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Touro Law Review

Volume 37 | Number 3

Article 12

2021

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Recommended Citation

Karpman, Samantha B. (2021) "Locking the Golden Door and Throwing Away the Key: An Analysis of Asylum during the Years of the Trump Administration," *Touro Law Review*. Vol. 37: No. 3, Article 12. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol37/iss3/12>

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LOCKING THE GOLDEN DOOR AND THROWING AWAY THE KEY: AN ANALYSIS OF ASYLUM DURING THE YEARS OF THE TRUMP ADMINISTRATION

*Samantha B. Karpman**

“Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”¹

ABSTRACT

The years of the Trump Administration have certainly been some of the most divisive in modern American political history. One of the largest divides arose from former President Trump’s brazen, “zero tolerance” immigration policies that relentlessly attacked many forms of immigration coming into the United States. Asylum-based immigration, which allows immigrants to come to this country as a safe haven when they are fleeing persecution in their home countries, was one of former President Trump’s main targets. Former President

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¹ Emma Lazarus, *The New Colossus*, NAT’L PARK SERV. (Aug. 19, 2019), <https://www.nps.gov/stli/learn/historyculture/colossus.htm>.

Trump even came dangerously close to eliminating asylum-based immigration with his “Death to Asylum” policy in December of 2020. President Biden has since reversed many of former President Trump’s detrimental asylum policies and enacted executive orders that facilitate asylum-based immigration. While asylum-based immigration has been saved by President Biden (for now), the actions of the Trump Administration have highlighted the issues regarding lack of consistency and over-delegation to the executive branch that plague immigration law to this day. This Note will examine various sources of asylum law, both prior to and during the Trump Administration, and evaluate the constitutionality of asylum policies between 2016 and 2020. Finally, this Note will give four recommendations future administrations can implement in order to provide fairer and more consistent asylum policies that are not so dependent on which President happens to be in power at the time: (1) creating a direct, fair, and inclusive path to citizenship; (2) decreasing ICE’s role in exchange for increasing the EOIR’s presence; (3) changing the focus in creating available facilities to immigrants; and (4) guaranteeing legal representation in immigration proceedings.

I. INTRODUCTION

Emma Lazarus’ powerful words, inscribed on the Statue of Liberty, serve as both a reminder of our nation’s rich immigrant history and an inspiring message to those who come to this country to build a better life for themselves and their families as part of the “American dream.”

Ever since the colonial era, the United States – referred to then as part of the “New World” – has always been thought of as a destination of hope and opportunity. During the colonial period, a large influx of people came, mainly from European nations, to colonize and settle areas that would eventually form the United States.² The United States facilitated free-flowing immigration without any restrictions for roughly a century after it became an independent nation.³ During the American Industrial Revolution,⁴

² *U.S. Immigration Before 1965*, HISTORY (July 28, 2020), https://www.history.com/topics/immigration/u-s-immigration-before-1965#section_1.

³ *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUD., <https://cis.org/Historical-Overview-Immigration-Policy> (last visited June 16, 2021);

especially from 1880 to 1920, the federal government issued regulations to monitor the “first wave of immigration.”⁵ Prior to this era, immigration was primarily governed by the individual states.⁶ However, the federal government became more involved in regulating immigration through the introduction of federal legislation.⁷ Restrictions imposed by the new federal legislation not only complicated the process of coming to the country, they also made the necessary qualifications to successfully immigrate with full documentation increasingly difficult to satisfy.⁸ The complications created by immigration legislation are especially difficult for immigrants who may not feasibly be able to wait for years in order for their paperwork to process.⁹ Among this group of immigrants are asylum seekers, individuals who want to escape their home countries due to a fear of persecution or other life-or-death situations.¹⁰

This Note will discuss the Trump Administration’s attempt to effectively nullify asylum-based immigration¹¹ and how former President Trump used both the broad delegation of authority to the executive branch in the field of immigration law and the pandemic to justify his actions.¹² At the same time, this Note will analyze what President Biden has done during his term so far¹³ – under the same

Philip Martin, *Trends in Migration to the U.S.*, POPULATION REFERENCE BUREAU (May 19, 2014), <https://www.prb.org/us-migration-trends>.

⁴ The American Industrial Revolution occurred in the late nineteenth to early twentieth centuries. *The Industrial Revolution in the United States*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/industrial-revolution-in-the-united-states> (last visited Feb. 7, 2021).

⁵ *U.S. Immigration Before 1965*, *supra* note 2.

⁶ *Id.*

⁷ See *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (holding that the powers to set rules regarding immigration and manage foreign relations rested with the federal government, not the individual states). Since this case, there has been a plethora of federal immigration regulations that created “waves” of immigration. See *A Brief History of Civil Rights in the United States*, GEO. L. LIBR. (Jan. 27, 2021, 11:42 AM), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4171684>.

⁸ Michelle Mark, *Jeff Sessions Said Immigrants Should ‘Wait Their Turn’ to Come to the US – Here’s How Complicated That Process Can Be*, BUS. INSIDER (May 3, 2018), <https://www.businessinsider.com/how-to-green-card-visa-legal-immigration-us-news-trump-2017-4>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *infra* Section V.

¹² See *infra* Sections VI-VII.

¹³ As of the date of publication of this Note, which is in October 2021.

authority as former President Trump – to preserve and facilitate asylum-based immigration.¹⁴ Along with discussing the differences in asylum policies between the two administrations, this Note will provide several general solutions that can be implemented to help create lasting and consistent immigration reform that does not fluctuate from administration to administration.¹⁵ There are two limitations on the overall scope of this Note. First, this Note will mainly limit its analysis to the highest level of actors of each of the three branches of the federal government. Second, while there are several ways an individual can immigrate to the United States under current immigration law, this Note will focus solely on asylum.

This Note will be divided into nine sections. Section II will discuss the development of federal immigration law in the United States. Section III will give a general overview of asylum and the asylum process. Section IV will discuss and offer the history of the different sources of American asylum law, including federal statutes, major Supreme Court decisions, executive orders, treaties, and international norms. Section V will examine asylum policies during the Trump Administration. Section VI will evaluate the constitutionality of the policies discussed in Section V. Section VII will discuss the COVID-19 pandemic and the pandemic's impact on United States immigration policies, especially regarding asylum seekers. Section VIII will address various solutions, and discuss what the Biden Administration has already done, to overcome contemporary asylum hurdles through immigration reform. Finally, Section IX will conclude the Note.

II. IMMIGRATION WAVES & HOW THEY SHAPED U.S. FEDERAL IMMIGRATION LAW

The first wave of immigration began around the Civil War, when some states passed legislation allowing immigrant laborers and soldiers to enter the country.¹⁶ Following the ruling in *Chy Lung v. Freeman*,¹⁷ and the enormous increase in immigration throughout the

¹⁴ See *infra* Section VIII.

¹⁵ See *infra* Sections VIII-IX.

¹⁶ Éva Eszter Szabó, *The Migration Factor in the American Civil War: The Impact of Voluntary Population Movements on the War Effort*, AMERICANA (Spring 2016), <http://americanajournal.hu/vol12no1/szabo>.

¹⁷ 92 U.S. 275 (1876).

latter half of the nineteenth century,¹⁸ Congress passed the Chinese Exclusion Act of 1882 and the Alien Contract Labor Laws of 1885 and 1887 to restrict labor-based immigration.¹⁹ The Immigration Act of 1882 imposed a fifty-cent tax for each immigrant and excluded certain groups of people from the country including “idiots, lunatics, convicts, and persons likely to become a public charge.”²⁰ The Immigration Act of 1891 further excluded certain immigrant groups including “polygamists, persons convicted of crimes of moral turpitude, and those suffering loathsome or contagious diseases.”²¹ Finally, among this wave’s most notable regulations are the creation of immigration checkpoints²² and a standardized immigration and naturalization policy.²³

The second wave of immigration began with a large group of immigrants coming into the United States around the time of World War I and a few years following the end of the war.²⁴ From 1900 to 1920, the U.S. admitted over 14.5 million immigrants.²⁵ In response to growing fears about mass immigration and its impact on the country, Congress passed a series of immigration regulations in the Immigration Act of 1917 to slow down the rate of immigration.²⁶ The Immigration Act of 1917 required that certain factors must be satisfied so a person could be eligible to immigrate.²⁷ These factors included the immigrant’s literacy in their native language, more rigorous medical examinations, and imposing additional paper

¹⁸ Szabó, *supra* note 16; *see also* *Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2020), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/early-american-immigration-policies>.

¹⁹ *Early American Immigration Policies*, *supra* note 18.

²⁰ *Id.*

²¹ *Origins of the Federal Immigration Service*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2020), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/origins-of-the-federal-immigration-service>.

²² *Id.* The most famous of these checkpoints was Ellis Island in New York. *Id.* Other entry locations included cities with busy travel ports including Boston and Philadelphia. *Id.*

²³ *Id.*; *Origins of the Federal Naturalization Service*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/origins-of-the-federal-naturalization-service>.

²⁴ *Mass Immigration and WWI*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2020), <https://www.uscis.gov/about-us/our-history/mass-immigration-and-wwi>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

requirements such as passports and border crossing cards.²⁸ At the end of the post-World War I wave, the federal government implemented the national origin quota system.²⁹ Under the quota system, each nationality received a maximum quota of valid visas it could issue based on its representation in past census figures.³⁰ Along with the severe restrictions imposed by the quota system and the 1917 Immigration Act, Congress created the U.S. Border Patrol within the Immigration Service to enforce these new regulations.³¹

The third wave of immigration started during World War II.³² The federal government took measures to tighten control at the domestic border in response to the national security threat looming on the horizon.³³ The increased security measures included heightened recording procedures, organized internment camps and detention facilities for enemy aliens, and increased Immigration and Naturalization Service (“INS”) personnel.³⁴ At the same time, the federal government and INS personnel eliminated barriers for noncitizens to serve in the military and created more efficient overseas naturalization processes.³⁵

The fourth wave is characterized by the implementation of post-World War II relief.³⁶ Among the most notable pieces of legislation from this period is the Immigration and Nationality Act.³⁷ This Act, which Congress enacted in 1952, reformed and re-codified

²⁸ *Id.*

²⁹ *Era of Restriction*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/era-of-restriction>.

³⁰ *Id.*

³¹ *Id.*

³² *World War II*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/world-war-ii>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Military Naturalization During WWII*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 6, 2019), <https://www.uscis.gov/history-and-genealogy/our-history/overview-of-ins-history/military-naturalization-during-wwii>.

³⁶ *Post-War Years*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/post-war-years>.

³⁷ *Id.* The INA is also referred to as the Hart-Celler Act due to the names of the main sponsors of the bill, Philip Hart and Emanuel Celler. Jerry Kammer, *The Hart-Celler Immigration Act of 1965*, CTR. FOR IMMIGR. STUD. (Sept. 30, 2015), <https://cis.org/Report/HartCeller-Immigration-Act-1965>.

the entire United States immigration system.³⁸ The Immigration and Nationality Act received significant amendments in 1965, which is the current version of the Act.³⁹ One of the key revisions to the immigration law during this period was the stark reduction of the quota system, which de-racialized immigration and created a shift from European-heavy immigration to Asian and Latin American-heavy immigration.⁴⁰

The fifth wave started around 1980 and lasted until the 1990s.⁴¹ During this time, changes in world migration patterns made modern international travel much easier and created a growing emphasis on controlling illegal immigration.⁴² The immigration regulations defining this period included the Refugee Act of 1980, the Immigration Act of 1990 (“IMMACT 90”), and the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (“IIRIRA”).⁴³

Finally, the most recent wave of immigration and immigration reform took place in the post-9/11 era.⁴⁴ After the events of the September 11 terrorist attack, the federal government became hyper-vigilant about border security and removing criminal aliens for the protection of the country.⁴⁵ This wave of immigration marked the creation of three immigration agencies under the newly-created Department of Homeland Security (“DHS”): Customs and Border Protection (“CBP”), Immigration and Customs Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”).⁴⁶

³⁸ *Post-War Years*, *supra* note 36.

³⁹ *Id.*

⁴⁰ *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RSCH. CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065>.

⁴¹ *Late Twentieth Century*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/late-twentieth-century>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Post-9/11*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 4, 2019), <https://www.uscis.gov/about-us/our-history/post-911>.

⁴⁵ *Id.*

⁴⁶ *Id.*

III. GENERAL OVERVIEW OF THE ASYLUM PROCESS IN THE UNITED STATES

Asylum-based immigration serves as a refuge for individuals who face a credible fear of persecution, if they are forced to return to their home country.⁴⁷ Asylum immigration began in the United States as early as 1948 when President Truman allowed a great number of Europeans, including Jewish and Eastern-European refugees, to enter the United States following World War II.⁴⁸ Similar to other forms of immigration, asylum was largely formalized and established in the post-World War II wave of immigration through the Immigration and Nationality Act of 1965.⁴⁹

Under current immigration laws, asylum can be either affirmative or defensive.⁵⁰ For both affirmative and defensive asylum, applicants file an Application for Asylum and Withholding of Removal (“I-589 Application”).⁵¹ Applicants seeking affirmative asylum file this application with the USCIS before they are detained or threatened with removal.⁵² For defensive asylum claims, an applicant has already been detained before he or she has had a chance to file the asylum application with the USCIS.⁵³ Therefore, for

⁴⁷ *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 25, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum>. Asylum laws have constantly been reworked and redefined to include or exclude certain groups of people. *Id.* The current groups allowed to state a claim for asylum under the current system are those that have suffered persecution or have a reasonable fear persecution due to the applicant’s race, religion, nationality, membership in a particular social group, or political opinion. *Id.*

⁴⁸ Morning Edition, *The History of Asylum Laws*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624566268/the-history-of-asylum-laws>.

⁴⁹ *U.S. Immigration Before 1965*, *supra* note 2.

⁵⁰ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 22, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>. The key difference between affirmative and defensive asylum is the timing of when the immigrant submits the asylum application. *Id.* The legal requirements for affirmative and defensive asylum are the same. *Id.*

⁵¹ *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 25, 2020), <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

⁵² *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 22, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process>.

⁵³ *Obtaining Asylum in the United States*, *supra* note 50.

defensive asylum claims, the paperwork for the I-589 Application must be filed with the immigration court that either hears the applicant's removal proceedings or encompasses the jurisdiction of the applicant's detention location.⁵⁴

Additionally, there are bars to asylum that neither affirmative nor defensive asylum petitions can overcome, except for instances of "changed circumstances" or "extraordinary circumstances."⁵⁵ Bars to asylum can occur when: (1) a previous asylum application made by the applicant was denied by an immigration judge or the Board of Immigration Appeals ("BIA" or "the Board") or (2) the applicant can be safely removed to a third country under a two-party or multi-party agreement between the United States and potential host country.⁵⁶ Applicants can also include spouses and any of their children, if the child is unmarried and under the age of twenty-one, in their I-589 applications, so long as the included person also currently resides in the United States.⁵⁷

Next, once the USCIS receives the completed application, the applicant goes through fingerprinting and background checks.⁵⁸ Following the background checks, the next step is the interview process.⁵⁹ Everyone who is included in the application must be present for the interview, including any children or spouses the applicant chose to include.⁶⁰ The applicant may also attend the

⁵⁴ *Id.*

⁵⁵ *Establishing Good Cause or Exceptional Circumstances*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 25, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/establishing-good-cause-or-exceptional-circumstances>.

⁵⁶ *Id.* These examples are not the only scenarios where a bar can thwart an asylum petition, but they are among the most common bars to asylum listed on the USCIS website. *Id.*

⁵⁷ *Asylum*, *supra* note 47.

⁵⁸ *The Affirmative Asylum Process*, *supra* note 52.

⁵⁹ *Id.* To schedule the interview, the applicant will receive a notice to make an appointment with an asylum officer at one of the eight asylum offices, two asylum sub-offices, or at a USCIS field office. *Id.* Applicants who were originally scheduled for an interview that had to be rescheduled at the applicant's request or to meet the needs of USCIS receive first priority for obtaining interview dates. *Id.* Second priority goes to applications that have been pending for twenty-one days or less since filing. *Id.* Third priority goes to all other asylum interviews. *Id.* Asylum interviews usually last an hour and the asylum officer asks questions about specific material that applicants included in their I-589 application. *Id.*

⁶⁰ *Preparing for Your Asylum Interview*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 22, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/preparing-for-your-asylum-interview>.

interview with an attorney⁶¹ and an interpreter, if needed.⁶² After the interview, the asylum office issues a decision.⁶³ If the asylum office grants asylum, the case is concluded and the applicant is an asylee.⁶⁴ However, if the asylum office does not grant the application for asylum, the case is referred to the immigration court for de novo review.⁶⁵

Once in immigration court, the asylum petition, even if it started out as affirmative, is now defensive because the applicant is now subject to removal proceedings.⁶⁶ At this time, the DHS issues a notice to appear in immigration court.⁶⁷ This notice serves as the charging instrument to initiate the action in immigration court.⁶⁸ Following the DHS's actions, or similar actions by any other relevant enforcement agency, such as ICE, there is a master calendar hearing.⁶⁹ A master calendar hearing is usually the first time the immigrant is before an immigration judge from the Executive Office for Immigrant Review ("EOIR").⁷⁰ One purpose of a master calendar hearing is administrative – allowing the immigration court to obtain background information about the applicant's immigration status and to schedule the applicant's merits hearing.⁷¹ In addition to its

⁶¹ *Id.*; see also KATE M. MANUEL, CONG. RSCH. SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (2016). Unlike defendants' fundamental right to an attorney in criminal law where, even if they cannot afford an attorney, one will always be provided for them, there is no right to an attorney in immigration law. *Id.* If immigrants would like to have an attorney help them through the paper application process, asylum interview, and/or any court proceedings, they must be able to find and pay for the attorney themselves. *Id.*

⁶² *Preparing for Your Asylum Interview*, *supra* note 60.

⁶³ *Flow Chart: Steps in the Asylum Process*, IMMIGR. JUST., <https://immigrantjustice.org/sites/immigrantjustice.org/files/Asylum%20Flow%20Chart.pdf> (last visited Sept. 29, 2020).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Obtaining Asylum in the United States*, *supra* note 50.

⁶⁷ *Flow Chart: Steps in the Asylum Process*, *supra* note 63.

⁶⁸ 8 C.F.R. § 1003.13 (2020).

⁶⁹ *Obtaining Asylum in the United States*, *supra* note 50.

⁷⁰ *When You'll Get the Immigration Court Judge's Decision*, NOLO, <https://www.nolo.com/legal-encyclopedia/judges-decision-immigration-court-how-long-it-will-take-get.html> (last visited Sept. 29, 2020).

⁷¹ See *Immigration Judge Master Calendar Checklist for Pro Se Respondents*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/page/file/924091/download> (last visited Sept. 29, 2020) (discussing the types of questions asked at a master calendar hearing).

administrative purpose, a master calendar hearing allows judges to make other procedural decisions in a removal case.⁷² Therefore, the judge can issue multiple master calendar hearings if the judge believes more information is needed before the applicant's individual merits hearing.⁷³

The merits hearing occurs at the conclusion of the master calendar hearing(s).⁷⁴ This hearing serves as the trial portion of the removal proceedings, where both the government and the applicant present their substantive cases to the immigration judge as to whether the applicant should be allowed to stay in the United States.⁷⁵ At the conclusion of the merits hearing, the immigration judge makes a decision, either orally at the hearing or in writing one to six months later, on whether to grant asylum.⁷⁶ If the judge decides to grant asylum and DHS does not appeal, the applicant is now an asylee and his or her case in immigration court is now over.⁷⁷

However, if the immigration judge denies or grants asylum but DHS appeals, the appeal is then heard before the Board.⁷⁸ The BIA then makes its decision on whether to grant the appeal.⁷⁹ If the BIA grants asylum, the applicant becomes an asylee or, if asylum was originally denied, the case is remanded to immigration court.⁸⁰

If the BIA denies asylum, applicants may file a petition for review at the federal circuit court encompassing the trial court where

⁷² *Id.*

⁷³ *Master Calendar Hearing*, IMMIGR. JUST. CAMPAIGN, <https://immigrationjustice.us/get-trained/lpr-cancellation/master-calendar-hearing> (last visited Sept. 29, 2020).

⁷⁴ *Obtaining Asylum in the United States*, *supra* note 50; Conversation with Rajat Shankar formerly from Touro Law Center on Sep. 25, 2020 at 1:30 PM EST. If immigration judges choose to have multiple calendar hearings, they will often have no more than three total calendar hearings. *Id.* By that time, judges often believe they have gathered enough information for the individual merits hearing. *Id.*

⁷⁵ Fong & Aquino, *Merits Hearing Versus the Master Calendar Docket*, FONG & AQUINO (Nov. 18, 2014), <https://www.immigrationvisaattorneyblog.com/merits-hearing-versus-master-calendar-docket>.

⁷⁶ *Flow Chart: Steps in the Asylum Process*, *supra* note 63.

⁷⁷ *Id.* Once the applicant's case is concluded, the threat of removal ends as well. *Id.*

⁷⁸ *Id.* The appeal must be filed with the BIA within thirty days of the immigration judge's decision. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

the immigration hearing was originally held.⁸¹ If the circuit court grants the petition, the case is remanded to the BIA.⁸² However, if the petition is denied, the applicant is ordered to be removed from the United States.⁸³

The process involved in asylum claims is very lengthy; for example, the average case in 2019 took the EOIR 816 days to complete.⁸⁴ Due to the significant amount of time involved in litigating asylum cases, there is an enormous backlog in the immigration system.⁸⁵ Forty-eight percent of the immigration court backlog, more than 476,000 asylum cases, were pending in the immigration court system.⁸⁶ Along with the increased burden on the immigration system, there has been a spike of expedited removal proceedings referred by Border Patrol to USCIS over the past ten years.⁸⁷

IV. DIFFERENT SOURCES OF ASYLUM LAW

Each branch of the federal government plays a distinct role in establishing modern asylum law. The separation of powers among the branches must be kept in mind when dealing with asylum cases.⁸⁸ This is because one of the current issues facing asylum law is that the federal government has thrown off a delicate balance and granted an extreme amount of power to the executive branch at the expense of: (1) the inherent powers of the other two branches and (2) even more

⁸¹ *Appeals of BIA Decisions*, STONE GRZEGOREK & GONZALEZ LLP, <https://www.sggimmigration.com/practice-groups/family-removal/litigation/appeals-of-bia-decisions> (last visited Sept. 29, 2020). The applicant's petition for review is generally filed in the federal circuit court where the immigration hearing was originally held. *Id.*

⁸² *Flow Chart: Steps in the Asylum Process*, *supra* note 63.

⁸³ *Id.*

⁸⁴ Andrew R. Arthur, *Statistics Reveal the Scope of the Asylum Backlog*, CTR. FOR IMMIGR. STUD. (Nov. 25, 2019), <https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog>.

⁸⁵ *Id.*

⁸⁶ *Id.* Out of asylum cases in the immigration court backlog, roughly 71.2% of those cases – 340,810 – are affirmative asylum applications. *Id.*

⁸⁷ *Id.* This percentage increased from five percent to more than forty percent. *Id.*

⁸⁸ Freddie Wilkinson, *The Federal Role in Immigration*, NAT'L GEOGRAPHIC (Jan. 27, 2020), <https://www.nationalgeographic.org/article/federal-role-immigration/12th-grade>.

importantly, the rights of asylum applicants.⁸⁹ While this Note will mainly focus on domestic law, this section will also briefly discuss international conventions, because many of our domestic asylum laws come from norms and customs that arise under principles of international law.⁹⁰ Finally, due to this Note's focus on asylum law, these sections will only address sources of immigration law that have had either a direct or indirect impact on asylum-based immigration.⁹¹

A. Congress

1. General Constitutional Power

Out of the three branches of the federal government, Congress, has the broadest power to regulate immigration law under the Constitution.⁹² The Constitution grants Congress a plenary power in regulating immigration law.⁹³ Not only does Congress have the

⁸⁹ *See id.*

⁹⁰ *Study Guide: The Rights of Refugees*, UNIV. OF MINN. HUM. RTS. LIBR. (2003), <http://hrlibrary.umn.edu/edumat/studyguides/refugees.htm>.

⁹¹ This means that several major sources of immigration law will not be discussed due to their inapplicability to asylum. For example, Section IV(A) will not discuss pieces of legislation such as the 1882 Chinese Exclusion Act, which focused squarely on race-based bars to immigration (not on persecution or fear of the immigrant), and 1990 Immigration Act, which specifically leaves out special classes of immigrants such as refugees and asylees. *See* Chinese Exclusion Act, Pub. L. No. 47-126 (1882); Immigration Act of 1990, Pub. L. No. 101-649 (1990). While other crucial Supreme Court cases helped develop immigration law in general such as *Zadvydas v. Davis*, 533 U.S. 678 (2001) (addressing the Constitutional issues associated with indefinite periods of post-removal-period detention) and *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) (ruling on the administrative procedures of deportation), they will not be discussed in Section IV(B) because they do not deal with asylum law. Finally, Section IV(C) will not address crucial non-asylum policies such as President Reagan's and Bush Sr.'s "Family Fairness" policy, Executive Order 12081, which terminated the expedited naturalization process for military personnel, and Executive Order 12324, which deals with the confrontation of illegal aliens at the border. *See Immigration Council Strongly Reaffirms Research on Reagan-Bush Family Fairness Policy*, AM. IMMIGR. COUNCIL (Dec. 5, 2014); Exec. Order. No. 12081, 43 Fed. Reg. 42,237 (Sept. 18, 1978); Exec. Order. No. 12324, 46 Fed. Reg. 48,109 (Sept. 18, 1978).

⁹² Freddie Wilkinson, *The Federal Role in Immigration*, NAT'L GEOGRAPHIC (Jan. 27, 2020), <https://www.nationalgeographic.org/article/federal-role-immigration/12th-grade>.

⁹³ *Id.*

enumerated naturalization power under Article One, Section Eight, Clause Four of the Constitution, but also a large majority of immigration law and immigration-based procedure is based on statutes passed by Congress.⁹⁴ However, Congress has also delegated a substantial amount of its authority to govern immigration law to the executive branch, which was ratified by various Supreme Court decisions.⁹⁵

2. *Key Asylum Statutes Prior to the Trump Administration*

While initial forms of asylum law were created in response to the aftermath of World War II,⁹⁶ the first federal statute that codified asylum and set firm guidelines for the asylum process is the Immigration and Nationality Act of 1965 (“INA”).⁹⁷ Prior to the implementation of the INA, there was a national quota system that preferred European immigrants.⁹⁸ By eliminating the quota system, the INA gave rise to large-scale immigration that characterizes the modern wave of immigration.⁹⁹ Another effect of eliminating the formal quota system, is the shift in immigration law to give preference to applicants who have family members currently in the United States rather than those lacking any ties to this country.¹⁰⁰

Along with the general foundational basis the INA provides, it deals specifically with asylum law in 8 U.S.C. § 1158.¹⁰¹ This part of the INA explains: (1) who has standing to apply for asylum and

⁹⁴ *Id.*

⁹⁵ See *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Kucana v. Holder*, 558 U.S. 233 (2010); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁹⁶ See *supra* note 48 and accompanying text.

⁹⁷ 8 U.S.C. §§ 1101-05, 51-61, 81-89, 1201-04, 21-31, 52-60, 81-88, 1301-06, 21-30, 51-63, 1401-09, 21-59, 82-89, 1502-04, 21-24.

⁹⁸ Muzaffar Chishti, Fay Hipsman, & Isabel Ball, *Fifty Years On, The 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL’Y INSTIT. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

⁹⁹ *Id.* There are still some versions of quotas in the current system present for certain types of family-based immigration, often referred to as “lotteries.” *Id.*

¹⁰⁰ Chishti et al., *supra* note 98.

¹⁰¹ 8 U.S.C. § 1558. This section is also labeled as § 209 of the INA.

exceptions to that general rule,¹⁰² (2) conditions of granting asylum,¹⁰³ (3) the purpose of establishing and the process of terminating the status of asylum,¹⁰⁴ and (4) the procedure involved in applying for asylum.¹⁰⁵

The next vital piece of asylum legislation, even though it did not directly address the issue of asylum, was the Refugee Act of 1980.¹⁰⁶ The Refugee Act introduces the key language in asylum determinations – a “well-founded fear of persecution.”¹⁰⁷ While the language in this statute applies mainly to refugees, the immigration legal system uses the same language to determine the credentials of an asylum claim.¹⁰⁸

Another noteworthy piece of legislation that defined asylum law is the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (“IIRIRA”).¹⁰⁹ While the INA and the Refugee Act of 1980 both establish the scope of requirements for an asylum claim, the IIRIRA outlines the relevant factors and procedure involved in

¹⁰² *Id.* at §1158(a).

¹⁰³ *Id.* at §1158(b). These conditions include: eligibility, burden of proof, determination of credibility, exceptions to the general rules, and the treatment of parties that join the applicant in their application. *Id.*

¹⁰⁴ *Id.* at §1158(c).

¹⁰⁵ *Id.* at §1158(d).

¹⁰⁶ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). While refugees are very similar to asylum seekers, it is important to maintain each in a separate category because refugees are outside of the United States when they make their petition but asylum seekers are inside of the United States, or currently at a U.S. port of entry, when they make their petitions. *Refugees and Asylees*, U.S. DEP’T OF HOMELAND SEC. (Oct. 22, 2020), <https://www.dhs.gov/immigration-statistics/refugees-asylees>.

¹⁰⁷ 94 Stat. 12.

¹⁰⁸ *Refugee Act of 1980*, NAT’L ARCHIVES FOUND., <https://www.archivesfoundation.org/documents/refugee-act-1980> (last visited Sept. 29, 2020).

¹⁰⁹ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997) [hereinafter IIRIRA]. While the IIRIRA provides a distinct set of rules, the actual piece of legislation was incorporated into the INA as part of Section 212. See Memorandum from Donald Neufeld, Acting Associate Director Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, & Pearl Chang, Acting Chief, Office of Policy & Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, U.S. Citizenship & Immigr. Servs. (May 6, 2009).

deportation if asylum is not granted.¹¹⁰ The IIRIRA was designed to improve and heighten border control by imposing criminal penalties for certain crimes that are deemed to be removable offenses.¹¹¹ Specifically, there are two main provisions in this statute that are relevant to asylum seekers.¹¹² First, the IIRIRA allows for the deportation of undocumented immigrants who commit a misdemeanor or a felony.¹¹³ Second, the IIRIRA mandates that immigrants who are unlawfully present in the United States between 180 to 365 days must remain outside the United States for three years unless they are pardoned.¹¹⁴ Furthermore, if they remain in the United States undocumented for over one year, they must stay outside the United States for ten years, unless they have a waiver.¹¹⁵ If an

¹¹⁰ *Illegal Immigrant Reform and Immigration Responsibility Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act (last visited Sept. 29, 2020). This Act not only applies to asylum but also for other situations where an undocumented immigrant is removed for any reason. *Id.*

¹¹¹ *Id.*

¹¹² See INA § 212(a)(9)(A), (B)(i)(I)-(II).

¹¹³ *Illegal Immigrant Reform and Immigration Responsibility Act*, *supra* note 110; see Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2074-75 (2017) (discussing the lack of distinction the IIRIRA makes between different levels of crimes). This is important to note because one of the main reasons for denial of an asylum application is generally based on the applicant having a criminal background in the United States (no matter how remote, isolated, or minor of a crime it is). *Id.*; 72 FR 53013 § 1513(e) (2007) (setting aside victims of crime and individuals seeking a U-visa as a class of non-deportable people). There is an exception for victims of a crime or victims of trafficking that were forced to commit crimes against their free will; however, the general rule is that anything on immigrants' criminal records is a threat to their status in the country (especially when attempting to claim asylum). *Illegal Immigrant Reform and Immigration Responsibility Act*, *supra* note 110.

¹¹⁴ *Illegal Immigrant Reform and Immigration Responsibility Act*, *supra* note 110; Conversation with Rajat Shankar formerly from Touro Law Center on Nov. 11, 2020 at 9:30 AM EST. This section of the IIRIRA is important for asylum seekers because asylum seekers need to be inside the United States (and their family members attaching to their petition must be inside the United States as well) in order for their asylum claim to be processed). *Id.*

¹¹⁵ *Illegal Immigrant Reform and Immigration Responsibility Act*, *supra* note 110; Conversation with Rajat Shankar formerly from Touro Law Center on Nov. 11, 2020 at 9:30 AM EST. This ban can become a permanent bar to entry under the IIRIRA. *Id.* If someone has a three- or ten-year bar placed upon him or her and they still attempt to reenter the country, the immigrant can be facing a permanent ban from the country. *Id.*

immigrant stays past the specified guidelines in the IIRIRA without obtaining the waiver or pardon, they must wait ten years before they can apply for a waiver.¹¹⁶

The legislature has been the least active branch in establishing asylum law over the past couple of decades when compared to the actions of the executive and judicial branches.¹¹⁷ The major exceptions to this general rule come from the Bush¹¹⁸ and Obama¹¹⁹ Administrations, which worked with Congress to issue temporary grants of citizenship to people who would otherwise not qualify for asylum, but still feared returning to their home countries.

B. Supreme Court

1. General Constitutional Power

Out of the three branches of the federal government, the judiciary has the narrowest power to regulate immigration law under the Constitution.¹²⁰ While the Constitution provides limited power to the judicial branch to create immigration law, the Supreme Court shaped federal immigration law in three key ways. First, in the pivotal case of *Chy Lung v. Freeman*, the Court established that immigration regulation is a responsibility reserved solely for the

¹¹⁶ *Illegal Immigrant Reform and Immigration Responsibility Act*, *supra* note 110.

¹¹⁷ D'vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history>.

¹¹⁸ Development, Relief, and Education for Immigrant Minors Act, S. 1291, 107th Cong. (2001) [hereinafter DREAM Act].

¹¹⁹ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 4, 2021), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca>; *President Obama's Deferred Action for Parents Program (DAPA)*, NAT'L IMMIGR. L. CTR. (Nov. 26, 2014), <https://www.nilc.org/issues/immigration-reform-and-executive-actions/dapasummary>.

¹²⁰ U.S. CONST. art. III, §2. There is nothing mentioned in Article III that gives the Supreme Court original or appellate jurisdiction over asylum, or other general immigration, cases. *Id.* The only grant in the Constitution that comes close is the authority to have appellate jurisdiction over cases that “aris[e] under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” *Id.*

federal government, not the individual states.¹²¹ Second, in the cases that followed *Chy Lung*, the Court helped define the scope of federal immigration powers by setting boundaries for the other two competing branches.¹²² Finally, the power of judicial review adds an important layer of protection for the immigrants going through the system, albeit in a limited fashion,¹²³ in an attempt to ensure the immigration process is fair and accurate.¹²⁴

2. *Major Cases Prior to the Trump Administration*

Prior to the Trump Administration, the Supreme Court decided five cases that shaped the form of current asylum law.¹²⁵

The Supreme Court directly addressed the modern-day concept of asylum-based immigration for the first time¹²⁶ in *INS v.*

¹²¹ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (holding it was unconstitutional for the California legislature to pass a law excluding certain immigrants, except upon payment of a bond, because the power to control admission of aliens belongs solely to the national government); *see also* *Arizona v. United States*, 567 U.S. 387 (2012) (upholding the *Chy Lung* ruling).

¹²² Vincent J. Cannato, *Our Evolving Immigration Policy*, NAT'L AFFS. (Fall 2012), <https://www.nationalaffairs.com/publications/detail/our-evolving-immigration-policy>.

¹²³ *Background on Judicial Review of Immigration Decisions*, AM. IMMIGR. COUNCIL (June 1, 2013), <https://www.americanimmigrationcouncil.org/research/background-judicial-review-immigration-decisions>. Congress has set up many restrictions on the types of arguments available for judicial review on appeal in immigration decisions. *Id.* Some of these restrictions include the inability to challenge: “discretionary” determinations by immigration judges and officers, eligibility requirements for asylum, expedited removal proceedings, and cases where there is a criminal record (regardless of how minor the offense). *Id.*

¹²⁴ *Id.*

¹²⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *INS v. Ventura*, 537 U.S. 12 (2002); *Gonzales v. Thomas*, 547 U.S. 183 (2006); *Kucana v. Holder*, 558 U.S. 233 (2010).

¹²⁶ While there are other earlier cases that mention asylum-based immigration, such as *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971), *Cardoza-Fonseca* is the first one to address asylum-based immigration as its own category (*Rosenberg* categorized the respondent’s claim as a refugee claim rather than a stand-alone asylum claim). *Rosenberg*, 402 U.S. at 56. *See* Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 *In Defense of the Alien* 74, 82 (1990) (referring to *Cardoza-Fonseca* as a “beacon” in the federal judiciary).

*Cardoza-Fonseca*¹²⁷ in 1987. The respondent was a Nicaraguan citizen who entered the United States as a visitor and remained in the country longer than she was permitted.¹²⁸ When deportation proceedings began, the respondent applied to withhold her order of deportation as well as for asylum.¹²⁹ Her basis for asylum was that her brother was tortured due to his political beliefs and that the Sandinistas would persecute and torture her to discover her brother's whereabouts if she returned to Nicaragua.¹³⁰ The immigration court and the BIA held that the respondent did not establish a credible fear based on a "more likely than not" standard of proof.¹³¹ However, the Court of Appeals for the Ninth Circuit held that the standard of proof to establish the credibility of an applicant's fear of persecution should not be based on a typical percentage.¹³² Instead, the Ninth Circuit held that the more appropriate standard to judge an applicant's fear of persecution is to evaluate whether the applicant has a "credible fear of persecution."¹³³ The Supreme Court agreed with the Ninth Circuit's holding and determined that the BIA and lower immigration court both abused their discretion by applying the incorrect standard; therefore, this case was remanded to the lower courts for further proceedings based on the "well-founded fear of persecution" standard.¹³⁴

In 1999, the Supreme Court heard the next foundational case that specifically addressed asylum law – *INS v. Aguirre-Aguirre*.¹³⁵ The respondent was burning buses, assaulting passengers, and vandalizing private property in Guatemala, his native country.¹³⁶ The respondent claimed that these acts were done to protest the Guatemalan government.¹³⁷ He then sought asylum in the United

approach to asylum policy after the lower courts slowly beginning to veer from the intended meaning of the INA).

¹²⁷ 480 U.S. 421 (1987).

¹²⁸ *Id.* at 424.

¹²⁹ *Id.*

¹³⁰ *Id.* at 424-25.

¹³¹ *Id.* at 425.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 449.

¹³⁵ 526 U.S. 415 (1999).

¹³⁶ *Id.* at 418.

¹³⁷ *Id.*

States due to his expressed fear of persecution for his earlier political activities in Guatemala.¹³⁸

The Supreme Court reversed the Ninth Circuit Court of Appeals decision, which held that the case should be remanded to the BIA for further factual analysis of three factors.¹³⁹ The three factors the Ninth Circuit focused on were: (1) the balancing test between the severity of Aguirre's offenses against the threat of political persecution,¹⁴⁰ (2) the qualification of atrocities of Aguirre's acts in comparison with others it faced in the past,¹⁴¹ and (3) the determination of whether Aguirre's acts were politically necessary or successful.¹⁴² The Court dismissed the Ninth Circuit's argument because neither the Attorney General nor the BIA is required to balance those factors under the INA since a grant of asylum is a discretionary judgment.¹⁴³ Ultimately, the Supreme Court issued a unanimous ruling that the matter should be remanded to the circuit court for further proceedings to be analyzed using the proper methods, excluding the prior factors the Ninth Circuit originally considered.¹⁴⁴ While the Court did not issue a definitive ruling in this case, *Aguirre-Aguirre* contributed immeasurably to the interpretation of asylum law. Not only did this case grant the Attorney General and BIA great deference to enforce asylum law,¹⁴⁵ especially when establishing the credible fear of political persecution, but this decision also further defined the scope of deportable offenses of a "serious nonpolitical crime" under the INA.¹⁴⁶

¹³⁸ *Id.*

¹³⁹ *Id.* at 423.

¹⁴⁰ *Id.* at 418.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 427-30. While the UN handbook requires the balancing of those factors, especially requiring administrative agencies to "consider[] whether the acts committed 'were grossly out of proportion to the alleged objective'. . . [t]he political nature of the offenses would be 'more difficult to accept' if they involved 'acts of an atrocious nature.'" *Id.* at 428 (quoting *Aguirre-Aguirre v. INS*, 121 F.3d 521, 524 (9th Cir. 1997) (quoting U.N. Handbook, P152, at 36)). Furthermore, the Supreme Court says the handbook "may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or the United States Courts." *Id.* at 427.

¹⁴⁴ *Id.* at 433. While the Supreme Court ultimately agreed with the lower court that the case should be remanded for further proceedings, the Court did not agree with the Ninth Circuit's rationale as to why it should be remanded. *Id.* at 419.

¹⁴⁵ *Id.* at 424-25.

¹⁴⁶ *Id.* at 427-30.

In 2002, the Supreme Court decided *INS v. Ventura*.¹⁴⁷ In this case, the respondent was seeking asylum for fear of persecution from the Guatemalan government and guerrilla forces.¹⁴⁸ Following the reasoning in *Aguirre-Aguirre*, the Court held that asylum decisions are discretionary and administrative agencies, such as the INS, should be granted broad deference when making those decisions.¹⁴⁹ Additionally, while threats of danger were certainly elevated in Guatemala during this time,¹⁵⁰ the Justices rejected the respondent's asylum claims because "'the underlying motivation in most asylum claims now appears to stem from common crime and/or personal vengeance,' i.e. not politics . . . only party leaders or high-profile activists generally would be vulnerable to such harassment and only in their home communities.'"¹⁵¹ The Court believed that the respondent could return safely to his home country, just not his local community.¹⁵² By refusing to grant the respondent the immigration relief he requested, the Justices in *Ventura* established that an applicant must have a well-founded fear of persecution in order to have a successful asylum claim.¹⁵³ While the concept of the "well-founded fear of persecution" is not a new requirement to successfully establish an asylum claim,¹⁵⁴ the Justices transformed the meaning of that terminology to grant a much broader sense of discretion to the government to cast doubt on an applicant's credibility than the Court previously intended in *Cardoza-Fonseca*.¹⁵⁵

¹⁴⁷ 537 U.S. 12 (2002).

¹⁴⁸ *Id.* at 17-18.

¹⁴⁹ *Id.* at 16.

¹⁵⁰ *Id.* at 17-18.

¹⁵¹ *Id.* (citing Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State, Guatemala -- Profile of Asylum Claims & Country Conditions at 4, 8 (June 1997) (citation omitted)).

¹⁵² *Id.* at 18. It is not enough for an individual to have a fear of persecution to return to a specific area in his or her native country. *Id.* In order to establish a credible fear, the individual must fear persecution if forced to return to any part of his or her native country. *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *Cardoza-Fonseca*, 480 U.S. at 449 (establishing the applicant's "persecution or well-founded fear of persecution" as the necessary standard to evaluate the credibility of an applicant's asylum claim).

¹⁵⁵ See *Ventura*, 537 U.S. at 13 (prioritizing the powers of the executive branch by having the first sentence of the opinion reference the broad discretion given to the Attorney General under the INA to evaluate the credibility of an applicant's claim of persecution).

After *Ventura*, the Supreme Court did not issue another substantive asylum ruling until *Gonzales v. Thomas*¹⁵⁶ in 2006. In *Gonzales*, the respondents were a South African family seeking asylum in the United States.¹⁵⁷ The respondents argued they should be granted asylum because they had a credible fear of persecution due to their political opinions and membership in a particular social group.¹⁵⁸ The immigration and BIA courts focused mainly on the political and racial elements of their asylum claim and denied the respondents' petition for asylum.¹⁵⁹ However, the Ninth Circuit overruled the lower courts and held that the BIA failed to consider a family unit as a "particular social group" since "certain 'kinship ties' fall within the statutory term."¹⁶⁰

The Supreme Court reversed the appellate court decision due to the Ninth Circuit's erroneous failure to remand the case for further proceedings on the issue of a "particular social group."¹⁶¹ The Justices agreed that the central issue of the case, whether a family is a "particular social group" for the purposes of asylum, was not determined in the lower courts.¹⁶² While the Court did not issue a definitive ruling in this case as to whether a family is a "particular social group," recent case law has interpreted this case and other

¹⁵⁶ 547 U.S. 183 (2006).

¹⁵⁷ *Id.* at 184.

¹⁵⁸ *Id.* The respondents argued the family collective constituted a "particular social group" because of their race and kinship with a particularly well-known, racist, white South African. *Id.*; Liliya Paraketsova, *Why Guidance From the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. OF MICH. J. OF L. REFORM 437, 437-38 (2018). Courts, including the Supreme Court, have struggled to define firm guidelines to establish a "particular social group." *Id.* The BIA in *Matter of A-B-* helps provide some guidelines to identify "particular social groups"; however, these guidelines have been not as helpful in creating a straightforward procedure for application. 27 I&N Dec. 316, 316 (A.G. 2018). The court in *Matter of A-B-* held that a "particular social group" is: (1) based on a "common immutable characteristic" that is "socially distinct within the society in question," (2) the "central reason for [his or] her persecution," (3) stated with specificity, and (4) separate from the harm asserted in the application for asylum. *Id.*

¹⁵⁹ *Gonzalez*, 547 U.S. at 184.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 185.

¹⁶² *Id.* at 186-87.

lower court decisions to allow certain types of family units to fall under the statutory definition of a “particular social group.”¹⁶³

The last important asylum case decided prior to the Trump Administration was *Kucana v. Holder*¹⁶⁴ in 2010. The Court in this case upheld the power of judicial review in asylum cases that involved violations under the IIRIRA.¹⁶⁵ In this case, the petitioner was a citizen of Albania who entered the United States in 1995 and did not leave when his visa expired, which is a deportable violation under the IIRIRA.¹⁶⁶ While the Court regularly gave significant deference to the executive branch and Congress in issuing immigration-based decisions, the Justices in *Kucana* maintained that the separation of powers is fundamental and must be respected, especially when the judicial branch has significantly diminished power when compared to the executive and legislative branch.¹⁶⁷

C. The President

1. General Constitutional Power

The Constitution does not explicitly grant the executive branch any immigration-specific powers.¹⁶⁸ However, the executive

¹⁶³ Andrew R. Arthur, *Attorney General Sets Standards for ‘Family’ as a ‘Particular Social Group’ and Reiterates His Authority to Interpret Immigration Laws*, CTR. FOR IMMIGR. STUD. (Aug. 5, 2019), <https://cis.org/Arthur/Attorney-General-Sets-Standards-Family-Particular-Social-Group>; see 27 I&N Dec. 581 (A.G. 2019) (raising the bar to qualify as a “particular social group”). While the Supreme Court has not clearly defined the term “particular social group,” the BIA has recognized certain clans and subclans as “particular social groups,” especially well-known families or those connected to well-known individuals. *Id.* However, most nuclear families are not inherently socially distinct. *Id.* Therefore, they do not qualify as “particular social groups.” *Id.*

¹⁶⁴ 558 U.S. 233 (2010).

¹⁶⁵ *Id.* at 249.

¹⁶⁶ *Id.* at 239–40.

¹⁶⁷ *Id.* at 237.

¹⁶⁸ There are some explicitly stated executive powers that have been interpreted to have immigration consequences. *Study Guide: The Rights of Refugees*, *supra* note 90. One of these powers is the broad definition of the Article II, Section III power to “receive Ambassadors and other public Ministers” seen in *Zivotofsky v. Kerry* by holding that the President has the power to recognize certain groups of people for purposes of immigration paperwork (which is inherent to their power to receive). See 576 U.S. 1 (2015). Another one of these powers that have been interpreted broadly in favor of increased executive control in the realm of immigration law is

branch has acquired a great deal of power to control, monitor, and regulate immigration law through several channels created by the separation of powers among the branches of government. First, as discussed in Sections IV(A)(1) and (2) of this Note, Congress has delegated much of its enumerated and inherent constitutional power to regulate immigration to the executive branch.¹⁶⁹ Second, as discussed in Sections IV(B)(1) and (2) of this Note, the Supreme Court has regularly held in favor of a broad exercise of executive power when regulating the various areas of immigration law, especially domestic asylum law.¹⁷⁰ Third, with the expansion of the administrative state, both the courts and Congress have given broad deference to agency decisions and have allowed a vast array of administrative policies as long as there is a legitimate purpose, which is not a high burden.¹⁷¹ Finally, the other branches have allowed the executive branch to enjoy an increased presence in immigration law by justifying their acquiescence under the language of the Take Care Clause of Article II, § 3 of the Constitution.¹⁷²

2. *Key Executive Orders / Programs Before the Trump Administration*

There are three key presidential policies that helped define current asylum law prior to the Trump Administration.¹⁷³

Former President Carter passed The Consultation on the Admission of Refugees in 1980.¹⁷⁴ This executive order serves, in

the power to “take Care that the Laws be faithfully executed.” Laura S. Trice, *Adjudication By Fiat: The Need For Procedural Safeguards In Attorney General Review Of Board Of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1766-67 (2010) (discussing how the Attorney General, a key player in the executive branch, has broad discretion to enforce federal immigration laws under the current statutes).

¹⁶⁹ See *supra* notes 92-94, 122 and accompanying text.

¹⁷⁰ See *supra* notes 95, 120-67 and accompanying text.

¹⁷¹ *Chevron v. Nat’l Res. Def. Couns.*, 467 U.S. 837 (1984).

¹⁷² U.S. CONST. art. II, §3.

¹⁷³ Exec. Order. No. 12208, 45 Fed. Reg. 25,789 (Apr. 15, 1980); Memorandum from Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, U.S. Dep’t of Homeland Sec. (June 15, 2012); WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION POLICY (July 20, 2018).

¹⁷⁴ Exec. Order. No. 12208, 45 Fed. Reg. 25,789 (Apr. 15, 1980).

part, to amend sections of the INA and the Refugee Act of 1980.¹⁷⁵ Furthermore, this order creates powers in the executive branch to monitor refugee and asylum law in three variations. First, the order allows the president to delegate certain types of immigration powers to the Secretary of State or Attorney General, both members of the President's Cabinet.¹⁷⁶ Second, the order grants the delegation of immigration oversight power to the United States Coordinator for Refugee Affairs, a member of the executive branch.¹⁷⁷ Finally, the President reserved several asylum-centered rights for himself in the order including the ability to "specify special circumstances for purposes of qualifying persons as refugees under Section 101(a)(42)(B) [of the INA]"¹⁷⁸ and "to fix the number of refugees to be admitted under Section 207(b) [of the INA]."¹⁷⁹

The next two central pre-Trump executive programs addressing aspects of asylum law came from the Obama Administration through presidential memoranda.¹⁸⁰ The first program is called "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."¹⁸¹ This program has also been referred to as the Deferred Action for Childhood Arrivals ("DACA") Program.¹⁸² Similar to DACA's

¹⁷⁵ *Id.* at § 1-101(a)-(b). These statutes have been previously identified by this Note as key statutes that guided the creation of United States asylum law. *See supra* Section IV(A)(2).

¹⁷⁶ Exec. Order. No. 12208 at § 1-101(a).

¹⁷⁷ *Id.* at § 1-101(b).

¹⁷⁸ *Id.* at § 1-103(a).

¹⁷⁹ *Id.* at § 1-103(c).

¹⁸⁰ As mentioned previously in this Note, there is also the DREAM Act originating from the Bush, Jr. Administration in 2001. *Supra* note 118. However, this program will not be discussed in detail in this Note because it has not yet cleared the Congressional floor after at least ten versions of the bill. *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Aug. 27, 2020), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers>.

¹⁸¹ Memorandum from Janet Napolitano, *supra* note 173.

¹⁸² The Obama Administration issued a parallel program two years after DACA for the parents of U.S. citizens or legal permanent residents – the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") Program. However, this Note only addresses DACA in depth because: (1) DAPA was discontinued in 2017, (2) there are no present, or future, plans to reinstate the program, and (3) the DACA Program is essentially the same as the DAPA program (the only difference is that DACA applies to the children and DAPA applies to their parents). *See Rescission of Memorandum Providing for Deferred Action for*

predecessor, the DREAM Act, and DACA's parental counterpart, DAPA, DACA is only meant to serve as a temporary solution that allows people who qualify for the program to stay in the country for a longer period of time than their status allows.¹⁸³ This extra time then allows people in the program to apply for citizenship while they remain safe from deportation due to their provisional immigration status.¹⁸⁴ While DACA, and the acts and programs similar to DACA, do not specifically address asylum law, they deal indirectly with asylum seekers. Once a person is admitted to these programs, they can apply for more permanent forms of relief and a significant number of DACA recipients – or family members of DACA recipients – choose to file asylum claims due to the dangerous conditions in their native country.¹⁸⁵

The second Obama Administration program that addressed asylum was the Family Case Management Program ("FCMP"), which was issued in January 2016 as a pilot program.¹⁸⁶ Unlike the other asylum policies and decisions discussed previously in this Note, the FCMP did not deal directly with the process of asylum or status of the applicant. Instead, the FCMP provided alternatives to deportation for asylum seekers in several large cities throughout the United States.¹⁸⁷ Some of these alternatives in the FCMP included

Parents of Americans and Lawful Permanent Residents ("DAPA"), U.S. DEP'T OF HOMELAND SEC. (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>; ANDORRA BRUNO, CONG. RSCH. SERV., R44764, *THE DACA AND DAPA DEFERRED ACTION INITIATIVES: FREQUENTLY ASKED QUESTIONS* (2017).

¹⁸³ Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 2021 Daily Comp. Pres. Doc. DCPD202100064 (Jan. 25, 2021).

¹⁸⁴ Doug Menten, *What Are the Options for DACA Recipients?*, SUPER LAWYERS (May 21, 2020), <https://www.superlawyers.com/oregon/article/what-are-the-options-for-daca-recipients/61de5ce1-896b-4a7c-92d6-d0661c841bb0.html>.

¹⁸⁵ *Immigration Relief for DACA Recipients Based on Fear of Return*, UNIV. OF CAL. HASTINGS COLL. OF L. CTR. FOR GENDER & REFUGEE STUD. (Feb. 2018), https://pennstatelaw.psu.edu/sites/default/files/CGRS%20DACA%20Fear%20of%20Return%20Claims%20Practice%20Advisory_02-28-2018.pdf.

¹⁸⁶ Jane C. Timm, *This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled It.*, NBC NEWS (June 24, 2018, 8:54 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896>.

¹⁸⁷ *Report of the ICE Advisory Committee on Family Residential Centers*, U.S. IMMIGR. & CUSTOMS ENF'T (Oct. 7, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final->

providing “case management, referrals for support services, and legal orientation, in partnership with community-based non-governmental organizations, in order to make sure that vulnerable families’ most urgent needs were met and they had the information they needed to comply with legal obligations.”¹⁸⁸ While the Trump Administration eliminated the FCMP in June 2017,¹⁸⁹ the Biden Administration has already begun reversing some of former President Trump’s immigration policies;¹⁹⁰ furthermore, President Biden has stated that a key priority in his immigration policy is to create a task force to reunite families¹⁹¹ – something that the FCMP was designed to do.¹⁹²

D. International Norms and Treaties

Although this Note focuses on domestic law, our country’s asylum laws are certainly influenced by international norms and treaties.¹⁹³ Therefore, a brief discussion of these sources of inspiration is necessary to understand the foundations of asylum law, especially the Geneva Convention on the Status of Refugees (“Geneva Refugee Convention” or “Geneva Convention”)¹⁹⁴ and the Convention against Torture and Other Cruel, Inhuman or Degrading

102016.pdf. These five metropolitan areas include: Baltimore / Washington D.C., New York City / Newark, Chicago, Miami, and Los Angeles. *Id.*

¹⁸⁸ Ruthie Epstein, *The Tried-and-True Alternatives to Detaining Immigrant Families*, ACLU (June 22, 2018, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/tried-and-true-alternatives-detaining>.

¹⁸⁹ *Report of the ICE Advisory Committee on Family Residential Centers*, *supra* note 187.

¹⁹⁰ Michael D. Shear & Zolan Kanno-Youngs, *Biden Issues Orders to Dismantle Trump’s ‘America First’ Immigration Agenda*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/02/us/politics/biden-immigration-executive-orders-trump.html>.

¹⁹¹ Exec. Order No. 14011, 86 Fed. Reg. 8,273 (2021).

¹⁹² See *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, WOMEN’S REFUGEE COMM’N (June 13, 2019), <https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration>.

¹⁹³ While there are several sources of international influences on United States asylum law, this Note will focus on the two primary treaties that have formed the foundational backbone of domestic asylum law in the country – the Geneva Refugee Convention of 1951 and the Convention Against Torture of 1987.

¹⁹⁴ U.N. HIGH COMM’R FOR REFUGEES, CONVENTION RELATING TO THE STATUS OF REFUGEES, G.A. Res. 2198(XXI) (1967).

Treatment or Punishment (“Convention Against Torture” or “CAT”).¹⁹⁵

The Geneva Refugee Convention was first created in 1951 but was then amended in 1967.¹⁹⁶ Similar to the Refugee Act of 1980, the Geneva Refugee Convention focuses on refugees and not asylees.¹⁹⁷ However, three central aspects of the Geneva Convention are fundamental to the development of asylum law. First, the Geneva Convention’s core principle of “non-refoulement, which asserts that refugee[s] should not be returned to a country where they face serious threats to their life or freedom,” has established international custom regarding the required treatment of those seeking safety in a foreign country.¹⁹⁸ Further, American asylum law’s “fear of persecution” language mirrors the Geneva Convention’s stated policy to not force refugees to return to “a country where they face serious threats to their life or freedom.”¹⁹⁹ Second, the definition used to define refugees and asylees in the Convention is very similar to the definition used in American asylum law – “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”²⁰⁰ Finally, while not stated explicitly in United States asylum law, the rights provided to those seeking refuge under the Geneva Convention establish an international standard of treatment, which those pushing for immigration reform in the United States seek to mirror in our country.²⁰¹

The Convention Against Torture was ratified and adopted by the U.N. General Assembly in 1984 and became effective in 1987.²⁰²

¹⁹⁵ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, G.A. Res. 39/46 (Dec. 10, 1984) [hereinafter CONVENTION AGAINST TORTURE].

¹⁹⁶ CONVENTION RELATING TO THE STATUS OF REFUGEES, *supra* note 194, at p. 1.

¹⁹⁷ *Id.* at “Preamble,” p. 13.

¹⁹⁸ *The 1951 Refugee Convention*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Feb. 7, 2021).

¹⁹⁹ *Id.*

²⁰⁰ CONVENTION RELATING TO THE STATUS OF REFUGEES, *supra* note 194, at “Introductory Note,” p. 3.

²⁰¹ *Id.* at art. 3-5, 12-30 (discussing the rights of refugees, and those in the “same circumstances,” under the Geneva Convention).

²⁰² CONVENTION AGAINST TORTURE, *supra* note 195.

While the Geneva Convention is a persuasive international norm, the Convention Against Torture was formally adopted into United States immigration law through 8 C.F.R. § 208.16-208.18.²⁰³ Even though the Convention Against Torture provides broader protections than asylum, such as eliminating the defined groups for fear of persecution and allowing individuals with felony records to obtain protection, CAT has helped the development of asylum law in three ways. First, CAT claims serve as alternative means to file claims that are unsuccessful under asylum.²⁰⁴ Although CAT requires torture or fear of torture from someone acting in an “official capacity” in the applicant’s home country,²⁰⁵ this program serves as a viable second option for those who do not fit within the rigid groups of people allowed to assert asylum claims.²⁰⁶ In this sense, the Convention Against Torture alleviate some of the burden on the asylum system and allows fewer asylum claims to place a strain on the already-delayed asylum system.²⁰⁷ Second, CAT follows similar principles as the Geneva Convention which focuses on the inherent rights of individuals and upholds the belief that all individuals that fall under the Convention Against Torture are due universal respect as human beings.²⁰⁸ Finally, like the Geneva Convention, the Convention Against Torture reaffirms the concept that individuals should not be punished by a forced return to their countries when they reasonably do not feel safe to return.²⁰⁹ These guiding principles from CAT and the Geneva Convention, in turn, shape – at least in theory and in intention – American asylum law.

V. ASYLUM DURING THE TRUMP ADMINISTRATION

As stated previously in this Note, the executive branch has become the most active branch in regulating federal immigration

²⁰³ U.N. High Commissioner for Refugees, Convention Against Torture, Memorandum Addressed to the Regional Office for the United States of America & the Caribbean (Mar. 10, 2003), <https://www.unhcr.org/5859a0464.pdf>.

²⁰⁴ Aruna Sury, *Qualifying for Protection Under the Convention Against Torture*, IMMIGR. LEGAL RES. CTR. (Apr. 21, 2020), <https://www.ilrc.org/qualifying-protection-under-convention-against-torture>.

²⁰⁵ CONVENTION AGAINST TORTURE, *supra* note 195, at art. 1.

²⁰⁶ Sury, *supra* note 204.

²⁰⁷ *Id.*

²⁰⁸ CONVENTION AGAINST TORTURE, *supra* note 195.

²⁰⁹ *Id.*

law.²¹⁰ Former President Trump embraced the role of the executive branch's expanding power within the realm of immigration law and was more active than the prior administrations combined in the field.²¹¹ Through the Trump Administration's increased executive presence in immigration law, in conjunction with a more active Supreme Court,²¹² President Trump sought to regulate, reshape, and restrict immigration, especially asylum-based immigration, into the United States.²¹³ Unlike this Note's previous discussion of pre-Trump asylum policies,²¹⁴ this section will mainly focus on the executive and judicial branches' actions during the years of the

²¹⁰ See *supra* Section IV(C)(1).

²¹¹ Compare Drew DeSilver, *Executive Actions on Immigration Have Long History*, PEW RSCH. CTR. (Nov. 21, 2014), <https://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history> (summarizing the eleven major immigration-based executive orders from 1961 to 2014) with *Document Search*, FED. REG., <https://www.federalregister.gov/documents/search> (Write "immigration" in the search bar; then click "Advanced Search"; in the field that says "Document Category," click on "Presidential Document"; then press the magnifying glass or search button) (showing the seventy-four immigration orders former President Trump issued in a single four-year term).

²¹² *Cases – Immigration and Naturalization*, OYEZ, <https://www.oyez.org/issues/164> (last visited Feb. 7, 2021) (showing the sixteen Supreme Court decisions curtailing immigration in various ways during Trump's four-year term to fourteen immigration decisions over the almost thirty-year period between the Reagan and Obama Administrations – with some administrations having no immigration-based Supreme Court decisions at all such as Presidents Clinton and Bush, Sr.).

²¹³ Even though the Trump Administration has had a significant impact in many areas of immigration law, similar to previous sections of this Note, the focus of this discussion will be on policies having an impact on asylum law. Other areas of the immigration law that President Trump was very active in include employment-based immigration (through his "America First" agenda), visa requirements (imposing stricter requirements to obtain a visa as well as ending the diversity visa lottery), green card requirements (eliminating eligibility for those deemed to be a "public charge"), supporting for-profit detention centers, and an attempt to remove foreign students from the United States during the pandemic. See, e.g., Amadu Jacky Kaba, *United States Immigration Policies in the Trump Era*, 9 SOCIO. MIND 316 (2019); Kandel, *supra* note 173; Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Aug. 26, 2020), <https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/?sh=1ec1d25f56c0>.

²¹⁴ See *supra* Section IV.

Trump Administration.²¹⁵ Also, to demonstrate the increase in activity before and after the COVID-19 pandemic, this section will divide the years of the Trump administration based on when the World Health Organization officially declared the virus as a pandemic in March of 2020.²¹⁶

A. Before COVID-19 (November 2016 – February 2020)

1. Supreme Court Decisions

During the four years of the Trump Administration, several cases reached the Supreme Court regarding immigration law and five cases have restricted asylum in accordance with President Trump's executive policies.²¹⁷ The two important Court cases decided before the pandemic were *Jennings v. Rodriguez*²¹⁸ and *Trump v. Hawaii*.²¹⁹

In *Jennings v. Rodriguez*, respondent, Alejandro Rodriguez, was a Mexican citizen who was a legal permanent resident of the United States.²²⁰ In April 2004, Mr. Rodriguez was convicted of drug and theft crimes.²²¹ Due to these convictions, the federal government sought to remove the respondent from the country pursuant to the protocol in the Immigration and Nationality Act.²²² After over three years of detention, Rodriguez filed a habeas petition claiming that his continued detention without an individualized bond

²¹⁵ This section will not address the actions of Congress during the Trump Administration because Congress was largely inactive in immigration law during this period (other than hosting debates on some executive proposals). See Catherine Rampell, *Trump Has Bulldozed Over Congress on Immigration. Will Lawmakers Ever Act?*, WASH. POST (Nov. 14, 2019, 7:09 PM), https://www.washingtonpost.com/opinions/trump-has-bulldozed-over-congress-on-immigration-will-lawmakers-ever-act/2019/11/14/67401466-0722-11ea-8292-c46ee8cb3dce_story.html.

²¹⁶ Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157, 157 (2020).

²¹⁷ *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dep't of Homeland Sec. v. Thuraissigiam* 140 S. Ct. 1959 (2020); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020).

²¹⁸ 138 S. Ct. 830 (2018).

²¹⁹ 138 S. Ct. 2392 (2018).

²²⁰ *Jennings*, 138 S. Ct. at 838.

²²¹ *Id.*

²²² *Id.*

hearing was a violation of his due process rights.²²³ The respondent's habeas claim was consolidated with other individuals' claims similar to his, most of the other claimants being non-citizen asylum seekers.²²⁴ After becoming certified as a class, Rodriguez and the other complainants alleged that the prolonged detention in ICE centers, without clear and convincing evidence that such detention is warranted,²²⁵ constituted a violation of their constitutional rights.²²⁶ The district court granted a preliminary injunction which required the government to provide each member of the class a bond hearing unless the government could show, by clear and convincing evidence, that continued detention was justified.²²⁷ The Ninth Circuit Court of Appeals affirmed the judgment of the lower court but limited the guarantee of a bond hearing to only those who were detained at least six months.²²⁸

In a plurality opinion by the Court,²²⁹ the Justices reaffirmed the large grant of authority to the executive branch regarding issues of immigration, detention, and removal.²³⁰ The Court specifically relied on the Attorney General's broad decision-making power in immigration cases.²³¹ The Court justified the Attorney General's immense scope of power within the field of immigration by reasoning that the default rule of the alien detention and expedited removal statute²³² is to allow the Attorney General to have the power to issue warrants for the arrest and detention of aliens pending the outcome of their removal proceedings.²³³ While there are a few limited exceptions, the applicability of these exceptions is also left to the

²²³ *Id.*

²²⁴ *Id.* at 838-39.

²²⁵ *Id.* at 839. Examples of when a prolonged detention is warranted include if the detainee is a flight risk, involved in the witness protection program, or a danger to himself / herself or others. *Id.* at 848.

²²⁶ *Id.* at 861.

²²⁷ *Id.* at 839.

²²⁸ *Id.* This limitation did not matter for members of this specific class, because they all met the qualification of being detained for at least six months. *Id.*

²²⁹ Justice Alito wrote the opinion of the Court. Chief Justice Roberts and Justice Kennedy joined Alito's opinion in full. Justices Thomas and Gorsuch joined the opinion with the exception of the discussion regarding the Court's jurisdiction in this case.

²³⁰ *Id.*

²³¹ *Id.*

²³² 8 U.S.C. §§ 1225-26.

²³³ *Jennings*, 138 S. Ct. at 837.

discretion of the Attorney General.²³⁴ The Court further held that the lower courts improperly applied the constitutional-avoidance canon²³⁵ by over relying on *Zadvydas v. Davis* in order to impose a time limit to require a bond hearing; meanwhile, the plain language of 8 U.S.C. §§ 1225-26 makes no such mention of this requirement.²³⁶

While this case focused primarily on bond hearings for detained aliens, it also had a significant impact on asylum law in two important ways. First, Mr. Rodriguez and many other detained members of the class applied for asylum and were currently facing removal proceedings.²³⁷ As discussed earlier in this Note, the removal procedures for a failed asylum claim are just as fundamental in shaping asylum law as the qualifications for the program itself.²³⁸ Therefore, the Court's review of the applicability and language of the alien detention and expedited removal statute is relevant to asylum law under the Trump Administration.²³⁹ The language of § 1225(b) of the statute separates the removal and detention process for asylum seekers whose cases are still pending from aliens in other categories.²⁴⁰ However, the Court in this case grouped both types of individuals together and held that, under § 1226 of the alien detention and removal statute, that: (1) neither group is entitled to a bond hearing regardless of the length of detention,²⁴¹ (2) bond hearings are

²³⁴ *Id.* at 839 (referencing 8 U.S.C. §1226(c) which states that exceptions will be granted “only if the Attorney General decides’ both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk”).

²³⁵ *Id.* at 836. The constitutional-avoidance canon allows a court to frame statutory language that is subject to multiple interpretations in a way that avoids interpretations that have the potential to raise serious constitutional problems. *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 859-60.

²³⁸ *See supra* notes 109-16 and accompanying text (discussing the role of the IIRIRA in shaping asylum law through establishing comprehensive removal procedures).

²³⁹ *Jennings*, 138 S. Ct. at 870.

²⁴⁰ *See id.* at 844-45 (discussing the statutory distinction between removal of aliens seeking asylum under 8 U.S.C. §1225 (b)(1) and removal of aliens not seeking asylum under § 1225 (b)(2)).

²⁴¹ *Id.*

not constitutionally guaranteed for either group,²⁴² and (3) both groups are eligible to be placed in expedited removal proceedings.²⁴³

Four months after the Court's holding in *Jennings*, the Justices issued another ruling in *Trump v. Hawaii* that had a large impact on asylum law.²⁴⁴ The petitioners in this case challenged Executive Order Nos. 13,769 and 13,780, which were issued by President Trump in February and March of 2017, respectively.²⁴⁵ These proclamations suspended the entry of individuals for ninety days for those coming from seven countries that had been previously identified as heightened terrorism risks.²⁴⁶ While the Court said multiple times throughout the opinion that these proclamations do not apply to asylum seekers,²⁴⁷ Justice Breyer's dissent also highlighted 2018 statistics from the State Department that show that this self-labeled Muslim ban²⁴⁸ does have a significant curtailing effect on asylum and refugee seekers from these countries.²⁴⁹ The majority opinion upheld these policies under the rational basis standard because of the expansive powers given to the federal government in regulating immigration²⁵⁰ and because of the immigration and national security issues involved in the issuance of these proclamations.²⁵¹ Furthermore, the Court attempted to distinguish this broad grant of power to the executive branch from the polarizing ruling in *Korematsu v. United States*.²⁵² Both cases deal with the intentional targeting of specific groups of people for the generalized purpose of "national security;" however, the Court in *Trump v. Hawaii* said that individuals who are U.S. citizens receive different

²⁴² *Id.* at 845.

²⁴³ *Id.* at 837.

²⁴⁴ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2431 (2018).

²⁴⁵ *Id.* at 2403-04.

²⁴⁶ *Id.* at 2403. The seven countries included in this ninety day ban are Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* (referencing Executive Order No. 13,769, 82 Fed. Reg. 8977 § 3(c) (2017)).

²⁴⁷ *Id.* at 2406, 2422.

²⁴⁸ David J. Bier, *A Dozen Times Trump Equated His Travel Ban with a Muslim Ban*, CATO INST. (Aug. 14, 2017, 12:06 PM), <https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban> (discussing twelve separate occasions when President Trump explicitly referred to these proclamations as a "Muslim ban").

²⁴⁹ *Trump*, 138 S. Ct. at 2431.

²⁵⁰ *Id.* at 2415.

²⁵¹ *Id.* at 2417.

²⁵² *Id.* at 2423.

treatment from people who are seeking entry into the country but do not have any status in the country yet.²⁵³ Along with the discriminatory effect this case has on asylum seekers from targeted countries, this case affects asylum law because it reaffirms the broad delegation to the executive branch in the field of immigration, including issues affecting asylum applicants – either directly or indirectly.²⁵⁴

2. *Executive Orders / Formal Presidential Statements*

Former President Trump led the most active administration regarding the executive branch's role in implementing immigration policies.²⁵⁵ While many Trump administration executive orders and presidential memorandums focused on restricting immigration as a whole, four main official executive policies affected asylum-based immigration.²⁵⁶

The first of these executive policies was the executive order called “Border Security and Immigration Enforcement Improvements,” which was issued on January 25, 2017.²⁵⁷ In this executive order, President Trump sought to secure the southern border through a variety of tactics including manning the border with more federal agents,²⁵⁸ terminating the practice of “catch and release,”²⁵⁹ and encouraging streamlined deportation proceedings.²⁶⁰

²⁵³ *Id.*

²⁵⁴ *Id.* at 2415.

²⁵⁵ See N.Y. Times Editorial Board, *Trump's Overhaul of Immigration is Worse Than You Think*, N.Y. TIMES (Oct. 10, 2020), <https://www.nytimes.com/2020/10/10/opinion/sunday/trump-immigration-child-separations.html>; Todd Schulte, *Tearing Families Apart – The Impact of Trump's Immigration Agenda*, FWD.US (Sept. 29, 2020), <https://www.fwd.us/news/the-impact-of-trumps-immigration-agenda>; Aline Barros, *How Trump Administration Dramatically Reshaped US Immigration Policy*, VOICE OF AM. (Oct. 22, 2020, 9:18 PM), <https://www.voanews.com/usa/immigration/how-trump-administration-dramatically-reshaped-us-immigration-policy>.

²⁵⁶ Exec. Order 13,767, 82 Fed. Reg. 8,793 (2017); Exec. Order 13,768, 82 Fed. Reg. 8,799 (2017); Exec. Order 13,888, 84 Fed. Reg. 52,355 (2019); *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

²⁵⁷ Exec. Order 13,767, 82 Fed. Reg. 8,793 (2017).

²⁵⁸ *Id.* at § 8.

²⁵⁹ *Id.* at § 6. The order characterizes “catch and release” as a procedure “whereby aliens are routinely released into the United States shortly after their apprehension

Furthermore, this statement affirmatively stated a goal of this administration is to reduce the amount of asylees and refugees entering the country.²⁶¹ The order specifically targeted asylum, and its partner program – refugee admission, by claiming asylees and refugees “abuse” the system by looking for loopholes in the removal guidelines.²⁶² Trump’s order not only directly affected asylum law through the intentional targeting of the program, but also unilaterally granted more authority to the executive branch to carry out immigration enforcement, especially by granting more power to border patrol agents and ICE agents.

The next of Trump’s pre-COVID executive policies that had a negative effect on asylum arose from another executive order issued on January 25, 2017, called “Enhancing Public Safety in the Interior of the United States.”²⁶³ Unlike the first executive order discussed in this section, this order does not have specific language targeting asylees or refugees. Instead, one of the main goals of this order was aimed at dismantling sanctuary cities and removing undocumented immigrants who stayed in these cities.²⁶⁴ Even though asylum is not mentioned specifically by name in this executive order, the attack on sanctuary cities was a tough hit to asylees. The term “Sanctuary City” has a direct connection to asylum-based immigration.²⁶⁵ The term originated when the sanctuary movement started in the 1980s to accommodate Salvadorians trying to escape the 1970s civil war for fear of political persecution.²⁶⁶ Sanctuary cities serve multiple purposes to provide a safe refuge for undocumented immigrants

for violations of immigration law.” *Id.* However, that is a mischaracterization of the procedure. “*Catch and Release*”: *Frequently Asked Questions*, JUST. FOR IMMIGR., <https://justiceforimmigrants.org/what-we-are-working-on/immigrant-detention/catch-and-release-frequently-asked-questions> (last visited Feb. 26, 2021). While it is true that some apprehended immigrants are released, they are only temporarily released pending their immigration court proceedings, which are still monitored by DHS. *Id.*

²⁶⁰ Exec. Order 13,767, *supra* note 257 at §§ 2(b)-(d).

²⁶¹ *Id.* at § 11(a).

²⁶² *Id.* at § 11, 11(a).

²⁶³ Exec. Order 13,768, 82 Fed. Reg. 8,799 (2017).

²⁶⁴ *Id.* at §§ 1, 9.

²⁶⁵ Rawle Andrews Jr. & Sanchita Bose, *Sanctuary Cities? Asylum? Dreamers? When a House is Not a Home: The Legal and Socioeconomic Implications of National Populism on Local Governance and Individual Liberties*, 21 UNIV. OF D.C. L. REV. 75, 85 (2019).

²⁶⁶ *Id.*

while giving them time to process their immigration claims.²⁶⁷ Some of the policies these locations enforce in order to maintain a safe environment for undocumented immigrants include prohibitions on ICE arrests without a judicial warrant, unrestricted sharing of immigration status with police and other city workers, and local police cooperation with ICE to increase detentions.²⁶⁸ This safe space is vital to asylum seekers because asylum applicants are already seeking refuge from a dangerous situation in their home country.²⁶⁹ By restricting access to these welcoming areas, the Trump Administration made it much harder for asylum seekers to assimilate into the country with ease and bide their time in a location where they are not actively facing a life or death situation as they wait, potentially for years, for their applications to process.²⁷⁰

The third initiative by the executive branch that attempted to tear down asylum-based immigration was the Migrant Protection Policy (“MPP” or the “Remain in Mexico Policy”).²⁷¹ The MPP was a DHS initiative created by President Trump which states that individuals attempting to cross the southern border without documentation will be returned to Mexico and forced to wait outside of the United States for the duration of their immigration proceedings.²⁷² This program was extremely detrimental to asylum seekers because they are met with one of two options when they try to enter through the southern border to flee serious persecution. First, they will be turned around at the border and forced to return to their home country.²⁷³ Or, second, they could choose to remain in

²⁶⁷ *Sanctuary Policies: An Overview*, AM. IMMIGR. COUNCIL (Oct. 21, 2020), <https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview>.

²⁶⁸ *Id.*

²⁶⁹ See *supra* notes 10, 47 and accompanying text.

²⁷⁰ See generally Andrews & Bose, *supra* note 265 (discussing the overall importance of sanctuary cities to undocumented immigrants and the overall effects of President Trump’s executive order trying to eliminate them).

²⁷¹ Vanessa Romo, *U.S. Supreme Court Allows ‘Remain in Mexico’ Program to Continue*, NPR (Mar. 11, 2020, 6:48 PM), <https://www.npr.org/2020/03/11/814582798/u-s-supreme-court-allows-remain-in-mexico-program-to-continue>.

²⁷² *Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

²⁷³ *MPP is Still Happening – And There’s a New Threat*, REFUGEE & IMMIGR. CTR. FOR EDUC. & LEGAL SERVS. (Oct. 19, 2020),

inhumane conditions in Mexico while they wait for months, if not years, to hear anything about their immigration court proceedings.²⁷⁴

The final policy this Note will discuss from this portion of the Trump Administration is the executive order issued on September 26, 2019, called “Enhancing State and Local Involvement in Refugee Resettlement.”²⁷⁵ This policy went somewhat hand in hand with MPP in that it outsources immigrants to locations outside of the United States. The main difference between MPP and this executive order was that MPP is more focused on punishment and detention whereas this order tries to revive the “safe third-country agreements.”²⁷⁶ However, these agreements are problematic for asylum seekers – especially those from Central American countries.²⁷⁷ This is because individuals seeking asylum due to persecution from gang member violence and political violence in these countries could easily be sent back home to the dangerous conditions they were facing, especially since Guatemala, Honduras, and El Salvador all had “safe third country agreements” with the United States during the Trump Administration.²⁷⁸

B. Post COVID-19 (March 2020 – January 2021)

1. Supreme Court Decisions

Once COVID was labeled as a pandemic, the Supreme Court saw a remarkable number of immigration cases – specifically, nine

<https://www.raicetexas.org/2020/10/19/mpp-is-still-happening-and-theres-a-new-threat>.

²⁷⁴ *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>.

²⁷⁵ Exec. Order 84 Fed. Reg. 52,355 (2019).

²⁷⁶ *Id.* While this order does not mention the third country agreements specifically, it talks about resettlement to other locations and countries that would be “best environment for refugees.” *Id.* This is also the stated language when it comes to the justification for the third country agreements.

²⁷⁷ Peniel Ibe, *The Dangers of Trump’s “Safe Third Country” Agreements in Central America*, AM. FRIENDS SERV. COMM. (July 28, 2020), <https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america>.

²⁷⁸ *Id.*

cases in less than a year.²⁷⁹ Aligning itself with the Trump Administration's executive limitations placed on immigration and asylum, the Supreme Court issued two central rulings that severely impacted asylum applicants over the span of eleven months²⁸⁰ — *Department of Homeland Security v. Thuraissigiam*²⁸¹ and *Department of Homeland Security v. Regents of the University of California*.²⁸²

The Supreme Court in *Thuraissigiam* evaluated the issue of whether an asylum seeker can file a petition for habeas corpus to challenge the legality and constitutionality of his detention.²⁸³ In this case, respondent, Vijayakumar Thuraissigiam, a Tamil from Sri Lanka, entered the United States through the southern border.²⁸⁴ Shortly thereafter, the respondent was detained for expedited removal.²⁸⁵ Mr. Thuraissigiam tried to assert an asylum claim; however, the asylum officer rejected his credible-fear claim — a decision that was upheld by a supervising officer and the immigration judge.²⁸⁶ In response to this denial, the respondent filed a motion for habeas corpus in federal district court in order to obtain a new opportunity to apply for asylum.²⁸⁷ In his petition, Mr. Thuraissigiam asserted that he had a credible fear of persecution, and therefore qualified for asylum, due to his minority group ethnicity and political views.²⁸⁸ While the district court dismissed the petition, the Ninth Circuit Court of Appeals reversed the lower court decision and held that the respondent's expedited removal without a grant of habeas corpus violated his constitutional rights.²⁸⁹

²⁷⁹ *Review of the Supreme Court's 2019-2020 Immigration Cases*, NAT'L IMMIGR. F. (Sept. 10, 2020), <https://immigrationforum.org/article/review-of-the-supreme-courts-2019-2020-immigration-cases>.

²⁸⁰ Similar to other sections in this Note, this section will only discuss asylum cases or cases that have a direct or indirect impact on asylum applicants. Therefore, while the Court has decided several other immigration cases during this time, they will not be discussed here. *See* *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020); *Guerro-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020); *Barton v. Barr*, 140 S. Ct. 1442 (2020).

²⁸¹ 140 S. Ct. 1959 (2020).

²⁸² 140 S. Ct. 1891 (2020).

²⁸³ *Thuraissigiam*, 140 S. Ct. at 1981.

²⁸⁴ *Id.* at 1967.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

The Justices, in a 7-2 opinion, with only Justices Sotomayor and Kagan dissenting, ruled in favor of the Department of Homeland Security and held that the Ninth Circuit erred in holding that expedited removal proceedings violated the Suspension Clause and Due Process Clause.²⁹⁰ Therefore, the case was reversed, remanded, and accompanied with directions that the habeas corpus claim should be dismissed.²⁹¹ When evaluating the legitimacy of the Suspension Clause claim, the Court looked at the historical meaning and intent of habeas corpus under the language of the Suspension Clause in Article 1, Section 9, Clause 2.²⁹² Using a strict interpretation of habeas corpus, the Court quickly dismissed Thuraissigiam's Suspension Clause claim, since he stated that the purpose of his habeas petition was to obtain a new chance to file for asylum, not to specifically challenge the legality of his detention.²⁹³ Furthermore, the Justices held that the ability to challenge the finality of the immigration officials' decision was not a valid reason to invoke a habeas corpus petition for a non-citizen and instead was a misinterpretation of Supreme Court finality decision precedent.²⁹⁴ As to the respondent's Due Process claim, the majority opinion held that: (1) Mr. Thuraissigiam is not a citizen and therefore does not require the same level of due process granted to citizens²⁹⁵ and (2) even though non-citizens are granted due process rights under the Fifth Amendment and statutory requirements of due process, the respondent received the required amount of due process from the administrative and executive decisions made by federal officers acting under the authority of Congress.²⁹⁶ Justices Breyer and Ginsburg also wrote a noteworthy concurring opinion which warned that the Court's holding should be applied narrowly.²⁹⁷ Finally, Justices Sotomayor's and Kagan's dissent argued that this decision essentially makes asylum determinations by the executive branch unreviewable,

²⁹⁰ *Id.* at 1983.

²⁹¹ *Id.*

²⁹² *Id.* at 1975.

²⁹³ *Id.*

²⁹⁴ *Id.* at 1975-82 (Sotomayor, J., dissenting) (criticizing the respondent's misapplication and overgeneralization of "finality era" such as *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)).

²⁹⁵ *Id.* at 1982.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1988-89.

granting a problematic amount of unchecked power to a single branch.²⁹⁸

Although this case dealt mainly with the constitutionality of expedited removal proceedings, or lack thereof, *Thuraissigiam* affected asylum law in several ways. Most prominently, Sotomayor's dissent highlights a common theme throughout Supreme Court precedent that addresses immigration law – cede power to the executive branch.²⁹⁹ By upholding the constitutionality of an expedited removal procedure without requiring the applicant to be heard in court, the Court showed its dedication to delegate broad decision-making authority to immigration officials and the executive branch.³⁰⁰ While the IIRIRA, the statute containing the applicable expedited removal procedures in this case, intends to protect asylum seekers who have a credible fear of persecution, this decision chipped away at the little procedural protections asylum seekers have to defend themselves from arbitrary abuses of power by the federal government.³⁰¹ Since *Thuraissigiam* did not specifically challenge the legality of his detention, instead choosing to challenge the legality of the asylum officer's decision to deny his asylum petition – which directly caused his detention – the Court found that he was not entitled to relief.³⁰² This rigid approach when it applies the law to noncitizens is extremely harmful to asylum applicants who are already in a difficult situation when confronted by immigration and federal officials.³⁰³ Finally, the Court reaffirmed the notion that noncitizens, such as asylum seekers, lack many of the constitutional and legal protections available to citizens.³⁰⁴ This negatively impacts those applying to seek refuge in this country because they are not treated as “people” deserving full due process under the language of the Fifth Amendment, rather they are harshly characterized as

²⁹⁸ *Id.* at 1993.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1963.

³⁰² *Id.* at 1975.

³⁰³ Not only are the confronted aliens already in a rough situation by having to escape a life or death situation at home, they face notable hurdles in the United States immigration system. Some of the struggles for immigrants involved in asylum decisions have been discussed in earlier sections of this Note. See *supra* Section III.

³⁰⁴ *Thuraissigiam*, 140 S. Ct. at 1982.

“aliens” – which has the potential for mistreatment in their proceedings.

While *Thuraissigiam* was the central asylum-based decision by the Court during the post-COVID Trump period, *Department of Homeland Security v. Regents of the University of California* affected asylum indirectly by addressing the constitutionality of the DACA and DAPA programs³⁰⁵ – programs that are linked to asylum.³⁰⁶ Several groups of plaintiffs challenged former Secretary of Homeland Security Elaine Duke’s June 2017 decision to rescind the DACA and DAPA programs in June 2017.³⁰⁷ Each of the plaintiffs won at the district court level, and the federal government appealed the various district court decisions to the Second, Ninth, and D.C. Circuits.³⁰⁸ Before judgment, the government petitioned the Supreme Court for certiorari.³⁰⁹ When the Ninth Circuit Court of Appeals affirmed the lower court decision, the Supreme Court granted certiorari in all of the government’s petitioned cases.³¹⁰

In its 5-4 decision in *Regents*, the Court upheld the DACA program on the ground that the sudden decision to rescind the program was a violation of the Administrative Procedure Act (“APA”).³¹¹ While this case dealt with immigration relief, the Court held that the INA did not apply to the DHS’s decision to rescind the DACA program because the parties did not challenge any removal proceedings.³¹² The Court found that the DHS acted arbitrarily and capriciously in rescinding DACA;³¹³ however, the Court majority failed to find any animus in the Department’s policy.³¹⁴ Due to this lack of animus, the Court held the door open to potential later challenges of DACA, as long as the challenger followed the proper procedures under the APA.³¹⁵

2. *Executive Orders / Formal Presidential*

³⁰⁵ Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. at 1905.

³⁰⁶ See *supra* notes 180-85 and accompanying text.

³⁰⁷ *Regents*, 140 S. Ct. at 1901.

³⁰⁸ *Id.* at 1902-05.

³⁰⁹ *Id.* at 1905.

³¹⁰ *Id.*

³¹¹ *Id.* at 1915.

³¹² *Id.* at 1907.

³¹³ *Id.* at 1915.

³¹⁴ *Id.* at 1916.

³¹⁵ *Id.* at 1919.

Statements

Even more than the first three years of the Trump Administration, when the issue of COVID-19 reached the United States, former President Trump became extremely forward in stating his intentions to restrict immigration into the country as much as possible. By hiding under the guise of national security and the health and welfare of individuals due to the pandemic, which will be discussed later in this Note,³¹⁶ former President Trump issued sweeping executive orders and memorandums barring practically every group of immigrants due to the increased health risk of traveling in and out of the country.³¹⁷ A list of these groups includes, but is not limited to: workers,³¹⁸ students,³¹⁹ individuals from specific countries,³²⁰ and certain visa groups.³²¹ The broad ban placed on general immigration procedures also indirectly affected asylum applicants. First, the placement of these restrictions forcibly stopped the UCSIS's application processing system – putting a halt not only to these specific groups but to the entire immigration process. Considering the already lengthy asylum process, the Trump

³¹⁶ See *infra* Section VII.

³¹⁷ Nick Miroff, Maria Sacchetti, & Tracy Jan, *Trump to Suspend Immigration to U.S. for 60 Days Citing Coronavirus Crisis and Job Shortage, but Will Allow Some Workers*, WASH. POST (Apr. 21, 2020, 5:01 PM), https://www.washingtonpost.com/immigration/coronavirus-trump-suspend-immigration/2020/04/21/464e2440-838d-11ea-ae26-989cfce1c7c7_story.html.

³¹⁸ See Proclamation 10052, 82 Fed. Reg. 38263 (2020); Proclamation 10014, 85 Fed. Reg. 23441 (2020).

³¹⁹ Jill Filipovic, *Trump Administration's Planned Purge of Students Serves a Cruel Purpose*, CNN (July 22, 2020, 1:18 PM), <https://www.cnn.com/2020/07/07/opinions/ice-online-learning-college-international-students-filipovic/index.html>.

³²⁰ See Proclamation 10041, 85 Fed. Reg. 38263 (2020) (excluding immigrants attempting to come into the country from countries such as Hong Kong, Macau, Iran, the UK, Brazil, Ireland, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland); see also *Immigration Policy Updates*, U. OF CAL MERCED, <https://iss.ucmerced.edu/immigrationpolicyupdates> (last visited Feb. 25, 2021).

³²¹ *Trump Extends Covid-Related Visa Ban; Health Coverage Policy Advances*, ASSOCED. PRESS (Dec. 31, 2020, 10:16 PM), <https://www.nbcnews.com/politics/white-house/trump-extends-covid-related-visa-ban-health-coverage-policy-advances-n1252638>.

Administration's imposition of additional roadblocks only served to further delay the process.³²² Also, many people seek to obtain other types of temporary visas to come to the United States in order to escape their situation while they look for more permanent forms of immigration relief.³²³

On December 10, 2020, in his final days of office, former President Trump also tried to pass a "Death to Asylum" Rule;³²⁴ however, that rule was ultimately challenged and struck down after twenty-two attorneys general from across the country challenged these pending regulations through amicus briefs to their local state and federal courts.³²⁵ While this rule was ultimately struck down in January 2021,³²⁶ the brazenness of this proposed rule shows how bold and confident the Trump Administration was, especially former President Trump himself and the executive branch, in their ability to shape asylum law into whatever it wanted using whatever language it pleased. In this 128 page document, former President Trump attempted to create "insurmountable procedural barriers, evidentiary burdens, and qualification standards to prevent . . . groups . . . from being able to exercise their right to seek and enjoy asylum in the United States."³²⁷ With the exception of the "Death to Asylum" rule, which was never passed, President Biden has since reversed each of

³²² Nina Narahari, *'The Backlog is Just Going to Get Bigger': COVID-19 in the Asylum Process*, DAILY CAL. (May 6, 2020), <https://www.dailycal.org/2020/05/06/the-backlog-is-just-going-to-get-bigger-covid-19-in-the-asylum-process>.

³²³ See *Dual Intent Visas and the Concept of Nonimmigrant Intent Explained*, CITIZENPATH (Jan. 21, 2020), <https://citizenpath.com/dual-intent-visas>.

³²⁴ 85 Fed. Reg. 80274 (2020).

³²⁵ Nancy Kelehar, *Legal Challenge to Trump's "Death to Asylum" Regulations Creates Hope*, HUM. RTS. PULSE (Jan. 19, 2021), <https://www.humanrightspulse.com/mastercontentblog/legal-challenge-to-trumps-death-to-asylum-regulations-creates-hope>.

³²⁶ Sabi Ardalan, *Court Blocks Illegal "Death to Asylum" Rule*, HARV. IMMGR. & REFUGEE CLINICAL PROGRAM (Jan. 9, 2021), <https://harvardimmigrationclinic.org/2021/01/09/breaking-court-blocks-illegal-death-to-asylum-trump-rule>.

³²⁷ Bill Frelick, *The Trump Administration's Final Insult and Injury to Refugees*, HUM. RTS. WATCH (Dec. 11, 2020, 6:00 AM), <https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees>.

former President Trump's policies which directly attack asylum that are mentioned in this Note.³²⁸

VI. WAS THE TRUMP ADMINISTRATION'S APPROACH TO ASYLUM CONSTITUTIONAL?

During his four years in office, former President Trump did not make it a secret that he does not approve of the asylum program and thinks the program is an illegitimate immigration loophole.³²⁹ Even though this Note argues that former President Trump's attempts to effectively eliminate asylum-based immigration were certainly in violation of essential constitutional principles, that does not necessarily make those actions illegal, or even unconstitutional. As previously emphasized throughout this Note, the executive branch has received an enormous amount of immigration power through delegation from the legislative and judicial branches.³³⁰ On one hand, with essentially *carte blanche* to handle immigration however that particular administration sees fit, the President can issue asylum policies even if they infringe upon traditional constitutional values such as the separation of powers or the protection of individuals' constitutional rights. On the other hand, just because the executive branch is allowed to act the way it has, this does not mean that the constitutionality of its actions should not be questioned.

³²⁸ *Migrant Protection Protocols*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/migrant-protection-protocols> (Aug. 25, 2021, 12:01 AM) (reversal of MPP); Exec. Order 14,013, 86 Fed. Reg. 8,839 (Feb. 4, 2021) (reversal of "Enhancing State and Local Involvement in Refugee Resettlement"); Exec. Order 13,993, 86 Fed. Reg. 7,051 (Jan. 25, 2021) (reversal of "Border Security and Immigration Enforcement Improvements"). While President Biden has reversed the executive orders discussed in this Note that specifically attack asylum, some of the COVID immigration regulations that targeted overall immigration into the US, therefore placing burdens on asylum, have still been kept intact. See *COVID-19 Travel Restrictions and Exceptions*, U.S. DEP'T OF STATE, BUREAU OF CONSULATE AFFS., <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/covid-19-travel-restrictions-and-exceptions.html> (Sept. 15, 2021).

³²⁹ See, e.g., Exec. Order 13,767, *supra* note 257; @realDonaldTrump, TWITTER (Sept. 11, 2019, 8:23:15 PM), <https://www.thetrumparchive.com/?searchbox=%22asylum%22;> @realDonaldTrump, TWITTER (July 30, 2019, 6:43:52 AM), <https://www.thetrumparchive.com/?searchbox=%22asylum%22.>

³³⁰ See *supra* Sections IV(C), V(A)(2), V(B)(2).

A. Separation of Powers Issues

The framers of the Constitution created the three separate branches of government in a checks and balances system in order to avoid having one branch that is overly powerful and essentially unchallengeable.³³¹ However, the extreme amount of delegation to the President, where Congress and the Court have essentially given all of their immigration decision-making power to the executive branch, is a highly problematic violation of this founding principle.³³²

The branch with the highest degree of constitutional authority to regulate all matters of immigration law is the legislature, where according to Article 1 Section 8, Congress has the power to establish a “uniform Rule of Naturalization” under Clause 4.³³³ However throughout the years, Congress has expressly or impliedly delegated almost all of its authority to soundly form immigration law to the President and the executive branch.³³⁴ Furthermore, the Court has endorsed this extremely broad delegation and granted a significant amount of discretion to key players in the executive branch, such as the President and the Attorney General.³³⁵ An example of the problematic nature of this uncontrolled expansion of presidential power is how President Trump regularly used the INA to unilaterally tear down asylum.³³⁶ While excessive delegation is a problem that spans across many areas of government and is not unique to only the Trump Administration, this method used by former President Trump is especially ironic because: (1) the INA was a work of Congress, (2) the INA was instrumental to the creation of asylum, and (3) President Trump intentionally used this specific act to destroy the very thing that Congress originally had the power to establish and regulate under the Constitution.³³⁷

³³¹ *Checks and Balances*, HISTORY (Dec. 4, 2020), <https://www.history.com/topics/us-government/checks-and-balances>.

³³² See Live at the National Constitution Center, *The President and Immigration Law*, NAT'L CONST. CTR. (Oct. 27, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/the-president-and-immigration>.

³³³ U.S. CONST. art. 1, §8 cl. 4.

³³⁴ See *supra* Section IV(A)(1); see also Adam B. Cox & Cristina Rodriguez, *The President and Immigration*, 119 YALE L. J. 458 (2009).

³³⁵ See *supra* Section IV(B).

³³⁶ See, e.g., Proclamation 10043, 85 Fed. Reg. 384353 (2020).

³³⁷ *Id.*

One issue at the heart of the separation of powers conflict between the legislative and executive branches is the classification of immigration law as either domestic or foreign law. While immigration law definitely has its roots in both foreign and domestic law,³³⁸ it is important to make this distinction, because the label placed on asylum law helps to define the scope of the President's constitutional power. According to the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*,³³⁹ the President has unprecedented power in the realm of foreign affairs.³⁴⁰ Not only have foreign affairs traditionally been an executive field of law, passed directly from the Crown to the President,³⁴¹ but also Congress grants more deference to the President to shape foreign law because, as Head of State, he is the central voice of the nation.³⁴² While the President has plenary powers to shape U.S. foreign policy or international law, this power should be defined through a narrow scope. Often times throughout modern American history, Presidents have observed the power disparity the executive branch has in shaping foreign versus domestic law and, therefore, have tried to frame issues that are truly domestic in nature as international or foreign issues.³⁴³ Despite the creative framing utilized by the executive branch, courts should look at these cleverly disguised issues through the lens of a domestic executive policy.³⁴⁴ The Court held in *Youngstown Sheet & Tube Co. v. Sawyer*³⁴⁵ that the executive power in "foreign" issues that have largely domestic roots, such as

³³⁸ See *supra* Section IV.

³³⁹ 299 U.S. 304 (1936).

³⁴⁰ *Id.* at 319-20 ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.").

³⁴¹ *Id.* at 316.

³⁴² *Id.* at 316-17. The Court establishes the President's role in this capacity by discussing how the different states are not sovereign nations and, therefore, do not engage in international negotiations. *Id.*

³⁴³ See Harlan Cleveland, *The Internationalization of Domestic Affairs*, 442 ANNALS AM. ACAD. OF POL. & SOC. SCI. 125 (1979).

³⁴⁴ Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J. L. & POLITICS 1, 13-14, 19-21 (2000).

³⁴⁵ 343 U.S. 579 (1952).

labor disputes in the steel industry during a current war, is notably less than the President's actual foreign policy power.³⁴⁶

Former President Trump's framing of immigration, especially asylum law, fits very well within the *Youngstown Sheet – Curtiss-Wright* conflict. While immigration law includes many domestic elements,³⁴⁷ the executive branch, especially under the Trump Administration, has shifted the dynamic of asylum law to the debate of "us versus them."³⁴⁸ By focusing on looking outward, rather than addressing the internal dynamics of our immigration system or population, immigration law has taken the role of a foreign policy issue due to national security concerns from outside countries.³⁴⁹

Another issue concerning the Trump Administration's usurpation of immigration power by the executive branch involves a potential breach of the nondelegation doctrine – which has made a resurgence in the current Supreme Court.³⁵⁰ Even though this was seemingly an outdated doctrine of the *Lochner* Era, the arrival of Justice Gorsuch and Justice Barrett – two originalists – joining other originalist Justices currently on the bench, such as Justices Thomas and Roberts, could signal the revival of nondelegation.³⁵¹ The

³⁴⁶ *Id.* at 641-43 (Jackson, J., concurring).

³⁴⁷ Harold Fields, *Immigration-A Domestic or an International Problem?*, 156 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 41 (1931) (discussing the domestic nature of immigration law and how it has the potential to be viewed as an international issue).

³⁴⁸ Arash Emamzadeh, *The Psychology of "Us-vs-Them,"* PSYCH. TODAY (Aug. 9, 2019), <https://www.psychologytoday.com/us/blog/finding-new-home/201908/the-psychology-us-vs-them>.

³⁴⁹ *Id.*; Kimmy Yam, *How Biden Can Undo the Divisions Trump Deepened in Immigrant Communities*, NBC NEWS (Feb. 1, 2021, 1:20 PM), <https://www.nbcnews.com/news/asian-america/how-biden-can-undo-divisions-trump-deepened-immigrant-communities-n1256228>; Tara Wu, *The Long History of Blaming Immigrants in Times of Sickness*, SMITHSONIAN MAG. (Oct. 19, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-history-blaming-immigrants-times-sickness-180976053>.

³⁵⁰ Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 286-87 (2021); William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y, <https://www.acslaw.org/analysis/acs-supreme-court-review/toward-a-non-delegation-doctrine-that-even-progressives-could-like> (last visited Apr. 5, 2021).

³⁵¹ See Stephen Wermiel, *SCOTUS for Law Students: Non-Delegation Doctrine Returns After Long Hiatus*, SCOTUS BLOG (Dec. 4, 2014, 8:00 PM), <https://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus>; Edward H. Stiglitz, *The Limits of Judicial*

principal two-part theory behind the nondelegation doctrine is that: (1) neither Congress nor the President can change the form or function of the Constitution³⁵² and (2) the Supreme Court is the final arbiter of the Constitution.³⁵³

Both Congress and the Court are disrupting the goals and means of the nondelegation doctrine both through the passive role they have recently taken in immigration law, as well as through their overly broad express delegations of authority to the executive branch. For example, by taking more of a passive role in recent asylum law,³⁵⁴ Congress is allowing the President and his executive branch to commandeer quasi-legislative functions, especially through the ease and speed of which immigration-based executive orders are passed and implemented. Additionally, the Court has impliedly delegated quasi-judicial functions to the executive branch as well by allowing the President and Attorney General to serve as judge, jury, and executioner in expedited removal cases for denied asylum seekers.³⁵⁵

Third, Congress and the Court during the Trump Administration have bypassed the issue of a balance of powers among the branches by expressly granting an enormous amount of power and discretion to the executive branch to make immigration decisions.³⁵⁶ The Supreme Court regularly held that members of the executive branch, especially the President and Attorney General, have ultimate discretion to issue final asylum decisions and that these decisions are largely unreviewable.³⁵⁷ Meanwhile, Former President Trump sought to take advantage of § 212(f) of the INA – an express delegation of *carte blanche* removal power to the President – to institute policies such as his Muslim ban and the Remain in Mexico

Control and the Nondelegation Doctrine, 34 J. L., ECON., & ORG., 27 (2018); Mortenson & Bagley, *supra* note 350; Araiza, *supra* note 350; *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132 (2021).

³⁵² See William N. Eskridge Jr. & Neomi Rao, *Article I, Section 1: General Principles*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/749> (last visited Apr. 6, 2021).

³⁵³ *Cooper v. Aaron*, 358 U.S. 1, 23-24 (1958).

³⁵⁴ Melanie Nezer, *An Overview Of Pending Asylum and Refugee Legislation In The US Congress*, 2 J. MIGRATION & HUM. SEC. 121, 121 (2014).

³⁵⁵ See *supra* Sections IV(B), V(A)(1), V(B)(1).

³⁵⁶ See *supra* Section V.

³⁵⁷ Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731 (2017).

Program.³⁵⁸ This broad grant of unreviewable, or at the very least highly discretionary authority, is contrary to the intended purpose of the founders when they created our federalist democracy – to keep each branch of equal power so one branch does not dominate the others.³⁵⁹

Finally, it is important to mention that former President Trump also informally expanded the presence of the executive branch past its constitutional limits. In his capacity as administrative head of federal agencies, under his “Take Care” power,³⁶⁰ former President Trump regularly implemented and encouraged policy decisions that made it significantly harder for asylum seekers during his four-year term. Three of these policies include the: closure of UCSIS offices across the country,³⁶¹ imposition of a monetary fee for asylum applications,³⁶² and increased use of ICE to rapidly increase detentions and expedite deportations.³⁶³ These unilaterally instituted informal policies create a conflict between the branches similar to the issues raised in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁶⁴ Here,

³⁵⁸ Stuart Anderson, *How to Limit a President's Power Over Immigration*, FORBES (June 8, 2020, 12:07 AM), <https://www.forbes.com/sites/stuartanderson/2020/06/08/how-to-limit-a-presidents-power-over-immigration/?sh=19fa8ac92531>.

³⁵⁹ See *supra* notes 331-35 and accompanying text.

³⁶⁰ U.S. CONST. art. II, §3. The Take Care power says that the President has the power to “take Care that the Laws be faithfully executed.” *Id.* This has been interpreted to include the power of the President to make sure government agencies are properly implementing and administering the laws issued by the executive branch. *Powers Derived from the “Take Care” Duty*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-2/section-3/powers-derived-from-the-take-care-duty> (last visited Feb. 27, 2021).

³⁶¹ *USCIS Temporarily Closing Offices to the Public March 18 – April 1*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 17, 2020), <https://www.uscis.gov/news/alerts/uscis-temporarily-closing-offices-to-the-public-march-18-april-1>; *USCIS Office Closings*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 19, 2021), <https://www.uscis.gov/about-us/uscis-office-closings>. Offices have been closed across the country for over a year and have only begun to start opening to full capacity. *Id.* Furthermore, emergency operations were closed nationwide from March 19, 2020 to June 4, 2020. *USCIS Offices Prepare to Reopen on June 4*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 24, 2020), <https://www.uscis.gov/news/alerts/uscis-offices-preparing-to-reopen-on-june-4>.

³⁶² See *infra* notes 401-04 and accompanying text.

³⁶³ Franklin Foer, *How Trump Radicalized ICE*, THE ATL. (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772>.

³⁶⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (Jackson, J., concurring) (discussing the three categories of presidential action as it relates to

there was no express delegation to former President Trump to create the informal policies he did. With that said, former President Trump still managed to sneak in additional policies that further increased the executive branch's sphere of influence regarding immigration law while making it harder for asylum seekers to come to and stay in this country. One of these informal policies even involved changing the requirements for an asylum application, something that is squarely in the jurisdiction of the legislative branch.³⁶⁵

Through these formal and informal actions, former President Trump has greatly expanded the presence of the executive branch in not only enforcing, but also shaping and interpreting immigration law to the detriment of the other branches.

B. Issues Involving Individuals' Constitutional Rights

Many of the immigration policies initiated by the executive branch violate individual rights under the Constitution. Even though non-citizens are not granted full protection under the Constitution, they are protected by several Constitutional rights.³⁶⁶ While there are many categories of rights allocated to both non-citizens and citizens

the President's relationship to Congress on the issue). Here, Congress's silence as presidents continue to seize power in immigration law would likely fall under Category Two – the limbo land. *Id.* at 637. In this category, it is important to justify the President's actions only by analyzing his Article II powers. *Id.* This is because the President neither acted with the express authority of Congress (which would give the President authority under Article I to do what he is doing as well) nor did he act specifically against what Congress said (which would severely weaken the President's power under Article II by subtracting whatever Congressional powers under Article I are in direct conflict with the President's actions). *Id.* at 637-39.

³⁶⁵ BEN HARRINGTON, CONG. RSCH. SERV., R46142, THE POWER OF CONGRESS AND THE EXECUTIVE TO EXCLUDE ALIENS: CONSTITUTIONAL PRINCIPLES (2019).

³⁶⁶ *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (upholding the right of illegal aliens to receive a public education); *Reno v. Flores*, 507 U.S. 292 (1993) (upholding the integrity of the family unit as a fundamental right of all people, not just citizens); *Graham v. Richardson*, 403 U.S. 365 (1971) (upholding due process rights for all people, not just citizens). *But see Hoffman Plastic Compounds, Inc. v. N.R.L.B.*, 535 U.S. 137 (2002) (holding that undocumented immigrants are not entitled to the same employment protections as citizens are); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that paperwork for a Notice to Appear in immigration court need not adhere to the same standards of notice required by the Federal Rules of Civil Procedure to citizens).

alike,³⁶⁷ this section of the Note will focus primarily on violations of the Fourteenth Amendment Due Process and Equal Protection Clauses, because those are the most applicable to the Trump Administration's asylum policies.

The relevant language of Section 1 of the Fourteenth Amendment is that "any State [shall not] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."³⁶⁸ By distinguishing this part of the Fourteenth Amendment, which applies to "any person," from the rest of section 1, which applies only to citizens of the United States, the plain language of the Constitution guarantees due process and equal protection rights to everyone, including undocumented immigrants and asylees.³⁶⁹

There were several times in the Trump Administration's "Zero Tolerance" policy that former President Trump tried to restrict asylum applicants' constitutional rights as much as possible. Specifically, there were three notable demonstrations of the Trump administration's assault on asylum which were challenged on constitutional grounds – the ruling in *Trump v. Hawaii*, the ruling in *Department of Homeland Security v. Thuraissigiam*, and the Remain in Mexico Program.

The constitutionality of former President Trump's actions was on full display in *Trump v. Hawaii* due to the discrimination of the Muslim ban and its apparent violation of the Fourteenth Amendment Equal Protection Clause. Normally, policies that discriminate on the basis of national origin or alienage³⁷⁰ receive strict scrutiny –

³⁶⁷ See Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARNLIBERTY (Apr. 30, 2017), <https://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens>; Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS (June 25, 2018), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have> (discussing the scope of non-citizens' rights to due process, legal counsel, family integrity, vote or hold office in local elections, education, and protection from unreasonable searches and seizures).

³⁶⁸ U.S. CONST. amend. XIV § 1.

³⁶⁹ Rachel Stockman, *Yes, 'Illegal Immigrants' Do Have Constitutional Rights Even Under Trump's New Immigration Plan*, L. & CRIME (Feb. 22, 2017, 8:36 AM), <https://lawandcrime.com/high-profile/yes-illegal-immigrants-do-have-rights-under-trumps-new-immigration-plan>.

³⁷⁰ The distinction between national origin and alienage is often hard to make; however, the Court has tended to look at national origin from the perspective of United States citizens and alienage from the perspective of non-citizens. *Alienage*

meaning “the law must advance a compelling state interest by the least restrictive means available.”³⁷¹ However, there are exceptions to the strict scrutiny analysis, including discriminatory actions taken by the federal government to protect national security.³⁷²

While the Court used this exception to hold that the Muslim ban was constitutional, even though it was facially discriminatory on the basis of alienage, the Court recognized the similarity between this case and *Korematsu v. United States*, tried to distinguish the two cases as much as possible, and failed.³⁷³ Both *Trump v. Hawaii* and *Korematsu* deal with facially discriminatory policies by the federal government on the basis of alienage and national origin.³⁷⁴ Also, both cases justify their holdings by referencing the President’s power to protect national security. In its failure to learn from history, the Court in *Trump v. Hawaii* issued a troublesome ruling that granted carte blanche to the federal government as long as it comes up with a good excuse for its deprivations of peoples’ fundamental constitutional rights.

Meanwhile, the Court’s ruling in *Thuraissigiam* and Former President Trump’s Remain in Mexico Policy both demonstrate clear examples of the Trump Administration’s violation of asylum seekers’ constitutional right to due process – especially their rights to petition for habeas corpus and to have their day to be heard in court.³⁷⁵

VII. WAS COVID-19 THE PERFECT SCAPEGOAT TO USE?

In the wake of one of the most severe pandemics in recent memory, almost every country across the world shut down to some

and Nationality, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-and-nationality> (last visited Apr. 2, 2021).

³⁷¹ *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

³⁷² *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (using the language of the rational basis test to apply to issues involving discrimination based on alienage such as “facially legitimate for a bona fide reason”).

³⁷³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

³⁷⁴ *Id.* at 2447-48 (Breyer, J., dissenting). One should realize that there were other concerns, outside of discrimination regarding immigration, in both cases – especially *Trump v. Hawaii* – including religion as well as due process and equal protection for U.S. citizens; however, for the purposes of this Note, the discussion of both cases focuses on issues of discrimination on the basis of alienage.

³⁷⁵ See *supra* Sections V(A)(2), (B)(1).

degree.³⁷⁶ The reason for these policies was two-fold – (1) stop, or at least slow down, the spread of the disease in their country and (2) protect domestic economies as much as possible that were affected by mandatory global shutdowns.³⁷⁷

However, former President Trump saw another opportunity brought by the pandemic shutdowns.³⁷⁸ For the first three years of his administration, he demonstrated his strict dedication to his Zero Tolerance immigration policy and to eliminating any forms of migratory relief that do not adhere to that policy, such as asylum.³⁷⁹ As other countries restricted immigration-based entry, the Trump Administration rapidly issued many executive orders and policies to negatively impact asylees and refugees.³⁸⁰ Not only did former President Trump follow suit with other leaders by restricting the number of immigrants allowed into the country, he instituted universal travel bans – both related to country of origin and type of immigration.³⁸¹ One of the travel bans specifically targeted asylum and ordered the complete stop to the processing of asylum applicants trying to enter through the southern border.³⁸² At the same time, former President Trump thrived on the culture of fear surrounding the COVID-19 pandemic and escalated the number of detentions and expedited deportations during his final nine months in office.³⁸³ Finally, for individuals who were currently processing asylum claims, former President Trump issued a massive shutdown of the entire immigration court system³⁸⁴ – the effects of which are still being felt

³⁷⁶ *Coronavirus (COVID-19) Resources*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/topics/coronavirus> (last visited Mar. 28, 2021).

³⁷⁷ Jack Herrera & Quito Tsui, *Could Covid-19 Mean the End of Asylum Law in the United States?*, THE NATION (June 3, 2020), <https://www.thenation.com/article/politics/coronavirus-refugee-asylum-law>.

³⁷⁸ Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL’Y INST. (July 2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency>.

³⁷⁹ See *supra* Section V(A).

³⁸⁰ See *supra* note 320.

³⁸¹ See *supra* notes 320-21; see also Pierce & Bolter, *supra* note 378.

³⁸² Pierce & Boulter, *supra* note 378.

³⁸³ *Id.*

³⁸⁴ *Id.*

over a year later, as there are still no in-person immigration proceedings in several major locations as of June 17, 2021.³⁸⁵

While the Trump Administration was not subtle in its immigration objectives throughout the entire term, Former President Trump was granted more leeway to control immigration under the general label of “public health and safety.”³⁸⁶ By masking these clearly discriminatory policies targeting individual groups of immigrants under the guise of protecting American health, former President Trump pushed most of his asylum initiatives forward without pushback from Congress, the Court, or a significant portion of the American public.³⁸⁷

VIII. DIRE NEED FOR SERIOUS IMMIGRATION REFORM

“Comprehensive immigration reform” is a term that frequents campaign platforms during election years, because many Americans agree that the immigration system is “badly broken and in urgent need of reform.”³⁸⁸ However, while there is a consensus that immigration reform is necessary, the complex and highly politicized nature of immigration law makes it hard for Americans to come

³⁸⁵ Conversation with Judge Alice Segal from the New York Immigration Court on Sep. 22, 2020 at 5:30 PM EST; *Operational Status Map*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir-operational-status/operational-status-map> (last visited June 17, 2021). While many locations are now open as of June 17, 2021, there are some locations that are still fully closed as of the date of visiting the website such as Houston – Greenspoint Park and Louisville. *Id.* There are also locations that are only open for limited purposes. For example, these locations are open for filings only (not for any hearings): Houston – South Gessner Road, Memphis, New York – Broadway, and Otay Mesa (San Diego). *Id.* There are also locations that are currently only allowing detained hearings (with most of these locations resuming non-detained hearings on July 6, 2021) including: Dallas, El Paso, Fort Snelling (Minnesota), Guaynabo (San Juan), Harlingen (Texas), Houston, Kansas City, New York – Federal Plaza, New York – Varick, and Portland. *Id.*

³⁸⁶ *How the Trump Administration is Using COVID-19 to End Asylum*, INT’L RESCUE COMM. (Sept. 16, 2020), <https://www.rescue.org/article/how-trump-administration-using-covid-19-end-asylum>.

³⁸⁷ *Id.*

³⁸⁸ *Focusing on the Solutions: Key Principles of Comprehensive Immigration Reform*, IMMIGR. POL’Y CTR. (Mar. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/Solutions_Paper_032310.pdf.

together on a universal policy to help improve the system.³⁸⁹ This section will focus on four goals of immigration reform that have an impact on asylum law.³⁹⁰

A. Goals of Immigration Reform

1. *Create a direct, fair, and inclusive path to citizenship*

The overarching goal is to provide a “direct, fair, and inclusive path to citizenship for immigrants in the U.S. without papers.” Within this objective, there are three smaller tasks. First, the government needs to make the process more transparent and less complicated for immigrants to follow by providing a straightforward set of rules and easily applicable procedures. Second, it is important that the federal government establishes flexible alternative channels for immigration other than the formalized system already in place. Finally, it is important for the government to remove some of the additional barriers imposed on asylum that other countries do not have, such as the asylum application processing fee of fifty dollars.³⁹¹

Furthermore, the entire asylum process is extremely technical and complicated. As demonstrated earlier in this Note, even the Justices of the highest court in the country have struggled to provide clear definitions for qualifications under asylum law.³⁹² Also, the process is not accommodating to asylees whatsoever because it is incredibly intimidating for applicants. Currently, the asylum procedure follows a rigid process that does not leave much room for applicants to explain their individual circumstances.³⁹³ Other than an initial confrontation with a border patrol officer, the only times asylum applicants can share their story before being thrust into court

³⁸⁹ James F Hollifield, *What Makes Immigration Reform So Hard*, GEORGE W. BUSH INST. (Winter 2018), <https://www.bushcenter.org/catalyst/immigration/hollifield-immigration-reform.html>.

³⁹⁰ There are other areas in immigration law that are referenced when notions of immigration reform are brought up – especially labor law, family-based immigration, and temporary visas. However, this Note will mainly focus on goals that have a direct or indirect impact on asylum law.

³⁹¹ 85 Fed. Reg. 87,251 (Dec. 18, 2020).

³⁹² See *supra* note 158 and accompanying text.

³⁹³ See *supra* Section III.

proceedings are in the I-589 Application and one sixty-minute interview with an ICE or USCIS official.³⁹⁴ However, this is insufficient to determine what the applicant has endured.

Moreover, a study in 2017 found that 72% of refugees at arrival, and 58% after five years, are below basic in English literacy.³⁹⁵ Another 18% of refugees at arrival and 25% of refugees are only at a basic level of English proficiency after five years in the United States.³⁹⁶ Only 6% of refugees at arrival, and 18% after five years, are actually proficient in the English language.³⁹⁷ Thus, if applicants are forced to explain their entire life stories in a form that requires a specially trained immigration attorney to complete, even for native English speakers, they are placed at a significant disadvantage. Then, after that, they wait for months, if not years, after they filed their original application to talk to an immigration representative for only a single hour.³⁹⁸ Both the form and the interview pose themselves as very scary situations for the applicant and create an inherent lack of fairness in a process where people feel they are intimidated by the federal government the entire time. Also, when an undocumented immigrant is discovered in the U.S. – even one who is currently applying for asylum – there are very few options available to them to obtain legal status.³⁹⁹ Their only options are to succeed in their asylum claim, which is very difficult to do, or try to obtain residency before they are detained and deported, an even more difficult task if their asylum claim is denied.⁴⁰⁰

Finally, additional barriers to obtain asylum that are not in the original system, but are now imposed by the federal government, do not make the process any easier. One of the additional barriers imposed by the Trump Administration on asylum applicants is the new fifty dollar processing fee for asylum applications.⁴⁰¹ Only four

³⁹⁴ See *supra* Section III.

³⁹⁵ Jason Richwine, *Rough Estimates of Refugee Literacy*, CTR. FOR IMMIGR. STUD. (Sept. 25, 2017), <https://cis.org/Richwine/Rough-Estimates-Refugee-Literacy>.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ See *supra* Section III.

³⁹⁹ David J. Bier, *Reforming the Immigration System: A Brief Outline*, CATO INST. (Nov. 11, 2020), <https://www.cato.org/study/reforming-immigration-system-brief-outline>.

⁴⁰⁰ See *id.* (discussing the inflexibility of the immigration system and the problem of the all-or-nothing approach when it comes to undocumented immigrants).

⁴⁰¹ 85 Fed. Reg. 87,251 (Dec. 18, 2020).

countries in the world, including the United States, currently charge asylum applicants a fee.⁴⁰² Even though fifty dollars does not seem like much of a burden to an average American, this fee is sometimes an insurmountable problem for asylum seekers who are already fleeing from dangerous situations in their home countries and often have no money when entering the country.⁴⁰³ Furthermore, the little money asylum seekers may have does not go very far in the United States due to the conversion rate of their domestic currencies.⁴⁰⁴

2. *Decrease ICE's role in exchange for increasing the EOIR's presence*

The second goal is to reform the enforcement of immigration laws. This involves both the necessary change to ICE's policies as well as the creation of an independent immigration court system that is not attached to the executive branch. Similar to the rationale behind defunding the police in an aim at reformation,⁴⁰⁵ requests are regularly made across the country to defund ICE and to engage in more targeted, less cruel immigration enforcement.⁴⁰⁶ Paired with

⁴⁰² Jessica Sutherland, *Only Three Nations in the World Charge Asylum Seekers a Fee. Trump Wants the U.S. to be the Fourth*, DAILY KOS (Nov. 9, 2019, 2:40 PM), <https://www.dailykos.com/stories/2019/11/9/1898288/-Only-three-nations-in-the-world-charge-asylum-seekers-a-fee-Trump-wants-the-U-S-to-be-the-fourth>. The other three countries are Fiji, Australia, and Iran. *Id.*

⁴⁰³ See Ryan Baugh, *Annual Flow Report – Refugees and Asylees: 2020*, U.S. DEP'T OF HOMELAND SEC. (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf (giving the top ten home countries of asylum applicants and each country has a lower exchange rate when compared to the United States dollar).

⁴⁰⁴ See *id.*

⁴⁰⁵ Michael Schwirtz & Ali Watkins, *Why the \$6 Billion N.Y.P.D. is Now a Target of 'Defund the Police,'* N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/06/28/nyregion/nypd-budget-defund-police.html>.

⁴⁰⁶ See *Defund Hate*, NAT'L IMMIGR. JUST. CTR., <https://immigrantjustice.org/issues/defundhate> (last visited Mar. 28, 2021); Beth Hallowell, *How to Talk About Defunding ICE and CBP—and Investing in Communities*, AM. FRIENDS SERV. COMM. (July 14, 2020), <https://www.afsc.org/blogs/news-and-commentary/how-to-talk-about-defunding-ice-and-cbp-and-investing-communities>; Julian Resendiz, *Activists Want Biden to Defund ICE, Overhaul Migrant Detention Policies*, BORDER REP. (Jan. 22, 2021, 3:32 PM), <https://www.borderreport.com/hot-topics/immigration/activists-want-biden-to-defund-ice-overhaul-migrant-detention-policies>; Kari Hong, *10 Reasons*

this initiative to reduce the role of ICE in immigration enforcement is to allow immigration courts to stand on their own feet. Right now, immigration courts are directly under the Department of Justice and function almost as administrative courts out of the Executive Office of Immigration Review (“EOIR”).⁴⁰⁷ Furthermore, the executive branch maintains additional control over the immigration courts because adjudications by the EOIR are squarely “under delegated authority from the Attorney General.”⁴⁰⁸ By creating an independent immigration court system that looks more like the judiciary rather than an adjudicative forum of an executive agency, there will no longer be an inherent conflict of interest between the court and the Attorney General.⁴⁰⁹ Furthermore, this will help to correct the severe imbalance of powers between the executive and judicial branches in the field of immigration law by removing some adjudicative control from the executive branch.⁴¹⁰

3. *Change focus in creating available facilities to immigrants*

Third, there should be an overhaul of the facilities available to immigrants to treat them more humanely as they undergo the asylum process. This involves: the removal of ICE detention centers, the promotion of sanctuary cities, and the reinstatement of the USCIS offices that were closed during the Trump Administration in response to the pandemic.

First, ICE detention centers are inhumane facilities.⁴¹¹ There are not only problems of overcrowding at detention centers,⁴¹² but

Why Congress Should Defund ICE’s Deportation Force, 43 N.Y.U. REV. OF L. & SOC. CHANGE 40 (2019).

⁴⁰⁷ *Executive Office for Immigration Review – About The Office*, U.S. DEP’T OF JUST. (Feb. 3, 2021), <https://www.justice.gov/eoir/about-office>.

⁴⁰⁸ *Id.*

⁴⁰⁹ Katie Shepherd, *Calls for Independent Immigration Court Grow Louder at Congressional Hearing*, IMMIGR. IMPACT (Jan. 30, 2020), <https://immigrationimpact.com/2020/01/30/independent-immigration-court-hearing/#.YGKCOS1h1-U>.

⁴¹⁰ *Id.*

⁴¹¹ *New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump*, HUM. RTS. WATCH (Apr. 30, 2020, 10:00 AM), <https://www.hrw.org/news/2020/04/30/us-new-report-shines-spotlight-abuses-and-growth-immigrant-detention-under-trump>; David J. Bier, *Are CBP’s Filthy and*

ICE detainees also have a severe lack of access to: showers, space to sit or lay down, toilets, sanitary products, air conditioning or heat, sleeping materials, water, food, and adequate medical care.⁴¹³ Due to unsanitary conditions, overcrowding, and inadequate medical care, ICE detention facilities have a significantly higher risk of COVID-19 outbreaks – even with the underreported numbers given by ICE officials.⁴¹⁴ Finally, ICE detention centers are extremely costly to maintain; therefore, eliminating these facilities provides a financial benefit as well as a humanitarian one.⁴¹⁵

Second, sanctuary cities are vital to provide refuge to asylum seekers who are looking to immediately flee dangerous situations in their home countries.⁴¹⁶ Not only are these areas safer environments for immigrants than their home countries, these cities are remarkably low in crime across the board – despite what members of the Trump Administration said to sway the public opinion against these areas.⁴¹⁷

Finally, by reopening USCIS offices and resuming their full functionality, it will immeasurably help asylum applicants in two main ways. Reopening these offices to full capacity would alleviate the backlog of immigration cases in the system and asylum claims could be processed at a faster rate. Also, the provision of more offices will make the asylum application process much easier for asylum seekers because they will not have to travel as far to be interviewed.

Inhumane Immigrant Detention Camps Necessary?, CATO INST. (July 3, 2019, 3:01 PM), <https://www.cato.org/blog/are-cbbs-filthy-inhumane-immigrant-detention-camps-necessary>.

⁴¹² Bier, *supra* note 411. Detention centers have at times held between four to five times the amount of people they are designed to hold. *Id.*

⁴¹³ *Id.*

⁴¹⁴ Noelle Smart & Adam Garcia, *Tracking COVID-19 in Immigrant Detention – A Dashboard of ICE Data*, VERA INST. OF JUST. (Nov. 18, 2020), <https://www.vera.org/tracking-covid-19-in-immigration-detention>; Letter by Parsa Erfani et. al., *COVID-19 Testing and Cases in Immigration Detention Centers, April-August 2020* (Oct. 29, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2772627>.

⁴¹⁵ Vaishnavi Vaidyanathan, *How Much It Costs ICE to House Immigrants in Detention Centers*, INT'L BUS. TIMES (Nov. 12, 2018, 1:24 AM), <https://www.ibtimes.com/how-much-it-costs-ice-house-immigrants-detention-centers-2731743>.

⁴¹⁶ See *supra* notes 264-69 and accompanying text.

⁴¹⁷ Natalie Delgadillo, *The Surprising Cost of Sanctuary for Progressive Cities*, GOVERNING (May 9, 2018), <https://www.governing.com/archive/gov-sanctuary-cities-trump-libby-schaaf.html>.

4. *Guarantee of legal representation – carrying Gideon to non-citizens*

Finally, in order to ensure fairness in the immigration process, immigrants and undocumented individuals applying for legal immigration status, should be guaranteed the right to an attorney as a constitutional right in all proceedings. Asylum applicants are allowed to have an attorney present with them in their USCIS interviews.⁴¹⁸ However, the right to an attorney is not guaranteed in all immigration proceedings.⁴¹⁹ Most notably, immigrants are not entitled to an attorney once their case reaches the immigration court.⁴²⁰ However, facing similar, if not greater, consequences to personal liberty as a criminal proceeding,⁴²¹ individuals applying for legal immigration status or currently in court for formal immigration proceedings should be able to obtain competent legal representation by right.⁴²²

B. **What President Biden Has Already Done in Furtherance of These Goals**

One of President Biden's main campaign issues was centered around fixing the destruction the Trump Administration caused to immigration – stating that “Trump has waged an unrelenting assault on our values and our history as a nation of immigrants. It’s wrong, and it stops when Joe Biden is elected president.”⁴²³ On the campaign trail, President Biden vowed not only to revive old Obama immigration policies, such as DACA, he also specifically stated he

⁴¹⁸ See *supra* note 61 and accompanying text.

⁴¹⁹ See *supra* note 61 and accompanying text.

⁴²⁰ See Manuel, *supra* note 61.

⁴²¹ These severe consequences include not only the deprivation of liberty through detention, similar to a criminal case, but also detention in less humane conditions than a prison and the risk of deportation.

⁴²² See John Oliver, *Immigration Courts: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 2, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA> (highlighting the lack of adequate legal representation in court proceedings as a central issue in immigration courts).

⁴²³ Joe Biden & Kamala Harris, *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, <https://joebiden.com/immigration> (last visited Mar. 27, 2020).

would revive programs that former President Trump tried to tear down – including asylum.⁴²⁴

During his time in office so far, President Biden has not disappointed on that promise. First, President Biden issued several executive orders directly targeting and seeking to overturn Former President Trump's actions to limit asylum.⁴²⁵ Some of the initiatives of these reforms to the prior administration's immigration policy include: a top-down review of executive agencies in charge of administering immigration law,⁴²⁶ ordering the specific revival of the asylum system and review of problematic Trump policies such as MPP,⁴²⁷ and increasing the presence of humanitarian aid programs for immigrant populations in need.⁴²⁸ President Biden also sought to change the narrative on asylum by removing the punitive stigma attached to asylum applicants.⁴²⁹ Third, President Biden issued a review of other problematic pre-Trump asylum policies including expedited removal and safe third country agreements.⁴³⁰ Finally, President Biden is working to clarify the requirements to qualify for asylum and remove some of the artificial barriers that Former President Trump created on his way out of office.⁴³¹ While there are still some lingering effects of Trump's asylum policies – such as the continued closure of the southern border due to a health order⁴³² – President Biden has already made improvements to correct the issues of former President Trump's asylum policy.

⁴²⁴ *Id.*

⁴²⁵ *See, e.g.*, Exec. Order. No. 14,010, 86 Fed. Reg. 8,267 (Feb. 2, 2021); Exec. Order. No. 14,013, *supra* note 328; Exec. Order. No. 14012, 86 Fed. Reg. 8,277 (Feb. 2, 2021).

⁴²⁶ Exec. Order. No. 14,012, *supra* note 415.

⁴²⁷ Exec. Order. No. 14,010, *supra* note 425.

⁴²⁸ Exec. Order. No. 14,013, *supra* note 328. While this Executive Order specifically addresses refugees, as stated earlier in this Note, asylees and refugees are regularly treated very similarly under American immigration law – especially since the Refugee Act of 1980. *Id.*; *see supra* notes 106-08 and accompanying text.

⁴²⁹ Sarah Libowsky & Krista Oehlke, *President Biden's Immigration Executive Actions: A Recap*, LAWFARE (Mar. 3, 2021, 12:13 PM), <https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap>.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

IX. CONCLUSION

As former President Clinton once said,

America has constantly drawn strength . . . from wave[s] . . . of immigrants. In each generation, they have proved to be the most restless, the most adventurous, the most innovative, the most industrious of people[;] . . . they have strengthened our economy, enriched our culture, renewed our promise of freedom and opportunity for all.⁴³³

On the other hand, then Senator John F. Kennedy wrote about the greatness of America as “[a] [n]ation of [i]mmigrants”⁴³⁴ and warned readers of his book about the dangers of devaluing the immigrant population in America through protectionist rhetoric by saying, “[h]owever, under the guise of warning people about the impact of illegal immigration, these anti-immigrant groups often invoke the same dehumanizing racist stereotypes as hate groups.”⁴³⁵

These two quotes paired together show why well-intentioned immigration reform needs to remain a constant throughout each and every administration, not just ebb and flow between presidential policies. However, unless there is significant change in the interplay between the federal branches of government in the field of immigration law, much of the fate of those truly in need is in the hands of a single individual and the wishes of his or her administration. While this systemic change would be optimal to provide stable and transparent policies in a highly complicated area of the law, there are no signs of Congress or the Court attempting to regain their immigration policy power from an overzealous executive branch any time soon. Thus, moving forward, one can only hope that President Biden continues to make positive progress in the field of asylum law and that future presidents can keep the door open that former President Trump tried to deadbolt permanently shut through the unjust, yet still constitutional, use of the executive power.

⁴³³ clintonlibrary42, *Pres. Clinton’s Commencement Address at Portland State Univ.* (1998), at 46:21, YouTube (June 21, 2013), <https://www.youtube.com/watch?v=2VOi1R0y1Ds>.

⁴³⁴ JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1958).

⁴³⁵ *Id.* at xiv.