Original Article

JOURNAL ON MIGRATION AND HUMAN SECURITY

Journal on Migration and Human Security
1-11

DOI: 10.1177/2331502419866203
journals.sagepub.com/home/mhs
SAGE

An Overview and Critique of US Immigration and Asylum Policies in the Trump Era

Paul Wickham Schmidt
Georgetown Law

Executive Summary
This article provides an overview and critique of US immigration and asylum policies from the perspective of the author's 46 years as a public servant. The article offers a taxonomy of the US immigration system by positing different categories of membership: full members of the "club" (US citizens), associate members (lawful permanent residents, refugees, and "asylees"), friends (non-immigrants and holders of temporary status), and persons outside the club (the undocumented). It describes the legal framework that applies to these distinct populations and recent developments in federal law and policy that relate to them. It also identifies a series of cross-cutting issues that affect these populations, including immigrant detention, immigration court backlogs, state and local immigration policies, and constitutional rights that extend to noncitizens. It ends with a series of recommendations for reform of the US asylum system, and a short conclusion.

Introduction

This article examines distinct categories of membership in the United States, a vibrant twenty-first-century democracy built on the not completely fulfilled promise of "liberty and justice for all." Membership in this "club" remains among the nation's most difficult, fundamental, and contentious issues. Membership determinations involve often-conflicting human needs, such as belonging, self-determination, allegiance, loyalty, and even survival. In addition, the stakes are high. The US Supreme Court has said that expulsion from the nation can result in the "loss of everything that makes life worth living."[1]

The US immigration process affects those living in not only Texas, California, New York, Florida, and states along the US–Mexico border, but also other states with rich histories that continue to be shaped by immigrants, both documented and undocumented.

In 2016, the United States had a very contentious national election in which immigration played a major role. The election's winners presented a far more hostile and negative view of immigration than the nation has seen in recent history. In ways not witnessed by recent generations of Americans, the Trump administration has challenged both the US tradition as a haven for immigrants and its traditional role in the international community as a beacon of freedom, liberty, and justice.

We have seen instances of accelerated, harsh, and aggressive removals in many areas of the country. Some politicians, most administration officials, and their supporters praise these efforts as necessary and long overdue. A debate over funding to build a wall the length of the US–Mexico border led to an unnecessary government shutdown from December 22, 2018, to January 25, 2019, which particularly hurt the US immigration court system (TRAC 2019). By mid-June 2019, the number of pending immigration court cases exceeded 900,000.

At the same time, other politicians and many states and localities have attempted to protect and reassure vulnerable populations in their communities that President Trump cannot keep all of his campaign promises to wall off, deport, and bar the admission of certain groups of individuals on a grandiose scale.

[1] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Corresponding Author:
Paul Wickham Schmidt, Adjunct Professor of Law, Georgetown Law.
Email: paulschmidt293@gmail.com

In most urban areas, local television news regularly features stories of scared families who believe that they could soon be forced out of their homes in the United States and sent to foreign countries where they have not been for years, perhaps decades. Some US citizen children who are part of these families face the prospect of exile to foreign countries they have never visited.

Families seeking to apply for refuge under our laws were intentionally separated as part of a misguided and probably illegal "zero tolerance" program instituted by former Attorney General Jeff Sessions to punish and deter asylum seekers. The administration has used a range of interception, border enforcement, and legal strategies to deny access to the US asylum system. The president has also mocked the US Constitution with threats to strip some US citizens of their birthright — citizenship under the Fourteenth Amendment — through unilateral and almost certainly illegal use of an executive order. Consequently, the issue of who should belong to our national club and how we treat those who are not welcome will continue to occupy our nation and its leaders.

Categories of Membership in the US "Club"

Full Members

The "full voting members" of our nation are US citizens. A very small group of people are US "nationals" who owe permanent allegiance to, but are not citizens of, the United States.

Under the Fourteenth Amendment to the US Constitution, persons born in the United States automatically become US citizens. The exceptions are children born to certain high-ranking foreign diplomats with immunity and rare individuals born on foreign public vessels who are not subject to the jurisdiction of the United States. US citizenship vests automatically, regardless of the US legal status of the mother or father.

Although so-called birthright citizenship has become a very controversial topic recently, it has been a firmly established constitutional rule for more than a century. Because it is a constitutional rule, Congress *cannot* change it by statute, nor can the president change it by executive order. The great majority of scholars and lawyers agree that to do so would require a constitutional amendment or a radical reinterpretation of the US Constitution by the Supreme Court.

In addition, certain individuals born abroad (i.e., whose parent or parents are US citizens who previously lived in the United States) can automatically acquire US citizenship at birth. "Citizenship by acquisition" is governed by statute, rather than the Constitution, and the rules have changed throughout the years.

This issue came up in connection with the 2016 presidential race because one of the leading primary candidates, US Senator Ted Cruz, was born in Canada to a Cuban citizen father and a US citizen mother who had lived in the United States for at least 10 years prior to his birth. Consequently, by the then-applicable statute, he became a US citizen at birth. That does not necessarily answer the question of whether he is a natural-born citizen eligible under the Constitution to become president.

In addition, children born outside the United States may under certain conditions automatically *derive* US citizenship on the naturalization of at least one parent or on being lawfully admitted to the United States to reside with a citizen parent.

Finally, certain individuals lawfully residing in the United States may, if eligible, choose to apply to the Department of Homeland Security (DHS) for naturalization. This is, in effect, a way in which a prospective member of the club may apply for and receive full membership.

While Article I, Section 8 of the Constitution gives Congress authority to establish "a uniform rule of naturalization," and the Fourteenth Amendment provides that naturalized individuals shall be citizens, the Constitution does not specify rules for naturalization. Theoretically, Congress could decide not to provide for naturalization at all.

The rules for naturalization are set by statute and also have changed frequently throughout the years. They largely depend on lawful permanent residence, knowledge of the English language and basic civics, and good moral character. In other words, *only* naturalized citizens actually earn their status by some type of merit-based process. The rest of us are simply beneficiaries of extreme good fortune that we did nothing to deserve.

There is a process for denaturalization of individuals who illegally obtained naturalization. Some of the most famous denaturalization cases involved Nazi war criminals who concealed their atrocities during the immigration and naturalization processes.

The current administration has instituted a vigorous program of reviewing applications of naturalized US citizens for evidence of past fraud that could lead to denaturalization. Otherwise, however, one may lose US citizenship only through "voluntary relinquishment."[2] In other words, Congress may not involuntarily strip an individual of legally acquired US citizenship. An "alien" is defined by law *not* as an "extraterrestrial being," but rather as anyone who is not a citizen or national of the United States.

Associate Members

A second group might be characterized as "associate members" or "prospective members" of our club. In immigration terms, they are known as lawful permanent residents (LPRs) or "green card" holders. While LPRs cannot vote or participate in our political

[2] *Afroyim v. Rusk*, 387 U.S. 253 (1967).

processes, they can reside here on a permanent basis, provided that they obey our laws. Generally, they can work here without much restriction and can travel relatively freely abroad. Eventually, most individuals in this category can attempt to meet the criteria to become US citizens, although significantly they are not *required* to do so.

LPRs are by far the largest group of "associate members." The US system of permanent legal immigration favors the admission of three groups: close relatives of US citizens and LPRs, persons with needed job skills, and refugees. The United States admitted approximately 1.1 million permanent residents in fiscal year (FY) 2017 (DHS 2017).

Family and Employment-Based Immigrants

Immediate relatives of US citizens — that is, spouses, minor children, and parents of adult US citizens — can immigrate without numerical limitation. Approximately 516,000 immediate relatives, 300,000 of them spouses, were admitted as immigrants in FY 2017 (ibid., table 6). Only parents of adult US citizens who are older than age 21, however, qualify for immediate relative status. Consequently, and contrary to popular opinion, the birth of a US citizen child confers no immediate immigration benefits on the parents.

Two hundred and twenty-six thousand immigrant visas are allocated annually for other types of family reunification for adult children of US citizens, spouses and children of LPRs, and siblings of US citizens. The latter category, however, has a waiting list of nearly 13 years; and for intending immigrants from certain countries in oversubscribed preference categories, projected backlogs can extend for decades (Wheeler 2016; Kerwin and Warren 2019).

Another 140,000 immigrant visas for employment-based immigrants are annually allocated, primarily to professionals and other skilled workers. "Members of the professions holding advanced degrees" and "outstanding professors and researchers" are within the preferred categories.

Significantly, at present, only 10,000 immigrant visas are available annually to so-called unskilled workers whose services are needed by US employers; yet this category appears to be one in which US employers have a great need. "Unskilled" is a highly misleading term. Many of the so-called unskilled possess abilities and skills that few college-educated persons possess or would be willing to learn and perform on a regular basis (Hagan, Demosant, and Chavéz 2014).

The Trump administration has chosen to characterize some aspects of legal family migration as "chain migration." Accordingly, this administration and some legislators have proposed a reduction in overall immigration and a reallocation of some of the family-based visas to the employment categories. There is no basis for such changes in the law, however. Indeed, most studies show that US society, and particularly the economy, would benefit from more legal immigration across the board (Bier 2018; Orrenius 2018).

Family immigration contributes to the success of the American economy and enriches our society, as does employment-based immigration. A more rational change would be to *increase* both family and employment-based legal immigration to better match the "market forces" of supply and demand, as well as to reduce the number of individuals seeking to migrate outside the legal system.

The current administration also erects bureaucratic roadblocks — often in the guise of additional security measures — to slow the legal immigration process, and to discourage and block prospective immigrants from seeking permanent status. In particular, it has tried to severely restrict Muslim immigration, apparently to make good on campaign promises. While US law generally does not permit such specific religious exclusions and courts have enjoined the most severe forms of discrimination, the president nonetheless enjoys significant discretion related to immigrant admissions.

Refugees

"Refugee" status can be granted to individuals who have been pre-screened abroad. While refugees — as well as asylees — do not immediately become green-card holders, they have a right to remain in the United States indefinitely, can bring into the country their spouses and minor children, and can work. In most cases, they eventually become eligible to receive green cards, which can lead to US citizenship.

In recent years, refugees have become a political football, both internationally and in the United States. The humanitarian disaster in Syria has sent millions of persons, many of them women and children, pouring across the borders of neighboring countries in search of life-preserving safety. Many have found their way to the borders of Europe, prompting European Union leaders to search for solutions, including resettlement in third countries, integration into host communities, and measures to stem the tide of future arrivals.

One of President Trump's first actions in office was to cut US refugee admissions drastically. As a result, refugee admissions have fallen from 84,994 in FY 2016, to 53,716 in FY 2017, 22,491 in FY 2018, and 18,051 in FY 2019 through May 31 (DOS-PRM 2019). Between FY 2017 and FY 2019, the refugee admissions ceiling set yearly by the president fell from 110,000 to 30,000 (ibid.), the lowest ceiling since the creation of the US Refugee Admissions Program in 1980.

In his first executive order on immigration, sometimes referred to as "Travel Ban I," the president sought to indefinitely bar the admission of Syrian refugees. As a result of litigation before the US Supreme Court, this order was modified to some extent. The

latest version, known as "Travel Ban 3.0," was finally allowed to go into effect by the Supreme Court, over several vigorous dissents. Many observers believe that this partial success at the Supreme Court, along with his appointment of more conservative justices, has emboldened the president to institute his highly questionable legal attack on the rights of asylum seekers at the border.

Notwithstanding the minute number of Syrian refugees that the United States resettles, the rigorous pre-screening they receive, and the fact that most are women, children, or family units, various US state governors — including, notably, current Vice President Mike Pence when he was governor of Indiana — have made well-publicized attempts to slam the door on Syrian refugee resettlement in their respective states based on unsustainable national security concerns (Kerwin 2016). So far, federal courts have soundly rejected such efforts.[3]

Nevertheless, a number of administration officials and members of Congress have expressed strong opposition to the current procedures for resettling refugees. Some legislators have introduced bills that would give states authority to block refugee resettlement, narrow the already limited refugee definition, and make it generally more difficult for refugees to be admitted, particularly those from Syria and the Middle East, while effectively giving preference to Christian refugees over Muslims and those of other religions (Human Rights First 2016).

The president ultimately has great authority to determine the future of US overseas refugee programs. In theory, he could designate any group of refugees as of "special humanitarian concern" to the United States or designate none at all. And, as shown in FY 2018 and FY 2019, he can reduce the number of legal refugee admissions to historic lows or even to zero.

A popular myth about US refugee and asylum law is that the United States protects everyone who can show that they would be killed or placed in severe danger if returned to their home country. In fact, US and international refugee law applies only to those who face harm on account of one of five protected grounds: race, religion, nationality, political opinion, or the amorphous and highly controversial "membership in a particular social group."

This means that if, for example, your neighbor seeks to kill you and rape your daughter because you are a Christian or a member of a targeted political party and the police cannot or will not offer help, you qualify for refugee status. On the other hand, if your neighbor threatens to do the very same things to you and your family because of envy or lust or just plain old criminal behavior, you do not qualify. These are the arcane distinctions that appellate judges and policy makers far removed from the scene argue about endlessly. But to the refugee or asylum seeker, the exact reason why he or she is likely to be killed or harmed on return seems unimportant in relation to the very real danger.

The nearly unprecedented retrenchment in our international humanitarian commitment to resettle refugees, at a time of historically high numbers of forcibly displaced persons, has negatively affected large refugee populations such as Syrians, who are in dire need of resettlement opportunities. As of June 2019, the United Nations High Commissioner for Refugees (UNHCR) reported that there were 5.6 million Syrian refugees and 6.6 million internally displaced within Syria. Many of the forcibly displaced are children. The United States accepted only 62 Syrian refugees in FY 2018. According to a report from Oxfam International, the US fair share would be 170,000 a year (Cowan 2016).

Asylees

"Asylees" typically enter or arrive in the United States with no status or with a temporary status, and they seek to establish their refugee qualifications while in the country. Asylum cases formed the bulk of my work as an immigration judge at the Arlington Immigration Court. Beyond seeking asylum in removal proceedings before an immigration judge, persons already in the United States or at our border who satisfy the "refugee" definition may be granted asylum by DHS's US Citizenship and Immigration Service (USCIS) asylum officers. Approximately 20,500 persons were granted asylum in FY 2016,[4] approximately 8,700 by the immigration courts[5] and the balance by the DHS Asylum Office.

The US asylum system is under unprecedented attack by the Trump administration. Former Attorney General Jeff Sessions and former DHS Secretary Kirstjen Nielsen claimed without proof that this system has attracted too many fraudulent applicants and served as a magnet for undocumented migration.

On February 15, 2019, President Trump declared a national emergency at the US–Mexico border, which has led to the deployment of several thousand National Guard troops to the border. In addition, the president, with assistance from DHS and the US Department of Justice (DOJ), has issued a "proclamation" and "Interim Regulations" that would severely restrict the right of individuals arriving at the border to apply for asylum. According to these measures, those who enter anywhere but at an official port of entry will be ineligible for asylum, even though most families turn themselves in to the Border Patrol in the immediate vicinity of the border.

[3] See, e.g., Kowalski (2016) and CBS News (2016).
[4] USDOJ, EOIR, FY 2016 Statistical Yearbook [hereinafter EOIR 2016], table 16, *available at* www.usdoj.gov/eoir.
[5] EOIR (2016, J-1).

A US district judge in San Francisco issued a temporary restraining order against the enforcement of this initiative. That order was upheld on appeal by a "split panel" of the Ninth Circuit Court of Appeals. Interestingly, the Ninth Circuit opinion was written by Judge Jay Bybee, a leading conservative jurist appointed by President George W. Bush.[6] By a 5–4 vote, with Chief Justice John Roberts siding with his four so-called liberal colleagues, the Supreme Court rejected the administration's irregular "emergency stay" request, thereby allowing the injunction to remain in effect pending further litigation in the lower courts (Liptak 2018).

Moreover, the administration has provided inadequate facilities and too few USCIS asylum officers at the ports of entry (POEs), thereby artificially creating lengthy waiting periods for asylum applicants to be screened. Others are illegally turned away by US authorities when they try to apply at a POE. Not surprisingly, the administration's actions have generated a spirited legal challenge from the American Civil Liberties Union and others, which is pending in a US district court.

In addition, the administration has instituted a program disingenuously called the "Migrant Protection Protocols," which requires certain individuals who have been found to have a "credible fear" of persecution to await their immigration court hearings in Mexico.[7] This policy has been challenged in federal court. In June 2019, the United States and Mexico reached an agreement to expand this program beyond the POEs at San Diego, Calexico, and El Paso.

A continuing controversy involves the mostly women, children, and families from Central America, who are fleeing violence and corruption. We face difficult questions regarding where, if anywhere, such individuals fit within our asylum and immigration systems. Will they be welcomed, or will they be returned to the danger zones from whence they fled?

The Trump administration has pledged not only to restrict the right to apply for asylum but also to hold all undocumented border crossers, including asylum seekers and their families, in expanded detention facilities in remote locations along the United States' southern border pending final determination of their asylum claims and to make it more difficult for those claims to be heard by US immigration judges. Also, the administration has so far been unsuccessful in blocking asylum applications by those who entered illegally. It has also made some asylum seekers wait for court hearings in Mexico, even though they have demonstrated a credible fear of persecution, which allows them to make an asylum claim in US immigration courts.

Another myth is that those who enter illegally should simply "get in line" for a visa. Unless an individual fits into one of the three limited groups of permanent immigrants, there is no line to join. Even some of those who appear to be eligible for permanent immigration may face lengthy waits or highly technical requirements that preclude any realistic chance of legal immigration in the foreseeable future. Finally, a high percentage of undocumented persons are already in the line but subject to multiyear visa backlogs (Kerwin and Warren 2017, 307).

Friends

A third membership category could be characterized as "friends" of the club, that is, individuals who are here with legal permission and may remain for a temporary period of time, sometimes quite lengthy, but who have no clear path to permanent residency or citizenship. The most numerous group in this category is nonimmigrants.

A "nonimmigrant" is distinct from an immigrant. The term "immigrant" generally refers to those, whether legal or illegal, who seek to remain permanently in the United States. Nonimmigrants, by contrast, seek only temporary admission to the United States, not permanent residence.

Visitors for business or pleasure, approximately 50 million in FY 2017 (DHS 2017, table 25), comprise the largest nonimmigrant category. An example of a "business visitor" might be a French national speaking at a conference and receiving no US compensation other than payment of expenses. Members of a German family coming to see the cherry blossoms or visit Colonial Williamsburg could be classified as "visitors for pleasure."

Another familiar category is nonimmigrant academic students with so-called F-1 status. In FY 2017, approximately 1.9 million such individuals with accompanying family members were admitted to the United States (ibid.). As reported in the *Washington Post* and other media, nonimmigrant student admissions have steadily declined since Trump's election (Rampell 2018). This has hurt the many colleges and universities that have come to rely on them to maintain and boost enrollment. Many attribute the decrease to the administration's anti-immigrant rhetoric and to bureaucratic roadblocks intended to slow down and discourage applicants applying for visas.

There are numerous other classifications in the alphabet-soup world of nonimmigrants. Because of very specific technical requirements and the general concept that a nonimmigrant is someone who is coming to the United States temporarily, however, these categories are seldom accessible to the undocumented immigrants who are already living, working, or studying in the United States. Nonimmigrant visas have also come into the limelight, because President Trump's executive orders on immigration bar visa issuance to nationals of certain, predominantly Muslim countries.

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[6] *East Bay Sanctuary Covenant v. Trump*, reported by Mark Joseph Stern (2018).
[7] See Chase (2019).

Beneficiaries of temporary protected status (TPS) represent another group of "friends." The secretary of DHS may make TPS designations for nationals of countries where there is an "ongoing armed conflict," "where there has been a natural disaster," or where "there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety."[8]

Individuals with TPS can temporarily reside and work in the United States. This status does not, however, lead to lawful permanent residence or US citizenship, although some TPS recipients eventually qualify for green cards through the normal immigration system. Three of the largest groups of TPS beneficiaries are nationals of El Salvador, Honduras, and Haiti. Because TPS designations are within the sole discretion of the Executive Branch, the administration can decide to terminate or revoke them, leaving former beneficiaries subject to removal if they cannot secure status in another way and fail to depart voluntarily. As of this writing, federal courts have enjoined the administration's attempt to terminate TPS for nationals of El Salvador, Honduras, Haiti, Nicaragua, Sudan, and Nepal. Testimony in these cases has indicated that the administration ignored the recommendations of career officials and other experts in reaching these highly questionable termination decisions.

Based on statements to date, the Trump administration is unlikely to grant any large groups TPS status in the future, no matter how dire their situation. It claims that TPS is widely abused and that the so-called temporary protection invariably morphs into permanence.

In reality, TPS has been proven to be a practical, low-budget way of handling large numbers of humanitarian cases that might otherwise clog our asylum and court systems. The vast majority of those granted TPS make positive contributions to our society, and many have US citizen or LPR family members (Warren and Kerwin 2017). The relatively few TPS recipients who misbehave are arrested by Immigration and Customs Enforcement (ICE), placed in detention, and usually promptly removed. Far from an evasion of law, TPS has proven to be one of the most successful, practical, and efficient US immigration programs. It fills gaps in our legal immigration and asylum systems that otherwise would be problematic. Terminating these long-standing grants of TPS, particularly for those with long residence and ties to the United States, makes little if any sense.

Outside the Club: The Undocumented

The estimated 10.7 million US undocumented residents — 5.4 million from Mexico — are outside the club (Warren 2019, 20). This group consists of individuals who crossed the border surreptitiously or by fraudulent means, as well as a significant group who entered legally as nonimmigrants, but overstayed or otherwise violated the terms of their admittance. A recent study by the Center for Migration Studies shows that overstays have significantly exceeded illegal entrants for each of the past seven years (ibid., 20–21).

In some instances, the law permits individuals in the United States to change to "green card" status through a process known as "adjustment of status." In FY 2017, approximately 550,000 individuals used this provision (DHS 2017, table 6). The stringent requirements for that relief, however, make it of little practical benefit to most of those who are here illegally (Kerwin and Warren 2019).

Also, there is a smaller, yet highly visible, group of individuals who were granted LPR status, but who by their subsequent criminal misconduct forfeited that right and are therefore subject to expulsion from membership and removal from the nation.

Most people would agree that the latter group presents plausible arguments for expulsion. Nevertheless, there may be circumstances in which forgiveness based on an overall assessment of the equities, particularly the effects on US citizen and LPR family members, is warranted. Indeed, a limited form of discretionary relief called "cancellation of removal" is available to individuals whose criminal record is on the less serious end of the spectrum.[9]

For many years, there has been an acrimonious debate on how to address the US undocumented population. Some say that these individuals possess characteristics, such as willingness to work hard in jobs most Americans do not want and US citizen or green card–holding relatives (particularly children), which make them strong candidates for membership in the club at some level. They also argue that mass removals of such individuals from the United States would be impractical and inhumane.

The Trump administration avers that such individuals are lawbreakers and a drag on US society, and should be removed through active enforcement efforts, a strategy of attrition, or both. The attrition strategy depends heavily on aggressive and effective enforcement of the prohibition on hiring noncitizens who lack employment authorization.

These laws also prohibit discrimination based on national origin or citizenship status against employees and job applicants authorized to work in the United States. The I-9 employment verification form is part of the process for enforcing these laws. To date, however, the so-called employer sanctions laws have not effectively eliminated US employment opportunities for unauthorized workers.

[8] Immigration and Nationality Act § 244(b).
[9] INA § 240A.

Groups favoring removal have consistently blocked efforts at overhauling the immigration system. One such effort, referred to as comprehensive immigration reform, was supported by then-President George W. Bush and subsequently by a bipartisan group of US senators. It would have combined stronger border enforcement with earned legal status for many individuals now residing and working in the United States without status. It also would have provided more avenues for the legal admission of temporary workers to do "low-skilled" or "semiskilled" jobs. In reality, however, many of these jobs, which are demeaned by immigration restrictionists and policymakers, involve skills that few possess and fewer still would be willing to obtain and carry out on a long-term basis.

A second unsuccessful proposal — the Development, Relief, and Education for Alien Minors Act (the "DREAM Act") — would have made it possible for certain undocumented youth (many of them US high school graduates) who have lived in the United States since a young age to regularize their status by attending college, working in the United States, or joining the US military.

Often, students who came with their parents at a young age might not become fully aware of their undocumented status until they fill out college application or financial aid forms and are asked to verify legal status in the United States. By one estimate, there are 1.25 million Deferred Action for Childhood Arrivals (DACA)-eligible individuals in the United States, making the issue of how to treat them a highly significant aspect of the immigration debate (Kerwin and Warren 2016).

In the absence of congressional action, in 2012 the Obama administration implemented an administrative program, known as DACA, to allow some potential DREAM Act beneficiaries to remain in the United States. As of 2018, approximately 750,000 young people residing in US communities had registered under DACA (Kerwin and Warren 2016, 22).

A similar program for parents of US citizens and green card holders known as Deferred Action for Parents of Americans ("DAPA") was prevented from going into effect by an injunction issued at the request of Texas and other states that claimed that they would be harmed by this program. An evenly divided Supreme Court rebuffed the Obama administration and allowed this injunction to stand.

At first, President Trump expressed "great sympathy" for the Dreamers and pledged to work with Congress to achieve a legislative solution to their plight. Later, however, he turned on the Dreamers after Democrats declined to accept his proposals to build the border wall, cut legal immigration, restrict family migration, and reduce the rights of children seeking asylum in return for granting Dreamers a path to citizenship.

In September 2017, the Trump administration ended the DACA program, claiming that it was an illegal action by President Obama. Terminating DACA would strip beneficiaries of authorization to work or study and would throw them into US immigration courts, which are already in chaos with a pending docket that may soon reach an astounding 1 million cases. Fortunately, that ill-advised decision has been blocked on legal grounds by a number of lower federal courts. The Supreme Court recently turned down the administration's request to intervene in the lower court actions.

At present, there are no politically viable comprehensive immigration proposals pending before Congress, nor is there any current prospect of legislative relief for Dreamers.

Cross-Cutting Issues

Detention

DHS holds many individuals in immigration detention. The possibility of long-term *civil detention* of individuals awaiting hearings or eventual removal is always a controversial aspect of immigration enforcement.

Indeed, a dispute over the number of authorized detention beds for DHS was a major issue in the recent bipartisan border security package. In simple terms, however, the lives and suffering of the real human beings in often dangerous and substandard facilities have been *dehumanized* to the point at which they are portrayed as mere inanimate objects — "beds." But we should never forget that those "beds" actually contain real men, women, and children, like the rest of us except for the bad hand that life has dealt them.

A case involving the permissible scope of pre-hearing immigration detention was recently before the US Supreme Court.[10] In a split decision that drew a stinging dissent from Justice Breyer, the court punted the case back to the lower federal courts. The Court's majority did not appear to be sympathetic to the plight of persons facing indefinite "civil" immigration detention, however. Nevertheless, the lower courts have once again indicated an intent to slam, this time on Fifth Amendment grounds, the government's position that indefinite detention without legal recourse pending immigration court hearings is acceptable.

The administration has announced plans to dramatically increase the use of immigration detention, particularly along our southern border with Mexico. This is in addition to President Trump's plans to build a wall along that border, which, as we know, has met with a mixed reception in Congress and has not been fully funded to date.

Many view President Trump's decision to send the military to the southern border to protect us from an alleged "caravan," consisting largely of desperate women and children seeking refuge from uncontrolled violence in the Northern Triangle of Central America, to be largely a spiteful reaction to Congress's failure to fully fund construction of the wall. The administration has also

[10] *Jennings v. Rodriguez*, 583 U.S. ___; 138 S. Ct. 830; 200 L. Ed. 2d 122 (2018).

used family detention, as well as family separation and criminal prosecution of asylum seekers, to deter persons from seeking refuge under our laws.

Immigration Court Backlogs

The immigration court backlog has largely been caused by political interference and ever-changing priorities during the past three administrations. This kind of aimless docket reshuffling involves priority cases moving to the front of the docket, and relegating other cases, some many years old, to the end. Under former Attorney General Sessions, the court backlog rose astronomically, to the point at which it is now so large and out of control that there is no realistic plan to address it. Meanwhile, the role of US immigration judges under this administration has been reduced to what are essentially demoralized rubber stamps.

State and Local Immigration Measures

A number of states and localities have enacted or are considering immigration proposals. Some are restrictionist, aimed at discouraging the presence of undocumented immigrants. Examples include denying them in-state tuition, requiring local law enforcement to turn suspected undocumented individuals over to DHS for removal, denying services or housing to undocumented individuals, or revoking the licenses of businesses that hire undocumented workers. Such laws and regulations have had mixed success in federal courts (Chisti and Bergeron 2014).

In a highly controversial countermove, some states and cities have enacted "Sanctuary City Laws," which limit cooperation between local police and federal immigration enforcement agencies. The apparent rationale for such laws is that fear of being turned over to DHS might inhibit cooperation from ethnic communities in reporting crimes or cooperating with law enforcement in solving crimes. This, in turn, has led to threats to enact laws on the federal and state levels to withdraw funding from localities that have enacted such provisions, as well as suits brought by DOJ to force cooperation with DHS.

In particular, former Attorney General Jeff Sessions and former DHS Secretary Kirstjen Nielsen took an aggressive stance to strip various types of federal funding from "sanctuary jurisdictions." Like the travel ban, however, these efforts have run into roadblocks in the lower federal courts, which have uniformly held them to be illegal.

Constitutional Rights

One often-misstated aspect of the current debate is the proposition that "aliens in the United States illegally have no rights." Although it is true that such individuals might ultimately have no right to remain in the United States, while here, they *do* have a number of important rights under our laws. The Supreme Court, for example, recently reaffirmed that US "representatives serve all residents, not just those eligible or registered to vote."[11]

First and foremost is the right to fair treatment under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to our Constitution.[12] Sometimes, the course of history can be changed by a single vote. One of those instances is a 5–4 decision by the US Supreme Court in 1982 in the *Plyler v. Doe* case.[13] The Court found that it was a violation of the Equal Protection Clause of the Fourteenth Amendment for the State of Texas to deny undocumented school-aged children the free public education that it provides to US citizens and LPRs. In doing so, Justice Brennan, writing for the majority of the Court, observed that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[14]

The right to receive free public education does not, however, extend to higher education. In many states, notwithstanding long residence, undocumented high school graduates have a difficult time continuing their education because they are required to pay *nonresident* tuition and are denied access to most scholarships or other forms of financial aid.

Not surprisingly, unlawful presence does *not* relieve an individual from compliance with local civil and criminal laws. Thus, for example, an undocumented couple from Uganda who seek to marry in Alexandria, Virginia, must comply with Virginia law rather than with Ugandan tribal customs.

Another important obligation under our laws that does not depend on legal status is payment of taxes. Failure to pay taxes, and to be able to prove compliance, may prove to be a serious impediment for a foreign individual who otherwise qualifies to regularize his or her status in the United States. Under the federal Real ID Act, designed to improve security following the 9/11 attacks, in many states it is difficult or impossible for someone without legal status to obtain a driver's license.

[11] *Evenwel v. Abbott*, No. 14-940 (March 4, 2016).
[12] *Zadvydas v. Davis*, 533 U.S. 678, 692-93 (2001); and *Plyler v. Doe*, 457 U.S. 202 (1982).
[13] 457 U.S. 202, 221-22 (1982); see also Rabin, Combs, and Gonzalez (2008).
[14] *Plyler v. Doe,* at 221-22 (citation omitted).

Recommendations for Reform of the US Asylum System at the Border

In November 2018, a *Washington Post* editorial argued for the need to send immigration judges, not the US military, to the US–Mexico border (Editorial Board 2018). While the solution is not quite so simple, taking this step would be a move in the right direction. The following asylum reform proposals would largely use existing laws that recognize and are, in fact, designed to deal efficiently with larger-scale migration situations.

- DHS and USCIC should send far more asylum officers to conduct credible-fear interviews at the border.
- Law firms, pro bono attorneys, and charitable legal agencies should attempt to represent all arriving migrants before both the Asylum Office and the immigration courts.
- USCIS asylum officers should be permitted to grant temporary withholding of removal under the Convention Against Torture (CAT) to applicants who would probably face torture if they were returned to their countries of origin.
- Immigration judges should put the asylum claims of those granted CAT withholding on the "back burner" — thus keeping them from clogging the immigration courts — while working with the UNHCR and other counties in the hemisphere on more durable solutions for those currently fleeing the Northern Triangle.
- Individuals found to have a credible fear should be released on minimal bonds and be allowed to move to locations where they will be represented by pro bono lawyers.[15]

Contrary to Trump administration claims, almost all represented asylum applicants show up faithfully for their immigration court hearings.

- Asylum officers should be vested with the authority to grant asylum in the first instance, thus keeping some of the asylum cases out of immigration court.
- If the administration wants to prioritize the cases of recent arrivals in immigration courts, this can and should be done without creating more docket reshuffling, inefficiencies, and longer backlogs.

To explain, hundreds of thousands of cases that unnecessarily clog immigration court dockets are for long-time residents who are eligible to apply for cancellation of removal for nonlawful permanent residents. The cancellation cases of persons without serious criminal records should be removed from the immigration court docket and sent to USCIS for initial processing. Those granted by USCIS should be put in a line for green card numbers maintained by USCIS, and those denied who have committed serious crimes (likely a small number) should be referred back to the immigration courts. The administration, in turn, should sponsor and Congress should pass legislation to provide legal status to those long-term residents who do not quality for cancellation.

The immigration courts could then focus on the cases that should be its real priorities: detained cases, cases of recently arrived individuals with or without asylum claims, cases of immigrants who have committed crimes, and cases of other individuals who don't fit within our legal system as properly administered.

These recommendations do not align with the administration's plans. Nonetheless, they offer a practical, legal solution that would be good for immigration enforcement, the legal system, and the country as a whole. In addition, until the recommended final step of legislation to legalize long-term residents is taken, *this plan can be achieved under the current law.* It would also cost less than some of the designed-to-fail and arguably illegal strategies being pursued by the administration. This is the case because applications to legalization programs pay for themselves through application fees — perhaps even turning a slight profit for the government.

Conclusion

This article has described how the rules governing permanent membership in the United States favor three groups — family, skilled workers, and refugees/asylees — while providing only limited opportunities for those who seek membership based on unskilled labor.

The undocumented possess certain well-recognized rights, including the right to receive public primary and secondary education and the right to fair treatment with respect to expulsion from the club and/or removal from the premises.

Mass deportation of the 10.7 million US undocumented residents is highly unlikely because all of these individuals have due process rights to a fair procedure prior to their removal. Moreover, it would be disastrous to US families, many industries, and communities. Nevertheless, the Executive Branch *does* have a great deal of discretionary power over immigration and could revoke executive protections granted by previous administrations, terminate or restrict overseas refugee admission programs, and step up arrests, detentions, and removals. While these actions are counterproductive and wasteful, they undoubtedly will be politically

[15] This reform would save the money currently spent on "tent cities" and other types of detention.

popular with certain voting blocs. Therefore, immigration is likely to remain both highly controversial and in the public eye for the foreseeable future.

Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

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