, the Administration seeks to make hundreds of thousands of immigrants

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<sup>205</sup> Madeleine Ngo, *Trump Officials Cut Length of Work Permits for Asylum Seekers and Refugees*, N.Y. TIMES (Dec. 4, 2025), <https://www.nytimes.com/2025/12/04/us/politics/work-permits-asylum-refugees-trump.html> [<https://perma.cc/Z796-NNBD>].

<sup>206</sup> Emily Ngo, *Immigration Courts Thrown into Chaos as Trump Administration Purges Dozens of Judges*, POLITICO (Dec. 6, 2025, at 11:59 ET), <https://www.politico.com/news/2025/12/06/trump-immigration-court-judge-purges-00679376> [<https://perma.cc/SE6E-BCME>].

<sup>207</sup> Ngo, *supra* note 175.

<sup>208</sup> See Ximena Bustillo & Sarah McCammon, *Immigration Judges Are Being Fired Despite Backlog of Immigration Cases*, NPR (July 15, 2025, at 04:59 ET), <https://www.npr.org/2025/07/15/nx-s1-5467710/immigration-judges-are-being-fired-despite-backlog-of-immigration-cases> [<https://perma.cc/4MYP-94GW>].

<sup>209</sup> Lucia Walinchus et al., *How the Trump Administration Pushed to Reopen Immigration Cases, Putting Thousands at Risk of Deportation*, NBC NEWS (Dec. 18, 2025, at 10:44 ET), <https://www.nbcnews.com/news/us-news/immigration-courts-reopened-cases-trump-deportations-rcna248182> [<https://perma.cc/XF8M-GML6>].

<sup>210</sup> See Ximena Bustillo, *Refugees in the U.S. Could Be Arrested Under a New Immigration Memo*, NPR (Feb. 19, 2026, at 10:10 ET), <https://www.npr.org/2026/02/19/g-s1-110721/trump-administration-refugees-memo-arrest> [<https://perma.cc/JC38-JHDQ>].

<sup>211</sup> U.H.A. v. Bondi, No. 26-cv-00417, 2026 WL 558824, at \*27 (D. Minn. Feb. 27, 2026) (enjoining this practice).

<sup>212</sup> Jazmine Ulloa et al., *Trump Administration Pushes Asylum Seekers to Apply in Other Countries*, N.Y. TIMES (Dec. 20, 2025), <https://www.nytimes.com/2025/12/20/us/trump-asylum-third-countries.html> [<https://perma.cc/M6LZ-EDDL>].

<sup>213</sup> NAT'L IMMIGR. F., TEMPORARY PROTECTED STATUS (TPS): FACT SHEET 5-7 (2026), [https://forumtogether.org/wp-content/uploads/2026/02/Temporary-Protected-Status-Fact-Sheet-February-2026\\_2.pdf](https://forumtogether.org/wp-content/uploads/2026/02/Temporary-Protected-Status-Fact-Sheet-February-2026_2.pdf) [<https://perma.cc/6KBX-2A4Y>].

<sup>214</sup> See, e.g., Camilo Montoya-Galvez, *Judge Voids Decision to End Legal Status of 60,000 Immigrants from Honduras, Nepal and Nicaragua*, CBS NEWS (Jan. 1, 2026, at 10:22 ET), <https://www.cbsnews.com/news/judge-temporary-protected-status-honduras-nepal-nicaragua> [<https://perma.cc/WDU4-9CNX>].

“illegal” by taking away the liminal statuses<sup>215</sup> that they had until recently.<sup>216</sup> And once illegalized, these individuals become the targets of the Administration’s ramped-up detention and removal efforts.<sup>217</sup>

Individuals present on student visas and green cards also have faced new waves of scrutiny and deportation risk on the basis of their political opinions. The Administration has charged both individuals on student visas<sup>218</sup> and lawful permanent residents<sup>219</sup> with removability on foreign policy grounds based on their expressed pro-Palestinian views. And individuals on the cusp of naturalization have been denied access to citizenship through arbitrary cancellations of naturalization ceremonies.<sup>220</sup>

The threats to citizenship extend beyond those who are still trying to secure it. The Administration has begun to aggressively threaten U.S. citizens with denaturalization.<sup>221</sup> President Trump’s initial threats in this regard have been aimed at Somalis in Minnesota.<sup>222</sup> But planned denaturalizations are likely to be broader. U.S. Citizenship and Immigration Services field offices have been asked to identify 100 to 200 cases

<sup>215</sup> Professor Cecilia Menjivar originally developed the notion of “liminal legality” to refer to the status of Central American migrants relegated to unstable TPS protections that offer no path to citizenship and require periodic renewal and reapplication. See Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 1015–16 (2006). The term has since been used to describe a broad array of migrant residents with legal forms of protection that do not amount to a legal immigration-status category and do not afford a path to citizenship, such as DACA. See, e.g., Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 719 (2015). Other authors have referred to such status categories as “twilight status.” See, e.g., DAVID A. MARTIN, MIGRATION POL’Y INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 2 (2005) (emphasis omitted), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_PB\\_6.05.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_PB_6.05.pdf) [<https://perma.cc/C33V-AE3D>].

<sup>216</sup> See NAT’L IMMIGR. F., *supra* note 213, at 3–5.

<sup>217</sup> See *supra* notes 115–30, 144–45 and accompanying text (discussing the expansion of mandatory detention and expedited removal against these newly illegalized populations).

<sup>218</sup> Jonah E. Bromwich, *Immigration Judge Says Trump Administration Cannot Deport Tufts Student*, N.Y. TIMES (Feb. 10, 2026), <https://www.nytimes.com/2026/02/10/us/immigration-judge-tufts-student-rumeysa-ozturk.html> [<https://perma.cc/7LZM-NTY8>]; see Peter Charalambous et al., *Some Foreign College Students Are Being Targeted for Deportation. What Rights Do They Have?*, ABC NEWS (Mar. 31, 2025, at 16:23 ET), <https://abcnews.com/US/foreign-college-students-targeted-deportation-rights/story?id=120262362> [<https://perma.cc/6AG3-YLWG>].

<sup>219</sup> See, e.g., Michael Wilson et al., *How a Columbia Student Activist Landed in Federal Detention*, N.Y. TIMES (Mar. 17, 2025), <https://www.nytimes.com/2025/03/16/nyregion/mahmoud-khalil-columbia-university.html> [<https://perma.cc/K2CQ-EDHY>]; Jonah E. Bromwich, *Mahmoud Khalil Asks Federal Judge to Intercede After Deportation Order*, N.Y. TIMES (Sep. 18, 2025), <https://www.nytimes.com/2025/09/18/nyregion/mahmoud-khalil-deportation-order.html> [<https://perma.cc/EW4A-FV5J>].

<sup>220</sup> See Jazmine Ulloa & Orlando Mayorquín, *One Step from Citizenship, Some Find It Eludes Their Grasp*, N.Y. TIMES (Dec. 8, 2025), <https://www.nytimes.com/2025/12/06/us/immigration-citizenship-naturalization-trump.html> [<https://perma.cc/G7WL-T68H>].

<sup>221</sup> AM. IMMIGR. LAWS. ASS’N, POLICY BRIEF: DENATURALIZATION AND THE ADMINISTRATION’S TARGETING OF U.S. CITIZENS 1 (2025), <https://assets.aila.org/files/8off5383-1333-41c8-8bb9-c7ae7b6a1980/25072102.pdf> [<https://perma.cc/V23V-2WSD>].

<sup>222</sup> Callum Sutherland, *Trump Threatens to Denaturalize U.S. Citizens If They “Deserve” It. Experts Raise Grave Concerns About Future*, TIME (Jan. 12, 2026, at 07:29 ET), <https://time.com/7344931/trump-threatens-to-denaturalize-us-citizens> [<https://perma.cc/X8KM-W6B2>].

for denaturalization each month.<sup>223</sup> The other component of these efforts to restrict citizenship is the Administration's ongoing defense of President Trump's January 2025 order purporting to deny birthright citizenship to children born in the United States to parents who either lack lawful immigration status or are present on student visas.<sup>224</sup>

## II. CONSEQUENCES

The current Administration's shifts in immigration policy are of a piece with a broader reconfiguration of presidential power in at least three notable ways. First, the changes in immigration policy under President Trump signal an obvious break from the nation's post-1965 commitment to a formally nondiscriminatory system of immigrant admission. As such, they are concordant with a larger set of policy moves away from post-Civil Rights era antidiscrimination commitments. Second, the changes are part of a larger reconfiguration of executive authority through the erosion of separation of powers principles. Third, recent developments in immigration policy embody the Trump Administration's general rejection of a rule-based system of international law. Recent developments in immigration policy constitute both a microcosm and a staging ground for broader antidemocratic shifts in the Trump Administration's governance strategy.

### A. *The End of Antidiscrimination?*

The Immigration and Nationality Act of 1965<sup>225</sup> (1965 Immigration Act) eliminated race-based quotas and signaled a commitment to formal equality in the administration of federal immigration law.<sup>226</sup> The promise of formal equality has long run up against the reality that the law generates persistent patterns of racial discrimination,<sup>227</sup> but the promise

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<sup>223</sup> Hamed Aleaziz, *Trump Administration Aims to Strip More Foreign-Born Americans of Citizenship*, N.Y. TIMES (Dec. 17, 2025), <https://www.nytimes.com/2025/12/17/us/politics/trump-immigration-citizenship-denaturalization.html> [<https://perma.cc/K2RB-FAT6>].

<sup>224</sup> Exec. Order No. 14,160, 90 Fed. Reg. 8449, 8449 (Jan. 20, 2025); *see also* Petition for a Writ of Certiorari Before Judgment at I, *Trump v. Barbara*, No. 25-365 (U.S. filed Sep. 26, 2025) (seeking certiorari on whether President Trump's birthright citizenship order "complies on its face with the Citizenship Clause").

<sup>225</sup> Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

<sup>226</sup> Gabriel J. Chin & Rose Cuison Villazor, *Introduction* to THE IMMIGRATION AND NATIONALITY ACT OF 1965, at 1, 1-2 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

<sup>227</sup> *See* Rose Cuison Villazor, *The 1965 Immigration Act: Family Unification and Nondiscrimination Fifty Years Later*, in THE IMMIGRATION AND NATIONALITY ACT OF 1965, *supra* note 226, at 200, 213-20 (discussing the discriminatory impact that country caps have had on intending immigrants from some Asian countries). *See generally* Jennifer M. Chacón, *Immigration and Race*, in THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon W. Carbado et al. eds., online ed. 2022) (discussing how both quantitative and qualitative exclusions have adversely affected Mexican migrants and other groups).

itself was significant.<sup>228</sup> The 1965 Immigration Act was part of a broader set of legislative enactments, which include the Civil Rights Act of 1964<sup>229</sup> and the Voting Rights Act of 1965.<sup>230</sup> Collectively, this legislation provided a set of legal frameworks and tools to address longstanding and persistent patterns of racial discrimination in the United States.<sup>231</sup> The statutes sought to recapture the Fourteenth Amendment's promise of equality, which had been substantially weakened by judicial interpretation.<sup>232</sup>

The second Trump Administration has broken decisively and deliberately with the spirit of the 1960s civil rights laws, including the 1965 Immigration Act. In the immigration sphere, this has taken the form of a deliberate rejection of the formal neutrality of the 1965 Immigration Act, with the Administration instead enacting a series of policies that disfavor immigrants from countries with populations constructed as non-White in the United States.<sup>233</sup> The Administration has also explicitly stated a preference for the immigration of White immigrants from countries outside of Europe on the pretext that the non-White majority is “persecuting” White citizens.<sup>234</sup> The Administration's decisions to revoke, vacate, and rescind TPS and humanitarian parole have heavily disfavored migrants from Latin America and Africa, and those disfavored immigrant groups are adding to swelling populations in the nation's immigration detention centers.<sup>235</sup> And the government is

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<sup>228</sup> Chin & Cuisson Villazor, *supra* note 226, at 4 (“[W]hen Congress passed the 1965 Immigration Act, it intended to end racism as an idea as well as a formal matter. Accordingly, it deserves to be considered a sibling of other celebrated (albeit imperfect) [civil rights] laws . . .”).

<sup>229</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5 and 42 U.S.C.).

<sup>230</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.); see Chin & Cuisson Villazor, *supra* note 226, at 4.

<sup>231</sup> Chin & Cuisson Villazor, *supra* note 226, at 1–2; Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOU. L. REV. 1, 2 (2007) (“It took the Civil Rights Movement of the 1950s and 1960s to resuscitate the Fourteenth and Fifteenth Amendments’ promise of political integration.”); Kenneth W. Mack, “Foreword: A Short Biography of the Civil Rights Act of 1964,” 67 SMU L. REV. 229, 234–35 (2014) (summarizing the various provisions of the Civil Rights Act of 1964 and the social and legal history of the Act).

<sup>232</sup> See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11–13 (1883); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–80 (1873).

<sup>233</sup> See *supra* notes 185–201 and accompanying text.

<sup>234</sup> See *supra* notes 175–83 and accompanying text; Damian Zane, *Trump Ambushes S African Leader with Claim of Afrikaners Being “Persecuted,”* BBC (June 5, 2025), <https://www.bbc.com/news/articles/ce9vvljenoxo> [<https://perma.cc/9JW3-NTPJ>]; Exec. Order No. 14,204, 90 Fed. Reg. 9497, 9497 (Feb. 7, 2025) (extending support to “Afrikaner refugees escaping government-sponsored race-based discrimination”).

<sup>235</sup> See *ICE Enforcement and Removal Operations Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/statistics> [<https://perma.cc/HD47-CXQJ>] (choose “Country of Citizenship” from dropdown; then filter for Burma, Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, and Venezuela). In 2025, the Administration announced the rescission of TPS for Ethiopia, Honduras, Myanmar, Nepal, Nicaragua, South Sudan, and Venezuela. See *Temporary Protected Status*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status>

continuing and expanding past practices of racial profiling in immigration enforcement on the streets and in the workplaces and homes of American cities, with significant adverse effects on Latine, Black, and Asian residents, regardless of immigration status or citizenship.<sup>236</sup>

The Administration's move against birthright citizenship also signals a clear rejection of the principles that drove the Framers of the Fourteenth Amendment. The Fourteenth Amendment's Framers sought to enshrine in the Constitution an answer to the *Dred Scott* decision and to guarantee that race would have no bearing on one's ability to acquire citizenship.<sup>237</sup> The Administration's push to end birthright citizenship for the children of undocumented immigrants and the children of certain nonimmigrant visa holders would disproportionately harm children racialized in the United States as Latine and Asian.<sup>238</sup> This approach to the Fourteenth Amendment thus reifies a racialized notion of citizenship rejected by the Fourteenth Amendment's Framers.

The many moves to return to immigration and citizenship systems that privilege White immigrants fit into a broader framework of similar policies unrelated to immigration. President Trump's EEOC Director has announced her intention to target companies not for discriminating against historically marginalized groups, but for enacting policies designed to effectuate workforce diversity, equity among employees, and inclusionary efforts — a “hard pivot” away from the purposes that justified the creation of the organization in the 1960s.<sup>239</sup> President Trump's

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[<https://perma.cc/PMB5-WEMU>]. It also recently announced the rescission of TPS for Haiti and Somalia. See *Homeland Security Terminates Somalia's Temporary Protected Status Designation*, DHS (Jan. 13, 2026), <https://www.dhs.gov/news/2026/01/13/homeland-security-terminates-somalias-temporary-protected-status-designation> [<https://perma.cc/WQK9-NQPW>]; *Temporary Protected Status Designated Country: Haiti*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti> [<https://perma.cc/MMB5-JSMH>]. Hundreds of thousands of immigrants have lost TPS as a result of these decisions. NAT'L IMMIGR. F., *supra* note 213, at 4.

<sup>236</sup> See Adrian Florido, “Antagonized for Being Hispanic”: Growing Claims of Racial Profiling in LA Raids, NPR (July 4, 2025, at 13:00 ET), <https://www.npr.org/2025/07/04/nx-si-5438396/antagonized-for-being-hispanic-growing-claims-of-racial-profiling-in-la-raids> [<https://perma.cc/CD9D-USKT>]; Lydia Morrell, *St. Paul Mayor Kaohly Her Reports ICE Agents Asking, “Where the Asian People Live,”* KARE 11 (Jan. 16, 2026, at 11:47 CT), <https://www.kare11.com/article/news/local/ice-in-minnesota/stpaul-mayor-kaohly-her-reports-ice-agents-asking-where-the-asian-people-live/89-10880612-bb5f-4bd2-978b-786ae8760afb> [<https://perma.cc/L4DM-RQQH>].

<sup>237</sup> Kurt T. Lash, *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097, 1105, 1133 (2023) (“[W]hen Americans adopted the Fourteenth Amendment and erased the color bar to national and state citizenship, they did so with the understanding that these new citizens would receive equal civil rights.” *Id.* at 1105.).

<sup>238</sup> LUCÍA FÉLIX BELTRÁN ET AL., UCLA LATINO POL'Y & POLS. INST., BORN INTO UNCERTAINTY: THE HEALTH AND SOCIAL COSTS OF ENDING BIRTHRIGHT CITIZENSHIP 9 (2025), <https://latino.ucla.edu/wp-content/uploads/2025/02/UCLA-LPPI-Birthright-Costs-02132025.pdf> [<https://perma.cc/P5VQ-YH79>].

<sup>239</sup> David Hood-Nuño & Bianca Flowers, *Exclusive: Corporate America Faces DEI Reckoning in 2026, EEOC Chair Says*, REUTERS (Dec. 20, 2025), <https://www.reuters.com/sustainability/society-equity/corporate-america-faces-dei-reckoning-2026-eoc-chair-says-2025-12-19> [<https://perma.cc/3JPM-ZYKP>] (noting that the “hard pivot represents a new direction for the independent agency”).

Justice Department's Civil Rights Division has focused its efforts on ferreting out "fraud" in the form of diversity initiatives.<sup>240</sup> President Trump's Executive Order 14,173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," rescinds not only the affirmative action requirements of previous administrations but also their non-discrimination requirements.<sup>241</sup> In these and many other efforts, the Administration has made plain its intent to fight any efforts to challenge systems of White dominance and, perversely, to use civil rights laws to reaffirm that dominance.

### B. *The Erosion of Separation of Powers*

Some of President Trump's immigration policies are proceeding in direct contravention of laws previously enacted by Congress. This includes the Administration's disregard for statutory schemes governing immigration detention, asylum processing, and visa quotas and formulas.<sup>242</sup> In his first term, President Trump demonstrated his willingness and ability to circumvent congressional spending decisions when he used his emergency powers to justify his funding of the border wall even after Congress declined to fund it.<sup>243</sup> In both of President Trump's terms, the Department of Justice has also threatened to withhold federal law enforcement funds (and, this term, transportation funds<sup>244</sup>) from various states and localities on the ground that the targeted jurisdictions are "sanctuaries."<sup>245</sup>

By withholding congressionally authorized funds on grounds not specified by Congress, these moves test the notion that Congress, and not the President, decides how to appropriate funds.<sup>246</sup> Some courts have concluded that the President's efforts to strip funding from so-called sanctuary jurisdictions unlawfully usurped Congress's

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<sup>240</sup> See Memorandum from Todd Blanche, Deputy Att'y Gen., to Off. of the Assoc. Att'y Gen. et al. 1–2 (May 19, 2025), <https://www.justice.gov/dag/media/1400826/dl?inline> [<https://perma.cc/D7K6-YKRA>].

<sup>241</sup> See Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8633–34 (Jan. 21, 2025).

<sup>242</sup> See *supra* Part I, pp. 1564–92.

<sup>243</sup> See Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019) (invoking "construction authority" under 10 U.S.C. § 2808 to continue construction of the border wall); Charlie Savage & Robert Pear, *16 States Sue to Stop Trump's Use of Emergency Powers to Build Border Wall*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/us/politics/national-emergency-lawsuits-trump.html> [<https://perma.cc/ZR45-G84K>].

<sup>244</sup> Emily Badger, *Trump Raises New Threat to Sanctuary Cities: Blocking Transportation Dollars*, N.Y. TIMES: THE UPSHOT (Jan. 31, 2025), <https://www.nytimes.com/2025/01/31/upshot/sanctuary-cities-trump-transportation-funds.html> [<https://perma.cc/T7MF-JDG6>].

<sup>245</sup> See Joel Rose, *Trump Is Threatening to Cut Funding from Sanctuary Cities. Here's What to Know*, NPR (Jan. 17, 2026, at 05:00 ET), <https://www.npr.org/2026/01/17/nx-si-5679562/trump-sanctuary-cities-ice-immigration> [<https://perma.cc/W22N-24CC>]; see, e.g., *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1232–35 (9th Cir. 2018) (ruling that the Trump Administration did not have the power to withhold law enforcement funds from sanctuary jurisdictions during his first term).

<sup>246</sup> See *City and County of San Francisco v. Trump*, 897 F.3d at 1233–34.

appropriations power.<sup>247</sup> Though the executive branch has had an extraordinary amount of power over immigration policy for decades,<sup>248</sup> congressional quiescence and recent Supreme Court interventions have coalesced to create a situation where the President's exercise of power in this sphere is functionally eroding Congress's authority.<sup>249</sup>

Rather than stepping in to check this accretion of executive power over immigration law, in the first year of President Trump's second term, Congress largely acquiesced in the Trump Administration's encroachment on its immigration powers, even when the executive branch's agenda conflicted with laws previously enacted by Congress and signed by past Presidents.<sup>250</sup> Indeed, immediately after Congress passed a law expanding DHS's immigration detention authority,<sup>251</sup> rather than adhering to those newly expanded legal limits, the executive branch leapfrogged those efforts, interpreting its power to detain much more broadly than Congress had.<sup>252</sup> As DHS's violent enforcement efforts proliferated on the streets of U.S. cities, Congress not only failed to act to rein in this violence, but actually appropriated massive new funds for DHS enforcement agencies.<sup>253</sup> Congress's persistent failure to tackle the obvious pathologies of the nation's system of immigration laws through legislative reform<sup>254</sup> has left a policy void that the President has filled.

Throughout 2025, this congressional quiescence to executive exercises of power in contravention of existing law was not limited to

<sup>247</sup> See, e.g., *City and County of San Francisco v. Trump*, 779 F. Supp. 3d 1077, 1082–83 (N.D. Cal. 2025) (granting a preliminary injunction); *California v. U.S. Dep't of Transp.*, 788 F. Supp. 3d 316, 324 (D.R.I. 2025) (granting a preliminary injunction).

<sup>248</sup> Cox & Rodríguez, *supra* note 25, at 108–09.

<sup>249</sup> See *id.* at 130–34.

<sup>250</sup> For example, members of Congress, including at least one in the President's own party, have objected to the Administration's freeze of the asylum, green card, and naturalization processes spelled out in the immigration laws, but Congress has not passed responsive legislation. See Sergio Martínez-Beltrán, *Millions of Immigrants Are Now in Legal Limbo amid the Asylum Freeze*, NPR (Dec. 16, 2025, at 17:25 ET), <https://www.npr.org/2025/12/16/nx-s1-5645150/millions-of-immigrants-are-now-in-legal-limbo-amid-the-asylum-freeze> [<https://perma.cc/X6R3-KYGX>].

<sup>251</sup> See Laken Riley Act, Pub. L. No. 119-1, §§ 2–3, 139 Stat. 3, 3–4 (2025). For discussion of the Act, see Ximena Bustillo, *Trump Signs First Bill of His Second Presidency, The Laken Riley Act, Into Law*, NPR (Jan. 29, 2025, at 15:12 ET), <https://www.npr.org/2025/01/29/g-s1-45275/trump-laken-riley-act> [<https://perma.cc/T9GZ-PGFT>]; KHALED ALRABE ET AL., NAT'L IMMIGR. PROJECT, PRACTICE ADVISORY: THE LAKEN RILEY ACT'S MANDATORY DETENTION PROVISIONS 2 (2025), <https://nipnl.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf> [<https://perma.cc/ANQ5-X6LM>].

<sup>252</sup> See *supra* notes 122–25 and accompanying text.

<sup>253</sup> See Calen Razor, *Capitol Agenda: The Democrats Not Opposed to Another DHS Punt*, POLITICO (Feb. 5, 2026, at 08:00 ET), <https://www.politico.com/live-updates/2026/02/05/congress/dhs-funding-democrats-deal-stopgap-continuing-resolution-00766669> [<https://perma.cc/H7GB-M8CH>].

<sup>254</sup> Karoun Demirjian, *Over Decades, Congress Failed Repeatedly to Address Immigration Dysfunction*, N.Y. TIMES (May 14, 2023), <https://www.nytimes.com/2023/05/14/us/politics/immigration-legislation-congress.html> [<https://perma.cc/J525-MAUQ>].

immigration policy.<sup>255</sup> These same tendencies were on display when the President purported to create a new “Department of Government Efficiency” (DOGE) and gave its staff access to data to which many argued they were not entitled under federal law.<sup>256</sup> Congress allowed the President to exercise a pocket rescission over funds previously appropriated in a bipartisan budget process, including funding for migration and refugee assistance and other international economic and development assistance.<sup>257</sup>

For months, the big picture has been one in which the President has been able to exercise primacy not just in the sphere of foreign policy, where presidential power has long been interpreted to be substantial,<sup>258</sup> but in the management of day-to-day domestic affairs.<sup>259</sup> Congress’s inaction has been bolstered by the Supreme Court’s interventions in response to recent lawsuits challenging the Administration’s policies. The Court largely has been unwilling to look behind national security justifications that the Administration has offered to justify sweeping changes

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<sup>255</sup> See Claudia Grisales, *Is Congress Willing to Curb Trump’s Approach to Executive Power?*, NPR: ALL THINGS CONSIDERED (Oct. 22, 2025, at 17:34 ET), <https://www.npr.org/2025/10/22/nx-s1-5581461/is-congress-willing-to-curb-trumps-approach-to-executive-power> [https://perma.cc/7NN6-22DJ] (discussing congressional abdication of power of the purse and control over the use of force abroad).

<sup>256</sup> Joe Hernandez, *DOGE Is Making Major Changes to the Federal Government. Is It Legal?*, NPR (Feb. 4, 2025, at 18:47 ET), <https://www.npr.org/2025/02/04/nx-s1-5286314/departement-of-government-efficiency-doge-explainer-elon-musk> [https://perma.cc/PZB6-MH4V]. The legality of DOGE access is still being litigated. See *Soc. Sec. Admin. v. AFSCME*, 145 S. Ct. 1626, 1626–27 (2025) (permitting the Social Security Administration to give DOGE employees access to data during the course of ongoing litigation); *Am. Fed’n of Tchrs. v. Bessent*, 152 F.4th 162, 177 (4th Cir. 2025) (vacating a district court’s injunction that had prevented DOGE from accessing data from the Department of Education, the Office of Personnel Management, and the Department of the Treasury).

<sup>257</sup> See SEAN STIFF, CONG. RSCH. SERV., LSB11373, POCKET RESCISSIONS AND THE IMPOUNDMENT CONTROL ACT: BACKGROUND AND HISTORY 1 (2025); Rescissions Act of 2025, Pub. L. No. 119-28, §2(a), 139 Stat. 467, 467; Josh Boak, *Trump Blocks \$4.9B in Foreign Aid Congress OK’d, Using Maneuver Last Seen Nearly 50 Years Ago*, AP NEWS (Aug. 29, 2025, at 17:26 ET), <https://apnews.com/article/trump-foreign-aid-pocket-rescission-374c63e6b4004e819a657e33b76f502e> [https://perma.cc/HY3E-CFMH].

<sup>258</sup> See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 238 (2001) (noting that “[t]he practice of the last century and an array of judicial opinions support the idea of presidential primacy” in foreign affairs, though they argue this is an incorrect read of the Constitution (footnotes omitted)); see also *id.* at 238 nn.7–8 (citing sources that support this proposition).

<sup>259</sup> See Byron Tau et al., *The 911 Presidency: Trump Flexes Emergency Powers in His Second Term*, AP NEWS (June 7, 2025, at 09:02 ET), <https://apnews.com/article/trump-emergency-powers-tariffs-immigration-5cbe386d8f2cc4a374a5d005e618d76a> [https://perma.cc/6EPA-8E7K] (noting President Trump’s unprecedented reliance on emergency powers for both foreign and domestic policy matters).

to immigration, environmental, and economic regulation, as well as foreign aid spending.<sup>260</sup>

The Trump Administration has even developed ways to generate new revenue streams independent of congressional appropriations. As previously discussed, the Administration has created expensive new visa “cards” that simply impose new fees on wealthy applicants seeking to fast-track their visa applications.<sup>261</sup> The Administration also generated a new revenue stream for itself through the imposition of tariffs. The President argued that he was empowered to impose these tariffs as part of his congressionally authorized national-emergency power, though he levied the tariffs in response to no apparent emergency.<sup>262</sup> The costs of tariffs were borne primarily by U.S. consumers and business.<sup>263</sup> At the same time, the Administration expressed its plans to distribute tariff revenues to benefit particular political constituencies at President Trump’s own discretion.<sup>264</sup> When the Supreme Court ultimately concluded that the tariffs unlawfully exceeded the President’s statutory authority, the President berated the Justices who sided against him before

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<sup>260</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (accepting a national security justification for an entry ban affecting the nationals of seven countries, most of which were predominantly Muslim); *Noem v. Nat’l TPS All.*, 146 S. Ct. 23, 24 (2025) (mem.) (clearing the way for the Trump Administration to strip hundreds of thousands of Venezuelan nationals of their protected status prior to the expiration date set by the Biden Administration); *Dep’t of State v. AIDS Vaccine Advoc. Coal.*, 146 S. Ct. 19, 19 (2025) (mem.) (allowing the Administration to withhold billions of dollars in foreign aid funding); see also Amy Howe, *Supreme Court Allows Trump Administration to Withhold Billions in Foreign-Aid Funding*, SCOTUSBLOG (Sep. 26, 2025, at 18:05 ET), <https://www.scotusblog.com/2025/09/supreme-court-allows-trump-administration-to-withhold-billions-in-foreign-aid-funding> [<https://perma.cc/EYJ6-8R42>] (discussing the Supreme Court’s stay of a district court order prohibiting the Trump Administration from withholding billions of dollars in foreign aid funding); Amy Howe, *Supreme Court Allows Trump to Remove Protected Status from Venezuelan Nationals*, SCOTUSBLOG (Oct. 3, 2025, at 18:45 ET), <https://www.scotusblog.com/2025/10/supreme-court-allows-trump-to-remove-protected-status-from-venezuelan-nationals> [<https://perma.cc/UC8A-GWTA>] (discussing the Supreme Court’s stay of a district court order that stopped the Trump Administration from removing TPS status from Venezuelan nationals).

<sup>261</sup> *Trump Claims Over \$1 Billion in Immigration “Gold Cards” Have Been Sold*, SCRIPPS NEWS (Dec. 19, 2025, at 15:15 ET), <https://www.scrippsnews.com/politics/immigration/trump-claims-over-1-billion-in-immigration-gold-cards-have-been-sold> [<https://perma.cc/YD64-GR68>]. For a discussion of the new visa “Gold Card,” see *supra* note 201 and accompanying text.

<sup>262</sup> The President relied upon powers granted by the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706. The Supreme Court has since struck down the tariffs, holding “that IEEPA does not authorize the President to impose tariffs.” *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 646 (2026).

<sup>263</sup> Mary Amiti et al., *Who Is Paying for the 2025 U.S. Tariffs?*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECON. (Feb. 12, 2026), <https://libertystreeteconomics.newyorkfed.org/2026/02/who-is-paying-for-the-2025-u-s-tariffs> [<https://perma.cc/58Q8-D2K9>] (indicating that U.S. businesses and consumers bore about ninety percent of the cost of tariffs during 2025).

<sup>264</sup> Meredith Lee Hill, *Trump Making Plans to Send Billions in Cash Bailouts to Farmers with Taxpayer Money*, POLITICO (Oct. 2, 2025, at 15:00 ET), <https://www.politico.com/news/2025/10/02/trump-bailouts-farmers-tariffs-usda-00591846> [<https://perma.cc/2U7J-A9AT>].

imposing a new set of tariffs on statutorily dubious authority.<sup>265</sup> In these ways, the executive branch is continuing to try to create new revenue streams that it can allocate without congressional approval, circumventing Congress's power of the purse.<sup>266</sup>

*C. The End of the U.S. Role  
in the Liberal International Legal Order*

Immigration enforcement operates in a legal zone where sovereignty, foreign affairs, and border control blur ordinary legal and institutional constraints.<sup>267</sup> The political branches have tremendous power to override individual rights in the enforcement of immigration law.<sup>268</sup> The Supreme Court has taken a very narrow view of the constitutional rights of noncitizens to access courts to vindicate their ability to stay in the United States, including in habeas proceedings, not only when they are outside of the country, but also when they are within it.<sup>269</sup> For example,

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<sup>265</sup> See Kim Bhasin, *What's Happened Since the Supreme Court's Tariff Ruling*, N.Y. TIMES (Feb. 24, 2026), <https://www.nytimes.com/2026/02/23/business/supreme-court-trump-tariffs-updates.html> [<https://perma.cc/3UTH-LCE9>]; Lawrence Hurley, *Trump Calls Supreme Court Justices "Disloyal to the Constitution" over Tariffs Ruling*, NBC NEWS (Feb. 20, 2026, at 14:21 ET), <https://www.nbcnews.com/politics/donald-trump/trump-calls-supreme-court-justices-disloyal-unpatriotic-tariffs-rcna259948> [<https://perma.cc/RD7K-ERG6>]; Stan Veuger & Clark Packard, *Analysis, Trump's New Tariffs Are Also Illegal*, FOREIGN POL'Y (Feb. 26, 2026, at 12:00 ET), <https://foreignpolicy.com/2026/02/26/trump-tariffs-supreme-court-section-122-illegal> [<https://perma.cc/M4TG-W7XW>].

<sup>266</sup> The Administration's handling of Venezuelan oil revenue to date has similarly been effectuated without congressional control. Carl Hulse & Robert Jimison, *Democrats Push for Transparency on Venezuelan Oil Money Controlled by U.S.*, N.Y. TIMES (Feb. 11, 2026), <https://www.nytimes.com/2026/02/11/us/venezuela-oil-money-democrats-congress.html> [<https://perma.cc/J3V2-HWXX>]. The President's pay-to-play "Board of Peace," which, among other things, claims power to engage in the "reconstruction" and "rebuilding" of Gaza, is also operating outside of normal budgetary channels. *Statement on President Trump's Comprehensive Plan to End the Gaza Conflict*, WHITE HOUSE (Jan. 16, 2026), <https://www.whitehouse.gov/briefings-statements/2026/01/statement-on-president-trumps-comprehensive-plan-to-end-the-gaza-conflict> [<https://perma.cc/Q8BT-SS26>]; Helen Regan & Kara Fox, *What Is Trump's "Board of Peace" and Who Is Joining? Here's What to Know.*, CNN (Jan. 22, 2026), <https://www.cnn.com/2026/01/22/world/trump-board-of-peace-explainer-intl-hnk> [<https://perma.cc/Y5NL-2G9N>].

<sup>267</sup> See, e.g., Jennifer M. Chacón, *Commentary, Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REGUL. 639, 640 (2004); Susan Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, in ISLAMOPHOBIA AND THE LAW 34, 34 (Cyra Akila Choudhury & Khaled A. Beydoun eds., 2020); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–81 (2002); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 369 (2006); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 159 (2012).

<sup>268</sup> See generally sources cited *supra* note 267 (canvassing acts by Congress and the executive branch that have interwoven criminal enforcement and immigration law).

<sup>269</sup> See *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64 (2020); Daniel Kanstroom, *Essay, Deportation in the Shadows of Due Process: The Dangerous Implications of DHS v. Thuraissigiam*, 50 SW. L. REV. 342, 343 (2021); Jennifer M. Chacón, *Stranger Still: Thuraissigiam and the Shrinking Constitution*, 2019–2020 AM. CONST. SOC'Y SUP. CT. REV. 167, 167–68 (2021).

noncitizens seeking to enter the United States were not permitted to challenge their exclusion, even when the exclusionary policies discriminated on the basis of race.<sup>270</sup> Until recently, it seemed that affected U.S. citizen family members were able to contest such discriminatory policies in court (albeit without much chance of prevailing over any administration's "national security" justifications for exclusion).<sup>271</sup> After the Supreme Court's decision in *Department of State v. Muñoz*,<sup>272</sup> however, it may be that not only excluded noncitizens but also the citizens harmed by their exclusion cannot make these arguments in court.<sup>273</sup>

Courts also treat ports of entry as exceptional spaces in which government officials have less constrained powers of search and seizure than in other policing contexts. This logic also manifests in some judicial analyses of interior immigration policing. The experience and training of the Border Patrol are presented as a reason to defer to officers' abilities to discern immigration status merely by looking at someone.<sup>274</sup> The sovereign imperative to defend the nation's territory justifies the extraordinary power of those agents.<sup>275</sup> This is true even when these powers are exercised in the interior of the United States against citizens.<sup>276</sup>

<sup>270</sup> See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

<sup>271</sup> *Kerry v. Din*, 576 U.S. 86, 101 (2015) (plurality opinion) (in which the Court reviewed such a claim and only three Justices concluded that the citizen family member had no constitutional due process right to challenge the exclusion); cf. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (acknowledging the implicated First Amendment rights of citizens bringing a challenge to a speaker's exclusion, though ultimately upholding the exclusion because the government offered a "legitimate and bona fide" reason for it).

<sup>272</sup> 144 S. Ct. 1812 (2024).

<sup>273</sup> See *id.* at 1817–18 (2024) (stating that the wife of a noncitizen had no right to bring a claim challenging the denial of her husband's visa application for national security reasons); see also Jennifer M. Chacón, *Loving's Borders*, 113 CALIF. L. REV. 1075, 1080 & nn.29–31 (2025) (explaining that the *Muñoz* decision, like the *Din* decision, could have been decided on grounds that the government had provided a sufficient justification rather than declaring that the plaintiff had no constitutional right to bring her claim). But see *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (allowing U.S. citizen and lawful permanent resident family members of visa applicants to challenge travel bans without deciding all reviewability issues).

<sup>274</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 8 (2025) (Sotomayor, J., dissenting).

<sup>275</sup> *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2024) ("Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.'" *Id.* at 153 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985))); *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020); see also *Egbert v. Boule*, 142 S. Ct. 1793, 1804–05 (2022) (declining to extend a *Bivens* cause of action in an altercation between a Border Patrol agent and a U.S. citizen business owner on his property because "national security is at issue," *id.* at 1805).

<sup>276</sup> See, e.g., *Brignoni-Ponce*, 422 U.S. at 884–87 (allowing officer reliance on race as a "relevant factor," *id.* at 887, in the formulation of "reasonable suspicion" that led to the stop and eventual arrest of a U.S. citizen of Puerto Rican descent, *id.* at 884); *Egbert*, 142 S. Ct. at 1804–05 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); see also Emily R. Chertoff, *Violence in the Administrative*

Nevertheless, migrants have achieved some important protections under U.S. law, particularly in the late twentieth century, as the United States internalized the core elements of the 1951 United Nations Convention<sup>277</sup> (International Refugee Convention) and 1967 Protocol<sup>278</sup> relating to the status of refugees.<sup>279</sup> The Trump Administration's recent changes to immigration policy signal a rejection of these important international legal protections for migrants despite their incorporation into domestic law.<sup>280</sup> The breakdown in migrant protections is neither

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*State*, 112 CALIF. L. REV. 1941, 1947–48 (2024) (arguing that when bureaucratic administrative law is applied to force agencies like CBP and ICE, “the results can be pathological,” because “bureaucratic administrative law within force agencies masks, and at its worst accelerates, the use of arbitrary violence,” *id.* at 1948).

<sup>277</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

<sup>278</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>279</sup> Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1154–55 (1990) (recounting how the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, incorporated the definition of “refugee” developed in the 1951 Convention and the 1967 Protocol); *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 438 n.21 (1987) (“Although the United States has never been party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention’s definition in relevant part.”).

<sup>280</sup> Article 31(1) of the International Refugee Convention prohibits states parties from “impos[ing] penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Convention Relating to the Status of Refugees art. 31(1), *supra* note 277, 189 U.N.T.S. at 150. One author has noted that the Trump Administration’s policies “that have effectively closed the border to asylum seekers[] breach[] the United States’ [international] *non-refoulement* obligations and violat[e] the explicit language of the INA in remarkably anomalous ways.” Jaya Ramji-Nogales, *The Trump Administration’s Unprecedented Violations of the Non-Refoulement Principle*, 119 AM. J. INT’L L. 758, 759 (2025). The same author notes that “[t]he expansion of expedited removal [in the interior of the country] has increased the risk of violations of the *non-refoulement* obligation, resulting in the deportation of refugees, including non-citizens with orders of protection against removal and those with genuine fear of persecution or torture in their home country.” *Id.* at 762. The Administration’s use of the Alien Enemies Act to justify the extraordinary detention of more than 200 Venezuelans in the notorious Terrorism Confinement Center (CECOT) prison facility in El Salvador, “[g]iven the known conditions in CECOT, . . . violated the prohibition on expulsion to ‘another State where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.’” *Id.* at 764 (second alteration in original) (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter CAT]). The Administration is also violating *non-refoulement* obligations by rendering individuals with orders of protection to third countries that are “apparent sites of persecution and torture.” *Id.* at 767; *see also* Thomas Michael McDonnell, *Unsafe at Any Speed: “Safe Third Country Agreements” — Offshoring and Eroding Legal Protections Owed to Refugees and Asylum Seekers*, 53 FORDHAM URB. L.J. 17, 23 (2025) (explaining that “safe third countries” do not always comply with international law or respect widely accepted refugee rights).

completely new<sup>281</sup> nor limited to the United States.<sup>282</sup> For some time now, the United States has adopted policies that have weakened its asylum protections, notwithstanding the requirements of the International Refugee Convention.<sup>283</sup> The closing of the southern border during the COVID-19 pandemic,<sup>284</sup> the use of metering,<sup>285</sup> and past enforcement of requirements that asylum seekers remain in another country pending asylum adjudication<sup>286</sup> have all undercut the guarantees that U.S. law provides for asylum seekers.

But under the second Trump Administration, the domestic asylum protection system has ground to a halt. The Administration indefinitely paused all asylum processing in response to the violent actions of one immigrant.<sup>287</sup> The Administration coupled the freezing of asylum adjudication with the elimination of subsidiary protections, including humanitarian parole programs (like the program for Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV)<sup>288</sup>) and TPS protections for

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<sup>281</sup> See Alice Hamilton Farmer, *The Discretion Loophole: Executive Power, International Refugee Law, and the Erosion of Asylum Protections in the United States*, 36 STAN. L. & POL'Y REV. 1, 7 (2025) (“[B]oth President Trump and President Biden have used the discretion loophole to introduce strikingly broad restrictions on asylum, operating through the executive branch rather than legislating with Congress.”).

<sup>282</sup> See SUSAN FRATZKE ET AL., MIGRATION POL'Y INST., THE END OF ASYLUM?: EVOLVING THE PROTECTION SYSTEM TO MEET 21ST CENTURY CHALLENGES 4 (2024), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-beyond-territorial-asylum-final-report-2024\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-beyond-territorial-asylum-final-report-2024_final.pdf) [<https://perma.cc/EMD4-YBUJ>].

<sup>283</sup> James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 484 (2000) (“The uniquely American protection system rejects the most basic premise of the international refugee regime, namely that all persons who meet the refugee definition are entitled to benefit from internationally established rights. The legacy of the foundational jurisprudence of the U.S. Supreme Court has been illegitimately to substitute access to discretion for entitlement to rights.” (emphasis omitted)); see also Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1199–1200 & nn.59–60 (summarizing scholarly and institutional arguments that the one-year filing deadline for asylees violates international obligations). See generally Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117 (2001) (demonstrating the ways that “[t]he 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) wreaked wide-ranging changes on the refugee processing system in the United States,” *id.* at 117, and identifying “six specific sections of the IIRIRA that derogate from these rights and duties,” *id.* at 118).

<sup>284</sup> Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 150–52 (2020).

<sup>285</sup> Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States' Role in Endangering Asylum Seekers*, 55 U.C. DAVIS L. REV. 1513, 1530–31 (2022); Harris, *supra* note 284, at 130–31.

<sup>286</sup> Nessel, *supra* note 285, at 1523–24; Harris, *supra* note 284, at 138–39.

<sup>287</sup> Hamed Aleaziz & Edward Wong, *Trump Pauses All Asylum Applications and Halts Visas for Afghans*, N.Y. TIMES (Nov. 28, 2025), <https://www.nytimes.com/2025/11/28/us/politics/trump-affirmative-asylum.html> [<https://perma.cc/FC8R-K7GJ>].

<sup>288</sup> DHS Issues Notices of Termination for the CHNV Parole Program, Encourages Parolees to Self-Deport Immediately, DHS (June 12, 2025), <https://www.dhs.gov/news/2025/06/12/dhs-issues-notices-termination-chnv-parole-program-encourages-parolees-self-deport> [<https://perma.cc/7NCY->

hundreds of thousands of people who, in reality, cannot safely return to their home countries.<sup>289</sup> The Administration's policies routinely violate the international legal principle of *non-refoulement*, a principle that is embedded in U.S. law.<sup>290</sup>

The second Trump Administration additionally has severely undercut CAT protections,<sup>291</sup> despite the fact that the United States Senate ratified the Convention in October 1990,<sup>292</sup> and President Bill Clinton signed CAT Article 3 into law as part of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).<sup>293</sup> Attorney General Bondi published a host of previously unpublished CAT decisions that are unfavorable to immigrants seeking CAT relief.<sup>294</sup> These newly precedential decisions, combined with the Administration's restrictions on the processing of CAT and asylum claims, have rendered the protection functionally inaccessible for most migrants in, or arriving in, the United States.<sup>295</sup> Individuals who previously obtained CAT protection are also losing it as the Administration removes them to third countries that, in turn, repatriate them to the countries against which they were granted CAT protection in the first place.<sup>296</sup>

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JFG4]. The CHNV program functioned as an alternative, but less capacious and accessible, form of protection for vulnerable migrants. See AM. IMMIGR. COUNCIL, THE BIDEN ADMINISTRATION'S HUMANITARIAN PAROLE PROGRAM FOR CUBANS, HAITIANS, NICARAGUANS, AND VENEZUELANAS: AN OVERVIEW 4 (2023), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/147888892\\_09.23\\_chnv\\_factsheet.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/147888892_09.23_chnv_factsheet.pdf) [<https://perma.cc/DPP8-Q6CE>].

<sup>289</sup> See *supra* notes 213–17 and accompanying text (discussing the TPS revocations under the second Trump Administration); see also *supra* note 288 (discussing revocation of the CHNV program).

<sup>290</sup> See *supra* note 280.

<sup>291</sup> See, e.g., Ramji-Nogales, *supra* note 280, at 764–67 (identifying torture and removal of individuals who had been awarded CAT protections); McDonnell, *supra* note 280, at 26–27 (“[T]he Trump Administration made bilateral arrangements with Panama, Costa Rica, El Salvador, and Guatemala to accept detained immigrants of other nationalities and to ‘repatriate them’ (deport them) to their countries of origin.” (quoting Hamed Aleaziz et al., *U.S. Deports Migrants from Asia to Panama*, N.Y. TIMES (Feb. 13, 2025), <https://www.nytimes.com/2025/02/13/us/politics/trump-deportations-panama.html> [<https://perma.cc/HYX9-KTF2>])). Over the past year, the BIA has also issued a number of decisions raising the bar for CAT protections and revoking IJ orders extending CAT protection. See, e.g., A-A-R-, 29 I. & N. Dec. 38, 47 (B.I.A. 2025) (vacating IJ’s grant of deferral of removal under CAT); G-M-I-, 29 I. & N. Dec. 431, 436 (B.I.A. 2026) (same); A-A-F-V-, 29 I. & N. Dec. 118, 122 (B.I.A. 2025) (same); E-Z-, 29 I. & N. Dec. 123, 127 (B.I.A. 2025) (same); S-S-, 29 I. & N. Dec. 136, 140 (B.I.A. 2025) (same); N-N-B-, 29 I. & N. Dec. 79, 81 (B.I.A. 2025) (reversing IJ’s grant of deferral of removal under CAT); O-Y-A-E-, 29 I. & N. Dec. 190, 193 (B.I.A. 2025) (same).

<sup>292</sup> 136 CONG. REC. 36198 (1990).

<sup>293</sup> Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note).

<sup>294</sup> See *supra* note 291; BIA Limits Protection Under the Convention Against Torture, CATH. LEGAL IMMIGR. NETWORK, INC., <https://www.cliniclegal.org/resources/removal-proceedings/bia-limits-protection-under-convention-against-torture> [<https://perma.cc/G4WU-3CFJ>].

<sup>295</sup> See Mark Betancourt, *Many Immigrants Don’t Get the Chance to Prove Their Fear of Torture if Deported*, NPR: ALL THINGS CONSIDDERED (June 2, 2025, at 18:54 ET), <https://www.npr.org/2025/06/02/nx-s1-5415898/many-immigrants-dont-get-the-chance-to-prove-their-fear-of-torture-if-deported> [<https://perma.cc/3EPH-V2UH>]; CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 294.

<sup>296</sup> See, e.g., D.V.D. v. DHS, 778 F. Supp. 3d 355, 369 (D. Mass. 2025); D.A. v. Noem, 800 F. Supp. 3d 43, 49–50 (D.D.C. 2025).

With no constitutional floor of due process protections for migrants seeking entry,<sup>297</sup> the disregard for statutory protections and international treaty obligations leaves migrants in a state of exception; they are subject to the exercise of state power but outside of its protections.<sup>298</sup>

The same state of exception increasingly is experienced by noncitizens residing in the United States, too. Noncitizen residents historically have been able to count on a constitutional floor of rights protections. As residents of the country, they had protections, if sometimes watered down, under the Constitution's Fourth,<sup>299</sup> Fifth and Sixth,<sup>300</sup> and Fourteenth Amendments.<sup>301</sup> Courts have also found noncitizens in the United States to be entitled to due process protections when placed in removal proceedings.<sup>302</sup> The Administration is working hard to eliminate those protections, claiming that people who have lived in the United States for years deserve no greater statutory or legal protections than unauthorized migrants arriving at the U.S. border.<sup>303</sup> In the absence of domestic legal protections, international law requires consideration of the nature and length of a noncitizen's ties to the country and consideration of the best interests of affected children when assessing the legality of a deportation.<sup>304</sup> Such considerations have never had

<sup>297</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauff*, 338 U.S. at 544).

<sup>298</sup> See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 9 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995); GIORGIO AGAMBEN, *STATE OF EXCEPTION* 59 (Kevin Attell trans., Univ. of Chicago Press 2005) (2003).

<sup>299</sup> Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 189 (2013) ("Supreme Court doctrine dating back to the nineteenth century establishes that the Constitution's criminal procedure protections apply to noncitizens based solely on their presence within the United States . . . [E]ight Justices in [*Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984),] agreed that the Fourth Amendment protects undocumented noncitizens. Finally, *Arizona v. United States*[, 567 U.S. 387 (2012),] reinforces the Court's long-held view that all searches and seizures of noncitizens within the country are subject to the strictures of the Fourth Amendment." (footnotes omitted)).

<sup>300</sup> *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth][A]mendments . . .").

<sup>301</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding protections of Fourteenth Amendment "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

<sup>302</sup> *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025) (per curiam) (emergency order decided on grounds that noncitizens' entitlement to due process in removal proceedings is "well established" (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993))); *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903).

<sup>303</sup> See discussion *supra* notes 142-145 and accompanying text.

<sup>304</sup> International Covenant on Civil and Political Rights (ICCPR) Article 23(1) states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." International Covenant on Civil and Political Rights art. 23(1), Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171. ICCPR Article 17(1) states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." *Id.* art. 17(1). These provisions have been read in various international rulings to require consideration of family ties in deportation. See, e.g., *Winata*

much purchase in the United States, except to the limited extent that they have been embedded in statutes.<sup>305</sup> Now the U.S. government is failing to honor internationally recognized legal protections even when they *are* codified in domestic laws.

The governance of immigration is just one site where the United States is now refusing to participate in a rule-based international legal order. The Trump Administration has noisily withdrawn the United States from a number of international organizations and conventions.<sup>306</sup> U.S. policy toward Russia and Ukraine in the second Trump Administration,<sup>307</sup> its bombing of fishing boats allegedly voyaging from Venezuela,<sup>308</sup> its capture of the Venezuelan President,<sup>309</sup> and the President's startling proclamation that the United States will "run" that country indefinitely,<sup>310</sup> all signal the Administration's willingness to disregard the constraints of international law. Immigration law was one early site for this makeover of U.S. policy, a policy transformation now so complete that the nation has reached the point where its President asserts that the

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v. Australia, Comm'n No. 930/2000, ¶ 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001). Article 3(1) of the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, imposes a duty to consider "the best interests of the child" in every decision affecting a child. *Id.* The United States has not ratified this Convention. Sarah Mehta, *There's Only One Country that Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/news/human-rights/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/F5U8-KN62>]. Still, some scholars have argued that the principle of family preservation has risen to the status of binding customary international law. *See, e.g.*, Erica Stief, Comment, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 493 (2010); Bill Ong Hing & Lizzie Bird, *Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child*, 35 GEO. IMMIGR. L.J. 113, 147–50 (2020). Many more scholars have called for greater adherence to these international standards in domestic law. *See, e.g.*, David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 262 (2010); Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 57 (2015); *see also* Beharry v. Reno, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002) (concluding that the best-interest-of-the-child standard was customary international law and had to be considered in deportation cases), *rev'd on other grounds sub nom.*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003), *as amended* (July 24, 2003), *and abrogated by* Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005).

<sup>305</sup> *See* Hing & Bird, *supra* note 304, at 141; Thronson, *supra* note 304, at 254–55.

<sup>306</sup> Memorandum Withdrawing the United States from International Organizations, Conventions, and Treaties That Are Contrary to the Interests of the United States, 91 Fed. Reg. 2281, 2281–83 (Jan. 7, 2026).

<sup>307</sup> Kim Barker & Oleksandra Mykolyshyn, *Trump Said He'd End the War in a Day, But It's Worsened for Ukrainians*, N.Y. TIMES (Feb. 17, 2026), <https://www.nytimes.com/2026/02/17/world/europe/trump-ukraine-war-putin.html> [<https://perma.cc/4WSN-D4JP>].

<sup>308</sup> *See* Matthew C. Waxman, *Armed Conflict? Trump's Venezuela Boat Strikes Test U.S. Law*, COUNCIL ON FOREIGN RELS. (Oct. 15, 2025, at 16:59 ET), <https://www.cfr.org/articles/armed-conflict-trumps-venezuela-boat-strikes-test-us-law> [<https://perma.cc/NSQ7-4YSG>].

<sup>309</sup> *See* Stefano Pozzebon et al., *The US Has Captured Venezuelan Leader Maduro. Here's What to Know*, CNN: WORLD (Jan. 3, 2026), <https://www.cnn.com/2026/01/03/americas/venezuela-explosions-intl-hnk> [<https://perma.cc/CJD7-H652>].

<sup>310</sup> *See id.*

only limits on his global exercise of power are his “own morality” and “own mind.”<sup>311</sup>

#### CONCLUSION

The federal government has always had an extraordinary amount of power to police immigration, both outside the nation’s borders and within them. But this Administration is deploying this power in extraordinary new ways. The resulting shifts in the governance of immigration — shifts away from Civil Rights-era nondiscrimination principles, toward the usurpation of congressional and state governmental powers, and ever further out of alignment with the liberal international legal order — have both mirrored and fueled broader governance trends. By treating noncitizens as an enemy within, Administration officials are arrogating power to themselves at the expense of the individual liberties of citizen and noncitizen residents, the authority of the coequal federal branches, and the power of state and local officials who do not share the Administration’s goals.

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<sup>311</sup> Matthew Cullen, *Trump Said His Global Power Was Limited Only by His “Own Morality,”* N.Y. TIMES (Jan. 8, 2026), <https://www.nytimes.com/2026/01/08/briefing/trump-interview-oval-office-apple-ceo.html> [<https://perma.cc/D6WD-6MJU>].