

2022

Immigration After the Trump Administration: Surgical Fix or Another Band-Aid?

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Aleksandar Cuic, *Immigration After the Trump Administration: Surgical Fix or Another Band-Aid?*, 54 Case W. Res. J. Int'l L. 259 (2022)

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IMMIGRATION AFTER THE TRUMP ADMINISTRATION: SURGICAL FIX OR ANOTHER BAND-AID?†

*Aleksandar Cuic**

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I. INTRODUCTION

On January 20, 2021, many immigration practitioners, advocates, and representatives breathed a collective sigh of relief. The Trump Administration was no longer in office and what was perceived as a four-year assault on immigration was finally over.¹ The Biden Administration was sworn in and with it came promises of reform, new policies, and a more effective immigration system.² A common feature of new incoming administrations, particularly those that are politically different from the previous incumbent administration, is the undoing of

† Credit for this title must be given to Case Western Reserve University School of Law student, Alireza Nourani-Dargiri (J.D. 2022).

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1. 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/> [<https://perma.cc/HWB4-XYBM>].

2. Franco Ordoñez, *On Immigration, Biden Goes Big in Opening Bid to Congress*, NPR (Jan. 20, 2021, 5:00 AM), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958626092/on-immigration-biden-goes-big-in-opening-bid-to-congress> [<https://perma.cc/6WSD-8UBJ>].

the priorities and ambitions of the prior president.³ The Biden Administration seems, at least we believe, to be no different in that regard.

However, questions remain: will this immigration system, riddled with outdated laws and policies that no longer apply in twenty-first century America, get the surgical fix it requires or will it be left with another Band-Aid? And, how did we get here under the Trump Administration?

II. HOW WE GOT HERE

The Trump Administration's "desire to limit lawful (and unlawful) immigration is well-documented and was implemented through various executive actions and regulatory initiatives by governmental agencies, including the Departments of Homeland Security, Labor, and State."⁴ These agencies are headed by individuals who serve as integral parts of any president's administration. One expects cabinet members to be partisan, sharing in the vision set forth by the President.⁵ They are often former colleagues, holdovers from similar administrations, and party loyalists.⁶ For better or worse, we expect this. We witnessed Trump officials influence our immigration system. Officials like Stephen Miller, an immigration hardliner; Chad Wolf, a former Transportation Security Administration employee turned lobbyist; and Ken Cuccinelli, a former political candidate who once compared undocumented immigrants to "foreign invaders,"⁷ all helped shape the Trump

3. Rishi P. Oza, *Biden Overturning Many Trump Initiatives*, BROWN IMMIGR. L. (Feb. 8, 2021), <https://www.brownimmigrationnc.com/blog/2021/february/biden-overturning-many-trump-initiatives/> [https://perma.cc/H5JZ-FG8B].

4. *Id.*

5. CONG. RSCH. SERV., RL30673, THE PRESIDENT'S CABINET: EVOLUTION, ALTERNATIVES, AND PROPOSALS FOR CHANGE (2000).

6. David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 47, 53 (2011).

7. Andrew Kaczynski, *Trump Official Has Talked About Undocumented Immigrants as 'Invaders' Since at Least 2007*, CNN (Aug. 17, 2019, 9:00 AM), <https://www.cnn.com/2019/08/17/politics/kfile-ken-cuccinelli-immigration-invasion-rhetoric/index.html> [https://perma.cc/3P8G-SNZ2].

Administration's immigration policy.⁸ Again, we expect the President's cabinet members to be partisan and loyal to the cause.⁹

The courts however, we are told, are where bias and influence have no impact. Law, fact, and fairness rule; and justice is blind. However, ask any immigration practitioner and they will tell you that the immigration court system is a different story. It is not your regular court. Over the past four years, the immigration court system, which falls under the Department of Justice, hired hundreds of new immigration judges while Trump's Attorneys General, authorized by regulation,¹⁰ made sweeping changes to immigration case law and precedent.¹¹ Decisions from the Board of Immigration Appeals ("BIA"), the appellate body of the immigration court system, came in rapid fire on what felt like a weekly basis.

President Trump expressed his immigration agenda throughout his campaign. He proposed a wall between the United States and Mexico,¹² no option of amnesty,¹³ a limitation on individuals entering the United

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8. *Stephen Miller's Influence on Immigration Policy—and Throughout the Administration*, AM. OVERSIGHT (Jan. 27, 2021), <https://www.americanoversight.org/investigation/stephen-millers-influence-on-immigration-policy-and-throughout-the-administration> [https://perma.cc/7KDS-QLLF]; Zolan Kanno-Youngs & Maggie Haberman, *Ken Cuccinelli Emerges as Public Face, and Irritant, of Homeland Security*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/politics/ken-cuccinelli-immigration-trump.html> [https://perma.cc/24CE-ELD5]; Julia Ainsley, Katy Tur & Laura Strickler, *Trump Admin Considering Chad Wolf, an Author of Family Separation Policy, for DHS Chief*, NBC NEWS (Oct. 22, 2019, 1:57 PM), <https://www.nbcnews.com/politics/immigration/trump-admin-considering-chad-wolf-architect-family-separation-dhs-chief-n1070006> [https://perma.cc/3LK8-8CQU].
 9. See CONG. RSCH. SERV., *supra* note 5.
 10. See 8 C.F.R. §1003.1(h)(1)(i) (2021).
 11. 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/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/5JJ7-LRZT].
 12. Tamara Keith, *Once a Fence, Later Slats, Almost Always a Wall: Trump's Border Wall Contradictions*, NPR (Jan. 11, 2019, 7:53 AM), <https://www.npr.org/2019/01/11/683920624/once-a-fence-later-slats-almost-always-a-wall-trumps-border-wall-contradictions> [https://perma.cc/3SJC-NRXH].
 13. John Whitesides, *Trump's Planned Order on 'Dreamers' Will Not Include Amnesty, White House Says*, REUTERS (July 10, 2020, 6:57 AM), <https://www.reuters.com/article/us-usa-trump-immigration/trumps-planned-order-on-dreamers-will-not-include-amnesty-white-house-says-idUSKBN24B35E> [https://perma.cc/AL5Z-3AQL].

States,¹⁴ and more deportations,¹⁵ just to name a few.¹⁶ However, actually executing that plan in Washington would be a hurdle. In a canny move, knowing congressional reform and political support was a hopeless endeavor, the Trump Administration used the immigration court system to drive their policy agenda.¹⁷ They wasted no time showing their cards. On September 10, 2018, then-Attorney General Jefferson Sessions III, before the largest class of immigration judge hires in history, appeared in person and provided his remarks, as an overview of the Trump vision to reform this system.¹⁸

Fairly, Attorney General Sessions stated that “it is perfectly legitimate, moral, and decent for a nation to have a legal system of immigration and to enforce the system it adopts.”¹⁹ A statement with which most would agree.²⁰ Simply stated, it is fair to have a structure of rules and regulations that outline a nation’s immigration system. Otherwise, it would be chaotic. However, that is not where Attorney General Sessions stopped in his speech. Instead, he proceeded to lay the foundation of the Trump agenda.²¹

Statements such as “[immigrants] should file their claim and wait their turn,”²² “[c]ases must be moved to conclusion,”²³ and “our goal is

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14. Susan Heavey et al., *Trump Administration Sets Record Low Limit for New U.S. Refugees*, REUTERS (Oct. 28, 2020, 8:31 AM), <https://www.reuters.com/article/us-usa-immigration-refugees/trump-administration-sets-record-low-limit-for-new-u-s-refugees-idUSKBN27D1TS> [<https://perma.cc/K8MS-AQDD>].
 15. Ted Hasson & Quint Forgey, *Trump Promises Mass Deportations of ‘Millions of Illegal Aliens’ Next Week*, POLITICO (June 18, 2019, 7:04 AM), <https://www.politico.com/story/2019/06/18/trump-deportation-illegal-alien-1367012> [<https://perma.cc/3Z75-7UUE>].
 16. See *Timeline of Federal Policy on Immigration, 2017-2020*, BALLOTPEdia, https://ballotpedia.org/Timeline_of_federal_policy_on_immigration,_2017-2020 [<https://perma.cc/TW5Y-DNHZ>], for a more extensive list of immigration policies President Trump implemented during his term in office.
 17. Pierce & Bolter, *supra* note 11.
 18. Att’y Gen. Jeff Sessions, *Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review*, U.S. DEP’T OF JUST. (Sept. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history> [<https://perma.cc/4NAY-KVSN>].
 19. *Id.*
 20. *Id.* (“The American people are good and just. They rightly want a lawful system they can be proud of.”).
 21. *Id.*
 22. *Id.*
 23. See generally *id.* We can infer that moving cases through to conclusion and deterring illegal immigration means finishing cases quickly and deporting as many immigrants as possible.

not just to prosecute more but to deter and end illegality”²⁴ provided those new hires with their goal as judges: finish cases quickly and deport.²⁵ Then, with respect to those who actually represent individuals in immigration court proceedings, private bar immigration practitioners, Attorney General Sessions remarked that good immigration lawyers “work every day—like water seeping through an earthen dam—to get around the plain words of the [Immigration and Nationality Act] to advance their clients’ interest. Theirs is not the duty to uphold the integrity of the Act. That is our most serious duty.”²⁶

Remember, Sessions gave this speech to the largest class of new hires in history of the immigration court system.²⁷ Forty-six newly hired judges were given this outline.²⁸ Of those, twenty-eight were former prosecutors in some capacity;²⁹ half gained experience while employed at Immigration and Customs Enforcement (“ICE”),³⁰ the federal agency tasked with the removal of non-citizens.³¹ Of that group of hires, a small handful actually had private immigration attorney experience.³² For this Administration, it was now time to change how the court system operated, who it employed, and how it should work.

In the Trump Administration’s defense, that is what the law says: “Within the Department of Justice, there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General.”³³ So, the Attorney General

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See Executive Office for Immigration Review Swears in 46 Immigration Judges*, U.S. DEP’T OF JUST. (Sept. 28, 2018), <https://www.justice.gov/eoir/page/file/1097241/download> [<https://perma.cc/2JQT-JX4M>].

30. Which, as will be discussed more, was fairly indicative of judicial hires. *See Amy Taxin, Trump Puts His Stamp on Nation’s Immigration Courts*, ASSOCIATED PRESS (July 23, 2019), <https://apnews.com/article/donald-trump-us-news-ap-top-news-courts-immigration-50e97a112fb142f2abffa061ed5737d6> [<https://perma.cc/LL8F-GFVX>].

31. John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/> [<https://perma.cc/UMF4-4SFW>].

32. U.S. DEP’T OF JUST., *supra* note 29.

33. 8 C.F.R. §1003.0(a) (2021).

personally selects who directs the immigration court system.³⁴ There, Attorney General Sessions selected James McHenry,³⁵ who from 2005 to 2014 served as an attorney for Immigration and Customs Enforcement, to direct our nation's immigration courts.³⁶ Again, ICE is a party in immigration court proceedings.³⁷ So, stated another way, ICE's former lead attorney was now leading the courts at which his former employer appeared.

Serving as Director, Mr. McHenry was provided the authority to

(b)(1) . . . manage EOIR and its employees and . . . be responsible for the direction and supervision of each EOIR component [in the execution of its respective duties];

(b)(1)(i) [i]ssue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(ii) [d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred;

(v) [p]rovide for performance appraisals for immigration judges and Board members while fully respecting their roles as adjudicators, including a process for reporting adjudications that reflect temperament problems or poor decisional quality; [and]

(vii) [p]rovide for comprehensive, continuing training and support for Board members, immigration judges, and EOIR staff in order to promote the quality and consistency of adjudications.³⁸

As provided by Uncle Ben in Spider-Man, “with great power comes great responsibility.”³⁹ Here, the Trump Administration, through its new Director used the great powers afforded to them. During his term, Director McHenry oversaw a case completion program for judges which, according to immigration advocates, essentially led to immigration judges making hasty decisions to complete cases on time and to meet

34. 8 C.F.R. § 1003.9(a) (2021).

35. *Executive Office for Immigration Review Announces New Administrative Law Judge*, U.S. DEP'T OF JUST. (Dec. 2, 2016), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-announces-new-administrative-law-judge> [<https://perma.cc/N6X5-NX96>].

36. *Id.*

37. U.S. DEP'T JUST, IMMIGR. COURT PRAC. MANUAL 2 (2018).

38. 8 C.F.R. §§ 1003(b)(1), (b)(1)(i)–(ii), (b)(1)(v), (b)(1)(vii) (2021).

39. SPIDER-MAN (Columbia Pictures Apr. 29, 2002).

their quota.⁴⁰ He further restricted asylum law by stripping immigration judges of the ability to control their dockets while appearing to walk in step with ICE⁴¹ policies and objectives. The judiciary was anything but independent.⁴²

Another part of the Director's authority is the ability to select a Chief Immigration Judge, a position that establishes operating policies and oversees policy implementation for the immigration courts.⁴³ In July 2020, the Trump Administration selected Tracy Short as its Chief Immigration Judge.⁴⁴ Coincidentally, Short served as an ICE trial attorney from 2001 to 2003 and again from 2007 to 2015.⁴⁵ From 2017 to his appointment in 2020, he served as the ICE Principal Legal Advisor and Senior Advisor to the ICE Acting Director.⁴⁶

So, to recap, under the Trump Administration, the immigration court system, which again is not an independent court but one that falls under the Department of Justice, selected an individual who spent years working as an attorney for ICE to direct the court. That Director, in turn, selected an individual who spent years working as an attorney for ICE to oversee the immigration judges. That same person, the Chief Immigration Judge, is responsible for hiring, training and establishing priorities for over five hundred immigration judges located in sixty-six courts throughout the United States.⁴⁷ This court, where ICE is a party to litigation at every hearing in the United States, and which is led by

40. *See, e.g., Oversight of the Executive Office for Immigration Review: Hearing Before the Subcommittee on Immigr. & Border Sec. of the Comm. on the Judiciary House of Representatives*, 115th Cong. (2017) (statement of Rep. Zoe Lofgren, Member, Subcommittee on Immigr. & Border Sec.).

41. Which is not part of his Department of Justice employer. *See How the Trump Administration Broke the Immigration Court System*, AM. IMMIGR. L. ASS'N (Apr. 19, 2021), <https://www.aila.org/infonet/immigration-courts> [<https://perma.cc/VC7F-ZKUA>].

42. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: STRATEGIC PLAN 2021–2025, U.S. DEP'T OF HOMELAND SEC. 23 (2020).

43. *Responsibilities of the Chief Immigration Judge*, U.S. DEP'T OF JUST. (Aug. 2, 2021), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [<https://perma.cc/L2KT-C3E8>].

44. *See Biographies of Immigration Judges*, U.S. DEP'T OF JUST. (Sep. 24, 2021), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> [<https://perma.cc/J9JA-ZHGX>].

45. *Id.*

46. *Id.*

47. *See Responsibilities of the Chief Immigration Judge*, *supra* note 43.

two former ICE officials, embarked on a hiring campaign like never before.⁴⁸ So, the question remains: who are these judges?

Remember the 2020 election and the constant discussion of court packing?⁴⁹ By July 2019, roughly a year and a half since Trump took office, 190 new immigration judges were hired.⁵⁰ Of that group, 20% were former military lawyers and 50% previously worked for ICE.⁵¹ By 2020, 61% of the nation's immigration judges were Trump appointees.⁵² In President Trump's final class of new immigration judges in December 2020, seven of the fourteen hires were former ICE prosecutors and four others had prosecutorial backgrounds.⁵³

As for the Board of Immigration Appeals, the appellate body of the immigration court system, those hires, too, were spotlighted with issues under the Trump Administration.⁵⁴ After the promotion of six immigration judges to BIA positions, observers raised questions about the selection of each of these six judges, all of whom previously worked for ICE or the legacy Immigration and Naturalization Service ("INS") in some capacity, and all of whom had an asylum denial rate over 80% despite the fact that the national denial rate for asylum cases is around 57%.⁵⁵ In response, the American Immigration Council ("AIC") filed a Freedom of Information Act ("FOIA") lawsuit on behalf of the American Immigration Lawyers Association ("AILA") seeking

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48. Reade Levinson et al., *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, REUTERS (Mar. 8, 2021, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179> [<https://perma.cc/3ZHS-KW6E>].
 49. See, e.g., Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [<https://perma.cc/M4BW-9PVJ>].
 50. Taxin, *supra* note 30.
 51. *Id.*
 52. Kaila Philo, *Trump's Influence on Immigration Policy to Last*, COURTHOUSE NEWS SERV. (Feb. 26, 2021), <https://www.courthousenews.com/trumps-influence-on-immigration-policy-to-last/> [<https://perma.cc/43E9-2CJB>].
 53. See Exec. Off. for Immigr. Rev., *EOIR Announces 14 New Immigration Judges*, U.S. DEP'T OF JUST. (Dec. 18, 2020), <https://www.justice.gov/eoir/page/file/1347201/download> [perma.cc/UHB9-B9AN].
 54. Levinson et al., *supra* note 48.
 55. Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, ROLL CALL (Oct. 29, 2019, 2:51 PM), <https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/> [<https://perma.cc/3TUF-ZPCN>].

information about new hiring procedures for BIA judges.⁵⁶ According to the FOIA Complaint,

[t]he concerns revolve around hiring practices that seem to skew in favor of essentially promoting candidates whose track records indicate the potential to stray from impartial adjudication in furtherance of the administration's goals. These include the hiring of judges with a record of disproportionately denying immigrants' cases at the trial level, receiving a higher number of remands from the BIA, and the subject of complaints.⁵⁷

Hiring plan documents released in response to the FOIA litigation "show shortened hiring timelines and suggest preference given to judges with records of rulings against immigrants."⁵⁸ The documents also "demonstrate the influence held over the board by the political leadership of the EOIR, the Justice Department agency that oversees the nation's immigration court system, particularly its director, James McHenry."⁵⁹

Now, to be sure, all of these hires should be given the benefit of the doubt that they will still be impartial and fair regardless of their backgrounds as former prosecutors or former ICE employees. After all, that is the true role of a judge. However, statistics thus far indicate otherwise. According to Reuters, judges hired by the Trump Administration ordered deportations in over 69% of cases, compared with 58% for judges hired as far back as the Reagan Administration.⁶⁰ For immigration court cases centered around claims for asylum, the numbers were even worse.⁶¹

Remember that speech then-Attorney General Sessions gave to his first class of immigration hires? Well, in that speech, he stated:

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56. *FOIA Lawsuit Presses for Records on How Appellate Immigration Judges Are Hired*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/foia-lawsuit-presses-records-how-appellate-immigration-judges-are-hired> [<https://perma.cc/4ET7-8GBT>]; Complaint for Declaratory and Injunctive Relief, *Am. Immigr. Laws. Ass'n v. U.S. Dep't of Just. Off. of Info. Pol'y*, No. 1:20-CV-00572 (D.D.C. Mar. 17, 2020).
57. Complaint for Declaratory and Injunctive Relief at 11, *Am. Immigr. Laws. Ass'n v. U.S. Dep't of Just. Off. of Info. Pol'y*, No. 1:20-CV-00572 (D.D.C. Mar. 17, 2020).
58. Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, ROLL CALL (May 4, 2020, 3:23 AM), <https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/> [<https://perma.cc/A6XA-U9KJ>].
59. *Id.*
60. Levinson et al., *supra* note 48.
61. *See id.*

Of course, the problem of illegal immigration has only been compounded by issues surrounding the asylum process . . . [T]he percentage of asylum claims found meritorious by our Judges declined. The reason for the decline is because the vast majority of the current asylum claims are not valid under the law.⁶²

You got that right. Attorney General Sessions said most asylum classes are not valid under the law—without hearing any of them.⁶³ Cases pending and future cases are not valid under the law and new judges need to know this. So, what do you expect happened?

New judges, most of whom were hired with backgrounds as ICE prosecutors, are being told that most asylum claims they will determine are “not valid under the law.”⁶⁴ Couple this mindset with the asylum-restrictive precedent from the Attorneys General of the Trump Administration: *Matter of A-B*,⁶⁵ which redefined our nation’s asylum standards; *Matter of L-E-A*,⁶⁶ which limited family-based asylum claims; and *Matter of Negusie*,⁶⁷ which clarified the persecutor bar to asylum and held that withholding of removal does not include an exception for coercion or duress. This presumption of invalidity, along with the Trump-era precedent, ensured that the asylum denial rate would only go up.

And up it went. Nationally, the rate of asylum denial rose to 71.6% under the Trump Administration, up from 54.6% during the last year of the Obama Administration.⁶⁸ In the “Rust Belt” cities the numbers are high. In the Buffalo Immigration Court, one immigration judge was hired under the Trump Administration.⁶⁹ Her denial rate was 98.6%.⁷⁰

62. Sessions, *supra* note 18.

63. *Id.*

64. *Id.*

65. 27 I. & N. Dec. 316 (A.G. 2018).

66. 27 I. & N. Dec. 581 (A.G. 2019).

67. 28 I. & N. Dec. 120 (A.G. 2020).

68. *Asylum Denial Rates Continue to Climb*, TRAC IMMIGR. (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/5G3E-8B38>].

69. Mary C. Baumgarten was appointed to the Buffalo Immigration Court in 2019. U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN 31 IMMIGRATION JUDGES (2019), <https://www.justice.gov/eoir/page/file/1145691/download> [perma.cc/N7U3-LN8Z] [hereinafter DOJ March 2019 Announcement].

70. *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015-2020*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> [<https://perma.cc/5QKE-2LY7>] [hereinafter *TRAC Judge Statistics*].

In Cleveland, judges hired during that time frame denied cases 92.4%, 84.7%, 95.8%, 87%, 88.1%, and 80.2% of the time.⁷¹

Down south in Houston, denial rates of Trump-appointed judges were 98.4%, 95.7%, 97.2%, 100%, 97.8%, 95.5%, 98.5%, 91.3%, and 98.1%⁷² while out east in Boston denial rates were 62.4% and 75.4%.⁷³ Denial rates were high on the West Coast, too. In Seattle, Trump-

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71. *Id.* The Trump-appointed judges on the Cleveland Immigration Court include Monte J. Horton, James F. McCarthy III, Jonathan W. Owens, Teresa L. Riley, Christopher R. Seppanen, and David C. Whipple. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN SEVEN IMMIGRATION JUDGES (2017), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-seven-immigration-judges> [https://perma.cc/JP34-SLQA]; U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN NINE IMMIGRATION JUDGES (2017), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-nine-immigration-judges> [perma.cc/38QS-SAGW]; U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN 18 IMMIGRATION JUDGES (2019), <https://www.justice.gov/eoir/page/file/1161951/download> [perma.cc/5MLS-SXHG] [hereinafter DOJ May 2019 Announcement]; DEP'T OF JUST., OFF. OF PUB. AFF., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ANNOUNCES LARGEST IMMIGRATION JUDGE INVESTITURE SINCE AT LEAST 2010, HIRING TIMES REDUCED BY MORE THAN 50% (2018), <https://www.justice.gov/opa/pr/executive-office-immigration-announces-largest-immigration-judge-investiture-least> [https://perma.cc/C9LM-E68T].
72. *TRAC Judge Statistics, supra* note 70. The Trump-appointed judges on the Houston Immigration Court include Sam Brown IV, Marcos Gemoets, Monica Thompson Guidry, Bruce Imbacuan, Anwer A. Khan, Jennifer A. May, Erica J. McGuirk, Bao Q. Nguyen, and Lynn Wang. U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW RECENTLY SWEARS IN SEVEN IMMIGRATION JUDGES (2017), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-seven-immigration-judges> [perma.cc/4K9X-SYEW]; U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN 46 IMMIGRATION JUDGES (2018), <https://www.justice.gov/eoir/page/file/1097241/download> [perma.cc/7KV N-YPU2] [hereinafter DOJ September 2018 Announcement]; DOJ March 2019 Announcement, *supra* note 69; DOJ May 2019 Announcement, *supra* note 71; U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN 27 IMMIGRATION JUDGES (2019) [hereinafter DOJ October 2019 Announcement]; DEP'T OF JUST., OFF. OF PUB. AFF., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW TO SWEAR IN 28 IMMIGRATION JUDGES, BRINGING JUDGE CORPS TO HIGHEST LEVEL IN HISTORY (2019), <https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest> [https://perma.cc/5DRE-696T].
73. *TRAC Judge Statistics, supra* note 70. The Trump-appointed judges on the Boston Immigration Court include Lincoln S. Jalelian and Todd A. Masters. DOJ May 2019 Announcement, *supra* note 71; DOJ September 2018 Announcement, *supra* note 72.

appointed judges denied 89.5% and 84% of their asylum cases.⁷⁴ In sunny San Diego, the lone Trump appointee denied 89.4% of his cases.⁷⁵ In Las Vegas, denial rates of Trump judges yielded 84.1% and 83.5%.⁷⁶ If the goal was to leave a long-lasting impact on the immigration court process, then the Trump Administration met their goal. But, part of their strategy may have backfired.

When former Attorney General Sessions gave the aforementioned speech, he stated: “[W]e are [sic] currently have the most active immigration judges in history. But we won’t stop there. We will add even more by the end of this calendar year.”⁷⁷ James McHenry was hired specifically to lead the “timely and efficient adjudication of immigration cases” and to assist the Attorney General in “reduc[ing] the pending caseload by realigning the agency towards completing cases, increasing both productivity and capacity and . . . cutting the pending caseload in half by 2020.”⁷⁸ It did not go according to plan.

Despite the focus on the immigration court, despite the hiring of more judges than ever before, despite the vast expansion by the Department of Homeland Security (“DHS”) in hiring more prosecutors for ICE to represent the Department in these courts, the plan failed. It failed miserably. The *New York Times* wrote:

When [President Donald Trump] took office in 2017, [he] inherited a backlog of about 540,000 cases, already a major crisis. The administration could have used numerous means to bring that number down. Instead, Mr. Trump’s team drove it up. By

74. *TRAC Judge Statistics*, *supra* note 70. The Trump-appointed judges on the Seattle Immigration Court include Shane E. Johnson and Robert B.C. McSeveney. DOJ March 2019 Announcement, *supra* note 69; U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW SWEARS IN 16 IMMIGRATION JUDGES (2018), <https://www.justice.gov/eoir/page/file/1112111/download> [perma.cc/6WKB-FUXS] [hereinafter DOJ November 2018 Announcement].

75. *TRAC Judge Statistics*, *supra* note 70. Guy G. Grande was appointed to the San Diego Immigration Court in 2019. DOJ October 2019 Announcement, *supra* note 72.

76. *TRAC Judge Statistics*, *supra* note 70. The Trump-appointed judges on the Las Vegas Immigration Court include Ann M. McDermott and Lindsay M. Roberts. DOJ November 2018 Announcement, *supra* note 74.

77. Sessions, *supra* note 18.

78. DEP’T OF JUST., OFF. PUB. AFF., ATTORNEY GENERAL SESSIONS ANNOUNCES APPOINTMENT OF JAMES MCHENRY AS DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2018).

the time he left office in January, the backlog had ballooned to nearly 1.3 million pending cases.⁷⁹

As one judge stated in a letter announcing his retirement, “it is hard to understand how any court system can function like this.”⁸⁰

III. WHERE ARE WE GOING?

Like the Presidents before him, President Biden inherited a broken immigration system. This system, however, was packed full of Trump appointees waiting to challenge any changes Biden made. The Biden Administration has moved swiftly to reverse many Trump initiatives, which has had wide-ranging effects on several immigration areas.⁸¹ On his first day in office President Biden signed nine executive orders. Of those nine, six were related to immigration, including the border wall, the “Muslim Travel Ban,” and preserving the Deferred Action for Childhood Arrivals (“DACA”) program.⁸² Additionally, the DHS issued a 100-day moratorium on most deportations.⁸³

However, the resistance to these changes swiftly made its way to the courts. For example, following a lawsuit filed by Texas Attorney General Ken Paxton, the 100-day moratorium was enjoined by U.S. District Judge Drew Tipton, who held that “the January 20

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79. The Editorial Board, *Immigration Courts Aren't Real Courts. Time to Change That*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html> [<https://perma.cc/LC2H-E4ZM>].
80. Tal Kopan, *Controversial S.F. Immigration Judge Quits, Bashes System*, S.F. CHRON. (Apr. 16, 2021, 7:08 PM), <https://www.sfchronicle.com/politics/article/Controversial-S-F-immigration-judge-quits-16107366.php> [<https://perma.cc/2356-2SF4>].
81. Amanda Holpuch & Lauren Gambino, *Joe Biden Reverses Anti-Immigrant Trump Policies Hours After Swearing-In*, THE GUARDIAN (Jan. 20, 2021, 7:26 PM), <https://www.theguardian.com/us-news/2021/jan/20/biden-immigration-reform-trump-executive-order> [<https://perma.cc/HF9M-QL6F>].
82. *2021 Joseph R. Biden Jr. Executive Orders*, FED. REG., <https://www.federairegister.gov/presidential-documents/executive-orders/joe-biden/2021> [<https://perma.cc/E3RU-FEL3>]; The White House, *Fact Sheet: President-Elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-a-mid-converging-crisis/> [<https://perma.cc/2W8P-G9WA>].
83. Memorandum from David Pekoske, Acting Sec'y, Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs and Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. and Customs Enf't, Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship and Immigr. Serv. (Jan. 20, 2021) (on file with the Department of Homeland Security).

Memorandum not only fails to consider potential policies more limited in scope and time, but it also fails to provide any concrete, reasonable justification for a 100-day pause on deportations.”⁸⁴ Then, in another blow to President Biden’s early executive orders, another U.S. District Court Judge from Texas put a stop to any new applications for benefits under the DACA program. In a seventy-seven page decision, Judge Andrew Hanen found that the DHS violated the Administrative Procedure Act.⁸⁵ Thus, he held that the DHS could not accept and approve any new applications now eligible under Biden’s January 20th orders.⁸⁶ By doing so, the Judge effectively cut off new applicants from obtaining some form of protective status in the United States, lawfully working, and lawfully obtaining identification.⁸⁷

And then, in yet another blow to the Biden immigration agenda, a federal judge in Texas⁸⁸ blocked ICE from further implementing interim guidance on “Civil Immigration Enforcement and Removal Priorities” that was set forth in a February 18, 2021 memorandum.⁸⁹ In that guidance and as directed by Acting ICE Director Tae D. Johnson, ICE enforcement, through its agents and attorneys, was to focus on those deemed threats to national security, border security, and public safety.⁹⁰ On August 19, 2021, U.S. District Judge Drew Tipton found the enacted enforcement priorities violated federal administrative law, saying they should have been implemented through regulations open to comments from the public.⁹¹ As shown during the Trump

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84. Order Granting Plaintiffs Emergency Application for a Temporary Restraining Order at 10, *Texas v. United States*, 515 F. Supp. 3d 627, 635 (S.D. Tex. 2021) (No. 6:21-CV-00003).
 85. *Texas v. United States*, No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133114, at *120 (S.D. Tex. July 16, 2021).
 86. *Id.*
 87. *See What Is DACA? Everything You Need to Know*, BOUNDLESS, <https://www.boundless.com/immigration-resources/what-is-daca> [<https://perma.cc/8D2S-S3BZ>].
 88. See the pattern?
 89. Andrew R. Arthur, *Judge Blocks Biden Administration’s Immigration Enforcement Restrictions*, CTR. FOR IMMIGR. STUD. (Aug. 23, 2021), <https://cis.org/Arthur/Judge-Blocks-Biden-Administrations-Immigration-Enforcement-Restrictions> [<https://perma.cc/V445-KKJ2>].
 90. Memorandum from Tae D. Johnson, Acting Dir., to All ICE Employees, on Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021) (on file with U.S. Immigration and Customs Enforcement).
 91. *See Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021); *see also* Camilo Montoya-Galvez, *Judge Blocks Biden Administration Effort to Curtail ICE Arrests and Deportations*, CBS NEWS (Aug. 19, 2021, 3:30 PM), <https://www.cbsnews.com/news/immigr>

Administration, and now under the Biden Administration, oppositions to presidential policies may have started—but were often stopped—by a lone judge.

Biden focused on another controversial Trump-era policy, but this time his efforts were not stopped by a lone judge but by the U.S. Supreme Court. Publicly announced in December of 2018, the Migrant Protection Protocols (“MPP”), commonly known as “Remain in Mexico,” is a system where the U.S. government will return certain asylum seekers to Mexico.⁹² There, the asylum seekers remain in Mexico pending their immigration court proceedings to have their claims for asylum be heard. The issues were abundant: people living in camps on the U.S.-Mexico border missed hearings due to the lack of quality postal service; criminals targeted individuals in the camps; families were separated; and significant violations towards these immigrants were reported.⁹³ The Biden team sought to revoke this program from the early stages of the administration.⁹⁴ However, on August 24, 2021, the U.S. Supreme Court determined, with the Court’s three liberal justices dissenting, that the “applicants ha[d] failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious.”⁹⁵ Just like that, Trump’s policy endured.

However, the early stages of the Biden Administration’s immigration agenda have not all failed or been tied up in the courts. Where the Trump Administration used the immigration court to mold its immigration vision, so too has the Biden Administration. In the early portion of 2021, Attorney General Merrick Garland, much like his

ation-ice-arrests-deportations-judge-blocks-biden-administration/ [https://perma.cc/2NS4-XCXT].

92. *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, DEP’T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration#> [https://perma.cc/J3Q9-YN7E]; Memorandum from Kristjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec., on Policy Guidance for Implementation of the Migrant Protection Protocols to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm’r, U.S. Customs & Border Prot., & Ronald D. Bitiello, Deputy Dir. & Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf’t (Jan. 25, 2019) (on file with the Department of Homeland Security).
93. *Forced to Return to Mexico: At Least 1,544 Publicly Reported Cases of Murder, Rape, Torture, Kidnapping & Other Violence Assaults*, HUM. RTS. FIRST (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico> [https://perma.cc/U6BH-747W].
94. *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (proposed Feb. 2, 2021).
95. *Biden v. Texas*, No. 21A21, 2021 U.S. LEXIS 3678 (Aug. 24, 2021).

predecessors, issued several opinions greatly impacting immigration law while striking at Trump-era changes.

On June 16, 2021, Attorney General Garland issued two precedential decisions with names familiar to immigration practitioners. In yet another holding for the Respondent in the *Matter of A-B-* saga, he held that the rulings in *A-B- I* from 2018 and *A-B- II* from 2021 were no longer to be followed and are “vacated in their entirety.”⁹⁶ That case, which was first taken into consideration by Attorney General Sessions, created the foundation of the Trump-era immigration policy for asylum. Far too often, immigration judges and USCIS asylum officers, trained under the holding of 2018 *Matter of A-B-*, simply dismissed and denied asylum claims based on the analysis therein.⁹⁷ Now, this is no more. On that very same date, Attorney General Garland struck down another controversial Trump-era case finding that *Matter of L-E-A-* and *Matter of L-E-A- II* are vacated in its entirety “so as to return the immigration system to the preexisting state of affairs.”⁹⁸

The Attorney General did not stop there. In *Matter of Cruz-Valdez*,⁹⁹ he reinstated Administrative Closure,¹⁰⁰ a tool that allowed judges to remove active cases from their dockets or temporarily pause proceedings often times to allow the respondent to seek collateral relief or for purposes of judicial economy.¹⁰¹ This tool, allowed through prior BIA authority in *Matter of Avetisyan*,¹⁰² and *Matter of W-Y-U-*,¹⁰³ was in direct contrast to the Trump Administration’s quota system and need to finalize cases. Holding that the Trump policy under *Matter of Castro-Tum*¹⁰⁴ departed from a long-standing practice, yet another Trump-era immigration policy, implemented through the immigration court system, was gone.

96. A-B-, 28 I. & N. Dec. 307 (A.G. 2021).

97. See *Matter of A-B- Considerations*, IMMIGRANT LEGAL RES. CTR. (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf [<https://perma.cc/7C3H-LKQLQ>].

98. L-E-A, 28 I. & N. Dec. 304 (A.G. 2021).

99. Cruz-Valdez, 28 I. & N. Dec. 326 (A.G. 2021)

100. *Id.* at 329.

101. See Andrew R. Arthur, *AG Garland Resurrects Administrative Closure in Immigration Courts*, CTR. FOR IMMIGR. STUD. (July 17, 2021), <https://cis.org/Arthur/AG-Garland-Resurrects-Administrative-Closure-Immigration-Courts> [<https://perma.cc/7ZJU-5MBH>].

102. Avetisyan, 25 I. & N. Dec. 688 (BIA 2012).

103. W-Y-U-, 27 I. & N. Dec. 17 (BIA 2017).

104. Compare *Castro-Tum*, 27 I. & N. Dec. 271, 294 (A.G. 2018) with *Cruz-Valdez*, 28 I. & N. Dec. 326 (A.G. 2021).

So, much like his predecessor before him, President Biden, through the authority granted to the Attorney General, has used the immigration court system to further his objectives. These cases issued during his first seven months in office were a significant blow to the Trump Administration's efforts over the past four years.

IV. MEET THE NEW BOSS, SAME AS THE OLD BOSS?

While immigration advocates and practitioners cheer the policies and vision of the Biden Administration, criticism remains.

One source of such criticism is Title 42.¹⁰⁵ Due to the COVID-19 pandemic, on March 20, 2020, the Department of Health and Human Services ("HHS") issued an emergency regulation which was used, in turn, by U.S. Customs and Border Protection ("CBP").¹⁰⁶ Section 265 of U.S. Code Title 42 permits the Surgeon General of the HHS to "prohibit . . . the introduction" into the United States of individuals when the Surgeon General believes that there is "serious danger of the introduction of [a communicable] disease into the United States."¹⁰⁷ Implemented under the Trump Administration to combat the transmission of COVID through our borders, many believed that the rule was another Trump immigration restrictionism policy, albeit done through another agency.¹⁰⁸

Title 42 allows any customs officer patrolling the southern border, including CBP officers, to employ CDC orders.¹⁰⁹ This one, "prohibit[ing] . . . the introduction" means exactly what it says: it prohibits individuals from entering the United States. While a controversial policy to some, the Biden Administration is in fact now supporting it.¹¹⁰ While the guise is to combat COVID, the CDC temporarily suspended the entry of noncitizens:

105. 42 U.S.C § 265.

106. *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Mar. 29, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/7K9E-ANV3>].

107. 42 U.S.C § 265.

108. *See, e.g.*, Annika Kim Constantino, *Biden Administration Appeals Judge's Order to Stop Expelling Migrants Under Trump-Era Pandemic Policy*, CNBC (Sept. 17, 2021), <https://www.cnbc.com/2021/09/17/biden-administration-appeals-order-to-stop-expelling-migrants-under-trump-era-covid-policy.html> [<https://perma.cc/H4HS-7W3C>]; *Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021), <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border> [<https://perma.cc/P4E6-UHU8>].

109. AM. IMMIGR. COUNCIL, *supra* note 106.

110. *See, e.g.*, Molly O'Toole, *Biden Promised Change at the Border. He's Kept Trump's Title 42 Policy to Close It and Cut Off Asylum*, L.A. TIMES

based on the Director's determination that introduction of such noncitizens, regardless of their country of origin, migrating through Canada and Mexico into the United States creates a serious danger of the introduction of COVID-19 into the United States, and the danger is so increased by the introduction of such noncitizens that a temporary suspension is necessary to protect the public health.¹¹¹

Border apprehensions surpassed one million in June 2021.¹¹² In June alone, 188,829 persons attempted to enter the southern border—a five percent increase from May.¹¹³ With the numbers of border crossings at the U.S. southern border increasing daily and with monthly records being set seemingly every month, the Biden Administration announced on July 30, 2021 that it would continue to fast track the removal of individuals under Title 42.¹¹⁴ This announcement left many questioning whether Trump or Biden was in office. Many feel that Title 42 is a cover for yet another restrictive policy of our nation's immigration laws.¹¹⁵ If so, why would the Biden Administration support a policy such as this? Simply stated, if noncitizens cannot come in due to COVID, then they will be returned and will have no chance for asylum. As a result, the Texas Civil Rights Project, Refugee and Immigrant Center for Education and Legal Services (“RAICES”), Center for Gender & Refugee Studies, Oxfam,¹¹⁶ American Civil Liberties Union

(Mar. 19, 2021, 5:12 PM), <https://www.latimes.com/politics/story/2021-03-19/a-year-of-title-42-both-trump-and-biden-have-kept-the-border-closed-and-cut-off-asylum-access> [https://perma.cc/5UHE-86FP].

111. *CDC Extends Order at the Southern and Northern Land Borders*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 2, 2021), <https://www.cdc.gov/media/releases/2021/s080221-southern-northern-land-borders-order-extended.html> [https://perma.cc/SH24-2EUL].
112. *See, e.g., Maria Sachetti, U.S.-Mexico Border Apprehensions for the Fiscal Year Surpassed 1 Million in June*, TEX. TRIB. (July 16, 2021, 4:00 PM), <https://www.texastribune.org/2021/07/16/us-mexico-border-apprehensions-how-many/> [https://perma.cc/BBV5-LA3B].
113. *CBP June 2021 Operations Update*, U.S. CUSTOMS & BORDER PROT. (July 16, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-june-2021-operational-update> [https://perma.cc/MP2N-RG48].
114. Myah Ward, *Biden Administration Resumes Fast-Track Deportation Flights*, POLITICO (July 30, 2021, 6:33 PM), <https://www.politico.com/news/2021/07/30/biden-resumes-deportation-flights-501881> [https://perma.cc/AC8U-2VRV].
115. *See, e.g., Associated Press, Federal Judge Halts Use of Health Order to Expel Migrant Families Along the Border*, NBC NEWS (Sep. 16, 2021, 8:30 PM), <https://www.nbcnews.com/politics/politics-news/federal-judge-halts-use-health-order-expel-migrant-families-along-n1279404> [https://perma.cc/5NZR-H43A].
116. *See, e.g., Constantino, supra* note 108.

of Texas, and American Civil Liberties Union of the District of Columbia have sued the Biden Administration to end the policy.¹¹⁷

The criticism does not stop at Title 42 for many. Advocates are questioning the financial support and budget for ICE under Biden's 2022 budget proposal.¹¹⁸ Shortly after taking office, Biden said to a crowd at a rally in Georgia that demanded ICE reform (with some calling to abolish the agency altogether): "I agree with you. I'm working on it, man. Give me another five days."¹¹⁹ Yet, on May 29, 2021, when President Biden outlined his first proposed budget, this promise did not stand.¹²⁰ In his proposal, funding for ICE did not go down but in fact remained the same, despite the Biden Administration's enforcement priorities, while border patrol funding was budgeted to increase over 6%.¹²¹ These numbers were unexpected from those who had faith in Biden's immigration vision. But, mixed messages from the current administration were not expected by those who expected more.

A large portion of this Comment discussed how we got here, especially under the immigration court system and the judicial hires under Trump. Here too, little has changed under Biden. To be sure, shortly after taking office, the aforementioned James McHenry was removed from his position and replaced with Jean King, as Acting Director of the Executive Office for Immigration Review.¹²² Since then, it seems to some that little has been done. In fact, the Department of Justice's first announcement of immigration judge appointments under

117. See, e.g., Claire Hansen, *ACLU, Other Groups Resume Lawsuit Seeking to End Title 42 Border Order*, U.S. NEWS & WORLD REP. (Aug. 2, 2021), <https://www.usnews.com/news/national-news/articles/2021-08-02/aclu-other-groups-resume-lawsuit-against-biden-administration-seeking-to-end-title-42-border-order> [https://perma.cc/ELC9-33L3].

118. See, e.g., Caroline Simon, *Advocates Chide Biden Over ICE Funding Plan*, ROLL CALL (June 8, 2021, 5:29 AM), <https://www.rollcall.com/2021/06/08/advocates-chide-biden-over-ice-funding-plan/> [https://perma.cc/23HD-SBNP].

119. E.g., Brett Samuels, *Biden Speech Interrupted by Protestors*, THE HILL (Apr. 29, 2021, 6:43 PM), <https://thehill.com/homenews/administration/551082-biden-speech-interrupted-by-protesters> [https://perma.cc/62PJ-TTJB].

120. See OFF. MGMT. & BUDGET, EXEC. OFF. PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2022 (2021).

121. Aaron Reichlin-Melnick, *Biden's First Budget Is a Missed Opportunity to Overhaul Immigration Enforcement*, IMMIGR. IMPACT (June 1, 2021), <https://immigrationimpact.com/2021/06/01/bidens-first-budget-immigration/#.YVnVAUbMKcZ> [https://perma.cc/B9KM-R4FB].

122. Raymond G. Lahoud, *James McHenry, Trump Appointed Head of Immigration Courts, Replaced by Jean King*, NAT'L L. REV. (Feb. 11, 2021), <https://www.natlawreview.com/article/james-mchenry-trump-appointed-head-immigration-courts-replaced-jean-king> [https://perma.cc/YU4S-2WUR].

Biden saw seventeen new judges.¹²³ Of those seventeen, only one did not previously work for ICE or as a prosecutor.¹²⁴ To be sure, these judges may have applied during Trump Administration or were in the queue for a position before the Biden Administration transition. On July 16, 2021, ten more judges were appointed. Of those ten, only five were previously employed as prosecutors.¹²⁵ Perhaps a change, finally, in the make-up of those who are charged to rule on our immigration laws.

V. CONCLUSION: WHERE DO WE GO FROM HERE?

Realistically, our nation's immigration law has not fundamentally changed since the passage of the Illegal Immigration Reform and Immigration Responsibility Act (commonly referred to as "IIRAIRA"), which became effective on April 1, 1997 during the Clinton Administration.¹²⁶ Since then, five presidential administrations have been in Washington and here we are, still waiting for the fix.

Sure, presidential policies have been issued, enforced, and rescinded over the years. Judges were hired, judges retired, and Attorneys General¹²⁷ used their authority to issue precedent decisions impacting immigration law and analysis. Immigrants have entered the United States and have been deported from the United States. Businesses have employed immigrants and businesses have been sanctioned for violating immigration laws.

America's immigration train has been moving, but let us be honest: where is it going? "The immigration system is broken" is oft-repeated, and do we really want to remain on this broken track? It is entirely fair to ask for a system with secure borders coupled with a court system that is independent of the winds of Washington politics. It is fair to seek a system that permits the best and brightest to enhance our

123. See Igor Derysh, "*Is Steven Miller Still in Charge?*": Biden's First Immigration Court Appointees Are All Trump Picks, SALON (May 11, 2021, 5:50 AM), <https://www.salon.com/2021/05/11/is-stephen-miller-still-in-charge-bidens-first-immigration-court-appointees-are-all-trump-picks/> [<https://perma.cc/JA2V-3CQU>].

124. See U.S DEP'T OF JUST., EXEC. OFF. OF IMMIGR. REV., EOIR ANNOUNCES 17 NEW IMMIGRATION JUDGES (May 6, 2021).

125. See U.S DEP'T OF JUST., EXEC. OFF. OF IMMIGR. REV., EOIR ANNOUNCES 10 NEW IMMIGRATION JUDGES (July 16, 2021).

126. See *5 Things to Know About . . . Immigration*, CASE W. RSRV. UNIV.: THE DAILY (June 25, 2021), <https://thedaily.case.edu/5-things-to-know-about-immigration/> [<https://perma.cc/MD4G-65PE>].

127. Some Attorneys General clearly used their authority to impact immigration policy more than others. See SARAH PIERCE, MIGRATION POL'Y INST., OBSCURE BUT POWERFUL: SHAPING U.S IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 3 (2021).

nation's economic future while simultaneously providing refuge for those that will only enhance our nation's social fabric. It is fair to seek a pathway to legal status for those that arrived here as children or are otherwise law-abiding members of our community while seeking to remove those who violate our laws and endanger our communities. In short, it is fair to ask for a system that works.

This reform is needed, but is it realistic? As I write this, the Delta and Omicron variants of COVID are spreading across the United States,¹²⁸ Afghanistan has reverted back to the control of the Taliban,¹²⁹ Americans are arguing over vaccination policies,¹³⁰ our southern border is at a critical point,¹³¹ inflation is increasing,¹³² and we, as a country, still cannot agree on most things. Again, is it realistic that immigration be taken off the back burner when seemingly, bigger problems exist? A fair question to ask.

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128. See, e.g., Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Dec. 20, 2021), <https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron> [<https://perma.cc/CG7W-NJH9>].
129. See, e.g., Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN REL. (Sept. 15, 2021, 11:30 AM), <https://www.cfr.org/background-er/taliban-afghanistan> [<https://perma.cc/E353-Z9LP>].
130. See, e.g., Dennis Wagner, *The COVID Culture War: At What Point Should Personal Freedom Yield to the Common Good?*, USA TODAY (Aug. 2, 2021), <https://www.usatoday.com/story/news/nation/2021/08/02/covid-culture-war-masks-vaccine-pits-liberty-against-common-good/5432614001/> [<https://perma.cc/L4DF-AXJQ>].
131. See, e.g., James Dobbins, Eileen Sullivan & Edgar Sandoval, *Thousands of Migrants Huddle in Squalid Conditions Under Texas Bridge*, N.Y. TIMES (Sept. 16, 2021), <https://www.nytimes.com/2021/09/16/us/texas-migrants-del-rio.html> [<https://perma.cc/U86V-ZSYV>].
132. See, e.g., Anneken Tappe, *Why Prices Will Keep Soaring in 2022*, CNN BUS. (Jan. 1, 2022, 8:56 AM), <https://www.cnn.com/2022/01/01/economy/inflation-prices-2022-preview/index.html> [<https://perma.cc/U3GH-Y6WY>].