

Unstable Foundations: Asylum Law and Policy under the Biden Administration

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President Biden entered office in January 2021 with bold promises and a vision for restoring the U.S. asylum system,¹ which the first Trump administration decimated.² While the project faced substantial challenges, many observers, including this author, were optimistic that Biden could reframe the political conversation and use his executive authority to rebuild the asylum system.³ In his first two years in office, he eliminated many of Trump's more draconian rules and policies,⁴ and instituted creative approaches to enable safe and lawful access to the U.S. asylum system. Many of Biden's efforts on both fronts – dismantling Trump's harmful orders and establishing new approaches – were bogged down and even stymied by legal challenges. And in 2023, faced with the re-opening of the southwest border after the Covid-19 public health emergency officially ended, Biden headed down the same dark path as the first Trump administration, implementing harsh new federal regulations to deter asylum seekers from arriving at the southwest border.⁵

Written six months into the second Trump administration, this essay traces the arc of Biden's approach to the U.S. asylum system, from vision and promises, to litigation battles, to Trumpian restrictions that likely violate the immigration statute. It begins by offering a basic description of the U.S. asylum process. The essay then describes the numerous ways in which Biden fixed the harms that Trump wrought on the asylum system, from regulatory freezes to parole programs to vacatur of improperly decided case law. It discusses the legal challenges that the Biden administration faced in these efforts, focusing on their attempts to end the Remain in Mexico process and the Title 42 program.

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1. John Burnett, *Biden Pledges To Dismantle Trump's Sweeping Immigration Changes—But Can He Do That?*, NPR (Sept. 14, 2020), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-tha#> [https://perma.cc/BW3A-JS6Z].

2. ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, *THE END OF ASYLUM* (Georgetown Univ. Press 2021).

3. Jaya Ramji-Nogales, *Cultivating Normative Authority: The Biden Administration, Migration, and the International Legal Order*, 115 AJIL UNBOUND 46 (Jan. 2021) (Symposium: *The Biden Administration and the International Legal Order*, Gregory Shaffer and David Sloss, eds.).

4. See, e.g., SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 47-86.

5. Muzaffar Chishti & Colleen Putzel-Kavanaugh, *Despite Sharply Different Immigration Rhetoric, Democrats and Republicans Now Have a Similar Approach to the Border*, MIGRATION POL'Y INST. (Sept. 27, 2024), <https://www.migrationpolicy.org/article/harris-trump-election-border> [https://perma.cc/M7VT-4ZCT]; Elora Mukherjee, *The End of Asylum Redux and the Role of Law School Clinics*, 133 YALE L.J. FORUM 473 (Dec. 4, 2023).

The essay next catalogues the Biden administration's responses to the reopening of the southwestern border, from harmful expedited programs to two harsh and ultra vires regulations, Circumvention of Lawful Pathways and Securing the Border, that took effect in 2023 and 2024 respectively, and were met with legal challenges. It ends by highlighting the ways in which Biden set the stage for the exceptional cruelty of the second Trump administration, by setting out unstable foundations that could be amplified to subject asylum seekers to exploitation and abuse.

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I. The U.S. Asylum System

The Refugee Act of 1980 established the U.S. asylum and refugee processing systems over forty years ago.⁶ This federal statute implemented the 1951 United Nations Convention Relating to the Status of Refugees, which the United States bound itself to follow in 1968.⁷ The Refugee Convention defines a refugee as a person who has left their country of origin, and is unable or unwilling to return because of a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group.⁸ States parties to the treaty obligate themselves to the principle of *non-refoulement*, which prohibits the return of a refugee to the state in which they fear persecution.⁹ The Refugee Act incorporated this international definition into U.S. law, broadening the existing statutory approach, and instructed the U.S. Attorney General to create a process to adjudicate applications for

6. Pub.L. No. 96-212, 94 Stat. 102 (1980).

7. United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, entered into force Apr. 22, 1954 (hereinafter "Refugee Convention"). The U.S. did not ratify the Refugee Convention but undertook to comply with its provisions by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees, which incorporates Articles 2 through 4 of the Refugee Convention by reference. United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267, at Art. I (1-2) (entered into force for the United States Nov. 1, 1968).

8. Refugee Convention, Art. 1.

9. *Id.* art. 33.

asylum.¹⁰ After a decade, the Immigration and Naturalization Service issued a final asylum rule creating detailed standards for the asylum process as well as establishing the Asylum Office, which houses a corps of professional adjudicators trained in asylum law.¹¹

In addition to asylum, individuals in the asylum process simultaneously apply for withholding of removal and withholding or deferral of removal under the United Nations Convention Against Torture.¹² These statuses provide lesser forms of protection than asylum to individuals who are not eligible for asylum.¹³ To obtain withholding of removal, applicants must demonstrate that it is more likely than not that they will face persecution on the basis of one of the five grounds outlined above; this mandatory status is both harder to obtain and offers less protection, as it does not offer a pathway to citizenship.¹⁴ To obtain protection under the Convention Against Torture, applicants must establish that it is more likely than not that they will be tortured if they are returned to their country of origin.¹⁵

Though lawmakers have subjected the asylum process at the border to a dizzying array of changes since 2018,¹⁶ the process in the interior still largely follows the process set out in the original asylum regulations. Asylum seekers who file their claim affirmatively,¹⁷ that is, while they hold lawful status or before they have been apprehended by immigration authorities, are heard in the first instance at the Asylum Office, housed within the U.S. Citizenship and Immigration Services branch of the U.S. Department of Homeland Security. That proceeding involves a non-adversarial interview with an asylum officer at one of the eleven asylum offices around the country.¹⁸ If the asylum officer finds the

10. 7 INA §101(a)(42); 8 U.S.C. §1101(a)(42), INA 208(a)-(b); 8 U.S.C. §1158(a)-(b). The INA contain bars to asylum, including a one-year filing deadline; a prohibition on repeated filing of a claim that has been denied; persecution of others; conviction of a particularly serious crime; commission of a serious nonpolitical crime outside of the United States; threats to national security or terrorist activity; and firm resettlement in a third country. INA § 208(a)(2); INA § 208(b)(2), 8 U.S.C. § 1158(b)(2). Some of these align with the bars to asylum found in the Refugee Convention while others do not.

11. 55 Fed. Reg. 30,674 (1990).

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984); implemented through 2 Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681–822 (codified as Note to 8 U.S.C. § 1231).

13. Applicants granted withholding of removal are not placed on a path to citizenship and cannot extend their status to a derivative spouse and minor children. They are released from detention and receive work authorization. Applicants granted deferral of removal may be detained indefinitely.

14. See 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b).

15. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998); 8 C.F.R. §§ 208.16(c), 208.18.

16. See, e.g., SCHOENHOLTZ ET AL., *supra* note 2, at 47–86.

17. *Credible Fear and Defensive Asylum Processes: Frequently Asked Questions*, CONG. RSCH. SERV., at 2 (Sept. 25, 2024), <https://crsreports.congress.gov/product/pdf/R/R48078#:~:text=Asylum%20may%20be%20granted%20to,social%20group%2C%20or%20political%20opinion> [https://perma.cc/LPV8-R4DL].

18. INA §235(b)(1)(E)(i); 8 U.S.C. §1225(b)(1)(E)(i) (describing asylum officer role); 8 C.F.R. §208.9; Refugee, Asylum and International Operations Directorate (RAIO), USCIS, <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate-raio> [https://perma.cc/5TRV-PNCA] (last visited Jan.

applicant eligible for asylum, their claim is granted, and they are able to extend derivative asylum status to their spouse and minor children, whether they are in the United States or abroad.¹⁹ The asylee and their family are eligible to adjust to permanent residence after one year and apply for citizenship after five years.²⁰ If the asylum officer finds the applicant ineligible for asylum on the merits, or that they did not meet the one-year filing deadline, and the applicant does not have another form of lawful status, the officer refers the applicant to the immigration court, part of the Executive Office of Immigration Review housed within the U.S. Department of Justice, where they face an adversarial hearing.²¹ Asylum seekers apprehended before applying present their asylum claim in immigration court as a defense to removal; these are known as “defensive” proceedings.²² In the immigration court hearings, which are scheduled for four hours, a trial attorney from U.S. Immigration and Customs Enforcement (ICE) represents the government and cross-examines the asylum seeker. The immigration judge may issue an oral decision from the bench or a written decision several weeks later.²³

The asylum seeker or the trial attorney may appeal the immigration judge’s decision to the Board of Immigration Appeals (BIA), which is the administrative appeal body specialized in immigration law within the Department of Justice.²⁴ Most BIA appeals are decided on paper; hearings are rare.²⁵ If the asylum seeker loses before the Board, they may appeal to the Federal Courts of Appeals; if they win, the government may not appeal.²⁶ Because the BIA acts under a delegation of Department of Justice authority, the Attorney General may self-certify any of their decisions, meaning that unilaterally intervene and decide the case of their own accord.²⁷

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act created a new process known as expedited removal that applied to asylum seekers who arrived without documentation at the southwest border of the United States beginning on April 1, 1997.²⁸ Both the Refugee Convention and

16, 2026) (listing eleven asylum offices in Arlington, Boston, Chicago, Houston, Los Angeles, Miami, Newark, New Orleans, New York, San Francisco, and Tampa).

19. USCIS, *Types of Affirmative Asylum Decisions: Grants of Asylum*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions#:~:text=Grant%20of%20Asylum,a%20qualifying%20relationship%20to%20them> [<https://perma.cc/GK72-ZY94>] (last visited Feb. 26, 2026); USCIS, *Family of Refugees and Asylees*, <https://www.uscis.gov/family/family-of-refugees-and-asylees> [<https://perma.cc/4H22-DA7Q>] (last visited Feb. 26, 2026).

20. INA § 209; 8 U.S.C. § 1159.

21. 8 C.F.R. § 208.14(c)(1).

22. *Credible Fear and Defensive Asylum Processes: Frequently Asked Questions*, CONG. RESCH SERV., 1, 2 (Sept. 25, 2024), <https://crsreports.congress.gov/product/pdf/R/R48078#:~:text=Asylum%20may%20be%20granted%20to,social%20group%2C%20or%20political%20opinion> [<https://perma.cc/BTT3-9CYA>].

23. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 6-24.

24. U.S. Dep’t of Justice, Executive Office for Immigration Review, *Board of Immigration Appeals*, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/BH8G-SXK4>] (last accessed Feb. 26, 2026).

25. *Id.*

26. 8 C.F.R. § 1003.1 (g); *Id.*

27. 8 C.F.R. § 1003.1(d)(1)(i), 1003.1(h).

28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996). The expedited removal provisions are codified at INA §235(b)(1).

the Refugee Act of 1980 mandate access to the asylum process for anyone who reaches the border, whether or not they hold lawful status or an entry visa.²⁹ Drafters of the treaty and the statute created the provision because individuals fleeing persecution in their home country may not have the luxury of time or access to government resources needed to obtain travel documents.³⁰ Lawmakers designed the expedited removal process to balance this requirement with the challenges involved with processing large groups of asylum seekers arriving at the southwestern border.³¹ As a result, the process originally required that immigration officers ask all migrants placed in expedited removal four questions intended to elicit a fear of return that could indicate eligibility for asylum; the official was required to create a written record of the applicant's answers to the "claim of fear questions."³² As discussed later in this article, the Biden administration removed this procedural safeguard, requiring asylum seekers to affirmatively assert their fear of return.³³ In either case, those who express a fear of return to their home country receive a hearing in which an asylum officer determines whether they have a "credible fear" of

29. Article 31(1) of the Refugee Convention requires that, "[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, 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." Accordingly, INA §1158(a)(1) states that, "[a]ny alien who is physically present in the United States or who arrives in the United States . . . , *irrespective of such alien's status*, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title." (emphasis added).

30. UN High Comm'r for Refugees, *Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/24/14 (Sept. 23 2024), <https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632> [<https://perma.cc/94HP-YHP9>] (accessed Feb. 22, 2026), at Para. 4, citing UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons—Memorandum by the Secretary-General (Jan. 3 1950) E/AC.32/2, comment to paragraph 2 of then-draft Article 24, www.refworld.org/docid/3ae68c280.html [<https://perma.cc/DF6V-HL36>] stating: "[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to protect from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum."

31. Originally applied only to undocumented migrants seeking entry at the border, expedited removal was expanded to incorporate all arrivals by sea in 2002. In 2004, expedited removal was expanded to include undocumented migrants within 100 miles of the border within 14 days of entry. *The Department of Homeland Security's Authority to Expand Expedited Removal*, CONG. RSCH. SERV., 1, 2–3 (updated Sept. 18, 2025), <https://www.congress.gov/crs-product/LSB10336> [<https://perma.cc/WZD2-YMQ8>].

32. *Claims of Fear*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> [<https://perma.cc/J5JU-6KDS>] (last visited Jan. 30, 2026). Those four questions are: (1) Why did you leave your home or country of last residence? (2) Do you have any fear or concern about being returned to your home country or being removed from the United States? (3) Would you be harmed if you are returned to your home country or country of last residence? (4) Do you have any questions or is there anything else you would like to add? See also *Report on Asylum Seekers in Expedited Removal*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (2005), <https://www.uscirf.gov/publications/uscirfs-expedited-removal-study> [<https://perma.cc/55P3-JXHB>].

33. *Securing the Border*, U.S. DEP'T OF HOMELAND SEC. (June 5, 2024), <https://www.dhs.gov/archive/securing-border> [<https://perma.cc/TA27-HVEL>].

return.³⁴ Immigration officers currently conduct all of these interviews remotely; they were previously conducted in person.³⁵ If the applicant's testimony meets the credible fear standard, establishing a significant possibility that they could demonstrate eligibility for asylum, the interviewing officer refers them to the immigration court to present a full asylum claim.³⁶ Applicants who do not express a fear can be immediately removed,³⁷ as can those who express a fear but are found by an asylum officer not to meet the credible fear standard. The latter group may appeal the asylum officer's finding to an immigration judge; again, if their appeal is not successful, they can be quickly removed.

The first Trump Administration inflicted many damaging changes on the asylum process, from imposing new legal restrictions and procedural obstacles, to closing the border to asylum seekers, to creating an omnibus regulation designed to make nearly every aspect of the asylum process more difficult for applicants.³⁸ The array of assaults on the asylum system ranged from the arbitrary banality of rejecting applications that contained a blank space in response to any questions on the twelve-page asylum application form,³⁹ to the horrifying cruelty of forcibly separating asylum-seeking parents from their minor children at the southwestern border.⁴⁰ Though the full array of changes wrought by Trump are too numerous to discuss in this essay, the next section will describe many of those policies as it catalogues Biden's efforts to overturn them.

II. Fixing What Trump Wrought

Biden entered office with a bold vision to undo the damage that Trump wrought on the U.S. immigration system, and the asylum process in particular.⁴¹ In his first 100 days in office, Biden issued 94 executive actions.⁴² With respect to asylum, he repealed some of the most discriminatory executive actions

34. INA §235(b)(1)(A)(ii); 8 U.S.C. §1225(b)(1)(A)(ii), and 8 C.F.R. §235.3(b)(4). Hillel R. Smith, *Expedited Removal of Aliens: An Introduction*, CONG. RSCH. SERV. (Mar. 25, 2022), <https://www.congress.gov/crs-product/IF11357> [<https://perma.cc/XKB2-AU3N>]. Applicants who are ineligible for asylum and seek withholding or deferral of removal must meet the higher "reasonable fear" standard. 8 C.F.R. § 208.31(a)

35. CONG. RSCH. SERV., *supra* note 17, at 10.

36. INA §235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v). See also 8 C.F.R. §208.30(e)(2).

37. INA §235(b)(1)(A)(i); 8 U.S.C. §1225(b)(1)(A)(i).

38. SCHOENHOLTZ ET AL., *supra* note 2.

39. *Form I-589, Application for Asylum and Withholding of Removal*, USCIS (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf> [<https://perma.cc/GBZ4-NY7P>].

40. *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*, U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN. (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf [<https://perma.cc/PVX6-J5YH>].

41. See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS DEMOCRATS (last accessed Jan. 30, 2026) [<https://perma.cc/2QAA-AQ2Y>].

42. *In His First 100 Days in Office, President Joe Biden Has Advanced Three Times as Many Executive Actions on Immigration as Donald Trump Did*, MIGRATION POL'Y INST. (Apr. 26, 2021), <https://www.migrationpolicy.org/news/first-100-days-office-biden-executive-actions> [<https://perma.cc/LZ2B-D5XE>].

that Trump had taken, though some of those efforts were met with legal challenges. Biden moved quickly to install high-ranking officials who would undo the worst of Trump's policies, including revoking arbitrary and unprecedented changes to the substance of asylum law. He also used his executive authority in creative ways to create safe and lawful pathways for migrants to enter the United States in the face of decades of congressional inaction on comprehensive immigration reform.

A. The First 100 Days

On the day of his inauguration, January 20, 2021,⁴³ Biden repealed the Muslim Ban that Trump had issued on his first week in office. The first version of the ban generally prohibited the entry of all nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, and specifically prohibited the entry of Syrian refugees with no exceptions.⁴⁴ This initial iteration was blatantly unconstitutional and quickly enjoined.⁴⁵ After four attempts to revise it, Trump subsequently introduced a version of the ban that was upheld by the U.S. Supreme Court.⁴⁶ Biden's revocation of the ban on his first day in office sent a clear message of change. That same day, his Chief of Staff, Ron Klain, issued a regulatory freeze memo to all administrative agencies, requiring that they withdraw any federal rules that had not yet been published, and consider postponing for sixty days the effective date of any rules that had been published, pending review by the new administration.⁴⁷

The following day, the Biden administration suspended enrollment in the Remain in Mexico program, also known by the Orwellian moniker "Migrant Protection Protocols."⁴⁸ That program, instituted through a press release issued by then-DHS Secretary Kirstjen Nielsen, required asylum seekers arriving at the southwestern border to return to Mexico to await their immigration court hearings.⁴⁹ Asylum seekers subject to the policy suffered tremendously, unable to find work to support themselves in Mexico and easy prey for violent

43. Proclamation 10141 of January 20, 2021. *Ending Discriminatory Bans on Entry to the United States*, 80 FED. REG. 7005.

44. See Exec. Order No. 13,769, 82 Fed. Reg. 20, 8980–81 (Feb. 1, 2017). It also banned the entry of all Syrian refugees without exception.

45. See *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017).

46. See *Trump v. Hawaii*, 585 U.S. 667, 710–11 (2018); Tally Kritzman-Amir and Jaya Ramji-Nogales, *Nationality Bans*, U. ILL. L. REV. 563, 590 (2019).

47. Memorandum from Ronald A. Klain, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies, *Regulatory Freeze Pending Review* 86 Fed. Reg. 7424 (Jan. 28, 2021).

48. *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, U.S. DEP'T OF HOMELAND SEC. (Jan. 20, 2021), <https://www.dhs.gov/archive/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/P22V-FFT3>].

49. *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* U.S. DEP'T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/archive/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/KRV5-VJWZ>].

extortionist actors at the border.⁵⁰ A month after the suspension, the Biden administration began to enable individuals who had enrolled in the Remain in Mexico program to enter the United States to seek asylum.⁵¹

On January 26, 2021, Biden's Acting Attorney General rescinded the cruel Zero Tolerance Policy, through which the Trump administration forcibly separated thousands of asylum seeking parents from their minor children at the southwest border.⁵² The Biden administration followed up a week later by creating an interagency task force on family reunification that was mandated to identify all of the children who were separated from their families through the Trump policy and to facilitate reunification, as well as to identify other forms of support needed by these families, such as mental health services.⁵³

Biden wasted no time in appointing high-level officials who would dismantle the excesses of the Trump administration.⁵⁴ He appointed Alejandro Mayorkas, the first Latine and the first immigrant to be the Secretary of Homeland Security.⁵⁵ For the position of Chief Counsel of U.S. Citizenship and Immigration Services, Biden selected Ashley Tabaddor, an immigration judge and the former president of the immigration judges' union. Tabaddor was an outspoken critic of the Trump administration's efforts to undermine the immigration court system, through measures such as inflicting numerical case adjudication requirements on immigration judges, overturning immigration judges' decisions, and limiting judicial authority and discretion.⁵⁶

In early February, Secretary of State Anthony Blinken announced the suspension of, and the beginning of the termination process for the "Asylum Cooperative Agreements" with El Salvador, Guatemala, and Honduras.⁵⁷ Those agreements enabled the Trump administration to send asylum seekers to these three Central American countries under the pretense that those governments would adjudicate their claims. Given the exceptionally limited capacity of

50. See, e.g., SCHOENHOLTZ ET AL., *supra* note 2, at 47–86.

51. DHS Statement on First Step in Process to Address Individuals in Mexico with Active MPP Cases U.S. DEP'T OF HOMELAND SEC. (Feb. 19, 2021), <https://www.dhs.gov/archive/news/2021/02/19/dhs-statement-first-step-process-address-individuals-mexico-active-mpp-cases> [<https://perma.cc/K4J9-PBTL>].

52. Memorandum to All Federal Prosecutors from Acting Attorney General Monty Wilkinson, *Rescinding the Zero Tolerance Policy* (Jan. 26, 2021), https://www.justice.gov/d9/2022-12/acting_ag_memo-rescinding_the_zero-tolerance_policy_for_offenses_dated_1-26-2021.pdf [<https://perma.cc/TY3R-K8TA>].

53. President Biden, *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families* 86 FED. REG. 8273 (Feb. 2, 2021).

54. Priscilla Alvarez, *Biden Wasting No Time Naming Officials to Reverse Trump's Immigration Policies*, CNN (Jan. 26, 2021), <https://www.cnn.com/2021/01/26/politics/immigration-biden-homeland-security/index.html> [<https://perma.cc/A6C2-6EG6>].

55. U.S. Dep't of Homeland Sec., *Alejandro Mayorkas Sworn in as Secretary of Homeland Security* (Feb. 2, 2021), <https://www.dhs.gov/news/2021/02/02/alejandro-mayorkas-sworn-secretary-homeland-security> [<https://perma.cc/5FEH-LNBZ>].

56. Priscilla Alvarez, *Biden Wasting No Time Naming Officials to Reverse Trump's Immigration policies*, CNN (Jan. 26, 2021), <https://www.cnn.com/2021/01/26/politics/immigration-biden-homeland-security/index.html> [<https://perma.cc/A6C2-6EG6>].

57. Antony J. Blinken, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras*, U.S. DEP'T OF STATE (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/> [<https://perma.cc/N6XG-RMA2>].

those nations' asylum systems, their geographic proximity to each other, and the fact that transnational gangs from which many asylum seekers from the region were fleeing operated in all three countries, this policy appeared to be designed to deny protection to asylum seekers at the southwestern border.⁵⁸ Though all three agreements were signed by September 2019,⁵⁹ and DHS issued implementing regulations in November 2019,⁶⁰ only the agreement with Guatemala was ever operationalized.⁶¹

Four days before the suspension and process of termination had been announced, Biden had ordered Secretary Blinken to "promptly consider whether to notify the governments of the Northern Triangle" of the United States' intent to suspend and terminate those agreements.⁶² In the same executive order,⁶³ he ordered the Attorney General and the Secretary of Homeland Security to "restore and enhance asylum processing at the border" by review with an eye to termination, rescission, or modification of the Remain in Mexico policy; the Title 42 policy Trump used to close the border, relying on spurious public health justifications; the Third Country Transit Ban that rendered ineligible for asylum any applicant who had travelled through a third country and had not applied for asylum in that country;⁶⁴ and the dangerously-expedited border removal processes known as PACR and HARP under which asylum seekers' credible fear interviews were held within 48 hours of entry.⁶⁵

In March, the Biden administration overturned Trump's expansion of the expedited removal process.⁶⁶ As described in the first section of this essay, the expedited removal regulations had historically limited its application to undocumented migrants apprehended within 14 days of entry and 100 miles of the border. The Trump administration expanded expedited removal to the full extent of its statutory authority, meaning that the process applied to all

58. See, e.g., SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 71-75; UNHCR, *Statement on New U.S. Asylum Policy* (Nov. 19, 2019), <https://www.unhcr.org/us/news/news-releases/statement-new-u-s-asylum-policy> [<https://perma.cc/R2A4-CSMB>].

59. "Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims," 84 Fed. Reg. 64,095 (July 26, 2019); "Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims," 85 Fed. Reg. 83,597 (Sept. 20, 2019); "Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims," 85 Fed. Reg. 25,462 (Sept. 25, 2019).

60. USCIS, *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994 (Nov. 19, 2019).

61. Office of Public Affairs, *Fact Sheet: DHS Agreements with El Salvador, Guatemala, and Honduras*, U.S. DEP'T OF HOMELAND SEC. (Nov. 7, 2019), https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf [<https://perma.cc/3TEK-YCP3>].

62. Exec. Order No. 14010 86 FR 8267§ 4(D) (Feb. 2, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/> [<https://perma.cc/BN8J-S7GT>].

63. Exec. Order No. 14010 86 FR 8267 § 4(A-C, E) (Feb. 2, 2021),

64. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 67-70.

65. *Id.* at 75-79.

66. 87 Fed. Reg. 16022 (Mar. 21, 2022).

undocumented migrants apprehended anywhere in the interior of the United States within two years of entry.⁶⁷ No previous administration, Democratic and Republican alike, had expanded the expedited removal regulations to their fullest statutory authority, believing such an application to be likely unconstitutional.⁶⁸ Biden returned the expedited removal policy to its historical limits.

Just before the end of the 100 day period, the Biden administration announced that it would put an end to the arbitrary policy of rejecting the asylum application form if a space was left blank.⁶⁹ Several months later, in October, it eliminated the quota system for immigration judges that had been subject to fierce criticism from Ashley Tabaddor and the immigration judges' union.⁷⁰

B. Fixing the Substantive Law

The Biden administration also worked quickly to rectify damaging and arbitrary changes that the Trump administration had made to the substantive law of asylum. Trump's attorneys general, starting with Jeff Sessions, had attempted to establish, contrary to longstanding precedent both domestic and international, that persecution by non-state actors could not meet the standard for asylum.⁷¹ They pursued that aim by certifying decisions of the BIA to themselves, a practice that was rarely used prior to the Trump administration. Through this self-referral process, Trump's attorneys general unilaterally deployed their authority to decide administrative cases, issuing a precedential decision binding on immigration courts nationwide.⁷² In 2018, Sessions used this mechanism to overturn two decisions awarding asylum to women fleeing domestic violence, relying on the erroneous assertion that "victims of private criminal activity" could not be eligible for asylum.⁷³ Decades of BIA precedent and USCIS training materials for asylum officers established that asylum seekers facing persecution by non-state actors simply had to demonstrate that the government was "unable or unwilling to control" those actors.⁷⁴ In July 2020, the U.S. Court of Appeals for the District of Columbia confirmed that

67. INA §235(b)(1)(A)(iii); 8 U.S.C. §1225(b)(1)(A)(iii).

68. Hillel R. Smith, *The Department of Homeland Security's Authority to Expand Expedited Removal*, CONG. RSCH. SERV. (Sept. 18, 2025), <https://www.congress.gov/crs-product/LSB10336> [<https://perma.cc/WZD2-YMQ8>].

69. USCIS, *USCIS Confirms Elimination of "Blank Space" Criteria* (Apr. 1, 2021), <https://www.uscis.gov/archive/uscis-confirms-elimination-of-blank-space-criteria> [<https://perma.cc/H7ML-FM3F>]; *Vangala v. USCIS*, No. 4:20-cv-08143 (N.D. Cal. 2020).

70. Erich Wagner, *Biden Admin. Suspends Immigration Judge Quotas, Prompting Similar Requests Elsewhere*, GOV'T EXEC. (Oct. 26, 2021) <https://www.govexec.com/workforce/2021/10/biden-admin-suspends-immigration-judge-quotas-prompting-similar-requests-elsewhere/186396/print/> [<https://perma.cc/D9AE-T9AR>].

71. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 32-36.

72. Stella Burch Elias and Paul Gowder, *Against Attorney General Self-Referral in Immigration Law*, 109 MINN. L. REV. 2331 (2025).

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

74. See, e.g., *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (2013); USCIS, *RAIO Directorate – Officer Training, Definition of Persecution and Eligibility Based on Past Persecution*, 1, 28 (Feb. 21, 2012), https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf [<https://perma.cc/UCU4-4GJW>].

persecution includes harm perpetrated by non-state actors.⁷⁵ In an exceptionally problematic response, Attorney General William Barr used the self-referral process to take control of a different asylum claim based on domestic violence. In that case, he held that asylum claims based on persecution by non-state actors were unlikely to succeed because they were based on “personal animus,” casting doubt on the future viability of asylum claims based on domestic violence.⁷⁶ In other words, the Trump administration undertook an immediate end-run around the federal court’s decision, undercutting authority that lies squarely within the judicial branch and injecting politics directly into immigration precedent.⁷⁷ Just six months later, after Barr resigned, in January 2021, acting Attorney General Rosen issued another decision defiantly contradicting the D.C. federal appellate court. Referring to himself the case decided by Sessions in 2018, Rosen held that asylum seekers persecuted by non-state actors were required to demonstrate that their government was “completely helpless” to protect them from that harm, in order to make a successful claim.⁷⁸ In addition to taking aim at the domestic violence cases, Barr upended over thirty years of precedent by deciding that persecution based on family ties could not form the basis for an asylum claim.⁷⁹ In June 2021, Associate Attorney General Vanita Gupta announced the vacatur of two of these cases, and Attorney General Merrick Garland overturned the other the following month.⁸⁰

C. Charting a Vision Through Executive Action

In addition to restoring the asylum system by reversing the first Trump Administration’s damaging actions, Biden sought to create a range of lawful pathways for asylum seekers to enter the United States, largely relying on the executive’s parole powers.⁸¹ He also limited detention of asylum seekers and

75. *Grace v. Barr*, 965 F.3d 883, 889 (D.C. Cir. 2020) (“Under longstanding administrative and judicial precedent, the term ‘persecution,’ undefined in the INA, encompasses harm inflicted by non-state actors. See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060 (9th Cir. 2017) (en banc) (explaining that “[t]he concept of persecution by non-state actors is ‘inherent’ in . . . the Refugee Act,” which amended the INA); Deborah Anker, *Law of Asylum in the United States* § 4:10 (2019 ed.) (“In U.S. law, recognition of the non-state actor doctrine is long-standing, pre-dating the 1980 incorporation of the international refugee definition into the [INA].”). (“In order to obtain asylum based on persecution by non-state actors, applicants must show that their governments were “unable or unwilling to control” the persecutors. See, e.g., *Bringas-Rodriguez*, 850 F.3d 1062–68 (collecting cases applying the ‘unable or unwilling’ standard).”)

76. *Matter of A-C-A-A-*, 28 I&N DEC. 84 (A.G. 2020).

77. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the duty of the Judicial Department to say what the law is.”).

78. *Matter of A-B-*, 28 I&N DEC. 199 (A.G. 2021).

79. See *Matter of L-E-A-*, 28 I&N DEC. 304 (Att’y Gen. 2021).

80. Memorandum from Vanita Gupta, Assoc. Att’y Gen., to the Civil Div., U.S. Dept’t of Justice, *Impact of Attorney General decisions in Matter of L-E-A- and Matter of A-B*, (June 16, 2021), https://www.justice.gov/d9/pages/attachments/2021/06/16/civ_oasg_memo_0.pdf [<https://perma.cc/4EWN-U9U6>]; *Matter of A-C-A-A-*, 28 I&N DEC. 351 (Att’y Gen. 2021).

81. Biden also attempted, unsuccessfully, to use his parole powers to enable beneficiaries of family petitions to adjust to lawful permanent residence more easily. The Keeping Families Together program, instituted in August 2024, enabled some spouses and stepchildren of U.S. citizens to obtain what is known as “parole in place,” INA section 212(d)(5)(A). Without this program, migrants who were eligible for lawful permanent residence through a family

expanded the Temporary Protected Status program that offers safety to many non-citizens who need protection but do not fall within the refugee definition.

Biden restored, albeit in the face of litigation, and expanded Temporary Protected Status (TPS), which offers safe haven to non-citizens residing in the U.S. who cannot return to their home country because of unstable conditions.⁸² TPS offers a blanket form of relief to all nationals of a designated country who lived in the United States before a certain date; it does not provide a path to citizenship but rather a short-term lawful immigration status that can be renewed.⁸³ In addition to providing relief from deportation, TPS provides recipients with employment authorization and protection against detention.⁸⁴ Beginning in September 2017, the first Trump administration announced its plan to terminate TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras, despite ongoing humanitarian concerns in those countries.⁸⁵ Trump's action was unprecedented, as previous administrations, Democratic and Republican alike, had extended TPS unless and until situations in the country of origin improved substantially.⁸⁶ The district court preliminarily enjoined that decision as arbitrary and capricious under the Administrative Procedures Act.⁸⁷ In the meantime, Biden extended TPS for all of the countries listed above that faced termination under Trump, as well as Somalia, South Sudan, Syria, and Yemen.⁸⁸ Biden also issued new TPS

petition but had not been admitted or paroled into the United States were required to leave the United States to have their visa processed at a U.S. consulate in a different country. The program allowed beneficiaries to adjust status without leaving the country. The estimated beneficiaries were 500,000 noncitizen spouses who had, on average, lived for 23 years in the United States as well as 50,000 noncitizen stepchildren of U.S. citizens, 89 Fed. Reg. 67,459 (Aug. 20, 2024); *Keeping Families Together*, USCIS (Jan. 24, 2025), <https://www.uscis.gov/keepingfamilies-together> [<https://perma.cc/5Q3V-242L>]. The program was challenged in court and vacated in *State of Texas v. Dep't of Homeland Sec.*, 24-cv-306 (E.D.T.X. Nov. 7, 2024).

82. The Secretary of Homeland Security may authorize TPS for nationals of a designated country where one of the following conditions is met: "(1) ongoing armed conflict in a foreign state that poses a serious threat to personal safety; (2) a foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster; or (3) extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning." Jill H. Wilson, *Temporary Protected Status and Deferred Enforced Departure*, CONG. RSCH. SERV., 1, 2 (Aug. 28, 2025), <https://sgp.fas.org/crs/homesecc/RS20844.pdf> [<https://perma.cc/S47R-CANS>]. TPS was created by statute in 1990. 8 U.S.C. §1254a(b)(1).

83. TPS can be awarded for 6 to 18 months and can be renewed indefinitely. Nearly 200,000 Salvadorans have resided in the United States with TPS since 2001. Wilson, *supra* note 82, at 2, 6.

84. 8 U.S.C §1254a (a)(1)(A), (a)(1)(B), (d)(4).

85. Hillel R. Smith, *Federal District Court Enjoins the Department of Homeland Security from Terminating Temporary Protected Status*, CONG. RSCH. SERV. (Mar. 18, 2019), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10215/LSB10215.3.pdf [<https://perma.cc/Y53X-8QH8>].

86. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1092-98 (N.D. Cal. 2018).

87. The preliminary injunction issued by the district court in 2018 is still in place pending a rehearing en banc before the Federal Court of Appeals for the Ninth Circuit. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018); *Ramos v. Nielsen*, ACLU OF S. CAL. (Mar. 13, 2018), <https://www.aclusocal.org/en/cases/ramos-v-nielsen> [<https://perma.cc/B8R7-HHT5>]. See also *Bhattarai et al. v. Nielsen et al.*, No. 19-cv-00731 (N.D. Cal. Mar. 2019).

88. *Update on Ramos v. Nielsen*, <https://www.uscis.gov/archive/update-on-ramos-v-nielsen> [<https://perma.cc/ADA4-56J4>] (last visited Jan. 30, 2026); *Continuation of Documentation for*

designations for Afghanistan, Cameroon, Ethiopia, Myanmar, Ukraine, and Venezuela.⁸⁹

In addition to TPS designations and extensions, Biden used his parole authority to create safe transit routes for nationals of certain countries and to enable family reunification. Humanitarian parole enables non-citizens to enter the United States lawfully, to obtain work authorization, and to remain in a temporary status for the duration of the parole designation.⁹⁰ Biden extended parole to non-nationals fleeing armed conflict. In August 2021, the Biden administration launched Operation Allies Welcome, which awarded a two-year parole status to 76,000 Afghans who managed to reach U.S. ports of entry after evacuating from Afghanistan during the U.S. withdrawal.⁹¹ An additional 114,000 Afghans entered with humanitarian parole from other countries under the follow-up Operation Enduring Welcome program.⁹² In April 2022, the Biden administration created the “Uniting for Ukraine” program, which offered a two-year parole status to Ukrainian citizens with a financial sponsor in the United States.⁹³ By August 2024, over 221,000 Ukrainians had been granted parole under Uniting for Ukraine, and an additional 430,000 Ukrainians had been paroled into the U.S. outside of that program.⁹⁴

In January 2023, the Biden administration extended parole to nationals of four countries in Latin America facing political instability: Cuba, Honduras,

Beneficiaries of Temporary Protected Status Designations, 86 Fed. Reg. 50725 (Sept. 10, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-09-10/pdf/2021-19617.pdf> [<https://perma.cc/UU36-VVG8>].

89. *Temporary Protected Status*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/L4XF-WL4W>] (last visited Jan. 30, 2026); *Outmatched: The U.S. Asylum System Faces Record Demands*, MIGRATION POL’Y INST., 1, 29 (Feb. 2024).

90. Immigration Parole, CONG. RSCH. SRVC. (Sept. 18, 2025), <https://www.congress.gov/crs-product/R46570> [<https://perma.cc/VC4T-5K5J>].

91. *Operation Allies Welcome*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/allieswelcome> [<https://perma.cc/TT2Y-9DSA>] (last visited Jan. 30, 2026); Julian Montalvo & Jeanne Batalova, *Afghan Immigrants in the United States*, MIGRATION POL’Y INST. (Feb. 15, 2024), <https://www.migrationpolicy.org/article/afghan-immigrants-united-states-2022#:~:text=The%20Biden%20administration%20launched%20Operation,total%2046.2%20million%20U.S.%20immigrants> [<https://perma.cc/N7V3-VS3A>].

92. *Congressional Budget Justification*, DEP’T OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS, 1, 86, <https://www.state.gov/wp-content/uploads/2025/06/FY-2026-State-CBJ-MASTER-6.3.2025-Updated.pdf> [<https://perma.cc/25AV-2PSU>] (last visited Jan. 17, 2026) (The process was criticized for its slow pace – as of April 2022, only 114 of nearly 45,000 applications for parole under Operation Enduring Welcome, or less than 0.3%, had been approved. *Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans*, AM. IMMIGR. COUNCIL (Mar. 16, 2023), <https://www.americanimmigrationcouncil.org/report/agency-failures-make-obtaining-humanitarian-parole-almost-impossible-for-afghans/> [<https://perma.cc/XVB6-U8BY>]; *Humanitarian Parole (HP) for Afghans & the Impact of Recently Released USCIS HP Training and Guidance Documents: Practice Advisory*, INT’L REFUGEE ASSISTANCE PROJECT (Feb. 22, 2024) <https://refugeerights.app.box.com/s/qf6lilx8vnlqg1hc6iqozwzc6700v827> [<https://perma.cc/63A5-KERR>].

93. *Uniting for Ukraine* U.S. DEP’T OF HOMELAND SEC. (Nov. 4, 2024), https://www.dhs.gov/sites/default/files/2024-12/2024_1104_dmo_plcy_uniting_for_ukraine_process_overview_and_assessment.pdf [<https://perma.cc/T8VR-3HW4>].

94. *2.7 Million People Could Lose TPS, DACA, and Humanitarian Parole*, NAT’L FOUND. FOR AMERICAN POL’Y, 1, 8 (Oct. 2024), <https://nfap.com/wp-content/uploads/2024/10/TPS-And-Humanitarian-Parole-Numbers.NFAP-Policy-Brief.2024.pdf> [<https://perma.cc/75RS-ERKF>].

Nicaragua, and Venezuela.⁹⁵ Known as the CHNV program, two-year parole benefits were available only to those with a financial sponsor in the United States.⁹⁶ Beneficiaries of the CHNV program were eligible for advance travel authorization under certain circumstances.⁹⁷ Though 530,000 individuals had arrived through the CHNV program as of August 2024, the Biden administration announced in October 2024 that, unlike in the case of Afghans and Ukrainians, it would not extend parole beyond the two-year period for recipients of CHNV.⁹⁸

Beginning in March 2021, the Biden administration restarted the family reunification process known as the Central American Minors (CAM) program.⁹⁹ Through CAM, children from El Salvador, Guatemala, and Honduras could enter the United States as refugees or parolees to reunify with a parent or legal guardian who is lawfully in the United States.¹⁰⁰ Originally established in 2014,

95. *The Biden Admin.'s Humanitarian Parole Program for Cubans, Haitians, Nicaraguans, and Venezuelans: An Overview*, AM. IMMIGR. COUNCIL (Oct. 31, 2023), <https://www.americanimmigrationcouncil.org/research/biden-administrations-humanitarian-parole-program-cubans-haitians-nicaraguans-and> [https://perma.cc/AH5Z-5NAJ].

96. USCIS, *Litigation-Related Update on CHNV* (Apr. 17, 2025), <https://www.uscis.gov/CHNV> [https://perma.cc/FH9U-W8TR].

97. *Id.*

98. For a critique of this policy, see *The Biden Administration's Humanitarian Parole Program for Cubans, Haitians, Nicaraguans, and Venezuelans: An Overview*, AM. IMMIGR. COUNCIL (Oct. 31, 2023), <https://www.americanimmigrationcouncil.org/research/biden-administrations-humanitarian-parole-program-cubans-haitians-nicaraguans-and>. [https://perma.cc/AH5Z-5NAJ].

99. *Restarting the Central American Minors Program*, U.S. DEP'T OF STATE (Mar. 10, 2021), <https://www.state.gov/restarting-the-central-american-minors-program/> [https://perma.cc/84PP-YQAQ].

100. USCIS, *Central American Minors (CAM) Program* (Oct. 11, 2024), <https://www.uscis.gov/CAM> [https://perma.cc/J3AH-HQY4] (“The qualifying child, at the time the AOR is filed, must be: The child (genetic, step, or legally adopted) of the qualifying parent; Unmarried; Under the age of 21; Physically located in El Salvador, Guatemala, or Honduras; and A national of El Salvador, Guatemala, or Honduras.” “The U.S.-based qualifying parent or legal guardian must be at least 18 years old and in the United States in 1 of the following categories: Lawful permanent resident; Temporary Protected Status; Parole (for a minimum of 1 year); Deferred action (for a minimum of 1 year); Deferred enforced departure (DED); Withholding of Removal; With a pending asylum application filed on or before April 11, 2023; With a pending U visa petition filed on or before April 11, 2023; or With a pending T visa application filed on or before April 11, 2023.”) Additional family members may also be eligible to join. (“In some cases, the following eligible family members may have access to the program when included with a qualifying child: *Unmarried children of the qualifying child who are located in-country and under 21* may be included as a derivative to the qualifying child’s CAM case; and *An in-country parent of the qualifying child* may be included if they: Are part of the same household and economic unit as the qualifying child; Are legally married to the qualifying parent in the United States at the time the qualifying parent files the AOR; and Continue to be legally married to the qualifying parent at the time of admission or parole to the United States. If an in-country parent of the qualifying child is not legally married to the qualifying parent in the United States, the in-country parent may be included if they are: The biological parent of the qualifying child; and Part of the same household and economic unit as the qualifying child. In-country parents who qualify under either scenario listed above have their own case and can include their unmarried children under 21 who are not the child of the U.S.-based qualifying parent. Those children would be listed as derivatives on the in-country parent’s case. The qualifying child’s biological parent who is not legally married to the qualifying parent in the United States may also include their legal spouse as a derivative on their case. If a legal guardian is filing the AOR for a qualifying child, the legal guardian cannot include an in-country parent of the qualifying child. . . . If a legal guardian is filing the AOR for a qualifying child, the legal guardian can include *siblings of the qualifying child*.”)

the first Trump administration shut down CAM in 2017.¹⁰¹ In January 2022, the state of Texas, along with seven other states, sued the Biden administration to terminate the second iteration of CAM.¹⁰² That case was stayed in January 2025, based on the parties' expectation that the second Trump administration would shut down CAM.¹⁰³

In spring 2023, Biden enabled candidates for refugee resettlement, family reunification, parole, and agricultural visas to access safe transit routes to the United States through new regional processing centers known as Safe Mobility Offices.¹⁰⁴ Three offices, in Colombia, Costa Rica, and Guatemala, opened in June 2023, and a fourth opened in Ecuador in October.¹⁰⁵ Each office had different eligibility criteria and offered different lawful pathways to applicants.¹⁰⁶ Successful applicants could travel to the United States lawfully, avoiding dangerous journeys through the Darién Gap and Central America. In January 2024, a reported 3,000 individuals had arrived in the United States under this program, and 9,000 more were in the pipeline.¹⁰⁷

III. The Challenges of Litigation

While Biden was successful to some extent in remedying the Trump administration's changes to the asylum system, other efforts, specifically with

Primary caregiver of the qualifying child: A caregiver may be given access to the CAM program if they are related to: The U.S.-based qualifying parent biologically or by legal marriage; or The qualifying child via a biological, step, or adoptive relationship. The caregiver must also be the qualifying child's primary caregiver and part of the same household and economic unit as the qualifying child.”).

101. Andrew Craycroft, *The Central American Minors Program*, IMMIGRANT LEGAL RESOURCE CENTER PRACTICE ADVISORY (June 2023), <https://www.ilrc.org/sites/default/files/2023-06/06-23%20CAM%20program.pdf> [<https://perma.cc/CP6X-T4BY>]. The original program was criticized for moving too slowly and leaving children in vulnerable situations. Mark Greenberg et al., *Relaunching the Central American Minors Program*, MIGRATION POL'Y INST. (Dec. 2021), https://www.migrationpolicy.org/sites/default/files/publications/cam-program-2021-english_final.pdf [<https://perma.cc/HQ22-38AQ>].

102. *Texas v. Biden (TX CAM) – District Court*, JUSTICE ACTION CENTER (Aug. 29, 2023) <https://litigationtracker.justiceactioncenter.org/cases/texas-v-biden-tx-cam-district-court> [<https://perma.cc/9SGS-6TH4>].

103. *Id.*

104. *Safe Mobility Initiative: Helping Those in Need and Reducing Irregular Migration in the Americas*, U.S. DEP'T OF STATE, <https://2021-2025.state.gov/bureau-of-population-refugees-and-migration/safe-mobility-initiative-helping-those-in-need-and-reducing-irregular-migration-in-the-americas/> [<https://perma.cc/WDM4-JVDP>] (last visited Jan. 30, 2026).

105. *Explainer: What Are Safe Mobility Offices?*, FORUM (Aug. 2, 2023), <https://immigrationforum.org/article/explainer-what-are-safe-mobility-offices/> [<https://perma.cc/T9G8-44QP>].

106. *What We Know About the Biden Admin.'s Safe Mobility Initiative*, INT'L REFUGEE ASSISTANCE PROJECT (Jan. 18, 2024), <https://refugeerights.app.box.com/s/8hhynmjoyri3futucfvgd90d7ryp8pk5> [<https://perma.cc/8EEA-S29X>].

107. Gisela Salomon & Colleen Long, *A New Immigration Policy that Avoids a Dangerous Journey is Working, But Border Crossings Continue*, AP NEWS (Jan. 5, 2024), <https://apnews.com/article/border-migrants-biden-asylum-immigrants-e92625e164eb2efc24b07c1fe4c7c32b> [<https://perma.cc/J8MP-VVYZ>]; Kathleen Bush-Joseph, *Outmatched: The U.S. Asylum System Faces Record Demands*, MIGRATION POL'Y INST., 1, 35-36 (Feb. 2024), https://www.migrationpolicy.org/sites/default/files/publications/mpi-us-asylum-report-2024_final.pdf [<https://perma.cc/MR94-XPVG>].

respect to the Remain in Mexico policy and the Title 42 policy, were met with lawsuits filed by governors of red states. The litigation was ultimately unsuccessful, but dragged out the Biden administration's efforts to end these policies of dubious legality, harming many migrants and inflicting substantial burdens of time and expense on the federal government.

A. The Remain in Mexico Policy/"Migrant Protection Protocols"

On June 1, 2021, Secretary of Homeland Security Alejandro Mayorkas announced that, after completing a review of the "Migrant Protection Protocols" (MPP), the Biden administration was terminating the program.¹⁰⁸ Two months earlier, claiming violations of the federal immigration statute and the Administrative Procedures Act, the states of Texas and Missouri had sued the Biden administration in the Northern District of Texas for suspending MPP.¹⁰⁹ Texas argued that the termination lacked detailed written reasoning, including consideration of states' reliance interests on MPP.¹¹⁰ Given that the Trump administration had created MPP through a press release, and that the policy had only been implemented for a little more than a year before the border was closed to asylum seekers in March 2020 under the Title 42 policy, the APA claim was not strong.¹¹¹ Nonetheless, in August 2021, Trump appointee Judge Matthew Kacsmaryk vacated the Biden administration's suspension of MPP and issued a nationwide injunction mandating implementation of the program.¹¹² Biden requested a stay of the injunction from the district court, the Federal Court of Appeals for the Fifth Circuit, and the U.S. Supreme Court; all three courts rebuffed him.¹¹³

In October 2021, Secretary Mayorkas published a longer memo describing DHS's rationale for terminating MPP.¹¹⁴ Two months later, the Federal Court of Appeals for the Fifth Circuit affirmed the district court decision, mandating that the Biden administration continue implementing MPP.¹¹⁵ In June 2022, the Supreme Court held that the Texas trial court's nationwide injunction violated the discretionary language of the relevant Immigration and Nationality Act provisions, explaining that the federal courts could not order agency officials to implement those sections of the statute.¹¹⁶ Yet even after the case was remanded to the Northern District of Texas, Judge Kacsmaryk again and in direct conflict with the Supreme Court's holding, attempted to enjoin Biden's termination of MPP.¹¹⁷ While that order was unenforceable order in the face of

108. *Termination of the Migrant Protection Protocols Program*, U.S. DEP'T OF STATE (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [<https://perma.cc/8FDN-ZUBE>].

109. Complaint, *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Apr. 13, 2021).

110. Complaint, *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Apr. 13, 2021).

111. See Innovation Law Lab v. Nielsen, Case 3:19-cv-00807, Order Granting Motion for Preliminary Injunction at 3-4 (N.D. Cal. Apr. 8, 2019) (describing press releases).

112. *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Aug. 31, 2021) (mem. Op. & order).

113. *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Aug. 17, 2021); *Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021).

114. *Biden v. Texas*, 597 U.S. 785, 795-97 (2022).

115. *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021).

116. *Biden v. Texas*, 597 U.S. 785 (2022).

117. *Texas v. Biden*, 646 F. Supp. 3d 753 (N.D. Tex. 2022).

the Supreme Court's decision to the contrary, the litigiousness of the red state governors and the obstinacy of the Trump-appointed judge highlight the substantial obstacles faced by the Biden administration in attempting to unwind what Trump had wrought.

B. Title 42

Biden faced similarly vexing resistance to his efforts to terminate the Title 42 policy that the Trump administration invented in March 2020 as a rationale to shut down the southern border to asylum seekers and other migrants.¹¹⁸ Dusting off a rarely utilized provision of a 1944 public health quarantine law that said nothing about the entry of migrants, the Trump administration demanded that, in response to the Covid-19 pandemic, the Centers for Disease Control and Prevention (CDC) forbid the entry of any immigrant at a land port of entry who did not have a visa or other lawful means of entry.¹¹⁹ This executive action was *ultra vires*, as the statute did not provide any authority to control entry of non-citizens. The policy was challenged through litigation and by public health experts.¹²⁰

In April 2022, the Biden administration announced that it would terminate Title 42 the following month. Two days later, three Republican attorneys general, from Arizona, Louisiana, and Missouri, sued the Biden administration for alleged violations of the APA,¹²¹ an additional twenty-one states joined the suit.¹²² The federal district court for the Western District of Louisiana mandated that the Biden administration keep the Title 42 policy in place until it published an official notice of the termination and extended an opportunity for public comments.¹²³

In November 2022, in the *Huisha-Huisha* litigation that had been filed by the ACLU challenging the first Trump administration's creation and implementation of Title 42, the D.C. District Court vacated the policy as arbitrary and capricious in violation of the APA, enjoining the Biden administration from implementing it.¹²⁴ A week later, a group of red states moved to intervene

118. Nat'l Immigration Project, *Comment Opposing the "Circumvention of Lawful Pathways" Rule* (Mar. 28, 2023), <https://nipnlg.org/sites/default/files/2024-06/NIPNLG-asylum-ban-public-comment.pdf> [<https://perma.cc/6WPU-XDK8>].

119. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 79.

120. James Bandler et al., *Inside the Fall of the CDC*, PROPUBLICA (Oct. 15, 2020), <https://www.propublica.org/article/inside-the-fall-of-the-cdc> [<https://perma.cc/55NS-HSJD>].

121. Those three AGs were Mark Brnovich of Arizona; Jeff Landry of Louisiana; and Eric Schmit of Missouri. See Jim Small, *Former AG Mark Brnovich Dead at Age 59*, AZ MIRROR (Jan. 13, 2026), <https://azmirror.com/briefs/former-ag-mark-brnovich-dead-at-age-59/> [<https://perma.cc/MK7Z-SBDB>]; Sara Cline, *Republican Jeff Landry Elected Governor of Louisiana*, PBS NEWS (Oct. 15, 2023), <https://www.pbs.org/newshour/politics/republican-jeff-landry-elected-governor-of-louisiana> [<https://perma.cc/BFN6-4TPB>]; Bridgette Dunlap, *Missouri Sen. Eric Schmitt Openly Promoted White Supremacism in a Public Speech*, MISSOURI INDEPENDENT (Sept. 15, 2025), <https://missouriindependent.com/2025/09/15/missouri-sen-eric-schmitt-openly-promoted-white-supremacism-in-a-public-speech/> [<https://perma.cc/C57E-H49B>].

122. *Louisiana v. Centers for Disease Control & Prevention*, 603 F. Supp. 3d 406, 412 (W.D. La. 2022).

123. *Id.* at 412.

124. *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1 (D.D.C. 2022).

in that lawsuit.¹²⁵ After the D.C. Circuit denied the intervention motion as untimely, the states appealed to the U.S. Supreme Court, which then granted expedited review and a stay.¹²⁶ In the meantime, the CDC announced that it would terminate the Covid-19 public health emergency on May 11, 2023.¹²⁷ The Supreme Court dismissed the case a week later.¹²⁸ The repeated barrier of litigation presented serious obstacles to Biden's efforts to undo Trump's immigration policies.

IV. Fear of the Border: Plus Ça Change

Unfortunately, and despite Biden's campaign promises, the story of the Biden administration's approach to asylum is not only that of a good actor trying to use executive authority creatively to undo the damage wrought by Trump, yet often stymied by red state litigation.¹²⁹ In order to control the flows of migrants at the southern border, Biden revived Trump-era policies characterized by questionable legality and obvious cruelty to migrants. Biden's administration began by experimenting with severely expedited asylum processes at the border, and proceeded to implement bans on asylum seekers who did not request protection in a third country or failed to use a smartphone app to schedule an appointment at the border. These policies left migrants stranded and vulnerable throughout Mexico, and agreements with the Mexican government to keep migrants away from the southern border pushed them back into Guatemala.

As early as March 2021, over two years before the Title 42 policy was lifted, the Biden administration began expressing concerns about a "crisis at the border."¹³⁰ By April 2021, the government had begun discussing a plan to "overhaul the southern border" by speeding up the asylum screening process and enabling asylum officers to grant claims presented by asylum seekers at the southern border.¹³¹ Increasingly, the nationality of migrants arriving at the southern border were from countries other than Central America or Mexico, but rather nationals of Cuba, Brazil, Ecuador, Haiti, and Venezuela – countries marked by political instability in recent years.

125. *Huisha-Huisha v. Mayorkas*, No. 22-5325, 2022 WL 19653946 (D.D.C. Dec. 16, 2022).

126. *Id.*; *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022).

127. *Arizona v. Mayorkas*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/arizona-v-mayorkas-2/> [<https://perma.cc/6X7Z-9VGZ>] (last visited Jan. 30, 2026); *Exec. Office of the President, Statement of Administration Policy*, H.R. 382 & H.J. Res. 7 (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf> [<https://perma.cc/DH3Y-PH2H>].

128. *Arizona v. Mayorkas*, 598 U.S. ___, 1, 2 (2023).

129. Jaya Ramji-Nogales, *A Crisis of Human Rights: Litigation as Governance at the Border*, in *HANDBOOK ON MIGRATION AND HUMAN RIGHTS* (Ruth Rubio Marín, Dorothy Estrada Tanck, Benedita Menezes Queiroz and Fulvia Staiano, eds., Edward Elgar 2025).

130. Jaya Ramji-Nogales, *Migration Emergencies*, 68 U.C. L.J. 609 (2017).

131. Franco Ordoñez, *Biden Administration Considers Overhaul Of Asylum System At Southern Border*, NPR (Apr. 1, 2021), <https://www.npr.org/2021/04/01/982795844/biden-administration-considers-overhaul-of-asylum-system-at-southern-border> [<https://perma.cc/9SME-5HUV>].

A. Expedited Processes

The first page that Biden took from the Trump playbook was the creation of excessively expedited asylum processes at the border.¹³² The Biden administration created two expedited processes that applied exclusively to families; created a new excessively expedited removal process known as AMI; and made it more difficult for asylum seekers in expedited removal to succeed in credible fear interviews.

In May 2021, the Executive Office of Immigration Review (EOIR), which houses the immigration courts, created a “dedicated docket” for families seeking asylum who had crossed the southwestern border and had not been detained.¹³³ In the ten participating courts, judges were expected to decide these asylum claims within 300 days.¹³⁴ Though efficient hearings are a worthwhile goal, because they were established without adequate supports for asylum seeking families, the results were disastrous. A study of the Los Angeles dedicated docket by researchers from UCLA found that between May 2021 and February 2022, of the nearly 2,500 families assigned to the docket, 70% did not have counsel, and immigration judges issued removal orders in 99% of the 450 completed cases.¹³⁵ Over 70% of these removal orders were issued *in absentia*, nearly half against children under the age of 6, many of whom did not have a lawyer.¹³⁶

In August 2021, the Biden administration introduced the Asylum Merits Interview (AMI) process, which aimed to expedite the asylum process at the southern border.¹³⁷ In AMI, asylum seekers underwent a full asylum hearing before an asylum officer within three to six weeks of their initial credible fear hearing.¹³⁸ Though families were placed into AMI beginning in May 2022,¹³⁹ AMI was paused after the end of Title 42 in May 2023.¹⁴⁰

In May 2023, U.S. Immigration and Customs Enforcement, which is responsible for removals in the interior of the country, announced the creation of

132. See, e.g., SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2, at 75-86.

133. Memorandum from Jean C. King, Acting Dir. Exec. Off. for Immigr. Rev., to All of EOIR, Dedicated Docket (May 27, 2021), <https://www.justice.gov/eoir/book/file/1399361/dl> [<https://perma.cc/M4GE-LDDG>]; Dedicated Docket in Los Angeles: A Study of Immigration Court Proceedings for Families, CTR. FOR IMMIGR. L. & POL’Y, UCLA SCH. OF L. (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf [<https://perma.cc/VGP6-ZUR8>].

134. *Id.*

135. *Id.*

136. *Id.*

137. See *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46906, 46918 (proposed Aug. 20, 2021); *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18155-56 (Mar. 29, 2022).

138. Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOWARD L.J. (19th Annual Wiley A. Branton Symposium: Immigration Equality 2023).

139. USCIS, *Implementation of the Credible Fear and Asylum Processing Interim Final Rule* (last updated Jan. 25, 2025), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule> [<https://perma.cc/6QCG-YU68>].

140. *Changes to Asylum Eligibility Under the Biden Admin.*, NAT’L IMMIGR. PROJECT (Sept. 5, 2024), https://nipnl.org/sites/default/files/2024-09/Biden_asylum-changes-chart.pdf [<https://perma.cc/4ECR-9MPG>].

the Family Expedited Removal Program (FERM).¹⁴¹ This policy was applicable to families in FERM-destination cities who were processed for expedited removal and who were nationals of countries to which ICE maintains regular removal flights.¹⁴² For asylum seeking families subject to FERM, the head of the household was subject to a GPS ankle monitor and a curfew.¹⁴³ FERM families found not to have a credible fear were removed from the U.S. within thirty days of the beginning of the expedited removal process.¹⁴⁴ In addition to the excessively short time frame that made it very difficult for asylum seekers to present their claim, FERM was criticized for creating severe obstacles to obtaining legal representation, discriminating in particular against indigenous families and other rare language speakers, and traumatizing parents and children by forcing family members to describe incidents of past violence in front of each other.¹⁴⁵

Finally, Biden tightened the standards for the expedited removal process that has applied to undocumented asylum seekers since 1997. The Biden administration increased access to the asylum process, finding asylum seekers at the southern border to meet the credible fear standard at a much higher rate (59%) than the first Trump administration (23%).¹⁴⁶ However, the administration increased substantive obstacles to accessing asylum by instructing asylum officers to apply bars to asylum during the credible fear interview, leaving asylum seekers insufficient time to prepare for challenging questions that could render them ineligible for protection. (Previously, credible fear interviews examined only the applicants' fear of persecution; bars to asylum were assessed at the immigration court hearing, for which asylum seekers had far more time to prepare.) Starting in May 2024, the Biden administration applied the internal relocation bar in credible fear interviews.¹⁴⁷ That same month, it issued a rule authorizing asylum officers to apply all bars to asylum, except firm resettlement, in credible fear interviews at their discretion.¹⁴⁸

141. U.S. Immigr. And Customs Enforcement, *ICE Announces New Process for Placing Family Units in Expedited Removal* (May 10, 2023), <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal> [https://perma.cc/3ANS-MFSG].

142. *Id.*

143. *Id.*

144. *Id.*

145. *The Family Expedited Removal Management (FERM) Program: A Three Month Assessment*, AMERICANS FOR IMMIGR. JUSTICE (Sept. 7, 2023), <https://aijustice.org/wp-content/uploads/2023/10/FERM-Report-Americans-for-Immigrant-Justice-2023.pdf> [https://perma.cc/9DMZ-FSDA] (CFI within 6-12 days; IJ review within 13-20 days); *ICE's Family Expedited Removal Management (FERM) Program Puts Families at Risk*, NAT'L IMMIGR. JUSTICE CENTER (Aug. 31, 2023), <https://immigrantjustice.org/research-items/policy-brief-ices-family-expedited-removal-management-ferm-program-puts-families> [https://perma.cc/KD6D-L73K].

146. See Bush-Joseph, *supra* note 107.

147. See Memorandum from John Lafferty, Chief, Asylum Division, to All Asylum Division Staff, *Updates to Credible Fear Checklist Related to Internal Relocation* (May 9, 2024) (on file with author).

148. Applicants will be ineligible for asylum if, "the Attorney General determines that-

- (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
- (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
- (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

This policy was a direct reversal of the Biden administration's position just two years prior. In March 2022, in the preamble to a relevant regulation, the administration explained that

[r]equiring asylum officers to broadly apply the mandatory bars at credible fear screening would increase credible fear interview and decision times because asylum officers would be expected to devote time to eliciting testimony, conducting analysis, and making decisions about all applicable bars,¹⁴⁹

Moreover, the administration expressed concern that this approach would require a “fact intensive inquiry requiring complex legal analysis that would be more appropriate in a full adjudication before an asylum officer or in section 240 proceedings with the availability of judicial review than in credible fear screenings.”¹⁵⁰ The executive branch further stated that “due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process.”¹⁵¹

B. Closing the Border

Beginning in May 2023, Biden deployed his regulatory authority to shut down the southern border to asylum seekers.¹⁵² Through two rules, the Biden administration severely limited access to the asylum process at the southern border by restricting eligibility for asylum.

As explained above, the Biden administration's termination of the Covid-19 public health emergency on May 11, 2023, put an end to the Title 42 policy that excluded asylum seekers at the border. Rather than reopening the border to asylum seekers who have a right to access the asylum process under international and federal law, the government issued the Circumvention of Lawful Pathways Rule, effective May 11, 2023.¹⁵³ This rule instituted a rebuttable

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.” 8 U.S.C. § 1158.

149. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers Interim Final Rule, 87 FR 18078 (Mar. 29, 2022) (“Asylum Processing IFR”).

150. *Id.* at 18093.

151. *Id.* at 18134. “In sum, the Biden administration explained that not applying mandatory bars at the credible fear screening stage both preserves the efficiency Congress intended in making credible fear screening part of the expedited removal process and helps ensure a fair process for those individuals found to have a significant possibility of establishing eligibility for asylum or statutory withholding of removal but for the potential applicability of a mandatory bar.”. Application of Certain Mandatory Bars in Fear Screenings, 89 Federal Register 41347, 41350 (May 13, 2024).

152. 8 C.F.R. §208.33(a)(1)(i); §1208.33(a)(1)(i),

153. Circumvention of Lawful Pathways Final Rule, applicable to OTMs who enter between May 11, 2023, and May 11, 2025; not applicable to UACs. The other two exceptions are, first, obtaining advance parole, which is available for 30,000 Cuban, Haitian, Nicaraguan, and Venezuelan nationals per month as well as 30,000 Ukrainians per month. Recipients of

presumption against asylum eligibility for any undocumented migrants who crossed the southern border after traveling through another country, if they had not obtained parole, scheduled an appointment using the CBP One app,¹⁵⁴ or applied for asylum and been denied in a transit country.¹⁵⁵ Though limited exceptions applied,¹⁵⁶ it was unclear how asylum seekers could assert emergency-based exceptions in practice if they could not reach the border without an appointment.¹⁵⁷ In any case, if an exception applied, the asylum officer employed the credible fear standard; if it did not, the applicant had to establish a reasonable possibility of persecution or torture.¹⁵⁸ On the positive side, a family unity provision converted withholding of removal to asylum for derivatives in the United States or abroad.¹⁵⁹

Many commentators, including the asylum officers' union, criticized the Circumvention of Lawful Pathways rule as violating domestic and international law.¹⁶⁰ In May 2023, immigrants rights' organizations challenged this rule by reviving a lawsuit originally filed against the first Trump administration's policy of barring from asylum anyone who transited through a third country without

advance parole receive travel documents that enable them to enter the United States by air, so they do not need to present at a land port of entry. In addition, migrants who sought and were denied asylum in a transit country do not face the presumption of ineligibility. *Circumvention of Lawful Pathways*, 88 Federal Register 31314, 31318 (May 16, 2023). The Final Rule has been challenged by immigrants' rights organizations in *East Bay Sanctuary Covenant v. Biden*, Amended and Supplemental Complaint for Declaratory and Injunctive Relief, Case No. 18-cv-06810-JST (N.D.C.A. filed May 11, 2023), <https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden> [<https://perma.cc/R4UC-3WSQ>] and by the state of Texas in *Texas v. Mayorkas*, Original Complaint, Case No. 2:23-cv-00024 (W.D.Tx. filed May 23, 2023). See NAT'L IMMIGR. PROJECT, *supra* note 140; *Human Rights First Comment on the Biden Administration's Proposed Asylum Ban*, HUMAN RIGHTS FIRST (Mar. 28, 2023), <https://humanrightsfirst.org/library/human-rights-first-comment-on-circumvention-of-lawful-pathways/> [<https://perma.cc/A48Z-UL8W>].

154. This smartphone app provided 1450 appointments for entry per day. Applicants other than Mexican nationals could utilize the app to make an appointment from northern and central Mexico as well as Chiapas and Tabasco. U.S. Customs and Border Protection, *CBP Link Mobile Application*, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> [<https://perma.cc/5YDL-ZUJ6>] (last visited Jan. 30, 2026); U.S. Customs and Border Protection, *CBP One Appointments Increased to 1,450 Per Day* (June 30, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day> [<https://perma.cc/G2P7-25PV>]. The app was the subject of numerous criticisms on the part of immigrants' rights organizations. See, e.g. *CBP One: An Overview*, AMERICAN IMMIGR. COUNCIL (Mar. 24, 2025), <https://www.americanimmigrationcouncil.org/fact-sheet/cbp-one-overview/> [<https://perma.cc/K4FR-6U5R>].

155. 8 C.F.R. § 208.33(a)(1)(i); 1208.33(a)(1)(i).

156. These exceptions included exceptionally compelling circumstances such as an acute medical emergency; "imminent threat of rape, kidnapping, torture, or murder"; or being a victim of a severe form of trafficking in persons. § 208.33. In additions, if applicants could demonstrate by a preponderance of the evidence that it was not possible to access or use CBP One due to "language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles," they would be allowed to enter and the applicability of the ban would be determined during the asylum process. Exceptions did not include inability to speak one of the three languages (English, Haitian Creole, Spanish) or insufficient technological literacy.

157. 8 C.F.R. § 208.33(a)(1)(i) (2024); 8 C.F.R. § 1208.33(a)(1)(i) (2024).

158. *Id.*

159. 8 C.F.R. § 1208.35(c) (2024).

160. Hamed Aleaziz, *Biden Immigration Plan Could Force Asylum Officers to Break Law*, *Union Warns*, L.A. TIMES (Mar. 27, 2023), <https://www.latimes.com/world-nation/story/2023-03-27/biden-asylum-plan-break-law> [<https://perma.cc/4PR2-X7NA>].

first seeking asylum there.¹⁶¹ In July 2023, the Northern District of California enjoined the Circumvention of Lawful Pathways rule.¹⁶² The injunction was stayed by the Ninth Circuit Court of Appeals a month later.¹⁶³ Also in July 2023, immigrants' right groups Al Otro Lado and Haitian Bridge Alliance filed a legal challenge to CBP One; the case survived a motion to dismiss in September 2024.¹⁶⁴ The state of Texas challenged the new rule in May 2023, claiming that the Biden administration was "encouraging" undocumented migrants to cross the border.¹⁶⁵

In June 2024, the Biden administration instituted the Securing the Border rule, which created a rebuttable presumption against asylum eligibility at the border when crossings reached a seven-day average of 2,500.¹⁶⁶ The bar was to remain in place until encounters dropped below 1,500 for seven consecutive days, and applied to nationals of all countries, including Mexico, who entered without inspection between ports of entry or sought to enter at a land port of entry without a visa. The rule was updated in September 2024 to require that border encounters remain below 1,500 for 28 consecutive days.¹⁶⁷ That threshold has continuously been exceeded since July 2020.¹⁶⁸

Asylum seekers subject to this rule were required to establish that they faced a "reasonable probability" of persecution or torture, which is a higher standard than under expedited removal, which requires only a significant possibility of persecution or torture.¹⁶⁹ Moreover, asylum seekers apprehended by DHS were provided only a four-hour minimum window to speak with an attorney, a period that was originally 48 hours but reduced to 24 hours by the Biden administration in 2023.¹⁷⁰ Asylum seekers who obtained parole or a CBP One appointment were not subject to this rule.¹⁷¹ Under the Securing the Border rule, CBP officials were no longer required to ask the four fear questions mandated in the expedited removal process; asylum seekers had to independently

161. Complaint, *E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST (N.D. Cal. 2023).

162. *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023).

163. *E. Bay Sanctuary Covenant v. Biden*, 2023 WL 11662094, at *1 (9th Cir. 2023) (The appeal was placed in abeyance pending settlement discussions, which broke down in February 2025.). *E. Bay Sanctuary v. Trump*, No. 23-16032 (9th Cir. 2025) (In April 2025, the Ninth Circuit vacated the July 2023 injunction and remanded the case to the district court to address the second Trump administration's termination of the lawful pathways at issue as well as new precedent on organizational standing.).

164. *Al Otro Lado, Inc. v. Mayorkas*, 2024 U.S. Dist. LEXIS 179081, at *39 (S.D. Cal. 2024). This case is ongoing under the second Trump administration, challenging the cancellation of CBP One interviews. The court is currently deciding the government's motion to dismiss.

165. Complaint at 8, *Texas v. Mayorkas*, 743 F. Supp. 3d 900 (W.D. Tex. 2024).

166. 8 C.F.R. § 208.33(a)(1)(2024); 8 C.F.R. § 1208.33(a)(1)(2024)

167. *Las Ams. Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec.*, 783 F. Supp. 3d 200 (D.D.C. 2025).

168. Adam Isacson, *The Futility of "Shutting Down Asylum" by Executive Action at the U.S.-Mexico Border*, WOLA (June 4, 2024), <https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/> [https://perma.cc/8YH9-RBQB].

169. *Securing the Border*, U.S. DEP'T OF HOMELAND SEC. (June 5, 2024), <https://www.dhs.gov/archive/securing-border> [https://perma.cc/TA27-HVEL].

170. Complaint at 3-4, *Las Ams. Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec.*, 2025 U.S. Dist. LEXIS 94453 (D.D.C. 2025); *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, U.S. DEP'T OF HOMELAND SEC. (Apr. 27, 2023), <https://www.dhs.gov/archive/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> [https://perma.cc/2C8U-SFRA].

171. 8 C.F.R. § 208.33(a)(2)(ii)(2024); 8 C.F.R. § 1208.33(a)(2)(ii)(2024)

“manifest” a fear of return to their home country. The rule contained exceptions through which asylum seekers could rebut the presumption of ineligibility, including acute medical emergencies; imminent and extreme threats; and severe trafficking.¹⁷² As with the Circumvention of Lawful Pathways rule, a family unity provision converted withholding of removal to asylum for derivatives the United States or abroad.¹⁷³ The ACLU sued to challenge the rule on June 12, 2024, on the basis that it violated the INA and the APA.¹⁷⁴ On January 20, 2025, the Trump administration terminated the use of the CBP One app as a mechanism for asylum seekers to schedule appointments.¹⁷⁵ On May 9, 2025, the D.C. district court vacated the rule’s restriction on asylum eligibility and the manifestation of fear requirement as well as the guidance that had shortened the attorney consultation window.¹⁷⁶

In addition to these rules, the Biden administration worked with the government of Mexico to prevent asylum seekers from arriving at the southern border. In March 2024, more migrants were apprehended in Mexico (over 280,000) than at the US border (189,000).¹⁷⁷

V. An Unstable Foundation

Biden entered office with a vision for reviving and reforming the U.S. asylum system in the face of devastating attacks by the first Trump administration.¹⁷⁸ Though the Biden administration made many positive changes to the system, it left office with dangerous tools in place that the second Trump administration has amplified to undermine the asylum process in many ways.

In terms of expedited processes, Biden’s changes to the expedited removal program, including the requirement that asylum seekers manifest their fear of return without being asked questions to elicit their fear, have been adopted by the second Trump administration – which has expanded expedited removal to apply to all undocumented migrants apprehended anywhere in the interior of the United States who cannot prove that they have resided in the country for at least two years. The second Trump administration has used expedited removal as a basis for third country rendition, sending non-citizens to countries other than their home country – including countries to which they have never travelled.¹⁷⁹ Moreover, Trump has terminated the liminal statuses that Biden created

172. 8 C.F.R. § 208.33(a)(3)(i)(2024); 8 C.F.R. § 1208.33(a)(3)(i)(2024)

173. 8 C.F.R. § 1208.33(c)(2024)

174. Complaint at 4, *Las Ams. Immigrant Advoc. Ctr. v. United States Dep’t of Homeland Sec.*, 783 F. Supp. 3d 200 (D.D.C. 2025).

175. U.S. Customs and Border Protection, *CBP Removes Scheduling Functionality in CBP One™ App*, (Jan. 21, 2025), <https://www.cbp.gov/newsroom/national-media-release/cbp-removes-scheduling-functionality-cbp-one-app> [<https://perma.cc/Z3C4-Y7QR>].

176. *Las Ams. Immigrant Advoc. Ctr. v. U.S. Dep’t of Homeland Sec.*, 2025 U.S. Dist. LEXIS 94453, at *29 (D.D.C. 2025).

177. Julia Ainsley & Chloe Atkins, *Mexico is Stopping Nearly Three Times as Many Migrants Now, Helping Keep U.S. Border Crossings Down*, NBC (May 15, 2024), <https://www.nbcnews.com/politics/immigration/mexico-stopping-three-times-as-many-migrants-as-last-year-rcna146821> [<https://perma.cc/6MRM-65CC>].

178. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 2.

179. Jaya Ramji-Nogales, *The Trump Administration’s Unprecedented Violations of the Non-Refoulement Principle*, 119(4) AM. J. INT’L L. 758, 763-67 (2025).

through temporary protected status and parole for Afghans, Cubans, Haitians, Nicaraguans, Ukrainians and Venezuelans.¹⁸⁰ These migrants now find themselves subject to expedited removal or removal under the Alien Enemies Act.¹⁸¹

When it comes to border closures, Trump closed the border to asylum seekers through two executive orders issued on his first day in office. The first prohibits all entries at the southern border, dismantling even the restrictive border system created by the Circumvention of Lawful Pathways and Securing the Border rules, and eliminating all access to the asylum process.¹⁸² The second order, based on Trump's determination that they are part of an "invasion," terminates access to the asylum process for all undocumented migrants at the southern border.¹⁸³ The Trump administration has reinstated the "Migrant Protection Protocols," though given the border closure, this policy has had little impact – so far.¹⁸⁴

Faced with widespread anti-immigrant sentiment provoked by right-wing politicians,¹⁸⁵ Biden was unable to effectuate the reforms that he had promised to fix the asylum system. While the Biden administration created more pathways for non-citizens seeking humanitarian protection and remedied the worst excesses of the first Trump administration, they were stymied by litigation and congressional gridlock. Rather than directly challenging the xenophobic politics underlying these efforts,¹⁸⁶ Biden succumbed to restrictionist policies that have created a highly unstable foundation for the next four years. It remains to be seen what will become of the U.S. asylum system under the second Trump administration, the first year of which has demonstrated an utter disregard for the international and domestic law of asylum.¹⁸⁷

180. Muzaffar Chishti, Kathleen Bush-Joseph, and Colleen Putzel-Kavanaugh, *Unleashing Power in New Ways: Immigration in the First Year of Trump 2.0*, MIGRATION POL'Y INST. (Jan. 13, 2026), <https://www.migrationpolicy.org/article/trump-2-immigration-1st-year> [<https://perma.cc/G2CQ-SQ2Q>].

181. Ramji-Nogales, *supra* note 179, at 761–62.

182. *Securing Our Borders*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/> [<https://perma.cc/P8E8-Y4CQ>]; See Jacob Katz Cogan, *Contemporary Practice of the U.S.*, 119 AJIL 314, 318-319 (2025); Jacob Katz Cogan, *Contemporary Practice of the U.S.*, 117 AJIL 500, 529-530 (2023).

183. This rule was vacated in July 2025. Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem, No. 25-5243, 2025 LX 348429 (D.C. Cir. Aug. 1, 2025). In August 2025, the D.C. Circuit stayed the district court's vacatur, and narrowed the certified class. While the litigation proceeds, non-citizens within the United States can seek withholding of removal or protection under the Convention Against Torture, but not asylum.

184. U.S. Customs and Border Protection, *Migrant Protection Protocols*, <https://www.cbp.gov/newsroom/stats/migrant-protection-protocols> [<https://perma.cc/343X-3BXB>] (last visited Jan. 17, 2026).

185. E. Tendayi Achiume, *Governing Xenophobia*, 51 VANDERBILT J. TRANSNAT'L L. 333, 337-38 (2021); Erika Lee, *Americans Must Rule America: Xenophobia in the United States*, 88 (4) SOCIAL RESEARCH 795, 814-15, 817 (2021); Brittany N Morey, *Mechanisms by Which Anti-Immigrant Stigma Exacerbates Racial/Ethnic Health Disparities*, 108(4) AM J PUBLIC HEALTH 460 (2018); Marcela Valdes, *Why Can't We Stop Unauthorized Immigration? Because It Works*, N.Y. TIMES (Oct. 1, 2023), <https://www.nytimes.com/2023/10/01/magazine/economy-illegal-immigration.html> [<https://perma.cc/926X-9P93>] ("Over the past 20 years, incendiary rhetoric about migrants has become a powerful and popular political tool, and many elected officials now or recently in office have built their careers by wooing voters with such rhetoric.")

186. *Id.*

187. Ramji-Nogales, *supra* note 179.