America's Immigration Policy - Where We Are and How We Arrived: An Immigration Lawyer's Perspective

Howard S. Myers III

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AMERICA’S IMMIGRATION POLICY—WHERE WE ARE AND HOW WE ARRIVED: AN IMMIGRATION LAWYER’S PERSPECTIVE

Howard S. Myers, III†

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I. INTRODUCTION

The Association of Immigration and Nationality Lawyers was founded on October 14, 1946, in Manhattan, New York.1 At that time, the organization consisted of nineteen members.2 Seventy-one years later, that organization—now named the American Immigration Lawyers Association (AILA)—boasts more than 15,000 members.3

Why do immigrants, their families, and their employers need so many lawyers? This article will help answer this question by tracing how our immigration law structure and policies have evolved to their current state of affairs within our “nation of immigrants.”4 For example, although the total number of legal immigrants entering the United States during the 1950s was already more than 2.5 million, that number rose to 3.3 million in the 1960s.5

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4. President Kennedy is generally regarded as having first used this phrase as the title of his book on American immigration, written while he was then a U.S. Senator. See JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1959).
of immigrants entering the United States continued to increase until the 1980s, when the annual number of lawful immigrants dropped to around 500,000 per year. This article will address, among other things, a brief history of immigration law throughout the decades, historical events and their impact on immigration policy, how the policies of President Trump have differed from those of President Obama, and thoughts on the future of immigration law and policy in America.

II. HISTORY OF IMMIGRATION LAW

A. Early Immigration to the United States

To refer to the earliest American view of immigration as “policy” is imprecise. The new country needed all the settlers it could muster. Early American and pre-American colonists were primarily of European origin, coming from Great Britain, France, the Netherlands, and Spain. With them came involuntary immigrants who were the earliest non-Europeans: African male and female slaves. By the first census in 1790, the total population of the United States was 3,227,000. Seventy-five percent of this total consisted of persons of English, Scottish, and Scottish-Irish heritage. Eight percent were German. Other nationalities that represented a significant number were Dutch, French, Swedish, and Spanish.
Surprisingly, immigration-stoked nativist tensions began early in the United States. In 1753, Benjamin Franklin reflected on these tensions in the following observations relating to the arrival of Germans in Pennsylvania:

Those who come hither are generally of the most ignorant Stupid Sort of their own Nation . . . and as few of the English understand the German Language, and so cannot address them either from the Press or Pulpit, ‘tis almost impossible to remove any prejudices they once entertain. . . . Not being used to Liberty, they know not how to make a modest use of it.

Throughout the nineteenth century, population overcrowding in Europe created a fortuitous match between the needs of the United States and its immigrant arrivals. The 1864 Republican national platform reflected this relationship:

[F]oreign immigration, which in the past has added so much to the wealth, development of resources and increase of power to the nation, the asylum of the oppressed of all nations, should be fostered and encouraged by a liberal and just policy.

By the mid-1800s, immigration had increased by nearly 600 percent to more than four million—mostly from Western Europe. The need for labor following the Civil War, along with the construction of intercontinental railway lines that facilitated dispersion of migrants west from the east coast, fueled much of this immigration. The people of the United States heard anti-immigrant concerns and nativist ideas from groups such as the Know

18. Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), http://founders.archives.gov/documents/Franklin/01-04-02-0173 [https://perma.cc/M22C-JUGJ].
19. BRIEF HISTORY, supra note 11, at 581 (“America . . . had a boundless need for people to push back the frontier, to build the railways, to defend unstable boundaries, and to populate new States. The belief in America as a land of asylum for the oppressed was reinforced by the commitment to the philosophy of manifest destiny.”).
21. See BRIEF HISTORY, supra note 11, at 582.
22. Id. at 583.
Nothing party, whose anti-Catholicism supporters feared labor competition, crime, poverty, and the political impacts of immigration. Nevertheless, immigration continued to increase during the latter half of the nineteenth century to more than five million immigrants in 1880, almost all of whom came from Great Britain, Germany, and Ireland.

The earliest immigration-control legislation focused on excluding immigrants who possessed unwanted moral characteristics. For example, the first immigration laws barred convicts and prostitutes. On August 3, 1882, the Immigration Act of 1882 became the country’s first general immigration law. Then came the Chinese Exclusion Act of 1882, which represented the first U.S. immigration law barring immigrant eligibility based solely on national origin. The Chinese Exclusion Act created a ten-year moratorium on Chinese labor immigration. The Act required the few non-laborers who sought entry to the United States to obtain certification from the Chinese government that they were qualified to immigrate. Because the Act defined “Chinese laborers" as "skilled and unskilled laborers and Chinese employed in mining.”

23. See Carl M. Cannon, Immigration and the Rise & Fall of the Know-Nothing Party, REALCLEARPOLITICS (Feb. 18, 2015), https://www.realclearpolitics.com/articles/2015/02/18/immigration_and_the_rise__fall_of_the_know-nothing_party_125649.html [https://perma.cc/74ZC-6M3P]. See generally E.B. BARTLETT ET AL., PLATFORM OF THE AMERICAN PARTY, ADOPTED BY THE NATIONAL CONVENTION, JUNE 15, 1855 (1855), https://www.sethkaller.com/slideshow.php?id=712&t=t-712-001-Ks22547_w.jpg [https://perma.cc/92Y4-7TZE]. Members of the group were instructed to respond “I know nothing” when questioned about their participation and ideals (showing the party was averse to grants of land or rights being extended to those “foreigners not naturalized”). Id.

24. BRIEF HISTORY, supra note 11, at 583.


28. Id. § 1, 22 Stat. at 59 (“[T]en years next after the passage of this act, the coming of Chinese laborers to the United States [shall] be . . . suspended.”).

29. Id. § 6, 22 Stat. at 60 (requiring that permitted Chinese immigrants be issued a certificate—written in English—detailing all their physical, occupational, and prior residential information).
very few Chinese could enter the country under the law. The Supreme Court, in *Fong Yue Ting v. United States*, upheld the Chinese Exclusion Act’s constitutionality over Justice Field’s vigorous dissent. The Chinese Exclusion Act was not repealed until 1943.

**B. The United States Implements Its First Numerical Quotas**

Until the 1920s, legal restrictions on immigration were focused more on qualitative characteristics than on numbers of immigrants admitted to the United States. This changed between 1921 and 1929 when Congress adopted the Immigration Act of 1924, which implemented a national origins quota. This quota effectively prevented individuals from immigrating if they were born in the “barred zone”—a region that consisted almost entirely of Asian countries.

Racial superiority was a dominant influence on the passage of the national origins quota. Testimony from Dr. Harry H. Laughlin, a eugenics consultant to the House Judiciary Committee on Immigration and Naturalization in the 1920s, presented his theory of the ethnic superiority of Caucasians:

> We in this country have been so imbued with the idea of democracy, or the equality of all men, that we have left out of consideration the matter of blood or natural born hereditary mental and moral differences . . . The National

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30. Id. § 15, 22 Stat. at 61.
35. *Brief History, supra* note 11, at 583.
Origins provisions of the immigration control law of 1924 marked the actual turning point from immigration control based on the asylum idea . . . definitely in favor of the biological basis.\(^{36}\)

This eugenics argument continued to influence the immigration debate during the decade but was soon replaced by practical considerations.\(^{37}\)

C. Factors Influencing U.S. Immigration in the 1930s and 1940s

Immigration to the United States, particularly since 1930, has directly reflected the economy’s need for immigrants as a labor supply.\(^{38}\) As the economy became stronger, immigration increased; when the economy weakened, immigration declined.\(^{39}\) This phenomenon was strikingly apparent during the Great Depression, when immigration virtually stopped because of economic hardships and restrictive immigration laws.\(^{40}\) The economy’s effect became further apparent in the steady rise in immigration during the United States’ period of sustained economic growth after World War II.\(^{41}\) Additionally, the Displaced Persons Act of 1948\(^{42}\)—the first refugee legislation in the nation’s history— influenced immigration to a significant degree.\(^{43}\)

Following the Russian Revolution and the resulting spread of Communism throughout the world, the United States sought to limit its influence.\(^{44}\) U.S. immigration policy in the 1930s and 1940s,

\(^{36}\) Id. at 585–86 (footnote omitted).

\(^{37}\) See infra Part II.C. But see infra Part II.A (wherein Congress returned to a national origins argument to support immigration legislation).


\(^{39}\) See id. See generally BRIEF HISTORY, supra note 11, at 586 (noting the balancing act that Americans of the period faced between economic protectionism and humanitarian idealism when it came to immigration).

\(^{40}\) Cf. Office of Immigration Statistics, supra note 38.

\(^{41}\) See id.


\(^{43}\) BRIEF HISTORY, supra note 11, at 586.

\(^{44}\) See Red Scare, HISTORY.COM, https://www.history.com/topics/cold-war/red-
however, was not all about eliminating Communism within its borders—immigration policy took a pragmatic turn in the form of the Bracero Program. Originally embodied in a 1942 executive order implementing a bilateral agreement between the United States and Mexico, Congress formally adopted the Bracero Program in 1951—nearly a decade after the Program’s initiation. The Program authorized the entry of hundreds of thousands of Mexican agricultural workers into the United States to supplement what was thought to be a post-World War II worker shortage.

III. MODERN IMMIGRATION LAW

A. The Immigration and Nationality Act of 1952

In 1952, Congress enacted the Immigration and Nationality Act (INA) to finally resolve the patchwork of federal immigration laws that Congress had enacted since 1790. The INA has been tremendously significant to U.S. immigration law and has served as the structural framework of the nation’s immigration laws, even after being amended several times.

The INA originally contained a controversial national origins quota, which was based on the 1920 U.S. census and imposed a 150,000-person limit on immigrants from the Eastern Hemisphere. Congress’ rationale for this limitation was somewhat defensive:

Without giving credence to any theory of Nordic superiority, the subcommittee believes that the adoption of the national origins formula was a rational and logical method of numerically restricting immigration in such a scare.

47. BRACERO HISTORY ARCHIVE, supra note 45.
manner as to best preserve the sociological and cultural balance of the United States.\footnote{Critics of the INA said that the Act’s provisions were more restrictive than the country needed, particularly with respect to the national origins limitations. President Truman bluntly expressed this opinion in his veto message:}

Today, we are “protecting” ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe . . . . The countries of Eastern Europe have fallen under the Communist yoke—they are silenced, fenced off by barbed wire and minefields—no one passes their borders but at the risk of his life. We do not need to be protected against immigrants from these countries—on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe . . . . These are only a few examples of the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law . . . . In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.\footnote{Congress overrode President Truman’s veto by a vote of 278 to 113 in the House and 57 to 26 in the Senate. Despite President Truman’s objections, the INA’s structure of inadmissible categories of individuals, classifications of nonimmigrants, numerical immigrant quotas, defined “preferences” of immigrants, immigrant admission procedures, procedure for obtaining permanent resident status, and immigrant removal procedures has remained largely intact.}


\footnote{See WEISSBRODT & DANIELSON, supra note 51, at 16.}

\footnote{HARRY S. TRUMAN, IMMIGRATION AND NATIONALITY ACT, H.R. DOC. NO. 82-520 (1952).}

\footnote{See id.}

\footnote{Immigration and Naturalization Act § 212, 8 U.S.C. § 1182 (2012) [hereinafter INA].}

\footnote{INA §§ 101(a)(15), 214, 8 U.S.C. §§ 1101(a)(15), § 1184.}

\footnote{INA § 202, 8 U.S.C. § 1152.}

\footnote{INA § 203, 8 U.S.C. § 1153.}

\footnote{INA § 214, 8 U.S.C. § 1184.}

\footnote{INA § 245, 8 U.S.C. § 1255.}

\footnote{INA § 237, 8 U.S.C. § 1227.}
The physical structure of the INA has remained remarkably durable—so much so that it is still common for those who regularly deal with immigration law to refer to nonimmigrant visa statuses as “E-1s,” “H-1Bs,” “H-2As,” “L-1s,” “O-1s.” These references reflect the statutory subsections of the INA section 101(a)(15) in which these statuses, the inadmissibility grounds, and even some forms of relief are located. For all of President Truman’s criticism of the philosophy and content of the INA, the Act has proven to be, structurally, quite resilient. As shown in the following sections, the INA has only occasionally undergone major amendments.

B. U.S. Immigration Policy in the 1950s, 1960s, and 1970s

1. Anti-Communism and Immigration Policy During the 1950s

One can trace the evolving values of the United States by reading the grounds for immigrant inadmissibility in section 212 of the INA. U.S. immigration laws have reflected the rejection of a wide variety of behaviors, such as criminal behavior, terrorist activities, Nazi participation, participation in genocide, illegal entries or misrepresentations to secure immigration, returning after deportation, and polygamy. Immigration law in the 1950s aligned with a heightened opposition to Communism, reflected by the U.S. policy decision to become a refuge for those fleeing Communism. The INA embodied this refugee policy in several amendments that authorized refugee admissions outside the national origins quota system. For example, the Refugee Relief Act of 1953, the 1954 amendments, the Refugee-Escapee Act of

65. See INA §§ 101(a)(15)(E), (H), (L), (O), 8 U.S.C. §§ 1101(a)(15)(E), (H), (L), (O).
74. Brief History, supra note 11, at 588.
1957,\textsuperscript{77} and the Fair Share Law of 1960\textsuperscript{78} focused on welcoming and protecting those immigrants fleeing from Communist countries, the Middle East, and Cuba.\textsuperscript{79}

2. The Abolition of the National Origins Quota and Immigration Policy in the 1960s and 1970s

Following the congressional override of his veto in 1952, President Truman appointed “The President’s Commission on Immigration and Naturalization.”\textsuperscript{80} This commission issued a 319-page report urging the abolition of the national origins quota and recommending a quota formula that was not based on “national origin, race, creed or color.”\textsuperscript{81} Ultimately, President Kennedy embraced the commission’s report and worked on securing amendments to the INA.\textsuperscript{82} After President Kennedy’s assassination, President Johnson picked up the national origins quota issue.\textsuperscript{83} During President Johnson’s administration, Congress passed the 1965 INA amendments.\textsuperscript{84} These amendments replaced the national origins quota formula with a system based primarily on familial and skills preferences.\textsuperscript{85}

The 1965 amendments fundamentally changed the INA and formed the basis for the current quota system.\textsuperscript{86} The amendments

\begin{itemize}
\item \textsuperscript{77} Pub. L. No. 85-316, 71 Stat. 639 (1957).
\item \textsuperscript{78} Pub. L. No. 86-648, 74 Stat. 505 (1960).
\item \textsuperscript{79} BRIEF HISTORY, supra note 11, at 588.
\item \textsuperscript{80} See President Harry S. Truman, Statement by the President Upon Issuing Order Establishing a Commission on Immigration and Naturalization (Sept. 4, 1952), http://www.presidency.ucsb.edu/ws/index.php?pid=14244 [https://perma.cc/5YCS-XAJB].
\item \textsuperscript{83} Muzaffar Chishti et al., Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States, MIGRATION POL’Y INST. (Oct. 15, 2015), https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states [https://perma.cc/VV3W-UL5B].
\item \textsuperscript{84} Pub. L. No. 89-236, 79 Stat. 911 (1965).
\item \textsuperscript{85} See id.
\item \textsuperscript{86} See Chishti, supra note 83.
\end{itemize}
“marked a radical break with previous policy and . . . led to profound demographic changes in America.” The amendments created an annual cap on “visas for immigrants from the Eastern Hemisphere, with no single country allowed more than 20,000 visas,” and established a somewhat lower cap for immigrants from the Western Hemisphere. Additionally, the amendments reserved “[t]hree-fourths of admissions . . . for those arriving in family categories.” Spouses, minor children, and parents of adult U.S. citizens were exempt from the caps; twenty-four percent of family visas were assigned to siblings of U.S. citizens.

In 1976, Congress adjusted the preference system to redefine who was eligible to immigrate and ultimately applied a 20,000 per country limit to the Western Hemisphere. “[I]n 1978, a worldwide immigrant visa quota was set at 290,000.”

C. Developments in Immigration Law During the 1970s

Relative to the complexities of today’s immigration system and enforcement agencies, the legal immigration landscape of the 1970s was relatively straightforward and accessible. Routinely, officials typed and mailed documents; applicants received their decisions by mail or in person. The implementing agencies—the Immigration and Naturalization Service (INS), the State Workforce Agencies, and the Department of Labor and State Department—were also relatively accessible. Because the process was simpler and shorter than in modern day, the outcomes of nonimmigrant and immigrant visa status applications were predictable. Applicants usually received their decisions within days or weeks.

During this period, attorneys and their clients could appear at an INS office, a U.S. embassy, or even a U.S. consulate to have a
nonimmigrant petition decided or a visa issued while they waited. Many INS offices had an upfront adjudication policy, which allowed individuals seeking a status adjustment to “permanent resident” to appear at an INS office, file their paperwork along with the modest filing fee, and receive employment authorization that same day. The INS would then schedule applicants for their interviews, at which time INS would regularly approve the applications.

Little more than a quick visit to the Social Security Office was needed for a foreign visitor to secure a U.S. social security number. No effective mechanism existed for counting the number of individuals entering or departing the United States. The only measurement available was through use of a simple little card, known as an I-94. The INS issued an I-94 card to most immigrants, who were then supposed to return the card to immigration authorities upon departure. Often, immigrants did not return their cards. Even if an immigrant returned their I-94 card upon leaving the United States, the INS would simply send the card to a storage facility where it was virtually impossible to retrieve.

At this time, employers regularly hired undocumented immigrants without acquiring knowledge of their prospective employees’ immigration statuses; employers had no obligation to question it. Furthermore, an exception to employer liability—often referred to as the “Texas Proviso”—protected businesses from violating federal law even if the hiring of these individuals constituted “harboring” an undocumented person. These conditions made the U.S. labor market freely open to immigrants with few adverse consequences to either party.

With relatively low border patrol and interior enforcement presence, limited documentation of entries and departures, availability of Social Security numbers for anyone who wanted one, walk-in service for most immigrant benefits, and no consequences for employers hiring undocumented workers, the result was inevitable: many undocumented immigrants were living in the United States. The most reliable estimates from that time suggested that about three million undocumented immigrants were living in the United States by 1980.

In the words of one observer, “[i]nstead


of the [expected] 450,000 immigrants anticipated in 1980, 808,000 legal immigrants, refugees, and special entrants were admitted, and an unknown number of illegal or undocumented workers, as many as 500,000, entered by various means." It comes as no surprise that, by 1980, many believed that immigration to the United States was out of control.

D. Employer Responsibility for Verifying Employee Immigration Authorization Status and Marriage Fraud Reduction

Given the state of immigration during the latter half of the twentieth century, Congress created the Select Commission on Immigration and Refugee Policy in 1978. Congress gave the Commission two years to develop a remedy for what was widely perceived as an outdated immigration system. The Commission’s report from March 1981 contained sixty-seven recommendations designed to reassert the government’s ability to regulate immigration. Among the Commission’s recommendations were objectives of establishing tougher enforcement practices, higher immigration quotas, amnesty for most illegal aliens already in the United States, and a “more reliable” means of checking the immigration status of all workers. Congress essentially adopted these recommendations through the Immigration Reform and Control Act of 1986 (IRCA).

Signed by President Reagan in 1986, IRCA focused not only on dealing with the undocumented population, but also on discouraging the employment of undocumented immigrants. IRCA assumed a forgiving attitude toward some undocumented immigrants who lived in the United States unlawfully for many

resourceID=000844 [https://perma.cc/7NJ9-EMHP].
98. Id.
100. Id.
102. See id.
years. However, IRCA also shifted a significant level of responsibility to immigrants and their employers to acquire and maintain mechanisms of authorizing lawful employment status. IRCA represented a political compromise: exchanging a “legalization” program affecting millions of undocumented persons for a requirement that employers must verify authorized status of all employees on pain of civil, or even criminal, sanctions. Conversely, IRCA prohibited employers from engaging in discriminatory practices against permanent immigrants who were legally present in the United States.

Essentially, IRCA turned employment in the United States into a regulated commodity by fundamentally changing the relationships between U.S. employers, foreign-born workers, and the immigration agencies. Titled the Simpson-Mazzoli Act—with reference to former Senator Alan K. Simpson (R-WY) and former Congressman Romano L. Mazzoli (D-KY)—IRCA permanently raised the level of employer responsibility concerning immigration authorization in all employer-employee relationships. Although several years passed before IRCA’s employment verification and employer sanction provisions gained full political traction, the ubiquitous “Form I-9” became an element of virtually every employment relationship consummated after November 6, 1986.

The impacts on these relationships are shown by the monetary consequences to employers for straying from the regulations;

103. INA § 245(a), 8 U.S.C. § 1255(a) (2012)
104. See id.
105. See id.
106. See id. §§ 101, 201.
109. Catherine P. Wells, The Modification and Expansion of the Employment Eligibility Verification Process, in THE IMPACT OF REVISIONS TO THE I-9 FORM AND E-VERIFY PROCESS 2009 WL 1428147, at *1 (“Pursuant to IRCA, following November 1986, all employers were required [sic] verify the employment authorization of all newly hired employees by completing a Form I-9 [sic] and reviewing documentation confirming each employee’s [sic] identity and authorization to work in the United States.”).
however, since IRCA’s passage, employer sanction fines have varied considerably. For instance, in 1999, the total amount of administrative fines levied was almost $1.7 million.\footnote{110} That figure dropped to zero in 2006;\footnote{111} thereafter, this figure began its steady increase, reaching over $16 million in 2014.\footnote{112} Criminal fines and forfeitures during the same period experienced a similar pattern, exceeding $35 million in 2014.\footnote{113}

The broad amnesty IRCA provided to undocumented immigrants was inextricably linked to IRCA’s employer sanctions and verification requirements. IRCA’s amnesty applied to millions of unauthorized immigrants who lived in the United States since January 1, 1982, and were continuously present in the United States until November 6, 1986.\footnote{114} According to the Migration Policy Institute, this program accounted for approximately 1.6 million individuals receiving permanent residence.\footnote{115}

Additionally, IRCA carved out provisions of law that penalized employers for engaging in unfair immigration-related employment practices.\footnote{116} This portion of IRCA sought to deter U.S. employers from avoiding immigrant employment altogether. These provisions prohibited employers with four or more employees from practicing citizenship or immigration-status discrimination “with respect to hiring, firing, and recruitment or referral for a fee.”\footnote{117} The legislation also prohibited employers with small numbers of employees from practicing “national origin” discrimination.\footnote{118}


\footnote{111. \textit{Id.}}

\footnote{112. See \textit{Bruno, supra note 110, at 5.}}

\footnote{113. \textit{Id.}}

\footnote{114. IRCA, Pub L. No. 99-603, § 201, 100 Stat. 3359, 3394–95 (1986) (allowing some brief, casual, and innocent departures to be forgiven for amnesty qualification).}


\footnote{117. § 102, 100 Stat. at 3374–80.}

\footnote{118. \textit{Id.} (including employers with more than three but fewer than fifteen employees).}
Under these provisions, employers could not request additional documents other than those required to verify employment eligibility, reject reasonably genuine-looking documents, or specify a preference for certain documents over others with the purpose or intent of discriminating on the basis of citizenship status or national origin. Finally, IRCA’s provisions prohibited retaliation against or coercion of employees who filed unfair employment practices complaints.

The primary classes of individuals protected by IRCA were U.S. citizens, permanent residents, temporary resident asylees, and refugees. These laws were (and are) enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, later renamed the Immigration and Employee Rights Section.

In addition to IRCA, the Immigration Marriage Fraud Amendments of 1986 (IMFA) increased personal responsibility on parties by adding consequences for abuse of marriage-based grounds for permanent residence. Before IMFA, parties who married solely for immigration purposes faced some consequences, but identifying fraudulent marriages was far more difficult for immigration agencies. After IMFA, parties who were married less than two years before acquiring permanent residence status received a conditional-status grant. IMFA required review of the grant prior to the second anniversary of the conditional residence status. Additionally, IMFA required a higher burden of proof of legitimacy before a couple could receive approval of a marriage that occurred

119. Id.

120. Id.


123. See id.

124. See Immigration Marriage Fraud Amendments of 1986, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/link/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-11685/0-0-0-11691.html [https://perma.cc/7D9F-H4BB]. While the consequences remained largely unchanged after IMFA, the act’s passage largely addressed the question of fraud through use of a “conditional residence” process. Id. This counteracted the opportunity for aliens to obtain a permanent residency through quickie marriages or “marriage for hire” schemes.” Id.


126. Id.
during removal proceedings.\textsuperscript{127} After IMFA, the consequences of entering a fraudulent marriage were much more severe.\textsuperscript{128}

\section*{E. The Immigration Act of 1990}

In a speech to AILA in the mid-1990s, former Congressman Peter Rodino was asked why Congress had found it necessary to divide immigration reform into two parts—the first dealing primarily with undocumented immigrants. His answer was simple: Congress certainly would have preferred to handle the entire immigration reform issue at one time; however, it was not politically feasible to address any issues of legal immigration until Congress addressed the issue of illegal immigration separately.\textsuperscript{129}

The Immigration Act of 1990 (IMMACT 90)\textsuperscript{130} contained the most comprehensive provisions concerning legal immigration since the 1965 amendments. Some believe it to be the most significant legal immigration legislation since 1924.\textsuperscript{131} Senator Simpson, one of the bill’s chief sponsors, said that the Act culminated the decade-long effort to “close the back door” of illegal immigration “while [opening] the front door wider to allow skilled immigrants of a more diverse range of nationalities.”\textsuperscript{132} IMMACT 90 is far too comprehensive to fully summarize in this article, but some aspects are notable. Specifically, IMMACT 90 established a flexible worldwide cap on family-based, employment-based, and diversity immigrant visas.\textsuperscript{133} IMMACT 90 also provided that visas for any single foreign state in these categories could not exceed seven percent of the total number of available visas.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} See id.
\item \textsuperscript{131} Cf. \textit{Congress Approves Major Immigration Reform}, 67 \textit{INTERPRETER RELEASES} 1209 (Oct. 29, 1990).
\item \textsuperscript{134} Id. § 131, at 4999.
\end{itemize}
IMMCACT 90 and its related technical amendments substantially increased the overall immigrant quotas to 700,000, which would decrease to 675,000 after three years; increased the immigrant quota allocations to family members; and increased and expanded employment-based immigrant quotas, as well as most of the nonimmigrant employment-based quotas. IMMCACT 90 further established the Employment Creation Immigrant Visa, EB-5.

The provisions of IMMCACT 90 redefined several family-based immigrant quotas and nearly tripled the number of employment-based immigration preferences—from 54,000 to 140,000 annually—creating significant new immigrant classifications called “preferences.” This new law also created a separate category of 50,000 “diversity” immigrant visas for nationals of “underrepresented countries.” IMMCACT 90 made significant changes to the H, L, J, and E nonimmigrant visa classifications, and added a few important nonimmigrant visa statuses—such as the O (extraordinary ability), P (athletes and entertainers), Q (international cultural exchange), and R (religious workers).

IMMCACT 90 also added a Temporary Protected Status authorization, which allowed certain individuals from countries beset with conflicts, natural disasters, or other unsafe conditions to remain in the United States temporarily. Finally, IMMCACT 90 made a significant change to the H-1B visa status, adding an annual cap of 65,000 immigrants. The Act required an employer to file a “labor condition attestation” application, assuring that H-1B workers were being paid either the prevailing wage for the position or the actual employer’s wage, whichever was higher. The annual quota became a significant

135. Id.
136. Id. § 121, at 4989. EB-5 visas gives preference to immigrants who have extraordinary abilities or hold advanced degrees, and those who are outstanding professors and researchers, multinational executives and managers, or skilled workers. Id.
137. Compare id. § 101, at 4982, with supra Parts IIIA–B. (discussing the “preference” criterion in two different eras).
138. § 131, 104 Stat. at 4998.
139. Id. §§ 205–209, at 5019–27.
140. Id. § 302, at 5030–36.
141. Id. § 205, at 5019–20.
142. Id. § 205, at 5021.
problem in later years as the need for highly skilled workers increased and exceeded the quota, resulting in an H-1B lottery.\footnote{143}

The Act’s favorable impacts were immediately felt on October 1, 1991.\footnote{144} After years of backlogs, the State Department Visa Bulletin showed virtually all immigrant categories as available.\footnote{145} IMMACT 90’s impact and the emergence of the high-tech revolution converged at the turn of the century, when many feared that databases and computer systems would require significant reprogramming.\footnote{146} This led to a high volume of computer engineers immigrating to the United States, particularly from India.\footnote{147}

On the enforcement side, IMMACT 90’s provisions reduced legal processes available to individuals convicted of aggravated felonies,\footnote{148} expanded the definition of an aggravated felony,\footnote{149} eliminated judicial recommendations against deportation,\footnote{150} and barred aggravated felons from admission to the United States for twenty years.\footnote{151} Finally, IMMACT 90 comprehensively revised the grounds of immigrant exclusion and deportation.\footnote{152}

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\footnote{143}{See id. § 205, at 5019; infra Part V.A.}
\footnote{146}{See Panic for the Year 2000 (CBC television broadcast Jan. 4, 1999), http://www.cbc.ca/archives/entry/panic-for-the-year-2000 [https://perma.cc/J3S3-R3V] (addressing fears over an approaching “large-scale breakdown” of technology surrounding the new millennium).}
\footnote{149}{§ 501, 104 Stat. at 5048.}
\footnote{150}{Id. § 505, at 5050.}
\footnote{151}{Id. § 514, at 5053.}
\footnote{152}{Id. § 601, at 5067–77.}
F. Immigration Law into the 1990s and Beyond

Legal immigration to the United States continued to be substantial after 1986, hitting one million in 1989 for the first time in U.S. history. In fact, legal immigration to the United States exceeded 900,000 people per year in two-thirds of the years between 1986 and 2015. In 2016, 13.5 percent of the U.S. population was comprised of immigrants. Likewise, since 1986, the growth of immigration legal practice has been exponential. The increased complexity of immigration laws—coupled with a greater number of immigrants coming to the United States—has required our society and our profession to adapt to new immigrant classifications, and to challenge agency interpretations of immigration laws, sometimes relying on the efforts of pro bono legal counsel and nonprofit organizations.

In addition to this increased complexity and volume of filings—and restructuring agencies to accommodate these
changes—governmental immigration agencies made a fundamental management change that would have implications for decades to come. Gradually, agencies regionalized adjudication functions so that it was no longer possible to physically go into an office and obtain a benefit. Immigration lawyers faced a system of “remote adjudications,” in which lawyers had virtually no interaction with the agents making the application and petition decisions. One might have thought that IRCA and IMMACT 90 would resolve most U.S. immigration issues. This was not the case. The U.S. Commission of Immigration Reform (the “Jordan Commission”), created by IMMACT 90, was tasked with considering policies and recommending changes in several areas of immigration enforcement. The Jordan Commission made interim reports in 1994, 1995, and 1997. The Commission’s 1994 interim report, entitled Restoring Credibility, recommended controlling illegal immigration through more aggressive enforcement efforts. By the time the Commission released Restoring Credibility, the number of undocumented immigrants in the United States had reached approximately 3.6 million. The Commission recommended

158. See Ingrid V. Eagly, Remote Adjudication in Immigration, 109 NW. L. REV. 933, 942, 945 (2015) (stating that “[i]today's immigration bench sits in sixty different geographic jurisdictions” with “several different hearing locations” and that “[t]ypically, the prosecutor, interpreter, and any respondent’s counsel remain in the courtroom with the judge rather than traveling to the detention facility to appear on video with the immigrant”).
159. Id. at 945 (“In 1996, Congress authorized the use of televideo in all immigration proceedings.”).
161. A thorough discussion of these reports is beyond the scope of this article but may be found elsewhere. See Carlos Ortiz Miranda, United States Commission on Immigration Reform: The Interim and Final Reports, 38 SANTA CLARA L. REV. 645 (1998).
163. See id. at 5, 15 (stating the Commission believes “that it is possible to reduce unlawful immigration in a manner that is consistent with our traditions, civil rights, and civil liberties,” but that “[u]nfortunately, no quick and easy solutions are available”).
increasing border controls and hiring more border police to reduce the flow of illegal immigrants from Mexico into Texas, Arizona, and California. The Commission’s 1995 interim report, entitled Setting Priorities, focused on legal immigration and emphasized two main areas: family-based and skill-based immigration. Setting Priorities urged the simplification of immigration categories and recommended the United States admit no more than 550,000 legal immigrants annually.


By the release of the second interim report in 1995, Congress’ composition was quite different from what it was in both 1986 and 1990. Specifically, when IRCA was passed in 1986 during Republican President Reagan’s second administration, Congress was divided: Democrats controlled the House of Representatives, and Republicans controlled the Senate. However, when IMMACT 90 was passed, Republican George H.W. Bush was President, and Democrats controlled both houses of Congress.
In the cultural arena, public commentary in the 1990s reflected anxiety over the increase in immigration from non-European countries. In 1995, for example, Peter Brimelow wrote a national bestseller entitled *Alien Nation*, criticizing the United States for falling away from its Caucasian roots through its immigration policies.\(^{174}\) Similarly, white nationalist Samuel Francis opined that “[t]he threat of white extinction is due to non-white immigration and high fertility coupled with low white fertility.”\(^{175}\) Even former U.S. presidential candidate Patrick J. Buchanan supported this notion in his book, *The Death of the West: How Dying Populations and Immigrant Invasions Imperil our Country and Civilization*.\(^{176}\)

By the time Congress considered the next significant immigration laws, the United States had a Democratic president in Bill Clinton, and “[f]or the first time in forty years, both houses of Congress were controlled by Republican[s].”\(^{177}\) Moreover, Republicans were interested in reducing overall immigration.\(^{178}\)

\(^{174}\) See, e.g., *Peter Brimelow, Alien Nation: Common Sense About America’s Immigration Disaster*, at xviii (1995) (“In this book, I discuss the surprising evidence that immigration is, and probably always has been, much less important to American economic growth than is conventionally assumed.”). Beginning in the 1970s, the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS), Numbers USA, The Pioneer Fund, and VDARE—a nationalist website founded and edited by Brimelow—became public advocates for reduced immigration. See Heidi Beirich, *The Nativist Lobby: Three Faces of Intolerance*, S. Poverty Law Ctr. (Jan. 31, 2009), https://www.splcenter.org/20090131/nativist-lobby-three-faces-intolerance [https://perma.cc/DQ2N-F3AX]. The influence of these and other immigration organizations, who have argued for reduced immigration, has expanded until today. See infra note 316.


\(^{178}\) In testimony before the Senate Immigration Subcommittee on March 14, 1995, Senator Alan K. Simpson (R-WY) outlined a “plan of attack” to deal with legal
a result, when the 104th Congress convened on January 4, 1995, Congress fully turned its attention to dramatically revising the legal system to increase immigration law enforcement. In his opening statement on September 13, 1995, Senator Simpson, Chairman of the Senate Subcommittee on Immigration, stated that a “false sense of security ha[d] resulted in an unnecessary increase in legal immigration.”


During the next year, extensive hearings and politics surrounded the issue of immigration. In fact, at a markup hearing on S. 269, Senator Simpson noted, “[w]e currently have an atmosphere in which almost anyone who wants to become [the next] President of the United States is using immigration as an avenue.” Moderating his approach somewhat, Senator Simpson warned against being swept along the current and urged Congress to

immigration that would emphasize legal immigration focusing on skilled immigrants, which would limit family sponsorship to members of the “nuclear family.” See Senate Immigration Subcommittee Hears Testimony on Legislative Proposals, 72 INTERPRETER RELEASES 377, 378–79 (Mar. 20, 1995). A Senate staffer indicated that a point system similar to those in effect in Australia and Canada might be considered. Id.

179. New Republican Congress Convenes, With Immigration High on the Agenda, 72 INTERPRETER RELEASES 58, 58–63 (Jan. 9, 1995) (discussing the then-anticipated roles of the political participants in this immigration law reform).
180. Senate Holds Hearing on Legal Immigration Reform, Ponders Draft Bill, 72 INTERPRETER RELEASES 1257, 1257 (Sept. 18, 1995).
181. See New Republican Congress Convenes, With Immigration High on the Agenda, supra note 179, at 59.
185. Senate Picks up the Pace, Heads Towards Markup of Simpson Bill, Administration Sends Bill to Congress, 72 INTERPRETER RELEASES 653, 653 (May 15, 1995).
consider “careful and thoughtful legislation . . . done in a way that is not nativist.”186

In 1996, the political conflict over immigration reform continued amid the bitter federal budget dispute between the Republican congressional leadership and the Clinton administration.187 The immigration legislative effort had adopted an ominous tone. One commentator noted at the time, “[c]haritable organizations understand that our nation’s current phase of hostility toward the foreign-born may find legislative expression. Many organizations already function in a hostile atmosphere. They are now, however, casting a wary eye toward legislation more draconian than they could have anticipated.”188

Eventually, on a motion by Senator Spencer Abraham (R-MI), S. 269 was split and eventually adopted in two parts: one addressing illegal immigration and the other addressing legal immigration.189 The House of Representatives followed the same divisional approach.190 This approach eliminated the immigration bills’ proposed reductions on future levels of family-based and employment-based immigration.

In the summer of 1996, the immigration legislation stalled in Congress. Disagreements in the Senate persisted over the newly created procedure of “expedited exclusion,” deadlines for asylum applications, admissibility bars for people who overstayed their nonimmigrant status, and specific income requirements for individuals filing affidavits of support for new immigrants.191 In the House of Representatives, a proposal that would have allowed states to deny public education to undocumented children was causing

186. Id.
188. Donald M. Kerwin, Don’t Give Me Your Tired, Your Poor or Your Huddled Masses: The Impact of Pending Legislation, 73 Interpreter Releases 157, 157 (Feb. 5, 1996).
189. Senate Committee Splits Immigration Reform Bill, House Floor Action is Next, 73 Interpreter Releases 313, 313 (Mar. 18, 1996); Senate Panel Continues Bill Markup, Simpson to Drop Employment Changes, 73 Interpreter Releases 289, 289–90 (Mar. 11, 1996).
However, the legislative process surrounding immigration reform eventually picked up steam, and on September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) into law.\(^{193}\)

Between 1993 and 2001, the Clinton administration’s approach reflected the Republican-controlled Congress’ emphasis on immigration enforcement. Although President Clinton supported legal immigration,\(^{194}\) when faced with strong Republican opposition, he did little to advocate for an increase in immigration. The bills that President Clinton signed were primarily aimed at enforcing laws against illegal immigration and unauthorized employment of undocumented workers.\(^{195}\)

In his 1995 State of the Union address, President Clinton announced a legislative proposal that would add seven hundred new Border Patrol agents; expand the employment verification pilot program; and increase penalties for alien smuggling, illegal reentry, failure to depart, employer violations, and immigrant document fraud.\(^{196}\) The President proposed streamlined deportation procedures to speed criminal aliens’ removal from the United States.\(^{197}\) This enforcement approach was clearly evident in the Violent Crime Control and Law Enforcement Act of 1994,\(^{198}\) the Antiterrorism and Effective Death Penalty Act (AEDPA),\(^{199}\) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,\(^{200}\) and IIRIRA.\(^{201}\) These acts eliminated eligibility for many

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192. Id. at 957.
194. BILL CLINTON, BETWEEN HOPE AND HISTORY 133–34 (1995) (“Immigrants who enter our country legally and begin the process of attaining citizenship today are little different from the strivers who were our own ancestors. We need to remember that, and repudiate those who argue against immigration as a thinly veiled pretext for discrimination.”).
195. Id. at 134 (“We must not tolerate illegal immigration.”).
197. See id.
federal benefits for noncitizens; increased border patrol resources; created criminal offenses for deported persons who reentered the United States; added new admissibility grounds, particularly for individuals who overstayed their nonimmigrant statuses; limited certain forms of federal judicial review; and significantly expanded government incarceration of undocumented persons.\footnote{202}

By 2000, U.S. legal-immigration laws were showing signs of insufficiency in meeting the nation’s long-term labor and family unification needs. IIRIRA’s six titles dealt almost exclusively with border control and interior enforcement.\footnote{203} Title I addressed border control, legal entry, and interior enforcement.\footnote{204} Title II focused on alien smuggling and document fraud.\footnote{205} Title III covered inspection, apprehension, detention, and removal.\footnote{206} Title IV dealt with employment restrictions.\footnote{207} Title V addressed public benefit restrictions,\footnote{208} and Title VI covered asylum, consular procedures, foreign students, and miscellaneous issues.\footnote{209}

While a comprehensive explanation of IIRIRA’s provisions is beyond the scope of this article,\footnote{210} several significant provisions have had lasting impacts. For example, section 110 of IIRIRA required the Attorney General to develop an “automated entry and exit control system.”\footnote{211} This automated system made accounting for the entry and departure of aliens much easier for immigration agencies. Further, section 123 authorized the establishment of pre-inspection

\footnote{104-208, 110 Stat. 3009-546 (1996).}
\footnote{203. Illegal Immigration Reform and Immigrant Responsibility Act § 1.}
\footnote{204. § 101, 110 Stat. at 3009-553.}
\footnote{205. § 201, 110 Stat. at 3009-564.}
\footnote{206. § 301, 110 Stat. at 3009-575.}
\footnote{207. § 401, 110 Stat. at 3009-655.}
\footnote{208. § 501, 110 Stat. at 3009-670.}
\footnote{209. § 601, 110 Stat. 3009-689.}
\footnote{210. For more on the 1996 Act, see generally INS Sends Instructions Highlighting Provisions, Effective Dates of New Law, 73 Interpreter Releases 1503 (Oct. 28, 1996); INS, State Dept.'s Begin Implementing New Law, Congress Passes Corrections Bill, 73 Interpreter Releases 1417 (Oct. 11, 1996); President Signs Immigration Overhaul Measure, 73 Interpreter Releases 1317 (Oct. 7, 1996); President Signs Immigration Overhaul Measure, 73 Interpreter Releases 1317 (Oct. 7, 1996); Eleventh-Hour Agreement Folds Immigration Bill Into Omnibus Spending Measure, 73 Interpreter Releases 1281 (Sept. 30, 1996).}
\footnote{211. § 110 Stat. at 3009-558.
stations at foreign airports to relieve Border Patrol agents of the burden of handling admissibility issues at land borders.\(^\text{212}\)

Section 133 of IIRIRA amended INA section 287 to allow the Attorney General to enter into written agreements with states and local subdivisions, which permitted state and local officers to receive training and certification to become immigration enforcement agents.\(^\text{213}\) IIRIRA replaced AEDPA’s summary exclusion procedures\(^\text{214}\) with expedited removal provisions.\(^\text{215}\) Additionally, IIRIRA imposed a one-year deadline on filing applications for asylum.\(^\text{216}\) IIRIRA also created new inadmissibility grounds for individuals who had remained “unlawfully present for more than 180 days and one year.”\(^\text{217}\) Under this provision, an individual who overstay his or her status by more than 180 days and voluntarily departed the United States was inadmissible for three years.\(^\text{218}\) Individuals who overstayed their status by more than one year and subsequently departed the United States were inadmissible for ten years.\(^\text{219}\)

With limited exceptions, a person who was present in the United States without admission or parole, or who arrived at a place other than a designated point of entry, was also inadmissible.\(^\text{220}\) Undocumented individuals who failed to attend their removal proceedings “without reasonable cause” were inadmissible for five years following their subsequent departure or removal from the United States.\(^\text{221}\) F-1 students who violated a term or condition of their status, including transferring from a private to a public school, were inadmissible for a five-year period beginning from the date of the violation.\(^\text{222}\)

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\(^{212}\) Id. at 3009-560.

\(^{213}\) Id. at 3009-563.


\(^{216}\) Id.

\(^{217}\) § 301(b)(B)(i)(I), 110 Stat. at 3009-576.

\(^{218}\) Id.

\(^{219}\) § 301(b)(B)(i)(II), 110 Stat. at 3009-576.

\(^{220}\) § 301(b), 110 Stat. at 3009-575–78.


\(^{222}\) Illegal Immigration Reform and Immigrant Responsibility Act, §§ 346, 625, 110 Stat. at 3009-638, 3009-699. F visas are non-immigrant student visas that allow foreigners to pursue education in the United States. F-1 students must be enrolled in and maintain a full course of study. See Aaron Larson, Student Visas, EXPERT
IIRIRA also significantly changed both the nature of the hearing process and immigrants’ rights in removal hearings. IIRIRA eliminated the distinction between “deportation” hearings—which formerly determined whether an individual was deportable—and “exclusion” hearings—which formerly determined whether an individual was inadmissible—lumping them all into “removal” hearings. Additionally, IIRIRA granted subpoena powers to immigration judges, enabling them to compel witnesses to appear to testify on behalf of or against an alien subject to the court’s jurisdiction. Removal hearings now required an alien to establish his or her admissibility “clearly and beyond doubt.” IIRIRA required those aliens who were admissible or admitted to prove that they were lawfully present by “clear and convincing evidence.”

“Suspension of deportation” relief was formerly available to individuals of “good moral character” who were continually present in the United States for at least seven years and who could show that their deportation would create severe hardship to themselves or to a spouse, parent, or child who was a U.S. citizen or a lawful permanent resident (LPR). Congress replaced the suspension of deportation relief with two versions of a form of relief known as “cancellation of removal”: one available to LPRs, and the other available to those who were not LPRs.

For cancellation of removal relief, LPRs now must show they have been an LPR “for not less than 5 years, [have] resided in the United States continuously for 7 years after having been admitted in any status, and [have] not been convicted of any aggravated felony.” To qualify for the same type of relief, non-permanent residents must show they have: (1) “been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [their] application; [2] been a person of good moral character during such period; [3] not been


223. § 304, 110 Stat. at 3009-587.
224. Id. at 589.
227. INA § 244(a), 8 U.S.C. § 1254(a) (1994).
228. INA § 212(c) was repealed and replaced with new INA § 240A(a) by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 304(b), 309(a).
229. Id.
convicted of an offense” under several sections of the INA; and (4) establish “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States” or an LPR. For both LPRs and non-permanent residents, the “continuous period” ends if “the alien is served a notice to appear” or if the alien commits certain offenses.

IV. EFFORTS TO LIMIT FEDERAL COURT JURISDICTION

Subject only to constitutional limitations, Congress and the executive branch have the authority to limit federal courts’ jurisdiction to review immigration. That said, the Supreme Court has held that habeas corpus petitions may be heard in federal courts because Congress has not stripped those courts of habeas corpus jurisdiction. Moreover, the Supreme Court has held that the Administrative Procedure Act confers jurisdiction for federal court review.

Beginning in 1952, the basis for federal judicial review of deportation orders has been by direct appeal from the Board of Immigration Appeals, not from the federal district courts. Individuals could only appeal immigration agencies’ orders of exclusion through habeas corpus. In 1996, Congress limited and streamlined administrative and judicial appeals procedures.

231. These include all criminal and related grounds of inadmissibility, all criminal grounds of deportability and grounds of deportability for failure to register and falsification of documents. See INA §§ 212(a)(2); 237(a)(2)–(3), 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)–(3).


237. Id.
AEDPA,\textsuperscript{238} IIRIRA,\textsuperscript{239} and the REAL ID Act of 2005 restricted habeas corpus and other indirect judicial review.\textsuperscript{240} Despite this, the Supreme Court has continued its reluctance—absent a clear statement of congressional intent—to hold that these statutes repeal habeas corpus jurisdiction over removal.\textsuperscript{241}

In 2011, the Supreme Court was called upon to interpret fundamental immigration law issues, with a significant issue being the role of the federal government in states’ efforts to control illegal immigration within their borders. For example, in \textit{Chamber of Commerce v. Whiting},\textsuperscript{242} the Court upheld an Arizona law that permitted the state to revoke a business license on a showing that the employer had employed an undocumented immigrant.\textsuperscript{243} Writing for the majority, Chief Justice Roberts stated:

\begin{quote}
Federal immigration law expressly preempts any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens. . . . [T]he Legal Arizona Workers Act . . . provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers. . . . Because we conclude that the State’s licensing provisions fall squarely within the federal statute’s savings clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted.\textsuperscript{244}
\end{quote}

\textsuperscript{243} \textit{Id}.
\textsuperscript{244} \textit{Id.} at 587 (quotation and citation omitted).
During the term that followed, the Supreme Court nullified three of four provisions of Arizona Senate Bill 1070 in *Arizona v. United States*, holding that federal immigration law preempted these provisions. The Court struck down provisions that made it a crime to be in Arizona without legal papers or for “an unauthorized alien” to apply for or obtain a job in the state. The statute had also allowed police “to arrest without a warrant a person ‘the officer [had] probable cause to believe’” had committed a crime that could lead to that person’s deportation. The Court further concluded, however, that the federal government had presented an insufficient record to nullify the provision of the statute permitting the police to “make a reasonable attempt . . . to determine the immigration status of any person they stop, detain, or arrest” if the police believed the person was in the country illegally. The Court left that provision intact, while acknowledging that a lower court might potentially see a challenge to that provision again. As discussed in Part VII below, the federal district courts, circuit courts, and the Supreme Court would once again be called upon to adjudicate important immigration issues, soon after the beginning of the Trump administration.

V. THE SHIFT OF IMMIGRATION POLICY TOWARD HOMELAND SECURITY

A. Effects of Economic Growth on Immigration and the American Competitiveness in the Twenty-First Century Act of 2000

The U.S. economy enjoyed historic growth during the 1990s. In fact, following the 1991 recession, the economy rebounded with the longest running expansion in the nation’s history. This long

246. Id. at 399–400.
247. Id. at 416; see id. at 400, 403.
248. Id. at 394.
249. Id. at 411–14.
250. Id.
expansion drove demand for skilled labor. The decade between 1990 and 2000 was a busy one for immigration lawyers and immigration law administering agencies. Employment-based immigrant quotas had substantially increased following the enactment of IMMACT 90 in 1991.\footnote{IMMACT 90 allowed 140,000 employment-based immigrants to enter the United States each year, which was almost triple the amount allowed under previous law. Immigration Act of 1990, Pub. L. 101-649, § 101(a), 104 Stat. 4978, 4987 (1990).}

This increase in employment-based immigrant quotas created a profound transformation for the United States’ employment-based immigration system—one that transformed from having a severe backlog of visa applications to having visas available to anyone who met the new criteria.\footnote{Compare Bureau of Consular Affairs, Visa Bull. 6-49, Visa Bulletin for Aug. 1991 (1991), with Bureau of Consular Affairs, Visa Bulletin for Oct. 1991 (1991).} Demand for labor certifications and H-1B visas, however, was so strong that the backlog for some employment-based immigrant visas, primarily for nationals of India and China, actually grew.\footnote{See Kenneth M. Geisler II, Fissures in the Valley: Searching for a Remedy for U.S. Tech Workers Indirectly Displaced by H-1B Visa Outsourcing Firms, 95 Wash. U. L. Rev. 465, 469 (2017) (“The tech industry’s demand for H-1B workers greatly exceeds the available supply, which is capped at 65,000 per year, albeit with plenty of exceptions.”).}

What’s more, H-1B visa applications started to exceed the allotted number far before the end of the fiscal year.\footnote{See, e.g., Jack McCarthy, Senator McCain to call for increase in H-1B Visas, Network World (Aug. 23, 1999), https://www.highbeam.com/doc/1G1-55548274.html [https://perma.cc/55B6-5FPJ].}

To address these developments, Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).\footnote{American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).} AC21 addressed many of the hardships facing H-1B employees attempting to maintain their lawful status while progressing toward the goal of becoming an LPR. First, AC21 increased the number of new H-1B visas available for fiscal years 1999–2003.\footnote{Id. § 102(a) (amending Section 214(g)(1)(A) of the INA to allow 195,000 temporary workers and trainees to enter the United States in fiscal years 2001, 2002, and 2003).} AC21 also exempted certain institutions of higher education, their related and affiliated nonprofit entities, nonprofit research organizations, and
governmental research organizations from the H-1B quota.\textsuperscript{258} Second, AC21 modified the way employment-based visas benefited certain classes of immigrant visas\textsuperscript{259} by enabling H-1B workers to change employers while the new employer’s H-1B petition was pending.\textsuperscript{260} Third, AC21 allowed H-1B petitions to extend beyond their normal six-year expiration in situations where labor certification applications took longer than 365 days to process.\textsuperscript{261} Finally, AC21 recaptured unused immigrant visas and restructured the amount of U.S. worker training fees that H-1B employers had to pay for petitions, to National Science Foundation competitive grant programs,\textsuperscript{262} and to other efforts to evaluate education and reduce immigration backlogs.\textsuperscript{263}

B. Effects of 9/11 on Immigration Reform

The 9/11 terrorist attacks caused significant change to the orientation of U.S. immigration laws and policies, reflecting a greater emphasis on national security. Following the attacks, Interpreter Releases—one of the oldest and most respected immigration law periodicals—led its September 24 edition with the following:

Reversing the momentum that had been building on Capitol Hill toward a more immigration-friendly climate, the tragic events of September 11, 2001, appear to have rewritten the legislative agenda for the foreseeable future. Lawmakers who several weeks ago were debating possible new guest worker and earned legalization programs now find themselves focused on a renewed round of border build-up plans and heightened restrictions on immigration.\textsuperscript{264}

On September 19, 2001, Attorney General John Ashcroft delivered the Bush administration’s proposed antiterrorism package to Congress.\textsuperscript{265} Eventually, Congress approved a new visa called the

\begin{itemize}
\item \textit{Id.} § 103.
\item \textit{Id.} § 104(a).
\item \textit{Id.} § 105.
\item \textit{Id.} §§ 106(a), 106(c)(2).
\item \textit{Id.} § 110.
\item \textit{Id.} §§ 201–205.
\item \textit{Events of Sept. 11 Spur Revised Custody Procedures, Altered Legislative Landscape, 78 Interpreter Releases 1493, 1493 (Sept. 24, 2001).}
\item Dan Eggen & Mary Beth Sheridan, \textit{Justice Drafts New Rules for Deportation,}
\end{itemize}
S nonimmigrant visa. This new visa was issued to aliens who possessed information concerning criminal or terrorist organizations and who would supply (or had supplied) such information to U.S. law enforcement agencies.

The Uniting and Strengthening America Act of 2001 (USA Act) also barred immigrant admission to the United States for a wide range of activities deemed to be supportive of terrorism. The USA Act included several notable sections. For example, section 412 amended INA to allow authorized mandatory detention of terrorist suspects and eliminated judicial review—by habeas corpus or otherwise—for any alien who may have been “engaged in any . . . activity that endanger[ed] the . . . United States.” Section 411 made the Act retroactive to all aliens regardless of when they entered the United States. Section 413 amended INA to grant the Secretary of State discretion to cooperate with other nations against terrorists and provided for interagency data sharing.

The USA Act passed the House of Representatives, and was later combined with provisions of a separate Senate bill, the Visa Integrity and Security Act of 2001. The Visa Integrity and Security Act required the government to expeditiously and fully implement the entry and exit data system mandated by section 110 of IIRIRA. In turn, Congress incorporated provisions from the USA Act and the Visa Integrity and Security Act into the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), which represented a compromise between the Senate and House bills. The process that Congress used to obtain this compromise was unusual, and it

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267. H.R. 2500.


269. See id at § 411(c).

270. Id at § 413.


272. Id.

angered some House Democrats. President Bush signed the USA PATRIOT Act into law on October 26, 2001.

Soon after Congress passed the USA PATRIOT Act, the Bush administration led a comprehensive reorganization of the immigration agencies. The Homeland Security Act of 2002 (HSA) combined twenty-two federal agencies into one. The HSA abolished the INS and created the United States Citizenship and Immigration Services (USCIS) as the exclusive agency dealing with adjudications and benefits programs. The reorganization consolidated the U.S. Customs Service, and rolled the inspection of borders and ports of entry into the Customs and Border Protection (CBP). The government transferred all other customs and law enforcement responsibilities, including detention and removal, intelligence, and investigations, to Immigration and Customs Enforcement (ICE). These efforts did not, however, extend to comprehensive reform of legal immigration.

Several years later, Congress made another attempt at comprehensive immigration reform. In 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) was introduced in the Senate. This bill was a bipartisan, broad-based proposal meant to reform the U.S. immigration system. It was co-sponsored by eight senators known as the “Gang of 8”: Senators Charles Schumer (D-NY), John McCain (R-AZ), Richard

274. President Signs Far-Reaching Antiterrorism Bill, 78 Interpreter Releases 1673, 1673 (Oct. 29, 2000); Robin Toner & Neil A. Lewis, A Nation Challenged: Congress; House Passes Terrorism Bill Much Like Senate’s, but With 5-Year Limit, N.Y. Times (Oct. 13, 2001), http://www.nytimes.com/2001/10/13/us/nation-challenged-congress-house-passes-terrorism-bill-much-like-senate-s-but.html [perma.cc/HN86-W7LB] (“Many lawmakers were outraged that a bipartisan bill, which had passed the Judiciary Committee by a unanimous vote, was set aside for legislation negotiated at the last minute by a very small group. Members rose to say that almost no one had read the new bill, and pleaded for more time and more deliberation.”).
277. Id. § 451(a)(1), at 2195.
279. Id.
Durbin (D-IL), Lindsay Graham (R-SC), Robert Menendez (D-NJ), Marco Rubio (R-FL), Michael Bennet (D-CO), and Jeff Flake (R-AZ).\footnote{See, e.g., Rachel Weiner, Immigration’s Gang of 8: Who are They?, WASH. POST (Jan. 28, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/?utm_term=.eae399476b1e [https://perma.cc/KX8Q-7JAM].} The bill attempted to cover everything from the process of immigrant legalization to the DREAM Act—including border protection, 700 miles of fencing along the border, a mandatory E-Verify employment verification system, changes in the family-based and employment-based immigration categories, and removal.\footnote{S. 744; see also A Guide to S.744: Understanding the 2013 Senate Immigration Bill, AM. IMMIGRATION COUNCIL (July 10, 2013), https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill [https://perma.cc/SB66-N9G8] (providing a summary of the bill).} Before passing the Senate on a 68-32 vote, S. 744 had received ninety-two amendments in the Judiciary Committee in addition to amendments on the Senate floor.\footnote{Amanda Peterson Beadle, Senate Judiciary Committee Reaches Agreement on Immigration Reform Bill, AM. IMMIGRATION COUNCIL (May 22, 2013), http://immigrationimpact.com/2013/05/22/senate-judiciary-committee-reaches-agreement-on-immigration-reform-bill/ [https://perma.cc/3VRS-VR4M].} However, because the House of Representatives refused to consider S. 744, the bill quietly died in the 113th Congress.\footnote{House Speaker John Boehner defended his actions by stating that “the American people and their elected officials don’t trust [President Obama] to enforce the laws as written.” However, many believed the Republican congress refused to consider the bill because there were no immediate benefits. See Why Immigration Reform Died in Congress, NBC NEWS (July 1, 2014), https://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276 [https://perma.cc/HG0M-F82B].} As of this writing, Congress has not introduced any further legislation dealing as comprehensively with immigration reform.

saying: “This bill will help protect the American people. This bill will make our borders more secure. It is an important step toward immigration reform.” The Secure Fence Act resulted in an effort called the Southern Border Initiative Network (SBInet). But only four years later, President Barack Obama dropped the SBInet initiative amid concerns over its expense and effectiveness. Despite those factors, President Donald Trump raised the ante by making a border wall—as opposed to a fence—along the southwestern U.S. border a centerpiece of his successful presidential campaign.

The debate over U.S. border security is largely the result of a lack of agreement on what constitutes a “secure border.” By one measure—comparing current to historical successful illegal entries—the United States seems to be approaching “secure.” For example, a recent Department of Homeland Security (DHS) Office of Immigration Statistics report estimated that 55 to 85% of attempted illegal border crossings were unsuccessful, up from 35 to 70% a decade ago. Estimated successful illegal entries into ports of entry plummeted from 1,800,000 in 2000 to fewer than 200,000 in 2016.

However, this data does not account for the number of individuals who overstay their visa statuses. In 2016, DHS produced

292. Id.
293. Id. at 18 (demonstrated by figure 10).
the first approximation of this figure, estimating that out of the forty-five million U.S. arrivals by air or sea whose business or tourist visas expired in fiscal year 2015, about 416,500 were still in the United States. The highest numbers of overstays were by Canadians, Mexicans, and Brazilians.

In April 2017, DHS released a new report reflecting that, of 2016’s fifty million visitors to the United States (including students, tourist/business visitors, and workers), 629,000 had overstayed their visas. Unlike the 2016 report, the 2017 report included overstays of all nonimmigrant classes, not just tourists and business visitors. The 2017 report disclosed that the percent of overstays was just over one percent of all nonimmigrants admitted. Judging from these data, it would be difficult to argue that the United States has porous borders and an excessive number of overstays. However, many still argue that the southwestern U.S. border is not secure, based largely on the government’s inability to account for departures.

VI. THE IMPACT OF PRESIDENT OBAMA’S EXECUTIVE ORDERS

Through executive action, President Obama achieved some of what he was unable to achieve legislatively. Depending on one’s

295. Id. at 7.
296. Id. at 10–15.
298. Id. at 11–30.
299. Id. at 40–41.
300. Chief among these critics is FAIR, which has consistently argued that the rate of overstays and the inadequacy of the United States to biometrically match entering aliens with departing aliens places all of the immigration statistics in question. See, e.g., Visa Overstayers, Fed’n For Am. Immigration Reform (2015), https://fairus.org/issue/legal-immigration/visa-overstayers [https://perma.cc/2TFH-WWNE].
301. See Binyamin Appelbaum, Once Skeptical of Executive Power, Obama Has Come to Embrace It, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html [https://perma.cc/4CXT-M5EE] (suggesting that, due to Republican challenges on most of his agenda, President Obama relied upon executive power to accomplish what he could not with
perspective, President Obama either compensated for a failure to enact immigration reform by refocusing enforcement priorities and deporting record numbers of undocumented immigrant populations, or he dismantled immigration enforcement altogether. Both sides would likely agree, however, that President Obama revised enforcement priorities and adopted administrative actions to carry out those priorities. During his two terms, President Obama oversaw the removal of three million undocumented immigrants—more than any president before him, and one million more than President George W. Bush. President Obama’s administrative actions led many in the immigration rights community to refer to him as the “deporter-in-chief.” The Obama administration aggressively enforced employer sanctions laws, issuing over thirteen times more fines against employers than President Bush’s administration. Viewed objectively, President Obama’s administration was arguably the most enforcement-oriented administration in our nation’s history.

“legislative transparency”).


305. See id.


307. See BRUNO, supra note 110, at 5. This calculation eliminates the first year of each man’s term as President as carry-over from the prior administration’s initiatives. Id.
From a leniency perspective, Obama’s policy directives leading to the creation of the Deferred Action for Childhood Arrivals (DACA) program protected more than three-quarters of a million undocumented immigrants who came to the United States as children. However, the Obama administration’s attempt to create a new class of protected undocumented immigrants—parents of United States citizens—failed to survive a federal court challenge by twenty-six states. Through 2014, President Obama had maintained approximately the same number of undocumented immigrants in the United States—between 11.1 and 11.5 million—since he was first sworn into office in 2009.

VII. The Trump Administration’s Impact on Immigration

Immigration was one of President Donald Trump’s central campaign themes. Before taking office, President Trump often
used his personal Twitter account to express an anti-immigrant reform platform. Trump’s April 1, 2013 tweet, for example, stated: “Immigration reform is all risk for the @GOP. Their base doesn’t want it and the 12M illegals will all vote Democrat.”

Eighty-five percent of those who voted for President Trump supported building a wall, and eighty-three percent favored deporting undocumented immigrants. President Trump’s supporters largely still support these initiatives. A group of individuals with ties to anti-immigrant advocacy groups—the Federation for American Immigration Reform in particular—have crafted many of President Trump’s policies. Ironically, although President Trump strongly criticized


President Obama’s use of the executive powers, the fledgling Trump presidency has almost exclusively used policy-making and executive orders to advance its anti-immigrant theme. But this strategy has not always served the Trump administration well in the courts. As of the time of this writing, President Trump has signed orders addressing border security, interior enforcement, refugees, and visa holders from designated countries.

A. The Travel Bans

Initially, federal district and circuit courts enjoined all of President Trump’s travel ban orders. Ultimately, the Supreme Court stayed (but significantly modified) the injunction on President Trump’s second travel ban order. In its order granting the government’s petition for a writ of certiorari, the Court modified the ban with respect to “foreign nationals who [had] a credible claim of a bona fide relationship with a person or entity in the United States” such as a “close relative” or a relationship that was “formal,


318. See, e.g., Julie Rheinstrom, Current Developments: One Hundred Days of President Trump’s Executive Orders, 31 Geo. Immigr. L.J. 433, 444–45 (2017) (juxtaposing President Obama’s executive actions—DACA and DAPA, as well planned legal endeavors—against President Trump’s “lack of preparedness and planning” with his executive orders, which has led to “successful challenges to [his executive] orders [that have] hinged on this haphazardness”).


documented, and formed in the ordinary course rather than for purposes of evading EO–2.\textsuperscript{322}\n
Most recently, the U.S. District Court for the District of Hawaii enjoined a third travel ban executive order on similar grounds as the injunction against the second travel ban.\textsuperscript{323} Namely, the court found that the executive order exceeded the executive power granted to President Trump by Congress under 8 U.S.C. § 1182(f) because it lacked sufficient findings that the entry of 150 million people from the six specified countries would be “detrimental to the interests of the United States.”\textsuperscript{324} Additionally, the court found that the executive order violated 8 U.S.C. § 1152, which prohibits discrimination on the basis of nationality when issuing immigrant visas.\textsuperscript{325} The third travel ban case, Hawaii v. Trump, remains before the United States Supreme Court, which granted the government’s petition for a writ of certiorari on January 19, 2018 and heard oral arguments April 25, 2018.\textsuperscript{326}

\textsuperscript{322}. Int’l Refugee Assistance Project, 137 S. Ct. at 2088. Lawsuits challenging the travel ban were initiated in New York, Virginia, Massachusetts, Washington, and Hawaii. In Washington v. Trump, the court issued a national temporary restraining order that was upheld by the Ninth Circuit. 847 F.3d 1151 (9th Cir. 2017). A second travel ban order (Executive Order, No. 13780) was also enjoined, which sought to, among other things, reduce the covered countries to six (eliminating Iraq), clarify that the earlier order was not “motivated by animus toward any religion” or applied to “any minority religion” in suspending the refugee program for one hundred twenty days, include Syrian refugees, and reduce the number of refugees to be resettled in the U.S. in 2017 from 110,000 to 50,000. 82 Fed. Reg. 13209 (Mar. 6, 2017).

\textsuperscript{323}. See Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017). The Ninth Circuit sustained the portions of the executive order that banned the entry of persons from the designated countries, suspending the refugee program, and reducing the cap of refugees. The Ninth Circuit allowed the internal reviews to go forward. See Hawaii, 241 F. Supp. 3d at 1119. In its decision granting the government’s petition for a writ of certiorari, the Court granted certiorari and modified the ban to leave it in place with respect to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States’ such as a “close relative” or a relationship that is “formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2.” Trump, 137 S. Ct. at 2088.

\textsuperscript{324}. Hawaii, 241 F. Supp. 3d at 1119.

\textsuperscript{325}. Trump, 137 S. Ct. at 2086.

B. DACA and Sanctuary Cities

More recent federal court decisions challenging President Trump’s executive actions relate to his decision to end the DACA program. In *Regents of University of California v. Department of Homeland Security*, the U.S. District Court for the Northern District of California blocked President Trump’s decision to end the DACA program, imposing a nationwide preliminary injunction on the executive action. The court’s decision contained a thoughtful history of Deferred Action and the DACA program, which plaintiff Janet Napolitano had implemented several years earlier when she was DHS Secretary. The court found that the rescission of DACA substantially relied on Attorney General Jefferson B. Sessions’ assessment that DACA was an “unconstitutional exercise of authority by the Executive Branch.” The resulting nationwide preliminary injunction permitted the government to resume accepting DACA extensions. This injunction was soon followed by a similar order entered by the U.S. District Court for the Eastern District of New York. The Trump administration has attempted, unsuccessfully, to have both decisions considered directly by the Supreme Court. The litigation concerning the legality of President Trump’s attempt to terminate DACA is particularly significant because DACA constitutes an important component of the (thus far unsuccessful)

/C2ML-MMGQ/ (last visited June 20, 2018).


329. Id. at 2–6.

330. Id. at 6–12.

331. Id. at 12.


attempts by the Trump administration and Congress to arrive at agreement on various aspects of legislative immigration reform.335

President Trump has also sought to take on so-called “sanctuary cities,” ultimately culminating in Executive Order 13768 of January 25, 2017, which attempted to deny federal funds to sanctuary cities.336 The U.S. District Court for the Northern District of California temporarily enjoined this order,337 and the lawsuit remains pending at the time of this writing.

The brewing dispute between the Trump administration and several states over the issue of sanctuary cities and the states’ unwillingness to participate in immigration enforcement presents an interesting variation on local control issues. Typically, states wishing to more fully engage in immigration enforcement have asserted the local control argument.338 In the sanctuary cities debate, however, the local control argument is just the opposite; local governmental entities argue that it is their right not to enforce federal immigration laws because of conflicting fiscal and law enforcement priorities.339 On February 22, 2018, President Trump attacked the State of California’s reluctance to engage in immigration enforcement and stated that he may pull ICE out of California, a decision that runs contrary to his policy of increased immigration enforcement by the Federal government.340

335. See infra Part VII.D.
337. City of Seattle v. Trump challenged the threatened federal fund cuts to “sanctuary cities.” No. 17-497-RAJ, 2017 WL 4700144, at *2 (W.D. Wash. Oct. 19, 2017); see also County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017), reconsideration denied, 267 F. Supp. 3d 1201 (N.D. Cal. 2017). The Northern District of California (San Francisco) issued a nationwide preliminary injunction on April 25, 2017. Id. at 539. On September 18, 2017, the Trump administration appealed Judge Orrick’s April 25 preliminary injunction and July 20 order denying defendants’ motions to dismiss and motion for reconsideration to the Ninth Circuit. Id. The Ninth Circuit opened a docket for the appeal, No. 17-16886. City and County of San Francisco v. Donald Trump, et al, 17-16886. On January 4, 2018, Judge William Orrick of the Ninth Circuit granted appellees’ motion to dismiss the appeal as moot. Id. All pending motions were denied as moot as well, and the appeal was dismissed. Id.
338. See, e.g., supra text accompanying notes 242–49.
C. Memoranda to Immigration Agencies

Despite legal setbacks, the Trump administration has been largely successful in directing immigration agencies to take a harder line on immigrants, both undocumented and documented, through a combination of executive orders and memoranda. For example, in a Presidential Memorandum dated March 16, 2017, President Trump gave the Secretary of State, Attorney General, and Secretary of Homeland Security directives to “implement protocols and procedures as soon as practicable that in their judgment [would] enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people.” The additional protocols and procedures from the memorandum suggested greater focus on the following:

1. preventing the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts; and
2. ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.

Furthermore, in the memorandum, President Trump also directed agencies to:

[R]igorously enforce all existing grounds of inadmissibility and to ensure subsequent compliance with related laws after admission. The heads of all relevant executive departments and agencies shall issue new rules, regulations, or guidance (collectively, rules), as appropriate, to enforce laws relating to such grounds of inadmissibility and subsequent compliance. To the extent that the Secretary of Homeland Security issues such new rules, the heads of all other relevant executive departments and agencies shall, as necessary and appropriate, issue new
rules that conform to them. Such new rules shall supersede any previous rules to the extent of any conflict.\textsuperscript{344}

Prior even to the President’s memorandum, in two separate memoranda,\textsuperscript{345} then-DHS Secretary John Kelly announced several initiatives intended to increase the enforcement of U.S. immigration laws. One initiative was to strip basic legal protections from the undocumented children arriving alone at the U.S. border—and to penalize their parents who sought to reunite with their children in the United States—by narrowing the definition of “unaccompanied alien child”\textsuperscript{346} and launching either civil or criminal enforcement against the parents.\textsuperscript{347}

Secretary Kelly’s memorandum was quickly followed by a memorandum from Attorney General Sessions, dated April 11, 2017,\textsuperscript{348} to all federal prosecutors, emphasizing the need for “consistent and vigorous enforcement” that would “disrupt organizations and deter unlawful conduct.”\textsuperscript{349} The Sessions memorandum stressed that districts “shall consider prosecution for any case involving the unlawful transportation or harboring of aliens,

\textsuperscript{344} Id.
\textsuperscript{347} Implementing, supra note 345.
\textsuperscript{349} Id.
or any other conduct proscribed pursuant to 8 U.S.C. § 1324.”

Prosecutors were to give priority to charging individuals who had transported or harbored three or more aliens. The memorandum also encouraged Assistant U.S. Attorneys to consider charging individuals with felonies who had “two or more misdemeanor improper entry convictions with aggravated circumstances, such as gang membership or affiliation, multiple prior voluntary returns, prior removal, deportation or exclusion or other aggravating circumstances.” Essentially, these directives ate at the heart of trial attorneys’ ability to exercise prosecutorial discretion for immigration enforcement, given that the Attorney General supervises the Board of Immigration Appeals, U.S. attorneys, and all of the government trial attorneys.

Another initiative expanded detention of undocumented immigrants, including a requirement that DHS “detain nearly everyone it apprehends” at or near the border. Additionally, the pertinent memoranda proposed expanding the group of undocumented persons in the interior of the country—not just those at the border—who would be subject to expedited deportation without going before an immigration judge. Expanding...

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350. Id.
351. Id.
352. Id.
353. See Matthew James Hannon Redavid Jr., Revamping Procedural Due Process for Illegal Aliens: Applying A Categorical Approach to Prosecutorial Discretion in Removal Proceedings, 28 GEO. J. LEGAL ETHICS 891, 891–92 (2015) (describing the “application of prosecutorial discretion to illegal aliens in removal proceedings” as “a case-by-case balancing of the equities either grants the alien the opportunity to remain in the United States or face removal”); Madison Burga & Angelina Lerma, The Use of Prosecutorial Discretion in the Immigration Context After the 2013 ICE Directive: Families Are Still Being Torn Apart, 42 W. ST. L. REV. 25, 30 (2014) (describing prosecutorial discretion in immigration cases as deferred action, which is “an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment” and “merely the decision not to prosecute someone at the given moment” (quoting 8 C.F.R. § 274a.12(c)(14) (2014)).
“expedited removal” would allow the government to bypass the backlogged immigration courts in an effort to deport people rapidly, with little to no due process and no recourse of federal judicial review.\(^{356}\) This expansion would mean that more children, families, and other vulnerable groups seeking protection in the United States would end up detained, at great financial and human cost.\(^{357}\)

The new memoranda rescinded earlier policies that deprioritized persons who posed no threat to communities.\(^{358}\) The new enforcement priorities are extremely broad, covering nearly all undocumented individuals in the United States, including individuals charged with (or suspected of having committed) crimes, and individuals who, in the judgment of the immigration officer, “otherwise pose a risk to public safety or national security.”\(^{359}\) These policies would make virtually all undocumented immigrants priorities for arrest, detention, and removal. The memoranda directed the hiring of 5,000 additional CBP agents and 10,000 additional ICE agents.\(^{360}\) The memoranda also ordered an expanded implementation of INA section 287(g),\(^{361}\) allowing DHS to enter into written agreements with states or other political subdivisions to allow state and local law enforcement officers to perform the functions of immigration agents.\(^{362}\)

The Trump administration’s aggressive policies concerning removal of undocumented immigrants have not targeted criminal aliens, but have instead been directed at virtually all out-of-status


\(^{357}\) THOMAS BLOOD & BRUCE HENDERSON, STATE OF THE UNION 44 (1996).

\(^{358}\) See, e.g., Bill Ong Hing, Federal Regulatory Policymaking and Enforcement of Immigration Law, in COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS 53 (Steven W. Bender & William F. Arrocha eds., 2017).


\(^{361}\) 8 U.S.C § 1357(g) (2006); U.S. IMMIGRATION AND CUSTOMS ENF’T, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (Oct. 3, 2017), https://www.ice.gov/287g [https://perma.cc/6VHH-EKH3].

As an immediate result of these policies, the backlog in removal cases has risen from 437,000 at the beginning of fiscal year 2015 to over 692,000 as of March 2018. The EOIR published a January 17, 2018, memorandum redirecting case priorities and specifying “Immigration Court Benchmarks and Performance Metrics.” The EOIR also updated its Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children and its Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap.
In 1996, IRIRA had directed United States Attorneys to institute criminal prosecution for the highest-level offenses of those bringing undocumented immigrants into the United States. In contrast, the new Trump-era policies are not limited to undocumented immigrants, but also extend to adjudications related to legal immigration. For example, acting under the authority of an executive order directed at hiring U.S. workers before foreign workers, USCIS has generated many Requests for Evidence to H-1B and other visa petitions to classify foreign employees within legal statuses. Moreover, a recent Trump administration decision increases the supervision of H-1B employers after the employment of visa holders has begun.

Yet another memorandum issued by the Trump administration revised and tightened USCIS review of circumstances underlying nonimmigrant workers who are sponsored by one employer but work on the site of another as a contractor. These relationships often exist between consulting firms and customers in the United States. The new policy memorandum will significantly raise the

documentation required of an H-1B employer to prove that the assignment of an H-1B worker to a customer falls within the scope of the H-1B work authority.\(^{374}\)

The Trump administration also rescinded a former policy directing USCIS adjudicators to give deference to a previous officer’s approval of a nonimmigrant petition. Now, USCIS will review all extensions as if they had not been previously approved.\(^{375}\) Moreover, beginning October 1, 2017, USCIS reinstated the adjustment-of-status interview of all I-140 applicants for permanent residence.\(^{376}\) The agency now known as USCIS had abandoned these interviews as a normal part of the employment-based I-140 procedure in 1996.\(^{377}\) At that time, the government considered the interviews to be an inefficient use of resources and allowed the INS to waive the interview whenever the agency thought it was appropriate.\(^{378}\)

On February 22, 2018, the Trump administration dramatically changed the USCIS mission statement by omitting any reference to “America’s promise as a nation of immigrants,” instead placing an emphasis on safeguarding the integrity of the agency’s lawful immigration system while protecting Americans and their values and securing the homeland.\(^{379}\) Although this constitutes a radical shift in

\(374\) Id. at 4–5.
\(375\) October 2017 Immigration Press Release, supra note 372.
\(378\) Id.
the guiding principles of USCIS, such a shift appears to be in line with the priorities of the Trump administration, as evidenced by the policy memoranda issued by the administration since President Trump assumed office in January 2017.

D. The Trump Administration’s Proposed Regulations

In the fall of 2017, the Trump administration published its proposed list of regulations. This list included a number of regulations directed at current immigration standards and procedures, border control and protection, ICE interior enforcement procedures, and those involving USCIS legal immigration statuses and procedures. These proposals were wide-ranging and included expanding expedited removal procedures from the border into the interior of the United States. The proposals also altered procedures to detain families—including children—in detention facilities.

The regulatory proposals did not stop with those directed at illegal immigration. For example, the proposals included raising fees that foreign students must pay and limiting practical training opportunities for certain nonimmigrant students. Among the understanding of citizenship, and ensuring the integrity of our immigration system.” Richard Gonzales, America No Longer ‘A Nation of Immigrants,’ USCIS Says, NPR (Feb. 22, 2018, 6:18 PM), https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says [https://perma.cc/NA6G-F2YK]. The new mission statement, as it appears on the agency’s website, reads: “U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.” About Us, U.S. CITIZENSHIP AND IMMIGRATION SERVS., https://www.uscis.gov/aboutus [https://perma.cc/D97Y-8WZR] (last updated Mar. 6, 2018).


381. Id.

382. Id.

383. Id.

384. See id.
proposals was a curious one—at least from the perspective of a business entrepreneur like President Trump—that would rescind a final Obama administration rule that established:

[A] program that would allow for consideration of parole into the United States . . . certain inventors, researchers, and entrepreneurs who had established a U.S. start-up entity, and who had been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research. 385

Another proposal would rescind the final Obama administration rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who were seeking employment-based LPR status. 386 Yet another would target the H-1B visa status by establishing:

[A]n electronic registration program for H-1B petitions subject to annual numerical limitations [that] would improve the H-1B numerical limitation allocation process . . . revis[ing] the definition of specialty occupation to increase focus on truly obtaining the best and brightest foreign nationals via the H-1B program and . . . revis[ing] the definition of employment and employer-employee relationship to help better protect U.S. workers and wages. 387

Combining the executive orders, memoranda, and presidential statements—on Twitter and the White House website—the current administration’s attitude is reminiscent of former INS Commissioner James Ziglar’s “zero tolerance policy” after the 9/11 attacks. 388 This policy essentially stemmed from reports that the 9/11 terrorists had all been in the United States on student visas, which were either irregularly issued or violated some other requirement. 389 The zero tolerance policy implied to INS adjudicators that there

385. Id.
386. Id.
387. Id.
would be no problem if an agent did not approve an immigration-approvable application or petition, but that there would be severe consequences if an agent approved an application or petition that should have been denied.\textsuperscript{390} This resembles the Trump administration’s message to the immigration field offices, although President Trump’s communication has been embroidered with much more negativity towards immigrants.

The contentious political climate surrounding immigration has also interfered with Congress’ ability to adopt a fiscal year budget.\textsuperscript{391} On January 20, 2018, the federal government began its shutdown procedure when Congress was unable to agree on a continuing resolution on the budget, largely because of disagreement on elements of immigration reform.\textsuperscript{392} The author notes that the contentious nature of these discussions was provoked, in part, by President Trump’s own vulgar and insensitive remarks about immigrants in a widely reported discussion session he hosted with congressional leadership at the White House on January 11, 2018.\textsuperscript{393}

The debate surrounding immigration—in the context of the budget negotiations—focused on five areas:

1. Achieving a conditional permanent residence immigration status that would lead to citizenship for DACA recipients who had been in the United States since certain dates;

2. Appropriating tens of billions of dollars for a border wall, related border security technologies, and hiring personnel;

\textsuperscript{390} Memorandum from James W. Ziglar, Comm’r, supra note 388 (“Individuals who fail to abide by issued field guidance or other INS policy will be disciplined appropriately.”).


(3) Eliminating the Diversity Visa program and ending the Temporary Protected Status of some 400,000 individuals;

(4) Limiting family immigration to spouses and minor children, providing parents of US citizens some sort of temporary visiting visa, and prohibiting parents of DACA recipients from receiving any immigration status except for a multi-year, immigration status; and

(5) Reducing legal immigration.\(^{394}\)

It is this author’s opinion that President Trump’s approach to enforcement and adjudication will lead to even more delays, backlogs, expense, and complications as employers, employees, and immigrants try to adjust to this new reality. Perhaps that is the intended outcome.\(^{395}\)

VIII. CONCLUSION: GOING FORWARD

There is a reason why the number of immigration lawyers in this country has grown exponentially and is likely to increase.\(^{396}\) It is likely that whatever new system the United States government creates—or even how it enforces the current system—will be

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394. By virtue of the tactically driven secrecy of the budget negotiations, at the time of this writing, there is no written source to cite for these negotiation objectives. Described is a summary of topics taken from various authoritative sources. For an excellent chart showing the elements of the legislative proposals, see Lisa Desjardins, Every Immigration Proposal In One Chart, PBS NEWSHOUR (Jan. 12, 2018, 3:42 PM), https://www.pbs.org/newshour/politics/every-immigration-proposal-in-one-chart [http://perma.cc/4AKJ-65MM].


complex. But as complex and frustrating as it is, the contemporary practice of immigration law provides intellectual challenge and great personal satisfaction to those fortunate enough to have the opportunity to practice it.

In many respects, Americans have not progressed far in our collective perception of immigration. Unfortunately, we still view immigration as a utilitarian policy, whether geared toward meeting insufficient labor market demands or threatening jobs of United States citizens.\footnote{397} We still experience the “drawbridge effect” of those who have recently immigrated, feeling threatened by those not yet here.\footnote{398} We still incorporate notions of ethnicity in our collective judgments about the value of immigrants who are not from Western Europe or who are not Anglo-Christian.\footnote{399} We have substituted a Muslim ban for a Chinese or Japanese ban. We view immigrants as unfairly drawing from public benefits.\footnote{400} We too often base our opinions on speculation, fear, or assumptions, rather than on facts. We have difficulty believing that people who come from different cultures, with differing religions or languages, are capable of adapting to the Constitution of our Founding Fathers. We live in a very difficult environment—one in which it is hard for people to agree on where to find accurate facts, let alone agree on them. But choosing one’s facts serves too many agendas. Overcoming these difficulties would be to our collective benefit.

We should, however, be able to agree on some things. First, it is possible to identify categories of people to whom we should grant access to the United States. Whether these people are relatives, workers, or some other group is a fair subject for debate. Second, with the advancement of technology, we should be able to create an

\footnote{397. For an example of an excellent analysis of immigration and the state workforce, see generally \textit{Ryan Allen, Immigrants and Minnesota’s Workforce} (2017).}

\footnote{398. \textit{Brimeelow, supra} note 174.}

\footnote{399. \textit{Id.}}

immigration system that accurately accounts for who is here and who leaves. Third, we should be able to create a system that provides people, within a reasonable time, a decision on whether they get to live here or not. In order to form a more perfect union, we must decide whether to accept, embrace, and manage immigration, or whether to significantly restrict and limit immigration and generate our population and workforce from within our existing populace—and be willing to live, as we must, with the consequences.
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