

Ending Bogus Immigration Emergencies

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ABSTRACT. In 1944, Justice Jackson dissented in *Korematsu*, warning that the majority’s decision would “lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” Seventy-five years later, President Donald Trump has picked up that doctrinal weapon. This Essay sets out three reforms that would prevent future abuses of this weapon by President Trump and his successors: (1) providing for meaningful review of presidential claims of “emergency” and “national interest”; (2) abolishing the punitive and militarized approaches to immigration enforcement enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and restoring basic principles of due process to the Immigration and Nationality Act; and (3) policies that recognize immigrants and refugees as fellow human beings and not as criminals.

INTRODUCTION: DANGEROUS TIMES

Donald Trump understands the mobilizing power of an emergency. While running for President, and since taking office, he has used the notion of emergency to feed our national habit of immigrant scapegoating and anti-immigrant policy-making. To set the stage for his policies, President Trump has proceeded in the arena of public opinion by stoking fears of the foreigner and using his rhetorical powers to transform even fellow citizens into foreigners. For example, in announcing his candidacy in June 2015, he infamously smeared Mexican immigrants as criminals, drug traffickers, and rapists;¹ in June 2016, then-candidate Trump baselessly attacked U.S. District Judge Gonzalo P. Curiel, predicting that he would rule for the plaintiffs in a case involving Trump University, based

1. See *Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid> [<https://perma.cc/DLF3-WXVZ>].

on the bald assertion that Judge Curiel is “a Mexican.”² These statements of blatant xenophobia and white nationalism—masked by bogus claims of national emergency—are unprecedented coming from a recent President, and stand in contrast to the language of welcome and more moderate immigration policies of some of his Republican predecessors.³

Nonetheless, the Trump Administration’s scapegoating of immigrants is part of a long history of xenophobia in U.S. immigration laws and policies, and his policies have recent antecedents. Even President Obama was reviled as “deporter-in-chief” by many immigrant advocates because of the record-high number of removals carried out under his watch.⁴ And President Trump followed his three immediate predecessors in exploiting the mass detention of immigrants defending against deportation charges, expedited removal proceedings that bypass even immigration judges, and purported limits on federal court review of deportation-related actions—all enacted by Congress and signed into law by President Clinton in 1996.⁵

But because of his extreme cruelty and utter disregard for laws and norms, President Trump’s immigration policies have demonstrated more clearly than ever before that when U.S. Presidents are permitted to speak in terms of “emergency” and security “threats” with plenary executive authority, they create deep and long-lasting harms to U.S. communities, due process, and the rule of law. To be clear, every one of President Trump’s immigration-related policies that has been challenged in litigation surpasses existing statutory and constitutional

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2. Z. Byron Wolf, *Read This: How Trump Defended Criticism of Judge for Being ‘Mexican’*, CNN (Apr. 20, 2017), <https://www.cnn.com/2017/04/20/politics/donald-trump-gonzalo-curiel-jake-tapper-transcript/index.html> [<https://perma.cc/6QG4-GKY9>] (transcribing a June 2016 interview of Donald Trump by Jake Tapper). In fact, Judge Curiel is a native-born U.S. citizen and the son of immigrants from Mexico. See Alan Rappeport, *That Judge Attacked by Donald Trump? He’s Faced a Lot Worse*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html> [<https://perma.cc/JX58-PU69>].
 3. See *Bush’s Speech on Immigration*, N.Y. TIMES (May 15, 2006), <https://www.nytimes.com/2006/05/15/washington/15text-bush.html> [<https://perma.cc/D8LM-CL67>] (transcribing a speech by President George W. Bush); see also Katie Mettler, *What Ronald Reagan Actually Said About Border Security—According to History, Not President Trump*, WASH. POST (Dec. 24, 2018), <https://www.washingtonpost.com/politics/2018/12/21/what-ronald-reagan-actually-said-about-border-security-according-history-not-donald-trump> [<https://perma.cc/KRT5-WTUP>].
 4. Bill Ong Hing, *Deporter-in-Chief: Obama v. Trump* 5 (Univ. of San Francisco Law Research Paper No. 2019-03, 2018), <https://ssrn.com/abstract=3254680> [<https://perma.cc/BLN6-7Q9Z>].
 5. See Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today’s Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM EDT), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> [<https://perma.cc/8K59-7666>].

limits on presidential power. But to ensure that neither this President nor any future one can engage in similar abuses, Congress and the courts – and ultimately, we the people – should act.

In this Essay, I trace President Trump’s abusive deployment of “emergency” declarations in his all-out assault on immigrants and refugees and identify the roots of those abuses in longstanding immigration policies. I set out three reforms that would prevent future abuses by this President or his successors: (1) providing for meaningful review of presidential claims of “emergency” and “national interest”; (2) abolishing the punitive and militarized approaches to immigration enforcement promulgated in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁶ and restoring basic principles of due process to U.S. immigration laws; and (3) seeing immigrants and refugees as fellow human beings and not as criminals.

I. HOLD THE PRESIDENT ACCOUNTABLE: NO BOGUS EMERGENCIES

President Trump infamously declared a national emergency earlier this year as he jostled with Congress over the implementation of his campaign promise to build a “big, beautiful wall” across the U.S.-Mexico border.⁷ After their disagreements over the border wall led to the longest federal government shutdown in U.S. history, Congress made its final fiscal year 2019 appropriation of \$1.375 billion for border barrier construction and attached specific restrictions, funding only construction in U.S. Customs and Border Protection’s Rio Grande Valley sector, forbidding construction in certain national parks and wildlife refuges, and prohibiting construction in certain municipalities without local consultation.⁸ President Trump signed this appropriations act the next day, but he simultaneously carried out his previous threat to declare a national emergency in order to spend \$8.1 billion, many times what Congress had appropriated.⁹

6. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

7. Kevin Breuninger, *Trump Reportedly Promised Pardons to Aides Who Break the Law to Build Border Wall by 2020 Election*, CNBC (Aug. 28, 2019, 3:29 PM EDT), <https://www.cnbc.com/2019/08/28/trump-promised-pardons-to-get-border-wall-built-before-election-report.html> [<https://perma.cc/QEX2-LA3H>]; see *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019).

8. See Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §§ 230-232 (2019).

9. See Proclamation 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019) [hereinafter *Border Wall Proclamation*]; *Statement by the President*, WHITE HOUSE (Feb. 15, 2019), <https://whitehouse.gov/briefings-statements/statement-by-the-president-28> [<https://perma.cc/YF9D-VJAX>]; see also Erica Werner, *Failed Senate Vote Sets Up Big Fight Over Border Wall, Budget*, WASH. POST (Oct. 17, 2019, 2:47 EDT), <https://www.washingtonpost.com/us-policy/2019/10/17/latest-failed-senate-vote-sets-up-big-fight-over-border-wall-budget> [<https://perma.cc/5V8K-C7NC>].

In his February 15, 2019 proclamation of a national emergency, President Trump began in typical fashion with a dire pronouncement that our nation is at risk: "The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."¹⁰ He declared "that a national emergency exists at the southern border of the United States,"¹¹ invoking the National Emergencies Act,¹² and directed the U.S. Armed Forces "to assist and support" Department of Homeland Security (DHS) activities at the border.¹³

Acting pursuant to the checks and balances established in the National Emergencies Act,¹⁴ Congress passed a joint resolution terminating the President's declaration of a national emergency.¹⁵ The President vetoed it, and a vote in the House of Representatives to override the veto did not pass.¹⁶ The Trump Administration quickly announced that it would begin construction of border wall sections in areas Congress had specifically exempted from its appropriations act.¹⁷ As Ilya Somin recently pointed out, the President's declaration of a national emergency to fund the border wall relies on a bogus claim and, moreover, is "a little like saying we have a fire going and we need to stop it quickly, so the remedy is to build a new fire station."¹⁸ And yet the Supreme Court stayed the Ninth Circuit's injunction against the President's usurpation of Congress's power under the Appropriations Clause.¹⁹

Beyond the context of the National Emergencies Act and the President's formal declaration of a national emergency, he has similarly exploited the language of threats and emergencies and abused existing legal authorities to achieve his

10. Border Wall Proclamation, *supra* note 9, 84 Fed. Reg. at 4,949.

11. *Id.*

12. 50 U.S.C. §§ 1601, 1621-1622, 1631-1641, 1651 (2018).

13. Border Wall Proclamation, *supra* note 9, 84 Fed. Reg. at 4,949.

14. 50 U.S.C. § 1622(a)(1) (2018) (providing for termination of a President's declaration of national emergency under 50 U.S.C. § 1621 by joint resolution of Congress).

15. H.R.J. Res. 46, 116th Cong. (2019).

16. *Sierra Club v. Trump*, 929 F.3d 670, 680 (citing Veto Message to the House of Representatives for H.J.R. 46, WHITE HOUSE (Mar. 15, 2019), <http://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46> [https://perma.cc/5JQ9-69F3]; 165 CONG. REC. H2799, H2814-15 (daily ed. Mar. 26, 2019)).

17. See Memorandum from Christina Bobb, Exec. Sec'y, U.S. Dep't of Homeland Sec. to Hallock N. Mohler, Exec. Sec'y, U.S. Dep't of Def., "Request for Assistance Pursuant to 10 U.S.C. § 284" (Feb. 25, 2019), <https://www.aclu.org/legal-document/sierra-club-v-trump-exhibit-i> [https://perma.cc/5YAC-PTNR].

18. Deborah Pearlstein & Ilya Somin, *State of Emergency: Presidential Power Run Amok*, CATO INST. (June 3, 2019), <https://www.cato.org/policy-report/mayjune-2019/state-emergency-presidential-power-run-amok> [https://perma.cc/3UL9-AXE7].

19. *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019).

draconian policy goals. For example, President Trump has repeatedly deployed Section 212(f) of the Immigration and Nationality Act (INA), which authorizes the President to suspend the entry of noncitizens upon a “find[ing] that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States.”²⁰ Section 212(f), first enacted in 1952, has historically been deployed as a tool in bilateral disputes and foreign-affairs disputes. For example, President Obama suspended the entry of individuals involved in violence in Libya in 2016,²¹ and President George W. Bush suspended the entry of individuals seeking to frustrate the implementation of the Dayton peace accords in the Balkans in 2001.²²

But President Trump has weaponized Section 212(f) in very different contexts. He has done so at the expense of other values reflected in the INA and the Constitution and despite the record evidence contradicting his findings of a national-interest imperative – most notoriously, with his Muslim ban, first issued as an executive order on his eighth day in office.²³ The first two versions of President Trump’s Muslim ban were enjoined by the lower courts,²⁴ but the third was finally upheld by a 5-4 vote in the Supreme Court.²⁵ In the preface to the first version of the order, the President stated that his ban on the entry of noncitizens from the listed predominantly Muslim countries was necessary “to protect the American people from terrorist attacks by foreign nationals admitted to the United States.”²⁶ By the time he issued the third version, he had directed Homeland Security and Defense Department officials to conduct a review of foreign countries’ security procedures, all the while preordaining the outcome by promising an “even tougher” ban and tweeting anti-Muslim videos faked by far-right white nationalists.²⁷ Former U.S. national security and foreign-affairs officials decried his Muslim ban orders as not only unnecessary, but also counterproductive for U.S. security interests.²⁸ The final version of the Muslim

20. 8 U.S.C. § 1182(f) (2018).

21. Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 21, 2016).

22. Proclamation No. 7452, 66 Fed. Reg. 34,775 (June 29, 2001).

23. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Feb. 1, 2017).

24. See Int’l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018); Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017).

25. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

26. Exec. Order No. 13,769, 82 Fed. Reg. at 8977.

27. Matthew Weaver et al., *Theresa May Condemns Trump’s Retweets of UK Far-Right Leader’s Anti-Muslim Videos*, GUARDIAN (Nov. 29, 2017), <https://www.theguardian.com/us-news/2017/nov/29/trump-account-retweets-anti-muslim-videos-of-british-far-right-leader> [https://perma.cc/2M2G-X3DF].

28. See, e.g., Brief of Amici Curiae Former National Security Officials in Support of Respondents, *Hawaii*, 138 S. Ct. 2392 (No. 17-965) <https://www.supremecourt.gov/DocketPDF/17/17>

ban approved by the Supreme Court effectively bars 150 million people, the vast majority of them Muslim. As the en banc Fourth Circuit noted in enjoining the second version of the ban on Establishment Clause grounds, the “Executive Order . . . in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination.”²⁹

President Trump again deployed INA § 212(f) – and the language of threat and emergency – to rationalize his policies interfering with the legal rights of people seeking asylum. On October 29, 2018, the President tweeted: “Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border. Please go back, you will not be admitted into the United States unless you go through the legal process. This is an invasion of our Country and our Military is waiting for you!”³⁰ A little over a week later, the Departments of Justice and Homeland Security issued a joint interim final rule providing that “[f]or applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to [INA § 212(f)].”³¹ The President issued his accompanying proclamation the same day, implementing a ninety-day suspension on the “entry of any alien into the United States across the international boundary between the United States and Mexico,” but excluding “any alien who enters the United States at a port of entry and properly presents for inspection.”³² In his Asylum Ban Proclamation, President Trump again used terms of crisis and invasion:

The arrival of large numbers of aliens will contribute to the overloading of our immigration and asylum system and to the release of thousands

-965/42290/20180404123144117_17-965AmicusBriefofFormerNationalSecurityOfficials.pdf [https://perma.cc/ETC9-QKM6]; Brief of Amici Curiae Retired Generals and Admirals of the U.S. Armed Forces in Support of Respondents, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/41713/20180330120220844_17-965%20Retired%20Generals%20and%20Admirals%20of%20U.S.%20Armed%20Forces%20Amicus%20Brief.pdf [https://perma.cc/4YNP-D2C3]; Brief for William Webster et al. as Amici Curiae in Support of Respondents, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/39956/20180326115420517_17-965%20Amicus%20Brief%20of%20William%20Webster%20et%20al_.pdf [https://perma.cc/MT7U-FEGT].

29. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017).
30. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 [https://perma.cc/5JWQ-GEUG].
31. *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018) (to be codified at 8 C.F.R. pt. 208).
32. Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

of aliens into the interior of the United States. The continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border has precipitated a crisis and undermines the integrity of our borders.³³

One can easily draw a direct path from this false rhetoric of “invasion” and criminality to the President’s official immigration policies – both when President Trump has formally declared a national emergency, as in the case of the border wall, and when he has used similar fearmongering language to rationalize his policies to the public and the courts.³⁴

The lesson from President Trump’s abuses of the National Emergencies Act and INA § 212(f) is that the checks and balances against presidential power – in these cases, Congress’s authority under the Appropriations Clause and its termination power under the National Emergencies Act, and the federal judiciary’s role in reviewing the lawfulness of executive action – may be dangerously ineffective. President Trump has invoked the statute to bar our country’s doors for vile reasons, including blatant religious and racial animus. In effect, the Supreme Court endorsed this when it accepted at face value President Trump’s sanitized justifications in the third Muslim ban order and in the government’s briefs in litigation:

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.³⁵

33. *Id.* at 57,661.

34. Commentators have also observed a link between President Trump’s inflammatory messaging and violent bias-fueled crimes by private individuals. See, e.g., Alexia Fernández Campbell, *Trump Described an Imaginary “Invasion” at the Border 2 Dozen Times in the Past Year*, VOX (Aug. 7, 2019, 1:50 PM), <https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion> [<https://perma.cc/AF8G-WKX3>]; Anthony Rivas, *Trump’s Language About Mexican Immigrants Under Scrutiny in Wake of El Paso Shooting*, ABC NEWS (Aug. 4, 2019, 3:05 PM), <https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566> [<https://perma.cc/D8D8-35EM>].

35. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

Tellingly, the Court upheld the President's Muslim ban order only by exalting the *general* power of the presidency; the Court averted its gaze from the particulars of President Trump's actions.

Some members of Congress have already made efforts to try to foreclose any reprise of *Trump v. Hawaii* by further clarifying what is already expressed in the existing laws: that statutes like INA § 212(f) grant the President broad powers, to be sure, but presidential declarations about the national interest and emergencies should be scrutinized.³⁶ And when those declarations are contradicted by all the facts, including the President's own public statements, they should be rejected.³⁷

More critically, it is time to reexamine the aged precedents that limn the so-called plenary-power doctrine, including *Kleindienst v. Mandel*,³⁸ which the Supreme Court reinforced in upholding President Trump's Muslim ban. In *Mandel*, a Belgian journalist and self-identified "revolutionary Marxist," was denied entry to the United States though he had previously been granted visas to attend academic meetings and had been invited by U.S. universities.³⁹ The Supreme Court upheld the executive branch's decision to exclude Ernest Mandel.⁴⁰ Although the Court rejected the executive's assertion that it had absolute and plenary power as to admission,⁴¹ it set forth an extremely deferential rule of decision. So long as the executive branch puts forward a "facially legitimate and bona fide reason" for its exclusion of a noncitizen, the courts will not "look behind" the decision.⁴²

To be clear, the lower federal courts had no trouble whatsoever in holding that the Muslim ban orders were unconstitutional even while applying *Mandel*.⁴³ For example, the Fourth Circuit rejected the government's argument of consular nonreviewability, which holds that "absent congressional authorization, courts lack jurisdiction to review a consular officer's decision to grant or deny a visa."⁴⁴ In its decision on the second version of the ban, the court noted the genuine threat behind the executive branch's attempt to accrete unreviewable power on immigration matters:

36. NO BAN Act, H.R. 2214, 116th Cong. (2019).

37. *See id.*

38. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

39. *Id.* at 756-57.

40. *Id.* at 769-70.

41. *Id.* at 770 (holding that Congress has delegated conditional exercise of the exclusion power to the executive).

42. *Id.*

43. *See, e.g., Int'l Refugee Assistance Project v. Trump (IRAP II)*, 883 F.3d 233, 264 (4th Cir.), *cert. granted and vacated*, 138 S. Ct. 2710 (2018).

44. *Id.* at 277 (Gregory, C.J., concurring).

Behind the casual assertion of consular nonreviewability lies a dangerous idea—that this Court lacks the authority to review high-level government policy of the sort here. Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, . . . it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake.⁴⁵

And yet, when the third version of the Muslim ban reached the Supreme Court, *Mandel* had no teeth at all.⁴⁶ Even though the majority of the Court, forced by Justice Sotomayor’s dissent, expressly overruled another outdated and frankly racist precedent, *Korematsu v. United States*, it left *Mandel* standing as a dangerous shibboleth in immigration law.⁴⁷

In 1944, Justice Jackson dissented in *Korematsu*. He noted that many had commented on the threats to liberty posed by the military order for the *en masse* internment of Japanese Americans.⁴⁸ He presciently wrote that “a judicial construction of the Due Process Clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself,” because an order based on military “emergency” would last only as long as the emergency.⁴⁹ But the Court’s opinion, with its rationalization for the racially discriminatory order, “then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”⁵⁰ Unfortunately, the same can still be said for *Mandel*, even though *Korematsu* has been officially overruled.

II. RESTORE DUE PROCESS AND RATIONALITY IN THE IMMIGRATION SYSTEM

As a rationale for his many other anti-asylum policies including the Asylum Ban Proclamation, President Trump has deployed the imagery of a “security

45. *Int’l Refugee Assistance Project v. Trump (IRAP I)*, 857 F.3d 554, 587 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017).

46. *Trump v. Hawaii*, 138 S. Ct. 2392, 2441 (Sotomayor, J., dissenting) (describing how the majority “rightly declines to apply *Mandel*’s ‘narrow standard of review’” (citation omitted)).

47. See Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629 (2019).

48. *Korematsu v. United States*, 323 U.S. 214, 245 (Jackson, J., dissenting).

49. *Id.* at 245-46 (Jackson, J., dissenting).

50. *Id.* at 246 (Jackson, J., dissenting).

crisis” at the border, in which children, women, and men fleeing persecution are cast as dangerous criminals. These policies include:

- a widely reviled policy of forcibly taking children from parents and detaining them separately while they pursue asylum claims;
- blanket detention of asylum seekers without regard for individual flight risk;
- legal opinions by Attorneys General Sessions and Barr purporting to reverse Board of Immigration Appeals (BIA) opinions on asylum standards and detention policy;
- expansion of “expedited removal” under INA § 235(b)(1)(B)(iii), a mechanism for rapid deportation that bypasses immigration courts and permits a single asylum officer to order an individual deported; and
- multiple policies building on the Asylum Ban Proclamation, including artificially bottlenecking the number of asylum claims processed at ports of entry, forcing applicants to return to Mexico pending adjudication of asylum claims, and finally a presidential proclamation prohibiting asylum for applicants who have passed through a third country without applying for resettlement, which effectively bars asylum for anyone entering the United States at the southern border except for Mexican nationals.

These policies are unprecedented in their severity and disregard for legal analysis.⁵¹ But to a large extent, President Trump has simply abused existing tools forged in IIRIRA. For example, under President Trump, ICE has jettisoned the longstanding practice of releasing individuals on “parole” while they seek asylum in their removal proceedings.⁵² For individuals who had passed their credible-fear interviews (the first hurdle for arriving noncitizens claiming asylum), five ICE field offices denied release on parole to between 92% and 100% of asylum seekers, representing a marked shift from the previous parole denial rates of less than 10%.⁵³

Such draconian detention policies highlight serious landmines in the existing immigration law—both in IIRIRA’s detention provisions and in the cases

51. The Trump Administration’s expansion of expedited removal exemplifies its disregard for the law and the longstanding conventional wisdom among immigration enforcement officials in both Republican and Democratic administrations that such broad application of the cursory process would pose serious due-process concerns. See Alan Gomez, *Trump’s Quick Deportation Plan May Be Illegal, Past Immigration Chiefs Say*, USA TODAY (Feb. 26, 2017, 1:00 PM EST), <https://www.usatoday.com/story/news/nation/2017/02/24/president-trumps-expedited-removal-plan-may-be-illegal/98276078> [<https://perma.cc/P4HR-89D6>].

52. *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339 (D.D.C. 2018); *Heredia Mons v. McAleenan*, No. 19-1593 (JEB), 2019 WL 4225322 (D.D.C. Sept. 5, 2019).

53. *Id.*

interpreting them. Those immigration detention precedents have gone far astray from fundamental constitutional norms, permitting deprivations of liberty without process that are not tolerated anywhere else in U.S. law. In IIRIRA, Congress instituted for the first time mass detention of individuals defending against removal charges, including the mandatory detention of certain classes of noncitizens without any individualized hearing on flight risk and dangerousness, the factors used in custody determinations in the analogous context of criminal pretrial detention.⁵⁴ In its 2003 decision *Demore v. Kim*, the Supreme Court upheld one of these mandatory detention statutes, INA § 236(c), which applies to people (mostly longtime lawful permanent residents) with certain criminal convictions.⁵⁵ *Demore* created a glaring exception to the due-process imperative of an individual hearing, which applies in every other context for civil detention, from criminal pretrial to civil commitment to juvenile detention.

Notably, the Supreme Court deferred to Congress's references to "evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States" and to the Solicitor General's submission of data purporting to show that detentions under INA § 236(c) were, on average, relatively brief.⁵⁶ And yet, when the Solicitor General confessed that those data were incorrect during the litigation of a follow-up question about the proper interpretation of Section 236(c),⁵⁷ in *Jennings v. Rodriguez*, the Court reinforced the error of *Demore* and reversed the Ninth Circuit's ruling that Section 236(c) should be construed to require an individualized custody hearing once detention was no longer as brief as approved in *Demore*.⁵⁸ The following Term, the Supreme Court once again doubled down on *Demore* by taking the government's most expansive reading of Section 236(c) to apply to people detained by ICE even long after their release from their underlying criminal sentences, notwithstanding the plain language of the statute directing that the government "shall take into custody any alien who" falls within one of four enumerated categories of criminal history "when the alien is released."⁵⁹

54. See 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1225(b)(2)(A), 1226(c) (2018) (providing for detention without hearing for people in removal proceedings).

55. See 538 U.S. 510 (2003).

56. *Id.* at 528-29.

57. See Regina Jeffries, *Tragedy of Errors: The Solicitor General, the Supreme Court, and the Truth*, JUST SECURITY (May 23, 2018), <https://www.justsecurity.org/56718/tragedy-errors-solicitor-general-supreme-court-truth> [<https://perma.cc/9BKM-ZSR8>].

58. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

59. 8 U.S.C. § 1226(c)(1); see *Nielsen v. Preap*, 139 S. Ct. 954 (2019). Neither *Jennings* nor *Preap* raised the question of whether INA § 236(c) is constitutional, that is, whether *Demore* should be overruled.

The Trump Administration's well-documented abuses of detention without a hearing demonstrate that we cannot rely on the assumed goodwill and unwritten norms of the executive branch. Any statute that permits executive detention without a hearing is a threat to fundamental liberty, and any judicial opinion that upholds such a statute is incompatible with due process. Both should be eliminated.

III. SEE IMMIGRANTS AND REFUGEES AS FELLOW HUMAN BEINGS, NOT CRIMINALS

Finally, and most fundamentally, the Trump Administration's excesses and abuses demonstrate how dangerous the political branches' false rhetoric of immigrant criminality has been. Donald Trump campaigned on an explicitly anti-Latino, anti-Muslim, and anti-immigrant campaign platform. And on his sixth day in office, he issued two executive orders on border and interior immigration enforcement that carried out his campaign promises.⁶⁰ These were his first moves implementing extreme measures that had been rejected by previous administrations, including:

- expansion of federal-local immigration enforcement agreements under Section 287(g) of INA, which had been largely abandoned during the Obama Administration after internal investigations and public advocacy and litigation demonstrated a disturbing pattern of civil-rights violations by local law-enforcement agencies that had embraced these 287(g) programs;⁶¹
- an end to "catch-and-release" – a derogatory phrase used by immigration hardliners like disgraced former Sheriff Joe Arpaio of Maricopa County, Arizona,⁶² to criticize the decision not to detain an immigrant pending removal proceedings;⁶³ and
- granting of unguided and unlimited discretion to individual ICE agents to determine whom to arrest, a reversal of a 2014 Obama Administration

60. Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8,793 (Jan. 25, 2017) [hereinafter Border Security]; Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 25, 2017) [hereinafter Enhancing Public Safety].

61. Border Security, *supra* note 60, 82 Fed. Reg. at 8,795 (§ 10); Enhancing Public Safety, *supra* note 60, 82 Fed. Reg. at 8,800 (§ 8).

62. Rebecca Kaplan, *Perry Gets Support from Get-Tough Sheriff Joe Arpaio of Arizona*, CBS NEWS (Nov. 29, 2011, 2:11 PM), <https://www.cbsnews.com/news/perry-gets-support-from-get-tough-sheriff-joe-arpaio-of-arizona> [<https://perma.cc/6SM4-AASW>].

63. Border Security, *supra* note 60, 82 Fed. Reg. at 8,795 (§ 6).

memorandum that prioritized the arrest of noncitizens with a criminal history or “recent border crossers.”⁶⁴

Both of the January 25, 2017 executive orders included prefatory language asserting that the President’s actions were necessary for national security. The border security order stated that “[a]liens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety,”⁶⁵ and that “[c]ontinued illegal immigration presents a clear and present danger to the interests of the United States.” The interior enforcement order further alleged that so-called “sanctuary jurisdictions” – that is, local and state government agencies that had made deliberate decisions not to participate in immigration enforcement for law-enforcement, fiscal, or community-safety reasons – “have caused immeasurable harm to the American people and to the very fabric of our Republic.”⁶⁶ These claims of danger to our nation were unsupported by empirical evidence, to say the least,⁶⁷ and if allowed to go unchallenged, would lead to the implementation of the Trump Administration’s white nationalist immigration agenda, including the reduction of immigration from African, Caribbean, and Latin American nations, which the President slandered as “shithole” countries.⁶⁸

Once again, President Trump’s rhetoric is shocking in its blatant racism and extreme cruelty, but his predecessors too have fallen into the trap of smearing immigrants and refugees as criminals and immigration as predominantly a national security issue. President Obama, like his fellow Democrats in Congress, repeatedly spoke of requiring undocumented immigrants to “get right with the law,”⁶⁹ and of a “security crisis” at the southern border.⁷⁰ They, too, poured

64. Enhancing Public Safety, *supra* note 60, 82 Fed. Reg. at 8,801 (§ 10).

65. Border Security, *supra* note 60, 82 Fed. Reg. at 8,793 (§ 1).

66. Enhancing Public Safety, *supra* note 60, 82 Fed. Reg. at 8,799 (§ 1).

67. See, e.g., Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html> [<https://perma.cc/985X-6MS3>]; Alex Nowrasteh, *Illegal Immigrants and Crime – Assessing the Evidence*, CATO INST. (Mar. 4, 2019, 1:16 PM), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence> [<https://perma.cc/J5FC-GUX>].

68. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/K5RX-TEL9>].

69. *Remarks by the President in Address to the Nation on Immigration*, OBAMA WHITE HOUSE ARCHIVES (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/7MR8-LR6Y>].

70. Joel Rose, *President Obama Also Faced a ‘Crisis’ at the Southern Border*, NPR (Jan. 9, 2019, 2:29 PM), <https://www.npr.org/2019/01/09/683623555/president-obama-also-faced-a-crisis-at-the-southern-border> [<https://perma.cc/TAM7-PLDT>].

hundreds of millions of dollars into an overgrown border enforcement machinery.⁷¹ As noted above, President Clinton signed IIRIRA and its punitive immigration detention scheme into law. This bipartisan language of immigrant criminality has imposed untold harms and irrational policy-making. It must stop.

CONCLUSION: A SAFER PATH FORWARD

In its first decision considering President Trump's Asylum Ban Proclamation, the conservative Judge Jay Bybee wrote an opinion for the Ninth Circuit that affirmed a preliminary injunction against President Trump's policy and denied the President's request for a stay of the injunction. Judge Bybee echoed some of the President's language, describing a "staggering increase in asylum applications" and an "overburdened" system, but he nonetheless held that the plaintiffs were likely to succeed on the merits of their claim that the Asylum Ban Proclamation and rules are contrary to statutes enacted by Congress.⁷² Critically, Judge Bybee responded to the government's arguments by noting the core role of the judiciary in such disputes:

We are acutely aware of the crisis in the enforcement of our immigration laws. The burden of dealing with these issues has fallen disproportionately on the courts of our circuit. And as much as we might be tempted to revise the law as we think wise, revision of the laws is left with the branch that enacted the laws in the first place – Congress.⁷³

The Ninth Circuit did not overturn any precedents to reach this result, and it did not disagree with the President's premises in declaring a crisis in immigration enforcement. And yet it fulfilled the traditional role of the courts in declaring the President's acts unlawful and providing a remedy to the people harmed by his acts. It remains to be seen whether the Supreme Court will do the same if it takes up the merits of President Trump's asylum and border-wall actions.⁷⁴

71. *Obama Signs \$600 Million Bill to Boost U.S. Border Security*, PBS NEWSHOUR (Aug. 3, 2010, 12:00 AM), <https://www.pbs.org/newshour/show/obama-signs-600-million-bill-to-boost-u-s-border-security> [<https://perma.cc/99E9-CB44>].

72. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 754, 770-71 (9th Cir. 2018).

73. *Id.* at 774-75.

74. The Supreme Court denied the government's application to stay a preliminary injunction against the original Asylum Ban Proclamation, *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (Dec. 21, 2018), but granted a stay of President Trump's follow-up proclamation prohibiting asylum for anyone who arrives at the southern border unless they either are Mexican nationals or applied for and were denied asylum in another country en route to the United States, *Barr v. E. Bay Sanctuary*, 140 S. Ct. 3 (Sept. 11, 2019). Neither order provides any substantive analysis of the merits. The Court granted a stay of a preliminary injunction blocking

As our nation looks forward to the 2020 election, many Americans are hoping for a return to Obama-era immigration policies. To be sure, the deliberate cruelty and outright racism of the Trump era makes that a welcome prospect. But we can and must do better than a return to the past. We must build an immigration system that finally transcends our xenophobia and prevents future abuses of executive power. We have our work cut out for us.

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the transfer of funds for border wall sections not approved by Congress on the ground that “the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with [the transfer statute]” but did not reach the ultimate merits. *Trump v. Sierra Club*, 140 S. Ct. 1 (July 26, 2019). The litigation in all three cases continues.