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# UNRAVELING: TRUMP, THE ‘END’ OF ASYLUM, AND THE PROSPECTS OF RESTORING LOST TIME

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## ABSTRACT

After many years of occupying an unreliable middle position between the draconian exclusion of the Australian refugee status determination (RSD) regime and the relatively stable humanitarianism of the Canadian one, the Trump administration pushed the United States’ asylum system from inconsistency to the point of collapse. The U.S. RSD regime was already vulnerable to exclusionary politics, and Trump exploited those vulnerabilities to systematically deny people access to asylum, not just at the border but also regionally and internally. Much time was, and continues to be, lost as the system was hardened and fortified and people were left in limbo, separated from loved ones. President Biden seems committed to reversing many of the most high-profile aspects of Trump’s war on asylum. But, unraveling the bureaucratic knot that is the current administrative process presents a significant challenge. This is a critical juncture in U.S. asylum politics. Without a deep commitment to the concept of asylum, a reckoning with the political realities of the moment, and a specific plan for what should replace the current system, the project of restoration is likely to flounder and revert to old patterns.

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INTRODUCTION

Seven years ago, I wrote a book comparing the refugee status determination (RSD) regimes of the United States, Canada, and Australia.<sup>1</sup> At that time, the United States occupied a volatile middle ground between the imperfect humanitarianism of the Canadian system and the stark brutality of the Australian one. I argued that the factor which explained this cross-national variation in otherwise similar states was the degree to which the institutions which made up each country’s asylum system were insulated from the exclusionary politics of border control.<sup>2</sup> Every destination state has exclusionary politics, but that politics does not trickle down to affect decisions regarding individual asylum seekers to the same degree in every destination. With regard to the American RSD regime, I concluded in 2014 that because Congress had repeatedly declined to invest in the administrative agencies tasked with conducting refugee status determination, the American asylum system was “not properly insulated from restrictive, anti-immigrant politics.”<sup>3</sup> In other words, the U.S. RSD regime was struggling, and was vulnerable to further deterioration if a highly restrictionist politics took hold.

I have never wished more fervently that I had been incorrect in a scholarly assessment. Unfortunately, the four years of the Trump administration provided a relentless series of grim reminders of just how thinly insulated the U.S. asylum system is from rampant xenophobia. All told, the Trump administration was extremely successful at both exploiting the vulnerability of the system and capitalizing on it to accelerate and enhance the fortification of the U.S. territory, demonstrating a complete disregard for the principles of international protection. The literal fortification at the southern border was just one aspect of a larger-scale hardening that occurred across all corners and levels of the American RSD regime. Under Trump, the United States became a fortress from which even the most desperate seekers of protection

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<sup>1</sup> See REBECCA HAMLIN, *LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA* (Oxford Univ. Press 2014).

<sup>2</sup> *Id.* at 9.

<sup>3</sup> *Id.* at 66.

are denied access.<sup>4</sup>

This article is primarily focused on mapping the hardening of the U.S. RSD regime, providing a comparative institutional assessment of how Trump's crackdown on asylum was able to take hold so firmly and quickly because of existing vulnerabilities in the system. Thus, my first aim is to take stock, and examine the pieces of an asylum system that was always already broken, but which has been further shattered, and the shards used as weapons. Part of taking stock also includes calculating the time that has been, and will still be, lost, as people are shut out, not just at the border, but also internally, as bureaucratic bordering practices keep people separated from loved ones and from the stability and security of a timely decision.

Durational time is assigned great value in democratic politics.<sup>5</sup> In the realm of immigration policy, devaluing people's time renders them outsiders in ways that enhance and complement other bordering practices.<sup>6</sup> Certainly, the process of seeking refuge is notoriously slow, often involving protracted periods of waiting and uncertainty, whether in detention or other precarious situations.<sup>7</sup> As Molly Fee has so eloquently phrased the dilemma, waiting is implicitly part of the system of asylum-seeking and refugee status determination, even when it is not functioning under conditions of crisis:

The expectation that refugees will wait for safety no matter what they lose in the process or what new forms of precarity they might face is implicit in the international humanitarian regime. In exchange for protection, refugees are compelled to renounce ownership of their time.<sup>8</sup>

Under the system that Trump and his cronies devised, time was

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<sup>4</sup> See generally ANNELEISE HERMANN, CTR. FOR AM. PROGRESS, ASYLUM IN THE TRUMP ERA (June 13, 2018), <https://www.americanprogress.org/article/asylum-trump-era/>.

<sup>5</sup> See generally ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE (2018).

<sup>6</sup> See Noora Lori, *Migration, Time, and the Shift Toward Autocracy*, in THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY: AYELET SHACHAR IN DIALOGUE 118, 120-28 (Antony S. Laden et al. eds., 2020) (arguing the use of time to police national boundaries and examining programs like the Temporary Protected Status where an individual's presence in the territory does not accrue to refugee status).

<sup>7</sup> See Molly Fee, *Lives Stalled: The Costs of Waiting for Refugee Resettlement*, JOURNAL OF ETHNIC AND MIGRATION STUDIES, Feb 18, 2021, at 1 (online publication first), <https://www.tandfonline.com/doi/full/10.1080/1369183X.2021.1876554>; Melanie B.E. Griffiths, *Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees*, 40 JOURNAL OF ETHNIC AND MIGRATION STUDIES 1991, 1994-98 (2014) (discussing the prolonged waiting period for migrants and asylum seekers and the sentiment of being stuck); see generally Rebecca Rotter, *Waiting in the Asylum Determination Process: Just an Empty Interlude?*, 25 TIME AND SOC'Y 80 (2016).

<sup>8</sup> Fee, *supra* note 7, at 3.

weaponized. Many people were denied asylum, but many more were forced to sacrifice years of their lives without any answer at all.<sup>9</sup> Time itself became a bordering practice, a tool of fortification.<sup>10</sup> When a system has been distorted to this degree, we must ask ourselves whether it can be restored, how long that would take, and how much waiting people must endure in the meantime. Given that reality, even dramatic reversals of policy must be viewed in light of what has been irretrievably lost, and what is still not being considered for reform.

In light of these realizations, the second aim of this article is to suggest that this is a critical juncture in American asylum policy, in which time is of the essence. While he was running for President to replace Donald Trump, then-presidential candidate Joe Biden tweeted out a criticism of the Trump administration's policy at the U.S./Mexico border accompanied by the hashtag RestoreAsylumNOW.<sup>11</sup> Now that Biden is in office, it is clear just how much of a challenge that call to action represents. This article argues that both the concept of restoration and the notion of urgency are much more complex than they might seem. The infrastructure and design of the system simultaneously will make the Trump administration's efforts to end asylum in the United States very difficult to unravel, and are also the key to creating an RSD regime that more closely resembles procedural justice. In understanding what might take the place of a regime that has been sentenced to death, we must ask ourselves what kind of vision is required to achieve something new, and how the institutional and legal landscape will shape and constrain what may be politically possible. As I argued in 2014, and as I continue to believe, an institutional approach helps to illuminate the structural entry points where a more inclusive politics might be possible.<sup>12</sup> Further, understanding the structure of the American RSD regime in comparative perspective helps to shed some light on the possible paths ahead.

#### I. RSD REGIMES IN THE PRE-TRUMP ERA

I coined the concept of an RSD regime to highlight the fact that in any destination state, a variety of different institutions are responsible for conducting RSD, and these institutions have particular relationships and power dynamics between and within them.<sup>13</sup> Understanding the interactive structure of the system as a whole enables us to see its vulnerabilities more clearly.

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<sup>9</sup> See generally HERMANN, *supra* note 4.

<sup>10</sup> See generally *id.*

<sup>11</sup> @JoeBiden, TWITTER (Jan. 29, 2020, 8:24 PM), <https://twitter.com/joebiden/status/1222691999364657152?lang=en>.

<sup>12</sup> See HAMLIN, *supra* note 1, at 9.

<sup>13</sup> See *id.*

An RSD regime which is designed to be insulated from the political winds can withstand moments of exclusionary panic, and decision-makers can feel unencumbered by pressure to reject a certain proportion of applicants.<sup>14</sup> Conversely, uninsulated regimes are vulnerable to allowing a deterrence orientation to become institutionally embedded, orienting the decision-making process away from the protection needs of individual asylum seekers.<sup>15</sup>

The American RSD regime was in some trouble in this regard well before the dawn of the Trump administration. Frontline decision-makers were burdened with heavy caseloads and little administrative assistance.<sup>16</sup> Shifts to bring the interpretation of a refugee in line with the jurisprudential guidance of the UN and with other liberal democracies had been agonizingly slow.<sup>17</sup> The regime was also dominated by a culture of “adversarial legalism,” which meant that it was fragmented across multiple different agencies, most of which were heavily reliant on lawyers.<sup>18</sup> It was characterized by “turf battles, inconsistency, and unpredictability,” as the federal circuit courts of appeal tried to provide some quality control for the underfunded and low-quality administrative processes from which the cases they heard originated.<sup>19</sup> In theory, such a regime would promise more positive outcomes for asylum seekers who have strong cases than a systematically restrictive regime, as it allowed applicants with adequate legal representation to appeal their cases across multiple institutional players.<sup>20</sup> Nonetheless, an attorney could never say with confidence that his or her client had a good shot at asylum, because there were too many variables at play.<sup>21</sup> Further, because the first several stages of decision-making take place within administrative agencies, rather than the judiciary, the decision-makers are not independent from the executive branch and its political priorities.<sup>22</sup> Ultimately, after a thorough study of the U.S. system in the pre-Trump years, including many interviews with attorneys representing asylum seekers and policy-makers across all of the relevant agencies, I concluded that: “because the American RSD regime is so fragmented, and so dominated by adversarial

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<sup>14</sup> *See id.* at 10.

<sup>15</sup> *See id.* at 11.

<sup>16</sup> *Id.* at 93-94.

<sup>17</sup> *See* Rebecca Hamlin, *A Recent Shift in Immigration Law Will Change Less Than You Think*, WASH. POST (Nov. 7 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/07/a-recent-shift-in-immigration-law-will-change-less-than-you-think/>.

<sup>18</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 7-10 (Harvard Univ. Press 2d ed. 2019).

<sup>19</sup> HAMLIN, *supra* note 1, at 82.

<sup>20</sup> *Id.* at 70-72.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 72.

decision-making bodies, a side effect is that there are multiple entry points for exclusionary politics to influence the process.”<sup>23</sup>

In the last few years of the Obama administration, this assessment stayed steadily accurate: the U.S. RSD regime was often arbitrarily cruel, but it did not succumb to pure restrictionism because neither President Obama nor Congress pushed it in that direction.<sup>24</sup> Instead, Obama tried to thread the needle between maintaining a fairly aggressive enforcement regime for both unauthorized arrivals and those within the United States with criminal records, and maintaining a posture of humanitarianism towards those seeking protection.<sup>25</sup> Also, the administration focused much of its deterrence efforts in the home countries of Central America, using messaging campaigns designed to dissuade potential migrants from leaving in the first place.<sup>26</sup> This position ran the risk of disappointing both ends of the political spectrum, because Obama neither stopped so-called illegal immigration, nor did he radically reform a system that was increasingly seen by many as inhumane in its inconsistency and unpredictability. Furthermore, the Obama position had the weakness of being based on the faulty assumption that border crossers fall into a binary in which economically motivated migrants and politically motivated refugees are conceptually distinct and easily distinguishable.<sup>27</sup> This assumption tends to disfavor the claims of people coming from Central America, who are often fleeing a combination of extreme poverty, political corruption, gang violence, and climate change – a blend of motivations which does not fit neatly within the definition of a refugee outlined in the Immigration and Nationality Act.<sup>28</sup> But, because deterrence measures do not stop people who are desperately seeking safety and freedom, whatever the reasons for their fear, the number of asylum claims filed each year rose dramatically, leading to a large backlog of cases at the time Trump took office

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<sup>23</sup> *Id.* at 70.

<sup>24</sup> See John D. Skrentny & Jane L. López, *Obama's Immigration Reform: The Triumph of Executive Action*, 2 *IND. J. L. & SOC. EQUAL.* 62, 64-68 (2013) (discussing generally the immigration policies in the Obama era, including Obama's proposal of a comprehensive immigration reform and the “Dream Act”).

<sup>25</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 136-41 (2015).

<sup>26</sup> Johnathan T. Hiskey et al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 *LATIN AM. RSCH. REV.*, 429, 430-31 (2018).

<sup>27</sup> See REBECCA HAMLIN, *CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE* 140-43 (Stanford Univ. Press 2021).

<sup>28</sup> See *id.*; see also CONG. RSCH. SERV., IF11151, *CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY* 1-2 (2021) (discussing the various causes faced by Central American immigrants encompassing complex socioeconomic condition, natural disasters, regional security conditions, and more). For the definition in U.S. law see: 8 U.S.C. § 1101(a) INA 101(a).

in January 2017.<sup>29</sup>

Meanwhile, in the intervening years since LET ME BE A REFUGEE was published, both Australia and Canada also remained stable in their respective positions as the most and the least restrictive RSD regimes.<sup>30</sup> Australia had established global notoriety for its extreme policy of offshore processing, through which it diverted asylum seekers to the neighboring island states of Nauru and Papua New Guinea.<sup>31</sup> The detention centers that were used as part of this offshoring policy were shrouded in secrecy, and the reports that did emerge revealed horrifyingly grim stories of self-mutilation and suicide attempts by detainees in despair.<sup>32</sup> Studies of these practices have concluded that offshore detention is essentially designed to produce such outcomes, since there is no transparency, accountability, or judicial review built into the system.<sup>33</sup> Despite the fact that asylum seekers who were detained while attempting to enter Australia tended to come from dangerous and war-torn countries of origin, and very frequently succeeded in gaining refugee status when they were able to access a hearing, the Australian government stood by the policy of blind deterrence.<sup>34</sup> It also capitalized on the “moral panic” within the Australian public about Muslim “terrorists” and Asian “invasion” in order to justify its actions.<sup>35</sup> The High Court has upheld the government’s authority to take such extreme measures on several occasions.<sup>36</sup> In sum, the Australian RSD regime has baked exclusionary politics into the system, and

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<sup>29</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 2 (2017) (finding the number of pending cases before immigration courts grew by 58 percent from 2012 through 2016 and there were 500,000 cases pending at the beginning of 2017).

<sup>30</sup> HAMLIN, *supra* note 1 (illustrating in detail the features of the three RSD regimes).

<sup>31</sup> See Damien Cave, *A Timeline of Despair in Australia’s Offshore Detention Centers*, N.Y. TIMES, June 28, 2019, at A5.

<sup>32</sup> See *id.*

<sup>33</sup> See Amy Nethery & Rosa Holman, *Secrecy and Human Rights Abuse in Australia’s Offshore Immigration Detention Centers*, 20 INT’L J. HUM. RTS. 1018, 1019-32 (2016).

<sup>34</sup> See HAMLIN, *supra* note 1, at 59-60; Hannah Ryan, *Revealed: 1,500 People in Limbo Under Australia’s ‘Bizarre and Cruel’ Refugee Deterrence Policy*, THE GUARDIAN (Dec. 9, 2020, 2:00 PM), <https://www.theguardian.com/australia-news/2020/dec/10/lives-in-limbo-more-than-1500-asylum-seekers-still-face-uncertain-future>.

<sup>35</sup> Greg Martin, *Stop the Boats! Moral Panic in Australia Over Asylum Seekers*, 29 J. MEDIA & CULTURAL STUD. 304, 307-08, 310, 313 (2015).

<sup>36</sup> *CPCF v Minister for Immigr and Border Prot* (2015) 255 CLR 514, 516 (Austl.) (upholding the detention of 157 Sri Lanka asylum seekers by the Australian government after intercepting boat at sea); see also Maria O’Sullivan, *Australia Can Detain Asylum Seekers on the High Seas, the High Court decides*, THE CONVERSATION (Jan. 28, 2015, 1:06 AM), <https://theconversation.com/australia-can-detain-asylum-seekers-on-the-high-seas-the-high-court-decides-32968>.

has remained that way consistently for decades. It is debatable whether such an exclusionary system can be said to meaningfully provide a path to protection for asylum seekers.

While Canada's RSD regime is unquestionably more insulated than either the United States and Australia, there are particular elements of the system which have not lived up to its reputation for generosity.<sup>37</sup> One of the biggest frustrations for Canadian advocates has been the Canada-U.S. Safe Third Country Agreement, which has been in place since 2004.<sup>38</sup> Under that agreement, asylum seekers may not apply for RSD in Canada if they come to the U.S./Canada border, or if they have flown through the U.S. on the way to Canada, because the United States has been designated an equivalent safe country, where asylum seekers should have been willing to make their claim.<sup>39</sup> This agreement has persisted for seventeen years despite extensive evidence that the United States frequently rejects certain types of claims, especially related to gender, that Canada consistently accepts.<sup>40</sup> Further, because this agreement only applies to people at ports of entry, and not to people who enter Canada illegally, it also incentivizes asylum seekers who are in the United States to make clandestine crossings into Canada, in conditions that can be unsafe.<sup>41</sup>

The Canadian RSD regime also came under a series of attacks during the Conservative government of Prime Minister Stephen Harper from 2006-2015.<sup>42</sup> In particular, the introduction of the Designated Country of Origin (DCO) policy, in which a particular list of countries was determined to not be refugee-producing,<sup>43</sup> limited the discretion of decision-makers who had

<sup>37</sup> HAMLIN, *supra* note 1, at 50-51.

<sup>38</sup> Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229 [hereinafter Canada-U.S. Safe Third Country Agreement].

<sup>39</sup> *Id.* art 4.

<sup>40</sup> HAMLIN, *supra* note 1, at 129.

<sup>41</sup> Jennifer Hyndman & Alison Mountz, *Seeking Safe Haven in Canada: Geopolitics and Border Crossings After the Safe Third Country Agreement*, in HAVEN: THE MEDITERRANEAN CRISIS AND HUMAN SECURITY 110, 112-13 (John Morrissey ed., 2020); Rebecca Hamlin, *Canada's Asylum Claims Are Spiking Dramatically. Will It Restrict Its Welcome at Last?*, WASH. POST: THE MONKEY CAGE (Sep. 14, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/14/canadas-asylum-claims-are-spiking-dramatically-will-it-restrict-its-welcome-at-last/>.

<sup>42</sup> See, e.g., Jenna Koumantaros, *Discourses of Exclusion and Undesirability: The Designated Countries of Origin Policy and its Impact on Hungarian Romani Refugee Claimants* 1-10 (Ryerson Ctr. for Immigr. and Settlement and CERC in Migration and Integration at Ryerson U., Working Paper No. 2020/12, 2020) (discussing the problems and threats of Canada's exclusionary Designated Countries Origin policy implemented in 2012).

<sup>43</sup> See Idil Atak, *Safe Country of Origin: Constructing the Irregularity of Asylum Seekers in Canada*, 56(6) INT'L MIGRATION 176, 179 (2018).

traditionally been granted a large degree of deference in Canada's RSD regime.<sup>44</sup> However, multiple components of the DCO policy were struck down in the Federal Court of Canada,<sup>45</sup> and then the Canadian government repealed it entirely in 2019.<sup>46</sup> At that time, the Department of Immigration, Refugees, and Citizenship Canada issued a statement saying that it was ending the policy because it "did not fulfil its objective of discouraging misuse of the asylum system and of processing refugee claims from these countries faster."<sup>47</sup>

Under Prime Minister Justin Trudeau, who has served as the leader of Canada's Liberal party since 2015, Canada has publicly embraced its reputation for humanitarianism again. When newly inaugurated U.S. President Trump began his term in office by issuing his notorious 'Muslim Ban,' Prime Minister Trudeau tweeted, "To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada."<sup>48</sup> The timing of this Tweet seemed deliberately designed to highlight the contrast between Canada and its neighbor to the south on matters related to immigration, refugee resettlement, and asylum.

In sum, at the moment that Trump took office, the contrast between the RSD regimes of the United States, Canada, and Australia was starker than ever. Canada was known for insulated, bureaucratic generosity, and had demonstrated that attacks on the system could be reversed without lasting damage. Meanwhile, Australia was defending its harsh RSD regime in front of the International Criminal Court.<sup>49</sup> The United States remained somewhere in the middle, with its dominant characteristic being inconsistency, and its lack of insulation placing it in danger of becoming more like Australia if the political winds turned in a more restrictionist direction.<sup>50</sup>

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<sup>44</sup> HAMLIN, *supra* note 1, at 89.

<sup>45</sup> See Julia Kalinina, *Feher v Canada: Strike Three Against the "Safe Country" List in Canada's Refugee Law*, THE COURT.CA (Apr. 2, 2019), <http://www.thecourt.ca/strike-three-for-canada-refugee-laws/>.

<sup>46</sup> Press Release, Gov't of Canada, Canada Ends the Designated Country of Origin Practice (May 17, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>.

<sup>47</sup> *Id.*

<sup>48</sup> @JustinTrudeau, TWITTER (Jan 28, 2017, 3:20 PM), <https://twitter.com/JustinTrudeau/status/825438460265762816>.

<sup>49</sup> Ben Doherty, *Australia's Offshore Detention Is Unlawful, Says International Criminal Court Prosecutor*, THE GUARDIAN (Feb. 14, 2020, 7:13 PM), <https://www.theguardian.com/australia-news/2020/feb/15/australias-offshore-detention-is-unlawful-says-international-criminal-court-prosecutor>.

<sup>50</sup> HAMLIN, *supra* note 1, at 66, 82.

## II. DEATH TO ASYLUM: THE RSD REGIME UNDER TRUMP

President Trump made no secret of the fact that he hoped to emulate the notoriously cruel policies of Australia. Only days after taking office, Trump had a phone conversation with Australian Prime Minister Malcolm Turnbull, in which Turnbull explained that his country invests heavily in deterrence and offshore processing because, “in order to stop people smugglers, we had to deprive them of the product. So we said if you try to come to Australia by boat, even if we think you are the best person in the world, even if you are a Noble [sic] Prize winning genius, we will not let you in.”<sup>51</sup>

According to a transcript of that call, Trump then interrupted and exclaimed: “That is a good idea. We should do that too. You are worse than I am.”<sup>52</sup> Similarly, in 2019, Trump tweeted out a picture of a notorious Australian deterrence campaign poster which read “NO WAY. You will not make Australia home” over an image of choppy waves at sea.<sup>53</sup> Trump tweet commented that “much can be learned” from Australia’s approach to this issue.<sup>54</sup>

Whether explicitly inspired by Australia or not, the Trump administration openly declared war on asylum, working to bring about the end of the promise of protection for people fleeing danger by coming to U.S. soil.<sup>55</sup> This crackdown was just one strand of a much larger web of bureaucratic violence that some have called an “invisible wall,”<sup>56</sup> which made it all but impossible under Trump’s tenure to immigrate to the United States via any channel.<sup>57</sup>

<sup>51</sup> *Full Transcript of Trump’s Phone Call with Australian Prime Minister Malcolm Turnbull*, THE GUARDIAN (Aug. 3, 2017, 6:32 PM), <https://www.theguardian.com/us-news/2017/aug/04/full-transcript-of-trumps-phone-call-with-australian-prime-minister-malcolm-turnbull>.

<sup>52</sup> *Id.*

<sup>53</sup> See Jamie Smyth, *Australia’s Hard Line on Asylum Gains Donald Trump’s Approval*, FIN. TIMES (July 8, 2019), <https://www.ft.com/content/8fef57ba-9c7d-11e9-9c06-a4640c9feebb>.

<sup>54</sup> Trump’s Twitter account has since been suspended, but a screenshot of the Tweet in question is available here: Luke Henriques-Gomes, *Donald Trump Says “Much Can Be Learned” from Australia’s Hardline Asylum Seeker Policies*, THE GUARDIAN (June 26, 2019, 9:34 PM), <https://www.theguardian.com/us-news/2019/jun/27/donald-trump-says-much-can-be-learned-from-australias-hardline-asylum-seeker-policies>.

<sup>55</sup> See, e.g., *How the Trump Administration is Eliminating Asylum in the U.S.*, INT’L RESCUE COMM. (Feb. 4, 2020), <https://www.rescue.org/article/how-trump-administration-eliminating-asylum-us>; Omar Jadwat, *The Trump Administration is Waging a War on People Fleeing Persecution. We Can’t Let Them Win*, AM. C.L. UNION (Sept. 30, 2019, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-administration-waging-war-people>.

<sup>56</sup> Rachel Morris, *Trump Got His Wall, After All*, HUFFPOST (Nov. 24, 2019), <https://www.huffpost.com/highline/article/invisible-wall/>.

<sup>57</sup> See Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL.

The Trump administration “solved” the problem the Obama administration had faced of distinguishing among people arriving at the southern border by deciding in a blanket fashion that all were ineligible for entry.<sup>58</sup> The legal right to seek asylum, even if one does not have the proper documentation required for entering the country, is enshrined in the 1951 Refugee Convention and in U.S. law.<sup>59</sup> However, the American asylum system has often been cast by exclusionists not as an important obligation, but as a loophole which allows people who are not serious or legitimate asylum seekers to gain access to the territory of the United States. For example, in 2019 the editorial board of the Wall Street Journal wrote that “the perverse incentives of U.S. asylum law invite a surge of migrants that is overwhelming border security.”<sup>60</sup> Trump bought into this perspective wholesale, tapping into a longstanding resistance among U.S. policymakers to acknowledge the U.S./Mexico border as a site of direct asylum.<sup>61</sup> As immigration journalist Dara Lind put it, “the Trump administration has simply expelled asylum-seekers.”<sup>62</sup>

#### A. The MPP Program

The most visible example of this categorical refusal took place at the border itself. The Trump administration began by putting heavy pressure on Mexico to agree to harbor people who the United States turned away.<sup>63</sup> This

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INTERDISC. L. J. 549, 549-50, 558, 561-64 (2019).

<sup>58</sup> See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019). By precluding asylum for all persons who failed to apply for protection in a third country through which they transited en route to the United States, the rule effectively abridged the right to seek asylum for anyone who is not a Canadian or Mexican. This basically meant no person from Central America would be eligible for asylum in the United States if they arrived at the country’s southern border. See also Kristie de Peña, *Overview of New Asylum Rule: Asylum Eligibility and Procedural Modifications*, NISKANEN CTR. (July 15, 2019), <https://www.niskanencenter.org/overview-of-new-asylum-rule-asylum-eligibility-and-procedural-modifications/>.

<sup>59</sup> Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137 (“Refoulement”); Immigration and Nationality Act (INA), 8 U.S.C. § 1158(a)(1) (stating that any alien who physically presents or arrives in the United States may apply for asylum under this section irrespective of status).

<sup>60</sup> Editorial, *The Border Asylum Crisis*, WALL ST. J. (Mar. 31, 2019, 3:54 PM), <https://www.wsj.com/articles/the-border-asylum-crisis-11554062066>.

<sup>61</sup> HAMLIN, *supra* note 1, at 139.

<sup>62</sup> Dara Lind, *Trump Got What He Wanted at the Border. Would Biden Undo It?*, PROPUBLICA (Oct. 28, 2020, 7:00 AM), <https://www.propublica.org/article/trump-got-what-he-wanted-at-the-border-would-biden-undo-it>.

<sup>63</sup> See *id.* (reporting that, following Trump’s threat to increase massive tariffs on Mexico if the latter did not fix immigration, the two countries agreed that non-Mexicans would wait in Mexico before attending their asylum hearings in the United States).

move incentivized Mexico to crack down more at its southern border to prevent Central Americans from making the journey north.<sup>64</sup> Then, when the numbers did not markedly decline, on January 24, 2019, the Trump administration launched a program which they euphemistically called the Migrant Protection Protocols (MPP),<sup>65</sup> but which soon became known as “Remain in Mexico.”<sup>66</sup> In practice, Asylum Officers (AOs) from the Department of Homeland Security were sent to the border, not to conduct asylum hearings, but to process MPP cases using a new protocol that was designed to screen people out, and using criteria which were far stricter than the Credible Fear Interviews they had been trained to conduct.<sup>67</sup> In order to pass the MPP screening, people would have to show evidence to prove not that they were afraid to return home, but that they were afraid to remain in Mexico while they waited for their asylum hearing.<sup>68</sup> If they could not prove they were in danger, they were left in Mexico to wait.<sup>69</sup> For two years, this program forced people into limbo,<sup>70</sup> leaving them to grapple with the psychological difficulties of prolonged uncertainty on top of the original motivations for leaving home.<sup>71</sup> MPP also subjected people to the very type of danger most were trying to flee.<sup>72</sup> The organization Human Rights First has collected accounts of over 1,500 murders, rapes, kidnappings, and assaults of people who MPP forced to remain in Mexican border regions,

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<sup>64</sup> *See id.*

<sup>65</sup> *See* Press Release, Dep’t of Homeland Sec., Migration Protection Protocols (Jan 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Press Release, Kirstjen M. Nielsen, Sec’y, Dep’t of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

<sup>66</sup> *The “Migrant Protection Protocols,”* AM. IMMIGR. COUNCIL (Oct. 6, 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_migrant\\_protection\\_protocols.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols.pdf).

<sup>67</sup> *See* This American Life, *The Out Crowd*, NAT’L PUB. RADIO, at 21:39 (Nov. 15, 2019), <https://www.thisamericanlife.org/688/the-out-crowd>.

<sup>68</sup> *See Id.* at 21:52.

<sup>69</sup> *See Id.*

<sup>70</sup> Press Release, Hum. Rts. First, After Two Years, Biden Must End Migrant Protection Protocols and Bring Asylum Seekers Swiftly to Safety (Jan. 29, 2021), <https://www.humanrightsfirst.org/press-release/after-two-years-biden-must-end-migrant-protection-protocols-and-bring-asylum-seekers>.

<sup>71</sup> *See generally* Caitlin Dickerson, *Inside the Refugee Camp on America’s Doorstep*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html> (discussing the dangerous areas where asylum seekers were forced to stay).

<sup>72</sup> *Deliver to Danger - U.S. Government Sending Asylum Seekers And Migrants To Danger*, HUM. RTS. FIRST (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

which are controlled by gangs.<sup>73</sup> Even for people who managed to avoid the most direct forms of violence, MPP left them living in tent camps under unsanitary conditions that were made much worse during the COVID-19 pandemic, and the winter storms of 2021.<sup>74</sup> A whistleblower AO told the *Washington Post* that “[t]he Trump administration’s policies have turned the process into a Kafkaesque nightmare.”<sup>75</sup> Another AO told NPR’s *This American Life* that “this administration has made me a human rights abuser.”<sup>76</sup> All told, the MPP program represented a giant leap towards a total “death of asylum” in the United States.<sup>77</sup>

### B. The Asylum Cooperative Agreements

In the summer and fall of 2019, the Trump administration extended its deterrence and enforcement practices beyond the border, taking a more regional approach. By signing the so-called Asylum Cooperative Agreements (ACAs) with Guatemala, Honduras, and El Salvador and designating these countries as safe third-countries that offered “full and fair” asylum procedures, DHS could transfer several hundred asylum seekers to these three countries to have their claims processed there.<sup>78</sup> These efforts were part of a global trend known as externalization: a worldwide proliferation of deterrence measures designed to move border control to external sites beyond the physical border.<sup>79</sup> Yet, no evidence suggests that such measures actually

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<sup>73</sup> *Id.*

<sup>74</sup> Dickinson, *supra* note 71; *see also* Acia Coronado, *Conditions Deteriorating at Makeshift Camp on the Rio Grande Where Thousands Await U.S. Asylum*, TEX. TRIB. (Oct. 25, 2019), <https://www.texastribune.org/2019/10/25/conditions-deteriorating-migrant-camp-thousands-await-asylum/>.

<sup>75</sup> Charles Tjersland Jr., *I Became an Asylum Officer to Help People. Now I Put Them Back in Harm’s Way*, WASH. POST. (July 19, 2019), [https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5\\_story.html](https://www.washingtonpost.com/outlook/i-became-an-asylum-officer-to-help-people-now-i-put-them-back-in-harms-way/2019/07/19/1c9f98f0-a962-11e9-9214-246e594de5d5_story.html).

<sup>76</sup> *This American Life*, *supra* note 67, at 38:57.

<sup>77</sup> Austin Kocher, *Migrant Protection Protocols and the Death of Asylum*, 20 J. LATIN AM. GEOGRAPHY 249, 249 (2021).

<sup>78</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994, 63994-95 (Nov. 19, 2019) (to be codified at 8 C.F.R. pt. 208, 1003, 1208, 1240); *see also* David S. Fitzgerald, *Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence*, 46 JOURNAL OF ETHNIC AND MIGRATION STUDIES 1, 12 (2020).

<sup>79</sup> *See* Nanneke Winters & Cynthia M. Izaguirre, *Es Cosa Suyá: Entanglements of Border Externalization and African Transit Migration in Northern Costa Rica*, 7 COMPAR. MIGRATION STUD. 1, 4 (2019) (explaining externalization as a way to govern the movement of migrants before they arrive at a country’s border); Maribel Casas-Cortes et al., *Riding Routes and*

deter people from attempting to seek refuge.<sup>80</sup>

The ACAs designate countries as “safe” which are also three of the top four states of origin for asylum seekers in the United States.<sup>81</sup> As such, the agreements seemed designed to facilitate shuffling asylum seekers amongst the countries, sending Hondurans and Salvadorans to Guatemala, and Guatemalans to Honduras and El Salvador, despite widespread reporting about the dangerous conditions for people who have been returned to these countries.<sup>82</sup> Prior to the signing of these agreements, the United States had only entered into one other such agreement, with Canada, a country whose citizens never seek asylum in the United States.<sup>83</sup>

Instead of sitting in parallel with the U.S./Canada agreement, the ACAs are eerily similar in intent and in the underlying geopolitical power dynamics to the agreements between Australia and Nauru and Papua New Guinea, allowing for offshore processing of asylum seekers in those states as a way of denying them access to Australia.<sup>84</sup> The ACAs seem as if they are based on the exact logic articulated by Australian Prime Minister Turnbull to Trump: depriving people of access to the planned destination state as a way

*Itinerant Borders: Autonomy of Migration and Border Externalization*, 47 ANTIPODE 894, 903-04 (2015).

<sup>80</sup> See Thomas Gammeltoft-Hansen & Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. ON MIGRATION & H. SEC. 28, 43-45 (2017) (contrasting the deterrence measures with a sharp increase in numbers of asylum seekers in Europe, partly due to the growing resources available to human smugglers, the discovery of alternative routes, the constant adaptation of the migration industry, and claiming that such policies neither decreased actual asylum claims nor dissuaded the need for global humanitarian protection).

<sup>81</sup> Morgan Kaplan, *The Biden Administration Suspends Asylum Agreements with the Northern Triangle*, COLUM. J. TRANSNAT’L L.: BULL. BLOGPOST (Feb. 8, 2021), <https://www.jtl.columbia.edu/bulletin-blog/the-biden-administration-suspends-asylum-agreements-with-the-northern-triangle>.

<sup>82</sup> See YAEL SCHACHER ET AL., DEPORTATION WITH A LAYOVER: FAILURE OF PROTECTION UNDER THE U.S. – GUATEMALA ASYLUM COOPERATIVE AGREEMENT 6 (Hardin Lang ed., 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

<sup>83</sup> See generally Canada-U.S. Safe Third Country Agreement, *supra* note 38.

<sup>84</sup> See Memorandum of Understanding Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, Austl.-Nauru, Clause 7-14, Aug. 3, 2013, <https://www.dfat.gov.au/sites/default/files/nauru-mou-20130803.pdf> (setting agenda for transferring people who reached Australia by sea or otherwise authorized by Australian law to Nauru, and settling those who Nauru determines in need of international protection in Nauru or a third safe country but removing the others to their countries of origin or residence); Memorandum of Understanding Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues, Austl.-Papua N.G., Clause 8-15, August 6 2013, <https://www.dfat.gov.au/sites/default/files/joint-mou-20130806.pdf> (similar agenda without mentioning safe third country).

to disincentivize further movement.<sup>85</sup> At the signing ceremony with Guatemala, President Trump remarked, “This landmark agreement will put the coyotes and smugglers out of business. These are bad people.”<sup>86</sup> Moreover, also like Australia, these agreements do not seem to be designed out of any concern for the protection needs of the individuals being transferred. For example, out of the 945 people who the United States sent to Guatemala for RSD under this program, none were granted asylum after being processed in Guatemala.<sup>87</sup> One American AO told a reporter, “This agreement feels like a pretext to get rid of as many asylum claims as possible.”<sup>88</sup> In response, the United Nations High Commissioner for Refugees issued a press release calling the agreements “at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers.”<sup>89</sup>

Meanwhile, in July 2020, the Federal Court of Canada ruled that the Canada-U.S. Safe Third Country Agreement violated section 7 of the Canadian Charter of Rights and Freedoms because the United States was returning asylum seekers to countries where they would face danger, and was also detaining them in poor conditions.<sup>90</sup> By the summer of 2020, enough changes had been made to the U.S. RSD regime that the Canadian court had significant constitutional concerns about allowing the United States and Canada to share the processing of asylum cases as if the two regimes were equivalent.<sup>91</sup>

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<sup>85</sup> See *Full Transcript of Trump’s Phone Call with Australian Prime Minister Malcolm Turnbull*, *supra* note 51.

<sup>86</sup> Remarks on the Signing of the Guatemala-United States Safe Third Country Agreement and an Exchange With Reporters, 2019 DAILY COMP. PRES. DOC. 1 (July 26, 2019).

<sup>87</sup> Kaplan, *supra* note 81.

<sup>88</sup> Hamed Aleaziz, *Asylum Officers Were Told of Killings and Violence in Guatemala. They Were Ordered to Send People There Anyway*, BUZZFEED NEWS (Nov. 21, 2019, 8:35 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/asylum-officers-guatemala-deport-central-guidance>.

<sup>89</sup> Press Release, United Nation High Comm’r for Refugees, Statement on New U.S. Asylum Pol’y, (Jan. 19, 2019), <https://www.unhcr.org/en-us/news/press/2019/11/5dd426824/statement-on-new-us-asylum-policy.html>.

<sup>90</sup> *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 (Can. Ont.) (finding that failed STCA applicants were imprisoned upon returning to U.S. that resulted in a lack of basic human dignity, medical care, food, and legal counsel and an increased risk of refoulement), *rev’d*, 2021 FCA 72 (Can.), *perm. app. granted*, 2021 CarswellNat 5884 (Can.) (WL).

<sup>91</sup> See Amanda Coletta, *Canadian Court Says Sending Asylum Seekers Back to U.S. Violates Their Rights*, WASH. POST (July 22, 2020), [https://www.washingtonpost.com/world/the\\_americas/canadian-court-says-border-agreement-with-us-violates-asylum-seekers-rights/2020/07/22/a8b3e908-cc3a-11ea-91f1-28aca4d833a0\\_story.html](https://www.washingtonpost.com/world/the_americas/canadian-court-says-border-agreement-with-us-violates-asylum-seekers-rights/2020/07/22/a8b3e908-cc3a-11ea-91f1-28aca4d833a0_story.html).

As these examples make clear, while the actual border wall that garnered so much attention during Trump’s presidency did little or nothing to keep people out, the Trump administration created such a large number of hurdles and barriers to access that a physical wall became practically irrelevant. In addition to all of these unprecedented efforts to fortify the territory of the United States and deny access to asylum seekers, the administration also engaged in a series of unprecedented steps to make the internal process more restrictive to those who were already being assessed for refugee status.<sup>92</sup> These changes reached from the very first step of the RSD process, the Asylum Office, to the top of the federal judiciary, as I will outline below. Thus, the “border” operated well beyond the physical territory of the United States, reaching far outside, and deep inside its demarcations. It is the internal fortification that may be the most insidious, because it will be the most difficult to undo.

### *C. Last In, First Out*

At the Asylum Office level, the administration instituted a “last in, first out” policy for processing asylum claims in January 2018, designed ostensibly to address the growing backlog of cases.<sup>93</sup> This policy meant that older cases were simply left to stagnate for years.<sup>94</sup> AOs were pressured to process new cases more quickly due to the time constraints.<sup>95</sup> Meanwhile, new training guidelines were issued that changed the requirements for passing the initial hurdle for accessing the RSD regime: the Credible Fear Interview.<sup>96</sup> The Credible Fear Interview is a crucial step for asylum seekers

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<sup>92</sup> See, e.g., Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control Over Immigration Courts — By Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling> (discussing how Attorney General Jeff Sessions gave his office the ability to review and rewrite rulings from the immigration court system).

<sup>93</sup> Archive of Press Release, U.S. Citizenship & Immigr. Servs., USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog>.

<sup>94</sup> See AM. IMMIGR. LAWS. ASS’N, AILA FREQUENTLY ASKED QUESTIONS (FAQS) ON CHANGES TO THE ASYLUM OFFICE AFFIRMATIVE SCHEDULING SYSTEM (2018), <https://www.aila.org/infonet/aila-provides-faqs-on-changes-to-the-asylum-office>.

<sup>95</sup> Elizabeth Riedford, *Who Do You Think I Am? A Qualitative Study on How Professional and Cultural Experience of Adjudicators Affects Perception of Asylum Seekers 84-90* (June 2, 2020) (Ph.D. dissertation, Northeastern University) (on file with the Digital Repository Service, Northeastern University).

<sup>96</sup> Mica Rosenberg & Kristina Cooke, *Exclusive: New Training Document for Asylum Screenings Reflects Tougher U.S. Stance*, REUTERS (May 4, 2019, 1:00 PM), <https://www.reuters.com/article/us-usa-immigration-asylum-exclusive/exclusive-new-training-document-for-asylum-screenings-reflects-tougher-u-s-stance-idUSKCN1SA0LG>.

who have been put into Expedited Removal proceedings.<sup>97</sup> If they do not pass that screening, they may be removed.<sup>98</sup> If they do, they are sent before an Immigration Judge (IJ) for a full asylum hearing in an adversarial setting.<sup>99</sup> In interviews with AOs who were working during the Trump administration, Riedford found that the most powerful influences on their decision-making came from the internal agency environment, as opposed to their previous professional or cross-cultural experience.<sup>100</sup> In particular, time constraints and supervisory pressures significantly affected their work and their mental state, which Riedford concluded was a key factor in exacerbating the implicit biases of the decision-makers.<sup>101</sup>

#### *D. Attorney General Review*

For those asylum seekers that were able to pass their Credible Fear Interview, or who accessed the asylum process through other channels, the Trump administration made many changes to the interpretation of the refugee definition, in order to make it more difficult to have a successful asylum claim in front of an IJ.<sup>102</sup> In a particularly striking example of de-insulation, various Attorneys General (AG) in the Trump administration re-shaped the landscape of the RSD regime by invoking an authority called the referral and review power.<sup>103</sup> This power allows an AG to review a decision by the Board of Immigration Appeals (BIA), setting a new immigration law precedent, and remanding it back to an IJ for reconsideration under the new precedent.<sup>104</sup> AGs under Trump used this power far more than under any previous president, always to narrow the scope of non-citizens' access to legal status.<sup>105</sup>

The invocation of this power had particularly devastating impacts on

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<sup>97</sup> *Id.*; see generally *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> (last updated July 15, 2015).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Riedford, *supra* note 95, at 5, 95.

<sup>101</sup> *Id.* at 95.

<sup>102</sup> See generally Mneesa Gellman, *The Trump Administration Keeps Making It Harder to Claim Asylum. Here's How — and Why.*, WASH. POST (Aug. 15, 2019), <https://www.washingtonpost.com/politics/2019/08/15/trump-administration-keeps-making-it-harder-claim-asylum-heres-how-why/>.

<sup>103</sup> SARAH PIERCE, MIGRATION POL'Y INST., *OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 1* (2021), [https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf).

<sup>104</sup> *Id.* at 1-3.

<sup>105</sup> *Id.*

asylum seekers. For example, in June 2018 AG Sessions issued an opinion in a case called *Matter of A-B-* which bluntly reversed the course of several decades of gradual progress in finding room for victims of violence by non-state actors within American asylum law.<sup>106</sup> The individual in the case was a Salvadoran woman who had suffered longstanding violent abuse by her husband, and had been unsuccessful in finding safety within her country, despite filing several restraining orders.<sup>107</sup> The BIA had granted her asylum, but AG Sessions remanded the decision back to an IJ, arguing that generally, “domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>108</sup>

Following AG Sessions’ opinion on *Matter A-B-*, the U.S. Citizenship and Immigration Services issued a guidance for its RSD adjudicators, instructing them on how to make asylum determinations and credible fear screenings in compliance with the AG’s decision.<sup>109</sup> This guidance simplified an extremely complex area of law to essentially instruct decision-makers to deny the vast majority of claims based on domestic or gang violence, instead of looking at the individual facts of the case.<sup>110</sup> Upon remand under the new standard, A-B’s case was denied, then appealed again, then the new Acting Attorney General Jeffery Rosen referred the case to himself before sending it back to the BIA again.<sup>111</sup> In January 2021, just before the Trump administration left office, Acting AG Rosen issued an opinion which claimed to be clarifying the interpretation of the asylum standard yet again, but which instituted a much narrower standard in the guise of a clarification.<sup>112</sup> As one legal

<sup>106</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021).

<sup>107</sup> *Id.* at 319-20.

<sup>108</sup> *Id.* at 320; *see also* PIERCE, *supra* note 103, at 14-15 (opining that to include gang violence in AG Sessions’ opinion was confusing because *Matter of A-B-* did not involve any gang violence).

<sup>109</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T. OF HOMELAND SEC., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B-, at 1 (2018). This guidance is revoked due to the vacating of *Matter of A-B-* in 2021.

<sup>110</sup> *See id.* at 6 (stating that, because asylum status was not meant to address all misfortunes and asylum was not a remedy for personal altercations reflecting economic and social relationships, “when a private actor inflicts violence based on a personal relationship with the victim, the victim’s membership in a larger group often will not be ‘one central reason’ for the abuse” (quoting *Matter A-B-*, 27 I. & N. Dec. at 338-39)).

<sup>111</sup> *Matter of A-B-*, 28 I. & N. Dec. 199, 119-200 (A.G. 2021), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021).

<sup>112</sup> *See id.* at 202-11 (stating that (i) there must be a governmental role in relation to persecution by private actors to establish a refugee status; (ii) there must be “far more” than a governmental inaction or failure to prevent or solve a crime to establish “unable or unwilling” to protect a person against private violence; and (iii) there must be more than a but-for

analysis of the 2021 decision put it, “[O]ne has to wonder if the AG desires such a rule because such a situation can rarely if ever be proven.”<sup>113</sup> In other words, the decision seemed to require asylum seekers to demonstrate a state of affairs in their home country that is so unlikely, no one could qualify for asylum under that standard.<sup>114</sup>

It is difficult to imagine a starker example of the ways in which a fragmented and legalistic RSD regime can be captured by exclusionary politics. Under Trump, Attorneys General, even acting ones, used power at their disposal to try to shift legal interpretation to be less favorable to the precise type of person who was arriving at the U.S./Mexico border in the hopes of filing an asylum claim. Many thousands of people were denied asylum using the precedents set by the decisions made in *Matter A-B*.<sup>115</sup>

### *E. Appointments*

Trump’s attack on the U.S. RSD regime left no institutional player untouched. One of the longest-lasting changes the Trump administration made to the RSD regime was the packing of the Executive Office of Immigration Review (EOIR), which includes the immigration courts and the BIA.<sup>116</sup> Much has been made of the fact that Trump was able, in just one term, to appoint three of the nine Supreme Court justices, as well as a quarter of judges in the federal courts of appeals.<sup>117</sup> These appointments will have a

causation to show that a person’s protected ground is “at least one central reason” for the persecution (quoting 8 U.S.C. § 1158(b)(1)(B)(i)).

<sup>113</sup> Geoffrey A. Hoffman, *The “Complete Helplessness” of Matter A-B- and One More Last Ditch Effort to Torpedo Asylum*, YALE J. ON REGUL. (Jan. 19, 2021), <https://www.yalejreg.com/nc/the-complete-helplessness-of-matter-of-a-b-and-one-more-last-ditch-effort-to-torpedo-asylum-by-geoffrey-a-hoffman/>.

<sup>114</sup> See also PIERCE, *supra* note 103, at 15, where Pierce opined that Acting AG Rosen’s opinion meant so long as an applicant’s home country had made efforts to prevent a crime, even if the efforts failed, the applicant could not establish a need for asylum.

<sup>115</sup> See Tanvi Misra, *Her Case Set The Precedent for the Trump Administration. Now She’s Been Granted Asylum*, THE FULLER PROJECT (Jul. 15, 2021), <https://fullerproject.org/story/asylum-the-matter-of-a-b-immigration-domestic-violence-survivors-women/> (a transparency and research group at Syracuse University found an overall increase in asylum denial rates following AG Sessions’ *Matter A-B-* decision in 2019).

<sup>116</sup> Reade Levinson et al., *Special Report: How Trump administration Left Indelible Mark on U.S. Immigration Courts*, REUTERS (Mar. 8, 2021, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179>.

<sup>117</sup> See *Judgeship Appointments by President*, U.S. COURTS, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf>; see also Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), [https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html).

major impact on all areas of law, including immigration and asylum.

However, Trump's efforts to reshape the immigration court system will have a far greater impact on a larger number of cases. The Trump administration appointed approximately two-thirds of all current IJs.<sup>118</sup> There is good reason to believe that these IJs are more likely to be skeptical of asylum seekers. A Reuters analysis of 800,000 cases decided over the last 20 years found that IJs appointed under Trump ordered deportation in 11% more cases than IJs appointed as far back to the Regan administration, resulting in "tens of thousands more people ordered deported each year."<sup>119</sup> Further, through a Freedom of Information Act request, advocacy organization Human Rights First discovered a memo from Attorney General Sessions outlining a new procedure for hiring IJs that gave political appointees within the Department of Justice a much larger role in the process.<sup>120</sup> Human Rights First also discovered that the vast majority of Trump appointees to the EOIR have a background in immigration enforcement or other government work, and almost none have a background in representing immigrants or public interest law.<sup>121</sup> To lead the EOIR, Trump appointed Tracy Short, a former Immigration and Customs Enforcement (ICE) prosecutor with no judicial experience, to the position of Chief Immigration Judge.<sup>122</sup>

At the level of the BIA, after members appointed by Obama declined the incentives they were given to retire, the Trump administration packed the board by adding six new positions,<sup>123</sup> in total appointing 14 out of 23 current members.<sup>124</sup> The six people added by Attorney General Barr were promoted from their positions as IJs, where they boasted outlier asylum grant rates ranging from 0-5% in fiscal year 2019, as opposed to the average across all IJs of 29% in the same fiscal year.<sup>125</sup> Promoting the decision-makers with the

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<sup>118</sup> Levinson et al., *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> *Immigration Court Hiring Politicization*, HUM. RTS. FIRST (Oct. 18, 2018), <https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf>.

<sup>121</sup> *Id.*

<sup>122</sup> See Press Release, Exec. Office for Immigr. Rev., U.S. Dep't of Just., EOIR Announces New Chief Immigration Judge (July 2, 2020), <https://www.justice.gov/eoir/page/file/1291891/download>.

<sup>123</sup> 8 C.F.R. § 1003.1(a)(1) (2021); Expanding the Size of the Board of Immigration Appeals, 85 Fed. Reg. 8,321 (Apr. 1, 2020).

<sup>124</sup> See *Board of Immigration Appeals: Biography Information*, EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> (last updated Nov. 16, 2021).

<sup>125</sup> See Bryan Johnson, *Immigration Judges Asylum Grants & Denials in FY 2018-2019*, AMOACHI & JOHNSON, PLLC ATTORNEYS AT LAW: NEWS AND VIEWS (Dec. 24, 2019), <https://amjlaw.com/2019/12/24/immigration-judges-asylum-grants-denials-in-fy-2018-2019/>.

lowest RSD acceptance rates in the country sends a clear message to every IJ about what the administration considers a successful IJ, further fortifying the internal fortress. In response to these actions, ten Democratic Senators sent a letter to the Government Accountability Office (GAO) requesting an investigation of the “politicization” of the immigration court system designed to “tip the scales of justice against non-citizens,” as Senators Sheldon Whitehouse, Dick Durbin, and Mazie Hirono phrased it in a statement.<sup>126</sup>

Meanwhile, the massive turnover among IJs under Trump has also made the backlog of cases much larger, 1.3 million instead of the 540,000 when he took office.<sup>127</sup> Even in 2014, there had already been an “immigration litigation explosion” into the circuit courts of appeal,<sup>128</sup> much of which was driven by asylum cases.<sup>129</sup> Today, federal courts continue to hear appeals from the BIA at a very high rate.<sup>130</sup> But now, as this massive backlog works its way through the system, applicants for asylum are likely to go before Trump appointees at every stage of the process.

#### F. Additional Measures

Additional proposed changes to the RSD regime that became known as the “death to asylum” regulations were slated to go into effect in January 2021, despite receiving a staggering 87,000 public comments raising concerns

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<sup>126</sup> Press Release, Sheldon Whitehouse et al., Sens., U.S. Congress, Senators Announce GAO Investigation of Trump Politicization of Immigration Courts as COVID-19 Crises Rages (Sept. 14, 2020), <https://www.whitehouse.senate.gov/news/release/senators-announce-gao-investigation-of-trump-politicization-of-immigration-courts-as-covid-19-crisis-rages>; Letter from Senator Sheldon Whitehouse et. al. to Gene Dodaro, Comptroller Gen. of the U.S., U.S. Gov’t Accountability Off. (Aug. 21, 2020), [https://www.feinstein.senate.gov/public/\\_cache/files/a/0/a0897fbc-f0b9-42c3-8ee9-4102f64ace6d/068AA8BD7FC14E588F8C99B9CC8DFDA2.letter-to-gao-requesting-investigation-of-eoir.pdf](https://www.feinstein.senate.gov/public/_cache/files/a/0/a0897fbc-f0b9-42c3-8ee9-4102f64ace6d/068AA8BD7FC14E588F8C99B9CC8DFDA2.letter-to-gao-requesting-investigation-of-eoir.pdf); see also Press Release, S. Comm. on the Judiciary, U.S. Congress, Senators Call for GAO Investigation of Trump Politicization of Immigration Courts as COVID-19 Crisis Rages (Aug. 21, 2020), <https://www.judiciary.senate.gov/press/dem/releases/senators-call-for-gao-investigation-of-trump-politicization-of-immigration-courts-as-covid-19-crisis-rages>.

<sup>127</sup> Editorial Board, *Immigration Courts Aren’t Real Courts. Time to Change That.*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html>.

<sup>128</sup> Hamlin, *supra* note 1, at 78.

<sup>129</sup> *Id.* at 79.

<sup>130</sup> See Federal Judicial Caseload Statistics 2019, THE ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> (last updated Mar. 31, 2019) (“BIA appeals accounted for 85 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit.”).

about the barriers they would pose for asylum seekers.<sup>131</sup> These regulations would have set in stone a very strict legal interpretation of many aspects of the refugee definition,<sup>132</sup> including cementing the AG opinions in *Matter of A-B-*. They would have also accelerated Expedited Removal hearings, raised the bar for credible fear screenings, and tightened the screws on the process in a variety of other ways.<sup>133</sup> In order to undo these changes, the new Biden administration would have had to go through the cumbersome process of issuing new and different regulations to replace them. However, just before they were set to take effect, a federal judge blocked several of the measures from going forward, saying the regulation “deprives vulnerable asylum applicants of essential procedural safeguards designed to avoid arbitrary denials of asylum.”<sup>134</sup> This decision was a major victory for asylum advocates, and will significantly reduce the amount of unraveling to be done by the Biden administration. Nevertheless, taken together, the four years of the Trump administration were still a scorched earth policy. Even though many of the most egregious attempts to end asylum were met with resistance in federal courts and ultimately failed or were stalled, there is still much work to be done.

### III. BIDEN’S UPHILL CLIMB

An institutional analysis helps to clarify the possibilities of the current moment. Most crucial is to distinguish between the elements of Trump’s legacy that can be easily reversed, and those which are more lasting and difficult to shift because they are institutionally embedded. Cox and Rodríguez have recently argued that presidents are powerful actors in the immigration policy landscape, and they claim that while Congress is notoriously slow, a new president could at least theoretically be more flexible and “nimble,” using executive authority to turn the ship around.<sup>135</sup> While I find much of their argument convincing, I do not believe that highly

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<sup>131</sup> Bill Frelick, *The Trump Administration’s Final Insult and Injury to Refugees*, HUM. RTS. WATCH (Dec. 11, 2020, 6:00 AM), <https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees>; see generally Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (June 15, 2020) (to be codified at 8 C.F.R. pt. 208).

<sup>132</sup> See Nolan Rappaport, *What Trump’s New ‘Death to Asylum’ Rule Actually Says*, THE HILL (Dec. 14, 2020, 11:00 AM), <https://thehill.com/opinion/immigration/530069-what-trumps-new-death-to-asylum-rule-actually-says>.

<sup>133</sup> *Id.*

<sup>134</sup> *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663, 664 (N.D. Cal. 2021); see also Miriam Jordan, *A Judge Has Blocked Trump’s Sweeping Restrictions on Asylum Applications*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/us/politics/a-judge-has-blocked-trumps-sweeping-restrictions-on-asylum-applications.html>.

<sup>135</sup> See Cox & Rodríguez, *supra* note 25, at 208-13, 246.

restrictionist and somewhat more humanitarian presidents are nimble to equal and opposite degrees. Rather, both the institutional and the political landscapes of the American RSD regime favor the restrictionists. Asylum has always sat as an uncomfortable exception to the rule that sovereign states can control their borders, and under Trump, as discussed in Part II, it was swept up in a tide of exclusionary politics. The Trump administration spent four years unleashing the whole apparatus of border control and enforcement to do (albeit more cruelly and efficiently) the very task it was designed to do.<sup>136</sup> It is increasingly difficult to articulate how asylum fits into this picture. To put it slightly differently, as examined above, the force of Trump's executive action on asylum was centripetal; it pulled all the actors of the system towards the priorities of a central goal: exclusion. Unraveling that tightly-wound bureaucratic knot and fully committing to an asylum system that provides meaningful protection would take a long time and be met with significant resistance along the way. It would require more than just undoing the most shocking and well-known initiatives of the previous administration. Further, it would require the political will to invest heavily in the project of providing safe haven for vulnerable people.

The first major obstacle to progress is simply coming to terms with the sheer number of changes that have been made to the system. As the *New Yorker* has reported, “[F]or every Trump-era policy that Biden has reversed, hundreds of lesser-known measures remain.”<sup>137</sup> A team of students at Yale and Stanford law schools, led by Professor Lucas Guttentag, have compiled the Immigration Policy Tracking Project, designed to be an exhaustive record of every immigration change the Trump administration made.<sup>138</sup> According to that database, there were 1,059 policy changes made during Trump's four years in office.<sup>139</sup> Ninety-six of them are specifically about asylum, but many other broader policies regarding border control and the staffing of the EOIR have also had major impacts on asylum seekers.<sup>140</sup> Most of the changes cannot be reversed via executive order, and will take diligence and persistence to address.<sup>141</sup>

The Biden administration initially took swift action on some of the most high-profile and upsetting aspects of Trump's immigration policy. For example, only weeks after taking office, in February 2021, the Biden

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<sup>136</sup> See HAMLIN, *supra* note 1, at 70.

<sup>137</sup> Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, THE NEW YORKER (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies>.

<sup>138</sup> See *Trump Policy Actions*, IMMIGR. POL'Y TRACKING PROJECT, <https://immpolicytracking.org/policies/> (last visited Jan. 10, 2022).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Stillman, *supra* note 137.

administration began to wind down MPP, and the United States began processing the applications of some asylum seekers who had been forced to wait in Mexico.<sup>142</sup> However, people were admitted at the rate twenty-five at a time at the beginning, with the goal to “eventually” increase that number to 300 per day.<sup>143</sup> In June 2021, following Executive Order 14,010,<sup>144</sup> the Secretary of the Department of Homeland Security (DHS) announced that the MPP program would be fully terminated.<sup>145</sup> However, in August 2021, a district court judge ruled that this action violated the Administrative Procedures Act and ordered MPP reinstated.<sup>146</sup> The Biden administration is still embroiled in ongoing litigation seeking a final ruling on the matter.<sup>147</sup> In the meantime, nothing can change the fact that more than seventy thousand people have been denied entry to the United States through MPP during the years it has been in place, and most of the people who were eventually admitted by the Biden administration had waited in Mexico for over a year.<sup>148</sup> Further, the Biden administration continues to block the entry of asylum seekers under a power granted to them under Title 42, which the previous administration invoked due to the COVID-19 pandemic.<sup>149</sup>

The Biden administration has also suspended and declared its intention to fully terminate the ACA’s with the three Central American countries, saying

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<sup>142</sup> See Press Release, White House, The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Dr. Elizabeth Sherwood-Randall (Feb. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and-national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/> (“Starting February 19, the United States will begin to process eligible individuals in the Migration Protection Protocols (MPP) program to pursue their asylum cases in the US, working closely with the Government of Mexico, as well as international and non-governmental organizations.”).

<sup>143</sup> Mimi Dwyer et al., *U.S. Unwinds Trump ‘Remain in Mexico’ Program, Mulls Flights for Asylum Seekers*, METRO US (Feb. 20, 2021), <https://www.metro.us/u-s-unwinds-trump-remain/>.

<sup>144</sup> Exec. Order No. 14,010, 86 Fed Register 8,267, 8,269 (Feb. 5, 2021) (directing the Secretary of Homeland Security to promptly review and determine whether to terminate MPP).

<sup>145</sup> U.S. DEP’T OF HOMELAND SEC., TERMINATION OF THE MIGRANT PROTECTION PROTOCOLS MEMO, at 1, 4 (2021).

<sup>146</sup> See *Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021).

<sup>147</sup> *Court Ordered Reimplementation of the Migrant Protection Protocols*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/migrant-protection-protocols> (last visited Jan. 10, 2022).

<sup>148</sup> AM. IMMIGR. COUNCIL, *supra* note 66, at 1.

<sup>149</sup> See Franco Ordoñez, *Title 42 Foes Go Back To Court To Try To End COVID Measure Blocking Asylum-Seekers*, NAT’L PUB. RADIO (Aug. 2, 2021, 6:34 PM), <https://www.npr.org/2021/08/02/1023187217/title-42-foes-go-back-to-court-to-try-to-end-covid-measure-blocking-asylum-seeke>.

it plans to replace the agreements with a “cooperative, mutually respectful approach to managing migration across the region.”<sup>150</sup>

Another massively important development came in June of 2021 when Attorney General Garland issued a precedent setting decision in *Matter of A-B*- vacating previous decisions on Ms. A-B-'s case which dictated a narrow interpretation of asylum law.<sup>151</sup> Following that decision, Ms. A-B- was granted asylum by the BIA.<sup>152</sup> AG Garland's decision will have a wide ripple effect across the U.S. RSD regime. However, many people's cases were denied, or pushed into the courts unnecessarily, under the previously narrow training guidelines for asylum officers issued under the Trump administration.<sup>153</sup> Further, while Ms. A-B- is finally safe, she initially entered the United States in 2014, and has endured many years of unnecessary additional trauma due to the initiatives of the Trump administration.<sup>154</sup>

These three changes are significant, but they also represent the lowest-hanging fruit, leaving the harder and more transformative work undone. While Biden was very vocal in his promises and his early actions about undoing Trump's immigration agenda, his focus is not on asylum per se.<sup>155</sup> There is nowhere near the same level of national consensus about liberalizing asylum processes as there is about other immigration issues, such as a path to citizenship for unauthorized people already living in the United States, which three fourths of Americans support.<sup>156</sup> The American public has

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<sup>150</sup> Press Release, Anthony J. Blinken, Sec'y of State, Blinken Statement on Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 2, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras>.

<sup>151</sup> See *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021).

<sup>152</sup> See *Justice Department Grants Asylum to Salvadoran Woman at the Center of Illegal Trump Policy*, CTR FOR GENDER & REFUGEE STUD. (July 15, 2021), <https://cgrs.uchastings.edu/news/justice-department-grants-asylum-salvadoran-woman-center-illegal-trump-policy>; see also Mallika Kaur, *Stopping Long Enough to Celebrate: Recent Win for Violence Survivor and Asylum-Seeker Holds Critical Lessons*, MS. (Aug. 8, 2021), <https://msmagazine.com/2021/08/18/immigration-violence-survivor-ms-a-b/> (interview with Ms. A-B-'s lawyer).

<sup>153</sup> Rosenberg & Cooke, *supra* note 96.

<sup>154</sup> See *Advocates Urge Attorney General Garland to End Policies That Endanger Women and Families Seeking Asylum*, UNIV. CAL. HASTINGS COLL. OF THE LAW: CTR. FOR GENDER & REFUGEE STUD. (June 11, 2021), <https://cgrs.uchastings.edu/news/advocates-urge-attorney-general-garland-end-policies-endanger-women-and-families-seeking-asylum>.

<sup>155</sup> See generally *The Biden Plan for Securing Our Values as a Nation of Immigrant*, DEMOCRATIC NAT'L COMM., <https://joebiden.com/immigration/> (last visited Jan. 10, 2022).

<sup>156</sup> See *Public's Priorities for U.S. Asylum Policy: More Judges for Cases, Safe Conditions for Migrants*, PEW RSCH. CTR. (Aug. 12, 2019), <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s->

expressed outrage about issues such as “kids in cages,” but generally speaking are not in favor of open borders,<sup>157</sup> and the details of asylum policy, while hugely significant for asylum seekers, can be extremely arcane and are unfamiliar to the vast majority of Americans.

Borders are messy. People arriving at them come for a huge variety of reasons. RSD regimes, by definition, have to sort through the mess and develop a process through which people are determined to qualify for entry, or not. Despite accusations by Republicans that Democrats are in favor of open borders,<sup>158</sup> the reality is that the Democratic party has not had a clear and consistent message on border control the way that the Republican party does.<sup>159</sup> Unlike the Trump administration, which did not acknowledge the U.S. as a site of direct asylum as discussed in Part II, the Biden administration seems to be slightly more willing to entertain that idea.<sup>160</sup> But, trying to carve out a middle ground between Trump’s fortress and open borders will inevitably involve a combination of forcing desperate people to wait as they are processed, and trying to discourage them from coming in the first place. In a February 2021 interview with NPR, the newly appointed DHS Secretary Alejandro Mayorkas said, “If, in fact, they don’t wait, we will see the detriments of that failure to wait. And that, regrettably, will be an important lesson with respect to what we have cautioned.”<sup>161</sup> Similarly, in June 2021, Vice President Kamala Harris said during her official trip to Guatemala, “I want to be clear to folks in this region who are thinking about making that dangerous trek to the United States-Mexico border: Do not come. Do not come. The United States will continue to enforce our laws and secure our border.”<sup>162</sup> The Biden administration thus seems committed to deterrence

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illegally-as-children/.

<sup>157</sup> See Danielle Kurtzleben, *What The Latest Immigration Polls Do (And Don’t) Say*, NPR (Jan. 23, 2018), <https://www.npr.org/2018/01/23/580037717/what-the-latest-immigration-polls-do-and-dont-say>, which reported that a majority of American supported DACA, favored a decrease in legal immigration, and did not strongly oppose a border barrier.

<sup>158</sup> *Biden’s Open Border Policies Have Deadly Consequences*, HOUSE GOP (Nov. 4, 2021), <https://www.gop.gov/bidens-open-border-policies-have-deadly-consequences/>.

<sup>159</sup> See David Leonhardt, *The Democrat’s Immigration Problem*, N.Y. TIMES (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/briefing/sedition-miami-beach-curfew-astrazeneca.html>.

<sup>160</sup> See Elena Moore, *Trump’s and Biden’s Plans on Immigration*, NPR (Oct. 16, 2020, 8:01 AM), <https://www.npr.org/2020/10/16/919258401/trumps-and-biden-s-plans-on-immigration>.

<sup>161</sup> *Biden Administration’s Asylum System To Replace Trump’s ‘Remain In Mexico,’* NAT’L PUB. RADIO (Feb. 12, 2021, 7:21 AM), <https://www.npr.org/2021/02/12/967260409/biden-administrations-asylum-system-to-replace-trumps-remain-in-mexico>.

<sup>162</sup> Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NAT’L PUB. RADIO (June 7, 2021), <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states>; Guardian News, *Kamala*

rhetoric, despite extensive research to suggest that it does not work to deter people who are desperately seeking safety and stability.<sup>163</sup>

Another major hurdle in achieving change will be addressing the issue of agency culture. The EOIR, U.S. Immigration and Customs Enforcement (ICE), Customs and Border Protection Agents, and DHS more generally are all agencies with reputations for hostility to immigrants.<sup>164</sup> Biden has replaced some of the top leadership at these agencies,<sup>165</sup> but the deeper issue is with the rank and file. There is no executive order that Biden can issue which will magically transform skeptical or hostile enforcement agents, AOs, and IJs. Executives like Trump, who wanted to push the massive apparatus of the U.S. RSD regime towards exclusion, had success in part because the individuals who opt into immigration enforcement work are more inclined to think in those terms. This issue can create what Cox and Rodriguez call “cultural obstacles,” resistance of an implementing agency to the priorities of the president.<sup>166</sup> Investigative reporting has corroborated this theory, revealing resistance within ICE to following along with the new enforcement priorities articulated by the Biden administration, which they view as too lax.<sup>167</sup>

Perhaps ironically, the Biden administration’s actions may have affected the chances of bringing the Canada-U.S. Safe Third Country Agreement to a close. Despite the major 2020 decision which raised constitutional concerns

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*Harris Tells Migrants ‘Do Not Come’ During Talks in Guatemala*, YOUTUBE (June 7, 2021), <https://www.youtube.com/watch?v=bpGitFlzamQ>.

<sup>163</sup> See, e.g., Jan-Paul Brekke & Kjersti Thorbjørnsru, *Communicating borders—Governments deterring asylum seekers through social media campaigns*, 7 *MIGRATION STUD.* 43, 46 (2020).

<sup>164</sup> Peter L. Markowitz, *Abolish ICE . . . And Then What?*, 129 *YALE L. J. F.* 130, 134-35 (2019); Jessica Cobian, *The Anti-Immigrant Extremists in Charge of the U.S. Immigration System*, *CTR. FOR AM. PROGRESS* (June 24, 2019), <https://www.americanprogress.org/article/anti-immigrant-extremists-charge-u-s-immigration-system/>.

<sup>165</sup> See, e.g., Press Release, U.S. Dep’t of Just., Attorney General Merrick B. Garland Announces Appointment of David Neal as Director of the Executive Office for Immigration Review (Sept. 24, 2021), <https://www.justice.gov/eoir/staff-profile/meet-the-director>; Nomination of Chris Magnus for Department of Homeland Security, PN565, 117th Congress (2021-2022), <https://www.congress.gov/nomination/117th-congress/565> (Senate confirming Chris Magnus as Commissioner of U.S. Customs and Border Protection); Nomination of Alejandro Nicholas Mayorkas for Department of Homeland Security, PN78-13, 117th Congress (2021-2022), <https://www.congress.gov/nomination/117th-congress/78/13> (Senate confirming Alejandro Mayorkas as Secretary of DHS).

<sup>166</sup> Cox & Rodríguez, *supra* note 25, at 172.

<sup>167</sup> See John Washington, *ICE Subverting Biden’s Priorities For Detention And Deportation*, *THE INTERCEPT* (May 7, 2021, 10:59 AM), <https://theintercept.com/2021/05/07/ice-biden-priorities-deportation/>.

about its continuation,<sup>168</sup> the Agreement is currently still in place. The Canadian government appealed the 2020 decision, and in April of 2021, the Federal Court of Appeal of Canada reversed the decision and ruled to uphold the Agreement, keeping it in place on narrow technical grounds.<sup>169</sup> The battle is far from over, as asylum advocates in Canada appealed to the Canadian Supreme Court, which has agreed to hear the case.<sup>170</sup> However, at least for now, the Canadian judiciary seems willing to allow the deal to continue under Biden, implicitly rejecting the argument that the U.S. system is too inferior in the protection it offers to be considered equivalent to Canada's RSD regime.

### CONCLUSION

There is nothing whatsoever that can be done to remedy the damage of policies that led people to be killed unnecessarily, to be traumatized irrevocably, to be separated from loved ones perhaps permanently, to lose years of their lives to uncertainty and stress. There will be no justice for the victims of that bureaucratic violence. And, even if President Biden made it his top priority, which seems highly unlikely, it will take years, in some cases generations, to fully eliminate the continuing damage being done, especially by Trump's judicial appointments. But, at the risk of being wildly over-optimistic at the end of a very grim tale, the current moment is not just a tragedy, it can also be an opportunity. At this critical juncture, a dramatic move to not just unravel the thicket of existing policy, but to totally reimagine the U.S. RSD regime is sorely needed. Creative and bold ideas often emerge in moments of despair. In such moments, hope for the future can feel equal parts irresponsible and essential. The first step is to survey the prospects, not

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<sup>168</sup> Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship), 2020 FC 770 (Can. Ont.).

<sup>169</sup> Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 72 (Can.). In dismissing the claim, the Federal Court of Appeal reasoned that the claimants should challenge the administrative review designating the United States as a safe third country under the legislation implementing the Canada-U.S. Safe Third Country Agreement rather than the legislation itself. *Id.* ¶¶ 2, 5, 53, 84-90. The Court also criticized that the claimants used individualized accounts and hearsay evidence rather than systemic evidence "gathered on a state-to-state basis." *Id.* ¶¶ 83, 135-138, 150. The Court also did not find the treatment of the returnees in the U.S. violated fundamental principle of justice as it neither "shock[ed] the conscience" in Canadian courts, *id.* ¶¶ 151-161, nor was grossly disproportional to the legislation's purposes of border cooperation, *id.* ¶¶ 162-168.

<sup>170</sup> Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2021 CarswellNat 5884 (Can.) (WL). See also Kim Mackrael, *Canada Can Keep Returning Asylum Seekers to U.S., Court Rules; Decision Reverses a Lower-Court Ruling and Sets Up Possible Challenge in Supreme Court of Canada*, WALL STREET J. (Apr. 15, 2021), <https://www.wsj.com/articles/canada-can-keep-returning-asylum-seekers-to-u-s-court-rules-11618525921>.

just for reversing course on matters of protection, but for charting a new course altogether.

The resolution of *Matter of A-B-* saga suggests that AG Garland is willing to use the referral and review power to issue precedent setting decisions which counter the ones issued by Trump administration AGs. However, this solution continues the ongoing tug-of-war that places high ranking political appointees at the center of the RSD regime. A much more durable strategy would be to issue federal regulations outlining procedural and legal safeguards for asylum seekers. This approach would promote stability in the system, because it would be much more difficult for future administrations to reverse. Further, many immigration advocates, including the American Immigration Lawyers Association, have been pushing for Congress to create an independent Article I court to replace EOIR that is completely outside of the Department of Justice.<sup>171</sup> Regulatory protections combined with an independent immigration court system would move the American RSD regime much closer to Canada's regime, which has an independent tribunal at its center.<sup>172</sup> Such a reform would go a long way to provide insulation to decision-makers, and put a stop to the battles that arise as each new presidential administration tries to make its mark on the EOIR.

In this moment, instead of trying to prove that he does not support open borders, President Biden could publicly back major reforms that promised a fair and timely process for each applicant, emphasizing the obligation to offer not just the faint and distant prospect of protection, but an actual chance at gaining it. Without this kind of major investment and overhaul, the best that can be hoped for is a return to an RSD regime like the one I observed in depth in 2014.<sup>173</sup> That RSD regime was highly unpredictable, and it privileged those who could physically get themselves into the territory of the United States, and then retain skilled counsel once they got here.<sup>174</sup> People who are urgently seeking protection deserve better.

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<sup>171</sup> *AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts*, at 1, AM. IMMIGR. LAW. ASSOC. (Jan. 4, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/aila-calls-for-independent-immigration-courts>.

<sup>172</sup> Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, 37 L. & SOC. INJURY 933, 947-48 (2012).

<sup>173</sup> HAMLIN, *supra* note 1.

<sup>174</sup> *See id.* at 66-67, 69.