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Ten Likely Changes to Immigration Policy Under Trump 2.0

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Executive Summary

During his first administration, former President Trump adopted aggressive anti-immigrant policies, which included family separation, a ban on individuals from Muslim-majority countries, stringent border policies like the Remain in Mexico and Title 42, and attempted terminations of programs such as Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS) for several national groups. Attorneys and representatives for immigrants had some success in pushing back against the administration's most extreme measures through litigation and advocacy.

Should they return to the White House, Trump and his supporters have promised to enact an even more draconian anti-immigrant agenda, including a commitment to conducting the largest mass deportation in U.S. history, ending birthright citizenship (which is guaranteed by the Fourteenth Amendment), and revoking humanitarian protections for those already in the United States. Many of these efforts, of course, will be challenged in court. This article summarizes 10 likely immigration initiatives under a second Trump administration. It seeks to educate members of the public who value the crucial role and myriad contributions of immigrants and refugees — past and present — in the United States. It will also outline how advocates can fight to protect their clients from these measures.

Keywords

Immigration, Immigration Policy, Election

Introduction

> *"When I am President, on Day One, instead of fighting Texas, I will work hand in hand with Governor Abbott and other Border States to Stop the Invasion, Seal the Border, and Rapidly Begin the Largest Domestic Deportation Operation in History. Those Biden has let in should not get comfortable because they will be going home." Trump, Truth Social, Jan. 25*, 2024.

Former President Trump has been outspoken about his intentions, should he be re-elected, to reverse the Biden administration's immigration initiatives and replace them with radical alternatives. Well ahead of any presidential transition team, allies working at the America First Policy Institute (2024) and the Heritage Foundation (2023) have been busy drawing up policy memoranda and executive orders that could be put in place immediately after Trump retakes office.

Some of these plans — constructing additional sections of a border wall, banning the immigration of persons from designated countries, reimplementing the Remain in Mexico policy for asylum applicants, and prioritizing the deportation of everyone present

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without lawful status — would simply be a continuation of his first administration's efforts.

In considering its immigration agenda for a possible return to power, it may be useful to recall just how successful the first Trump administration was in undermining the U.S. immigration system and the country's identity as a nation of immigrants and haven for the persecuted. The administration regularly railed against undocumented residents, but it mostly sought to eviscerate *legal* immigration by reducing family-based immigration, divesting several populations of legal status, and creating significant administrative barriers to gaining status and advancing to permanent residence and citizenship (Kerwin and Warren 2019, 111–117). When its legislative agenda imploded, it focused on erecting a "paper wall" of regulatory and administrative measures to slow and impede normal legal immigration processes (Guttentag 2024). It also systematically undermined the U.S. asylum system (National Immigrant Justice Center 2020) and largely succeeded in ending access to it at the southwest border (Gilman 2020). As a matter of practice and then policy, it separated thousands of children from their parents at the U.S.-Mexico border for protracted periods, permanently severing parent-child ties in hundreds of cases (Dickerson 2022; Southern Poverty Law Center 2022). It reduced refugee admissions to historically low levels and depleted the program's overseas and domestic infrastructure in an effort to permanently diminish this historic program (Kerwin and Nicholson 2021, 3–6). It also discontinued other humanitarian admission programs (Kerwin 2019). And, it politicized the U.S. immigration courts, including through its hiring practices (American Immigration Lawyers Association 2021). These "achievements," as well as many others, are cataloged in numerous papers and reports (see, e.g., Aleinikoff and Kerwin 2020; Bolter, Israel and Pierce 2022; Guttentag 2024).

Trump and his surrogates have now threatened new efforts that go well beyond anything previously attempted, such as mobilizing the military, constructing vast detention centers, and conducting the largest mass deportation in U.S. history (Brownstein 2024). Many of these efforts will likely be aimed at asylum seekers, such as further limiting their ability to apply inside the United States, tightening the eligibility standard, expediting asylum hearings, and deporting them to third countries. We can also expect a second Trump administration to rescind the humanitarian status of hundreds of thousands of persons who were paroled into the country or who are residing lawfully with Temporary Protected Status (TPS) or with Deferred Action for Childhood Arrivals (DACA).

Much has already been written about what might ensue without any congressional action (Savage, Haberman, and Swan 2023; Blitzer 2024; Brownstein 2024; Cortellessa 2024; Dias 2024; Eakin 2024; Hackman and Restuccia 2024; Mattingly and Seger 2024). Given the likely make-up of the Senate, it is doubtful that Congress would be able to pass any new legislation restricting immigration or supporting Trump's enforcement efforts. This article assumes no new substantive legislation will pass and focuses instead on the major executive orders, policy memoranda, and rulemaking that have been forecast. It will also discuss the likely legal and other practical challenges that would result.

Immigration advocates were successful during the first Trump administration in mitigating the most extreme policies set forth by the administration. However, there are reasons to be concerned that these efforts will be less successful during a subsequent administration. The make-up of the Supreme Court radically changed over the course of the Trump administration: the conservatives in the Court now hold a 6-3 supermajority, and they recently invited him to rule as king, if not dictator. In addition, having made many errors during the first term on which immigration advocates were able to capitalize,[1] a new Trump administration may be smarter, more ruthless, and more prepared to quickly implement its draconian policies. In short, the supposed "adults in the room" during his first term are expected to be replaced with more loyal and less independent-minded officials. It is imperative for immigration advocates to understand and prepare for the implementation of these extremist policies.

Border Enforcement

Enforcement at the border is an area where the Trump administration is likely to both restore prior policies as well as institute new, more extreme ones. First, it is

[1] Several Trump policies were invalidated, for example, because they were promulgated by an illegally appointed Acting DHS Secretary who had no authority to issue regulations on behalf of the agency (Doubek 2020).

important to acknowledge that the Biden administration has moved to the right on the issue of border enforcement during the last two years. It issued a series of regulations from 2022 o 2024 on the processing of asylum seekers who enter through the southern border, specifically 2022's Asylum Processing Rule,[2] 2023's Circumvention of Lawful Pathways Rule,[3] and 2024's Securing the Border Rule.[4] These regulations aim to speed up the processing of asylum seekers at the border and deter noncitizens from entering the United States without inspection by restricting asylum eligibility for those who are apprehended between ports of entry. It is possible to rebut the presumption of ineligibility only in certain limited circumstances. These restrictions no doubt reflect the reality that President Biden's earlier border policies had become a liability, as they were seen as too permissive by many on both sides of the political spectrum.

While advocates have criticized the Biden administration's recent policy changes as inhumane and contrary to the statute, it is important to keep in mind that border policies implemented by a future Trump administration would be far worse. For example, a return to 2019's Migrant Protection Protocols (MPP), also referred to as the "Remain in Mexico" program, is expected. In 2019, the U.S. Department of Homeland Security (DHS) implemented MPP, where certain noncitizens arriving by land from Mexico were returned to that country while their removal proceedings were in process.[5] Under the MPP program, individuals arriving at the southern border who requested asylum were issued Notices to Appear (NTAs), which are charging documents that initiate removal proceedings. They were then returned to Mexico with instructions to return to a specific port of entry at a designated time and date for their next hearing.

In early 2021, the Biden administration announced a suspension of new enrollments in the MPP program (DHS 2021a). The Secretary of DHS issued a memo on June 1, 2021 that formally terminated the program (DHS 2021b). While litigation temporarily forced the Biden administration to restart MPP, the Supreme Court ultimately held that termination of MPP did not violate the Immigration and Nationality Act (INA).[6] However, the Court noted that under the statute, the Secretary has a *discretionary* authority to return a noncitizen to a foreign contiguous territory.[7] Although the implementation of MPP is not mandatory, federal courts reviewing the matter are likely to determine that the statute grants the federal government *permission* to return asylum seekers to Mexico to await their court dates.

A second Trump administration would also likely re-implement Title 42, an obscure public health authority that was used during the COVID-19 pandemic to expel migrants at the border without providing them the opportunity to apply for asylum. The Biden administration finally ended the program on May 11, 2023, after no longer being able to justify it based on the public health emergency (Isacson 2023). However, Stephen Miller, a White House aide and Trump's adviser on immigration at that time, had reportedly proposed using Title 42 in order to close "the border to asylum seekers," even before COVID-19 began (Human Rights Watch 2021), indicating that a new Trump administration will not be deterred by the pandemic's end and may use other health-related developments to invoke Title 42, such as "severe strains of the flu, tuberculosis, scabies, other respiratory illnesses like R.S.V." (Savage, Haberman, and Swan 2023). A return to Title 42 would no doubt be subject to legal challenge, as its continued use on the basis of a public health emergency is legally dubious.

The Trump administration is also likely to revive the "asylum cooperative agreements" (ACAs) it previously made with Guatemala, Honduras, and El Salvador. The ACAs, which went into effect in 2019, allowed the United States to turn back asylum seekers and relocate them to the three signatory Central American countries where they could pursue asylum claims. These agreements were suspended by the Biden administration in February 2021 (DOS 2021). Not only would such agreements be reinstated by Trump, but they would likely be expanded to other countries, including in South America and Africa (Hackman and Restuccia 2024).

[2] 87 FR 18078 (Mar. 31, 2022).

[3] 88 FR 31314 (May 11, 2023).

[4] 89 FR 48710 (June 5, 2024).

[5] *See Biden v. Texas*, 142 S.Ct. 2528 (June 30, 2022) for a summary of the history of the MPP program and the resulting litigation.

[6] *Biden v. Texas*, 142 S.Ct. 2528 (June 30, 2022).

[7] *Biden v. Texas*, 142 S.Ct. at 2541.

One area where the Trump administration may struggle to resume its cruel policies is in family separation. On December 11, 2023, the U.S. District Court for the Southern District of California approved a settlement agreement in a class action lawsuit brought by the American Civil Liberties Union that challenged the Trump administration's practice of forcibly separating children from their parents at the border.[8] In approving the settlement agreement, the judge noted that the family separation policy represented "one of the most shameful chapters in the history of our country."[9] The settlement agreement contains various provisions aimed at reunifying the separated families and, importantly, one that bars the government from reenacting the zero-tolerance policy over the next eight years (American Civil Liberties Union 2023). It should be noted that Trump maintains close ties to Tom Homan, the former ICE director and architect of the family separation policy, who has continued to publicly defend it (Gutierrez et al. 2024). If the Trump administration attempted to re-enact some version of zero-tolerance, it would appear to be hampered by the clear terms of the settlement agreement.

Interior Enforcement

One of the first steps Trump would take in his anticipated mass deportation operation is to change the enforcement priorities that guide Immigration and Customs Enforcement (ICE). Biden's Civil Immigration Enforcement Priorities "prioritize the apprehension and removal of noncitizens who pose a threat to national security, public safety, or border security from the United States" (DHS 2021c). These include suspected terrorists, dangerous criminals, and recent unlawful entrants. In contrast, Trump would certainly return to the priorities that existed during his first administration, which simply targeted the arrest and removal of everyone who lacked lawful immigration status.

It would prove difficult to contest Trump's change in enforcement priorities. Texas and Louisiana brought a legal action challenging Biden's narrow priorities in part as a violation of INA § 236(c), which mandates the detention of persons convicted of certain crimes. But the Supreme Court held that the states lacked standing to bring their suit, finding that they ran up against Article II of the Constitution. That provision grants broad authority to the Executive to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[10] States or organizations challenging Trump's enforcement priorities would run into the same legal barrier.

Expect Trump also to return to an expansion of the use of "expedited removal," which is a 1996 law that allows the government to summarily remove certain persons without a court hearing when they are arriving at a port of entry or residing in the United States without having been admitted or paroled.[11] It currently applies to persons present within 100 miles of a land border and who have been in the United States for less than two weeks.

In July 2019, the Trump administration applied expedited removal to include undocumented immigrants present anywhere in the country and present for less than two years, which is the full extent of the statute.[12] A court initially enjoined DHS from implementing this initiative in response to a legal challenge on Administrative Procedure Act (APA) grounds.[13] But the DC Circuit reversed that decision, enabling DHS to apply expedited removal within the interior of the United States.[14] The appellate court held that the decision to expand expedited removal was within the DHS Secretary's "sole and unreviewable discretion," and was not subject to review under the APA's standards for agency decision-making.

[8] *Ms. L. v. U.S Immigration and Customs Enforcement (ICE)*, 310 F.Supp.3d 1133 (S.D. Cal. June 26, 2018).

[9] *Ms. L. v. ICE* hearing transcript from Dec. 8, 2023, *available at* https://www.aclu.org/docuents/ms-l-v-ice-hearing-transcript-from-dec-8-2023.

[10] *United States v. Texas, 599 U.S. 670, 679 (2023), citing TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021)*. See also, United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

[11] INA § 235(B)(1).

[12] 84 Fed. Reg. 35409 (July 23, 2019).

[13] M*ake the Road New York v. McAleenan*, Case 1:19-cv-02369 (D.C. D.C., Sept. 27, 2019).

[14] M*ake the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

Nor was it subject to the APA's notice-and-comment rulemaking requirements.[15]

To carry out any robust arrest and removal plans without additional funding, the Trump administration would need to drastically bolster the ranks of ICE officers. This could, reportedly, take the form of reassigning law enforcement officers from other federal agencies, enlisting state National Guard troops, deputizing local police officers, and even using the military.

The expected legal challenge to the use of the military would include application of the Posse Comitatus Act, an 1878 law that bars the use of the military in civil law enforcement. It specifically prohibits the Army and Air Force from acting as domestic law enforcement without explicit congressional authorization; Department of Defense (DOD) regulations also restrict the Navy and Marine Corps from performing law enforcement duties.

One exception, however, is a 1981 federal law that provides for military cooperation with civilian law enforcement officials in drug enforcement.[16] It is possible that the Trump administration would invoke that provision by characterizing its immigration enforcement as stopping the importation of fentanyl or other illegal drugs into the United States. That law designates DOD as the lead agency for detecting and monitoring the transit of illegal drugs into the United States, including the importation of drugs that cross the U.S.-Mexican land border.

More likely, however, would be Trump's threatened application of the Insurrection Act.[17] This 1807 law allows the President to deploy military and National Guard troops within the United States to suppress civil disorder, insurrection, and rebellion. It was invoked, for example, by President George H.W. Bush during the 1994 Los Angeles riots to restore order following the Rodney King verdict. But the law is seen as a last resort and is subject to significant legal and political scrutiny to ensure it doesn't undermine civil liberties and violate states' rights. No precedent exists for its use to supplement federal agency enforcement of immigration laws, and it would be quite a stretch to describe even record numbers of undocumented persons as "insurgents" or as presenting "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States."[18]

Another tactic might be Trump's invoking the Alien Enemies Act of 1798 to expel suspected members of drug cartels and criminal gangs without due process. That law allows for the apprehension and summary removal of persons as "alien enemies" anytime there is a "declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened."[19] While the Supreme Court has upheld past uses of that law in wartime,[20] even the current Court would be unlikely to allow its use without the direct actions of a foreign country or its authority to encompass drug cartel activity.

Apart from these legal impediments to the use of the military, there are also a host of practical challenges for the use of National Guard troops. While they can act in a law enforcement capacity within their own state, the National Guard can only be used in a neighboring state if invited. So "red" states such as Texas and Florida could share these resources with their neighbors. But outside of those two states, most of the country's undocumented population resides in the metropolitan centers of "blue" states — such as California, New York, New Jersey, Illinois, and Maryland — and the current governors of those states are not about to invite in National Guard troops from a contiguous state.

Assuming the Trump administration were able to muster the necessary forces to conduct a massive immigration enforcement effort against the undocumented population, the next difficulty would be locating and arresting them. Over half of the estimated 11 million undocumented immigrants have a pending application for asylum or another defense to removal. While about 1.3 million people are here despite having received a deportation order — and

[15] *Id.*

[16] *See, e.g.*, **National Defense Authorization Act for Fiscal Year 2023**, Pub. L. No. 117-263, amending and adding to Title 10 of the U.S. Code.

[17] **10 USC §§ 251-255**.

[18] **10 USC §§ 252, 253.**

[19] **50 USC § 21.**

[20] *See*, e.g., *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Ex Parte Quirin*, 317 U.S. 1 (1942).

would be the easiest to remove given they have already received due process — the government does not know their whereabouts.

The much-preferred way is for ICE officers to coordinate with state law enforcement and take custody of individuals being held in jails or police custody. This currently happens in red states through cooperative agreements under INA § 287(g). This provision authorizes local law enforcement to perform certain immigration enforcement duties, such as identifying, processing, and detaining individuals who are suspected of being in the United States in violation of its immigration laws. But Trump's enforcement efforts during his first administration drove several states, cities, and localities to stop coordinating with ICE and formally declare themselves sanctuaries. We can expect even more resistance within and among blue states to something heralded by Trump as a major campaign promise, just as Democrats united in opposition to funding border wall construction after the 2016 election.

On the issue of sanctuary policies, we might see the Trump administration deny Federal Emergency Management Agency (FEMA) grants to states and cities that refuse to cooperate with ICE enforcement and deny federal loans to schools and universities that allow in-state tuition to undocumented students. Federal law prevents states and local governments from prohibiting or restricting the "sending to, or receiving from [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[21]

If taking custody of immigrants from state police detention — the "low hanging fruit" — is the preferred method for apprehending them, then arresting persons where they reside is the hardest and most resource-consuming way. Rather than arrests at residences, expect a surge in workplace raids, which are always disruptive and opposed by the local business community, as well as sweeps in public settings and Form I-9, Employment Eligibility Verification investigations.

Many of the immigrants who do not have pending cases might raise claims of asylum or withholding of removal if arrested. Others, who have been in the United States for at least 10 years and have a U.S. citizen spouse or child, would be eligible to request cancellation of removal. Rather than removing them, the government would simply be adding them to the current immigration court backlog of more than three million cases.

Of those immigrants who have been ordered removed, many are from "recalcitrant countries" that limit or refuse to take back deportees. These include China, Vietnam, and certain countries in Africa and the Middle East. Countries such as Nicaragua, Venezuela, and Cuba are under U.S. economic sanctions, which hinder the U.S. government's ability to compel them to receive deportation flights. Haiti is in a current state of anarchy, and most U.S. officials have pulled out. Other "friendly" Latin America countries have restricted the number of flights and deportees they will accept.

But the major obstacle to any enormous deportation effort, however, would be the lack of detention space. Approximately 38,000 beds are currently being used to hold persons awaiting deportation. During the Trump administration, that number increased to over 50,000. While it is possible that the government could locate more beds in county jails, that would still be woefully short of the number needed to deport the millions of persons envisioned by Stephen Miller, the likely mastermind behind Trump's next immigration enforcement effort. To achieve that goal, Mr. Miller is proposing the construction of "vast holding facilities that would function as staging centers," and that would also allow persons to be held long-term while their deportation cases are pending (Savage, Haberman, and Swan 2023). The use of these "internment" camps would likely be focused more on single adults because the government cannot hold children for more than 20 days under a longstanding court order known as the *Flores* settlement.[22] To fund these efforts, Trump would probably redirect money in the military budget, as he did toward border wall construction when Congress failed to authorize it.

[21] 8 USC § 1373.

[22] *Reno v. Flores*, 507 U.S. 292 (1993).

End to Birthright Citizenship

Count on the Trump administration trying to end birthright citizenship for children born in the United States to undocumented parents. He might even initiate that by publishing an executive order that reinterprets the U.S. Constitution and prohibits the State Department from granting U.S. passports and the Social Security Administration from issuing Social Security cards to affected children.

Section One of the Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Amendment was ratified in 1868 and the Supreme Court affirmed birthright citizenship for the children of immigrants 30 years later.[23] In that seminal case, the Court ruled in favor of a man born in San Francisco of Chinese parents and held that birthright citizenship applied to everyone born here regardless of their race, ethnicity, and parentage. The Court interpreted the first sentence as simply an affirmance of the common law of England, which affixed the status of citizenship by the place of birth (jus soli) irrespective of parentage.

The legal dispute centered on the interpretation of the phrase "subject to the jurisdiction thereof." The majority interpreted this phrase as being required to obey U.S. law, which is an obligation that applies to everyone present in the country unless they are protected by diplomatic immunity.[24] The dissenters, however, interpreted it differently to mean those "not subject to any foreign power."[25] This interpretation would exclude parents and their children who owed allegiance to another country. Under that interpretation, a child born in the United States to undocumented parents and who acquired the citizenship of their parents' country (jus sanguinis) would not also acquire U.S. citizenship.

In addition to an executive order, which would be subject to immediate legal challenges, Trump could urge Congress to restrict birthright citizenship through a statute that redefined the phrase "subject to the jurisdiction" or through an amendment to the Constitution that overrides the Citizenship Clause. Both of those actions are very unlikely to succeed; to ratify an amendment first requires a two-thirds majority in both the Senate and the House. Any change in the law would more likely come through a new interpretation by the Supreme Court that reexamines congressional intent and sides with the dissenters in the 1898 case. Anyone gauging the probability of that happening must consider this Court's lack of inhibition in overturning decades of settled law or eliminating the rights of large classes of people.

Immigration Court

The first Trump administration chose not to exercise prosecutorial discretion in immigration court proceedings. Instead, anyone who was removable from the United States was considered a priority for immigration enforcement. This policy was initiated early in the Trump administration, with a January 25, 2017 Executive Order[26] and a February 20, 2017 memorandum issued by then-DHS Secretary John Kelly (DHS 2017).

On June 28, 2018, the administration issued another memorandum that significantly expanded the situations in which U.S. Citizenship and Immigration Services (USCIS) was directed to issue NTAs against individuals applying for immigration benefits, which included any situation in which an individual was denied an immigration benefit and lacked lawful status in the United States (USCIS 2018). This contributed to the clogging of immigration courts with cases that could have been resolved by USCIS. And the lack of prosecutorial discretion once individuals were placed into proceedings meant that even those eligible for relief outside of immigration court, such as those eligible for collateral relief before USCIS, found it difficult to get out of removal proceedings to pursue it.

[23] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[24] *Id.* at 682 ("The real object of the Fourteenth Amendment of the Constitution. . .would appear to have been to exclude. . . two classes of cases — children born of alien enemies in hostile occupation and children of diplomatic representatives of a foreign State").

[25] *Id.* at 720.

[26] Executive Order 13767: Border Security and Immigration Enforcement Improvements (signed Jan. 25, 2017).

Ending the Biden administration's use of prosecutorial discretion in immigration court will be one of the simplest administrative actions that Trump would be able to pursue and one that he would likely initiate immediately. The use of prosecutorial discretion is based on memoranda issued by DHS, and they can be revoked quickly and easily. Practitioners in immigration court should expect that the use of prosecutorial discretion will become extremely limited — perhaps nonexistent. DHS will no longer agree to dismiss removal cases, will not join in motions to reopen, and will no longer be empowered to stipulate to relief in appropriate cases. DHS attorneys may also move to re-calendar cases that were previously administratively closed, which happened during the first Trump administration and would again increase the already immense court backlog.

In addition to stripping ICE prosecutors of essentially all discretion, the first Trump administration also limited the ability of immigration judges and Board of Immigration Appeals members to continue,[27] administratively close,[28] or terminate[29] removal proceedings. The Biden administration has recently finalized regulations that codify the ability of EOIR adjudicators (immigration judges or Board members) to terminate or administratively close proceedings.[30] This will impede a Trump 2.0's ability to immediately strip immigration judges or Board members of this power. While the Trump administration could and likely would try to withdraw this regulation, this would involve going through a notice-and-comment rulemaking period and providing justifications for the policy reversal. Even though they are likely to try, this change would not be immediate and is likely to be challenged through litigation. This may provide practitioners with an extra cushion of time to request termination or administrative closure in appropriate cases, as contemplated by the regulations.

The Trump administration is likely to return to the practice of utilizing the Attorney General to issue precedential decisions that bind the Board, immigration judges, and USCIS. The first Trump administration utilized this power more than any other administration by issuing decisions, among others, that severely limited the ability of victims of domestic violence to seek asylum in the United States.[31] The former Attorney General issued a precedential decision limiting eligibility for asylum based on family membership.[32] It is easy to imagine that these decisions limiting asylum eligibility will be reinstated, especially since the Biden administration failed to issue regulations on the meaning of "particular social group," as the Attorney General indicated the Department of Justice (DOJ) would do upon vacatur of *A-B-* and *L-E-A-* in 2021. Thus, it would only take a subsequent Attorney General decision to severely curtail asylum eligibility based on family membership or domestic violence. These decisions can, however, be challenged through individual litigation. The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* may make these challenges easier, as courts will no longer be required to defer to agency interpretations of ambiguous statutory terms.[33]

Finally, we can expect the issuance of regulations to severely limit asylum eligibility for individuals in removal proceedings. In December 2020, the Trump administration issued regulations that advocates referred to as the "Death to Asylum," which were specifically designed to lead to denials of most applications for asylum. The regulations were enjoined and never went into effect.[34] However, it is expected that any Trump administration will use the rulemaking process to radically alter and substantially limit eligibility for asylum. New rules may be focused on the substance of asylum protection, such as the definitions of the terms "particular social group" or "persecution" as well as

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

[28] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) *vacated by Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021).

[29] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) *vacated by Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022).

[30] 89 Fed. Reg. 46742 (May 29, 2024).

[31] *Matter of A-B- I*, 27 I&N Dec. 316 (AG 2018) and *Matter of A-B- II*, 28 I&N Dec. 199 (AG 2021) *vacated by Matter of A-B- III*, 28 I&N Dec. 307 (AG 2021).

[32] *Matter of L-E-A- II*, 27 I&N Dec. 581 (AG 2019).

[33] Loper Bright Enterprises v. Raimondo, __ *S.Ct.* __, *2024 WL 3208360 (June 28, 2024)*.

[34] *Pangea Legal Services v. Department of Homeland Security*, 512 F.Supp.3d 966 (N.D. Cal., Jan. 8, 2021).

limiting asylum protection for those who have suffered harm by non-state actors. Or they may be focused on the bars based on adverse discretionary factors, such as manner of entry, or the ones based on criminal activity that go beyond those provided by statute.

Humanitarian Programs

The Biden administration has increased humanitarian protections for particularly vulnerable individuals, including individuals seeking adjustment of status through Special Immigrant Juvenile classification (SIJS) and victims of certain types of crimes seeking U nonimmigrant status. Backlogs in visa availability for those seeking SIJS classification or U visa status have meant that it can take years for a visa number to be available. For that reason, USCIS under the Biden administration has expanded the use of deferred action, which allows for the issuance of employment authorization while the person is awaiting visa availability. SIJS applicants are now considered for a grant of deferred action upon approval of the underlying self-petition, while U visa applicants are considered for a grant of deferred action once the agency has issued a "bona fide determination" that their U visa application was properly filed. The Trump administration would likely reverse this expansion of the application of deferred action and withdraw portions of the USCIS Policy Manual that allow eligibility.

The Biden administration has renewed TPS designations for several countries and designated many countries for the first time, including Venezuela, Afghanistan, Ukraine, and Cameroon. The Trump administration is likely to terminate most if not all new TPS designations in addition to not renewing prior designations. It attempted to terminate TPS for certain countries (El Salvador, Nicaragua, Haiti, Sudan, Honduras, and Nepal) during its first administration, but the terminations were successfully enjoined.[35] However, that litigation was in a precarious position at the end of Trump's first term, as the Ninth Circuit had vacated a lower court's injunction that prohibited DHS from terminating TPS for the affected countries.[36] Future challenges to TPS terminations, while possible, may prove difficult.

[35] *Ramos, et al. v. Wolf*, *et al*., 975 F.3d 872 (9th Cir. 2020).
[36] *Id.*

Parole Programs

Parole is the discretionary authority granted to the Secretary of DHS under INA § 212(d)(5) to allow an individual to enter, return to, or remain in the United States instead of being granted a visa or formal admission. Parole is typically granted for a temporary, finite period as noted on the parole document, and each parole request is considered on a case-by-case basis. Over time, DHS and its predecessors have paroled various categories of individuals into the United States. The Biden administration has expanded the use of country-specific parole programs as a way to increase lawful pathways into the United States and decrease irregular migration along the southern border. Some of the country-specific parole programs that DHS has created during the Biden administration include:

- Uniting for Ukraine;
- "CHNV" for citizens of Cuba, Haiti, Nicaragua, and Venezuela;
- Family Reunification Programs for citizens of Colombia, El Salvador, Guatemala, and Honduras; and
- Operation Allies Welcome for Afghans fleeing the Taliban's take-over of that country.

Biden has recently announced the new Process to Promote the Unity and Stability of Families, which will allow certain spouses of U.S. citizens to be granted parole in place.

It is likely that Trump will terminate all country-specific parole programs. Indeed, during the first administration, Trump took steps to terminate the few, modest country-specific parole programs that existed at that time, such as the Filipino World War II Veteran Parole Program and the Haitian Family Reunification Parole program (USCIS 2019). Simply look at the 2019 announcement ending those programs, which were established under the *statutory* parole authority, as evidence of the Trump administration's hostility to them:

> "Under these categorical parole programs, individuals have been able to skip the line and bypass the proper channels established by Congress. With the termination of these programs, these individuals will no longer be permitted to wait in the United States for their

> family-based green card to become available, consistent with the rules that apply to the rest of the world," said USCIS Acting Director Ken Cuccinelli. "Parole is to be used on a case-by-case basis for urgent humanitarian reasons or significant public benefit. USCIS is committed to exercising this limited authority in a manner that preserves the integrity of our immigration system and does not encourage aliens to unlawfully enter the United States." (ibid.).

DACA

The fate of the Dreamers is also at stake in this election. Deferred Action for Childhood Arrivals (DACA) has been hanging by a thread for the past several years. Trump tried to formally terminate DACA in his first term. In 2020, however, the Supreme Court held that the then-DHS Secretary's decision to rescind DACA was arbitrary and capricious in violation of the APA. But the Court's decision was a procedural one and did not rule on the legality of the program itself.[37] The decision was based on extremely narrow legal grounds and left open the door to the administration's future attempts to terminate the program.[38]

The Biden administration tried to protect and strengthen DACA by defending the program in court and issuing a final regulation codifying the DACA standards.[39] Despite these efforts, a federal judge in the Southern District of Texas found the program illegal — first in a July 2021 decision and later in a September 2023 decision that addressed the DACA final regulation.[40] The court stayed the effective date of the order, however, preserving the status quo.

The case is back before the Fifth Circuit and may ultimately reach the Supreme Court again. While the Court would likely hold the program unlawful regardless of which president is in power, the Trump administration has long agreed with the argument that DACA is an unauthorized use of executive power. It would neither defend the program nor work to find another administrative solution — such as offering deferred enforced departure or parole in place — to protect the hundreds of thousands of affected persons.

Family-Based Immigration

Expect the Trump administration to use its powers to reduce overall legal immigration to the United States. Given that roughly two-thirds of permanent residents gain that status each year based on a family relationship (DHS 2023, Table 6), it will likely target this group rather than employment-based applicants. Based on actions he took during his first administration, Trump will likely do the following:

- Expand ideological screening of visa applicants to block people the administration considers to have undesirable attitudes;
- Reduce U.S. consular staff who would otherwise process immigrant visa applications;
- Reduce or reassign comparable staff at USCIS who are responsible for adjudicating family-based petitions and applications for adjustment of status;
- Close USCIS overseas offices to eliminate eligibility for expedited adjudication of petitions and waivers of inadmissibility;
- Require all adjustment applicants and those applying for other benefits to appear at a USCIS interview, thus increasing the already long backlogs; and
- Apply unnecessary "extreme vetting" to routine petitions and applications.

Other anticipated efforts that would simply make it more burdensome for family-based applicants include:

- Increasing application fees and ending fee waivers;
- Reducing the validity of work permits for pending applicants;
- Inappropriately rejecting petitions and applications that do not include "N/A" or "none" in every blank space on the forms;[41]
- Ending biometrics reuse; and

[37] *Department of Homeland Security v. Regents of the University of California, 591 U.S. 1* (2020).

[38] *Id.*

[39] 87 Fed. Reg. 53152 (Oct. 31, 2022).

[40] *Texas v. United States, 691 F.Supp.3d 763 (S.D. Texas Sept. 13, 2023); see also Frequently Asked Questions, Court* Decisions, DACA, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.

- Terminating the Family Reunification Program that allows family members from Ecuador, Haiti, Cuba, El Salvador, Guatemala, Honduras, and Colombia to be paroled into the country after their petitions have been approved and while waiting for a visa to become available.

Trump will likely also bar citizens from certain designated countries from entering the United States, as he famously did to persons from Muslim-majority countries during his first administration.[42] Although it took him three attempts, his third was finally upheld by the Supreme Court, which determined that the president lawfully exercised the broad discretion granted him under INA §§ 212(f) and 215(a). Section 215(f) empowers the president to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate" if the president "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." The Supreme Court ruled that the provision in the 1952 law "exudes deference to the president."[43] The banning of entrants could also include canceling the visas of foreign students who participated in anti-Israel or pro-Palestinian protests. Given that the Trump administration now knows how to successfully craft such travel bans, and given the even more conservative make-up of the Court, future legal challenges would be more difficult to sustain.

Another issue that generated much attention and litigation during the first Trump administration was DHS and the Department of State (DOS) each publishing final regulations that fundamentally altered a long-standing interpretation of the term "public charge."[44] Applicants for family-based immigration must establish that they are not likely to become a public charge after becoming a lawful permanent resident (LPR). The two agencies attempted to tighten the definition of public charge by including additional public benefits whose receipt or likely receipt in the future would make an applicant for permanent residence inadmissible. More significantly, they interpreted the five statutory factors in such an overly burdensome and restrictive manner — such as heavily weighting the applicant's education, English-language proficiency, income, assets, prior employment, work skills, and enrollment in health insurance — that few low-income family members would have qualified.

Their effort both to reduce family-based immigration and frighten people from accessing important public benefits was short-lived. Soon after taking effect, the DHS and DOS regulations were enjoined and later vacated.[45] The two agencies under the Biden administration then resumed following the definition of public charge as set forth in the 1999 interim field guidance,[46] after which DHS published a final rule defining the term[47] and updated guidance interpreting and implementing it (USCIS 2022).

While the Trump Administration could once again publish a new rule redefining public charge, it would more likely just reinterpret the current definition. In other words, it could simply publish a memorandum and change the instructive language in the USCIS Policy Manual. All the litigation that successfully challenged Trump's final regulations did so by attacking the addition of new public benefits to the definition. It would be far more difficult to challenge an

[41] The Trump administration was sued for its "No Blank Space Rejection Policy," but the settlement agreement barring the USCIS from applying it in the future expired on July 14, 2024. *Vangala, et al. v. USCIS, et al.*, Case No. 4:20-cv-08143-HSG (N.D. Cal 2021).

[42] *Trump, et al. v. Hawaii, et al*., 585 U.S. 667 (2018).

[43] *Id.* at 684.

[44] 84 Fed. Reg. 41292 (Aug. 14, 2019); 84 Fed. Reg. 54996 (Oct. 11, 2019).

[45] *See, e.g.*, *Cook County et al. v Wolf et al., 498 F. Supp. 3d 999* (N.D. Ill. 2020); *Make the Road NY et. al. v. Pompeo*, 475 F. Supp. 3d 232 (S.D.N.Y. 2020). On March 9, 2021, the Seventh Circuit lifted its stay of an Illinois district court order enjoining the implementation and enforcement of the 2019 DHS public charge rule. The government dropped its appeal of that order and the vacatur went into effect nationwide. The government withdrew other appeals pending in the Ninth and Second circuits and in the Supreme Court. On March 15, 2021, DHS formally removed the 2019 public charge rule from the Code of Federal Regulations effective March 9, 2021.

[46] 64 Fed. Reg. 28689 (May 26, 1999).

[47] 87 Fed. Reg. 55472 (Sept. 9, 2022).

administrative change that reexamines the five statutory factors — age, health, family status, financial status, and education — and restores Trump's burdensome documentary requirements and weighted emphasis that all but precluded low-income applicants.

Naturalization

It may seem odd that a new Trump administration would want to discourage people from becoming U.S. citizens, but during the first term it imposed additional and unnecessary barriers to naturalization, beyond its efforts to prevent low-income and other immigrants from gaining status and becoming permanent residents (Kerwin, Warren, and Wheeler 2021). First, on December 1, 2020, it began administering a revised version of the U.S. citizenship civics test, which increased the number of questions from 100 to 128 and required applicants to correctly answer 12 out of 20 questions rather than the previous requirement of 6 out of 10. This version of the test proved to be more challenging, complex, and difficult for applicants to pass. Fortunately, on March 1, 2021, the Biden administration restored the previous 2008 version of the civics test.

More significantly, the Trump administration implemented a rigorous vetting process for naturalization applicants. This included more detailed background checks and greater scrutiny of applicants' history and eligibility for permanent residency. For example, if a USCIS officer had previously determined that an applicant was eligible to become an LPR, a naturalization officer could review that approval, determine the agency had made an error, and commence the rescission process. Coupled with Trump's enforcement priorities, that applicant would likely have been placed into removal proceedings. Understandably, this new "extreme vetting" had a chilling effect on LPRs' interest in applying to naturalize.

Finally, DHS proposed increasing the fees for the naturalization application from $640 to $1,170, an 83 percent price surge. It also proposed eliminating the ability to request a fee reduction and made it more difficult to qualify for a fee waiver. The proposed fee increase was temporarily blocked by a federal court when it ruled that the acting Secretary of DHS and the acting USCIS Director were not lawfully appointed, rendering their policy changes invalid.[48]

Refugee Program

It is no secret that Trump plans to substantially reduce or even suspend the nation's refugee program. The annual number of refugees that can be admitted to the country is determined each year by the President, in consultation with Congress. This determination also establishes regional allocations for the refugees. For example, the ceiling set by Biden for fiscal year 2024 is 125,000.

During the four Trump years, the ceiling was steadily reduced from 110,000 under the Obama administration to 50,000 for fiscal year 2017, to 45,000 for 2018, to 30,000 for 2019, and to 18,000 for 2020. For fiscal year 2021, Trump proposed setting a limit of 15,000. But the actual number of refugees admitted during those years never even approached those ceilings. The president's authority in determining the refugee ceiling relies primarily on INA § 212(f), the same section the Supreme Court has found to be almost unassailable.

Similar to the refugee program is the Central American Minors (CAM) program, an Obama-era effort to provide a safe and legal pathway for children from El Salvador, Guatemala, and Honduras, who are at risk, to reunite with their parents who were legally residing in the United States. The CAM program was designed in response to the increasing number of unaccompanied minors making the dangerous journey to the U.S. southern border. The program allowed them, instead, to apply for refugee status or humanitarian parole from their home countries. In 2016, the Obama administration expanded eligibility to include siblings and caregivers of the children.

The Trump administration terminated the program in 2017, but Biden reinstated it in 2021 and expanded eligibility for the program as part of his efforts to

[48] *Immigrant Legal Resource Center v Chad Wolf*, 491 F.Supp.3d 520 (D.N.D. Cal., Sept. 29, 2020).

address the root causes of migration and provide safe pathways for children. Given Trump's past efforts, it is almost certain that his administration will terminate the program again.

Conclusion

Rather than addressing the circumstances that are causing an historically high number of people to leave their countries and attempt to enter the United States, Trump simply protracted the problem and left it to the Biden administration to reengage with the issues, albeit with a seriously depleted refugee and humanitarian infrastructure and an overwhelmed court system. It has now become clear that simply increasing border or interior enforcement will not stem the flow of people who believe — due to gang violence, financial extortion, government corruption, economic collapse, climate change, or other environmental disasters — that they have no other option but to flee. Our immigration laws and policies are not designed to deal with global mass migration at its current level. With a Congress that has been deadlocked on this issue for almost 30 years and a political party that wants to use the border crisis to its advantage rather than try to remedy it, one wonders when the breaking point will come.

We may soon learn. In nearly every conceivable way, a second Trump administration promises to be more extreme than the first. Unconstrained by the need to moderate to win further elections, the administration would unleash its cruelty on millions of immigrants, their families, and their communities. Stephen Miller and a host of other zealots are waiting, ready and eager to impose their vision on the country. While their plans would be catastrophic to the immigrant population, it could also prove disastrous for the U.S. economy, which has relied on immigrant labor to propel itself to a post-pandemic economic recovery that is the envy of the world. Immigrant-rights advocates will no doubt fight at every turn to protect their clients, and many groups are already making plans to protect against the most extreme efforts of the administration. If the worst comes to pass, at least the U.S. public has been forewarned. Immigration advocates will once again need to hunker down, remain committed to advocating for their clients, and prepare for an avalanche of new ones.

Authors' Note

Elizabeth Carlson and Charles Wheeler: They are writing in their private capacities, and the analysis and ideas expressed here are not necessarily those of CLINIC.

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