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*THE RED SCARE TO THE TRAVEL BAN*

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## Reflections on Immigration One Hundred Years After the Red Scare

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DAVID D. COLE

## Reflections on Immigration One Hundred Years After the Red Scare

65 N.Y.L. SCH. L. REV. 171 (2020–2021)

This article is based on the keynote address at the *New York Law School Law Review* symposium titled “A Century of Targeting Immigrants: From the Red Scare to the Travel Ban” by David Cole, delivered on November 8, 2019.

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## REFLECTIONS ON IMMIGRATION

One hundred years ago, the U.S. government responded to a series of terrorist bombings in the United States by rounding up not the bombers, but immigrants.<sup>1</sup> The so-called “Palmer Raids,”<sup>2</sup> executed in coordinated fashion across the country, detained thousands on charges of mere association with anarchist or communist groups, and ultimately led to the deportation of hundreds.<sup>3</sup> Not a single bomber was found.<sup>4</sup> As we mark the centennial of that lesson in overreaction, my goal here is to ask what we can learn from it. Some of the tactics employed then are still all too evident today, but there are also important differences that provide a basis for hope.

My own introduction to immigration law came as a young lawyer with the Center for Constitutional Rights, a non-profit civil rights organization in New York. My first trial involved the defense of Margaret Randall, who faced deportation for advocating world communism.<sup>5</sup> This was in 1984, not 1954; the trial was an anachronism. There had not been a communist deportation trial in ages. (Indeed, I suspect the real reason I was invited to give this lecture is that I am the last person standing to have litigated a communist deportation case.)

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1. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 118 (2003) [hereinafter *ENEMY ALIENS BOOK*] (footnote omitted) (“Despite a nationwide hunt for the perpetrators, the bombers were never discovered. Instead, the Justice Department . . . launched a series of dragnet raids directed at deporting radical foreign nationals.”).
  2. The so-called “Palmer Raids” took place from November 1919 through January 1920 and resulted in “officials arrest[ing] between 4,000 and 10,000 persons,” often without arrest warrants. *ENEMY ALIENS BOOK*, *supra* note 1, at 119–20. The Palmer Raids take their name from Attorney General A. Mitchell Palmer, but they were actually the brainchild of J. Edgar Hoover. See *id.* at 116 (“Hoover . . . began his legendary career employing expansive powers to target, regulate, and imprison ‘dangerous’ foreign nationals without criminal charges . . . .”); see also John S. Bugas, Book Review, 29 *TEX. L. REV.* 562, 563 (1951) (reviewing MAX LOWENTHAL, *THE FEDERAL BUREAU OF INVESTIGATION* (1950)) (discussing the history of the Palmer Raids); see also Beverly Gage, *Counting Crime: J. Edgar Hoover, the Wickersham Commission, and the Problem of Criminal Statistics*, 96 *MARQ. L. REV.* 1109, 1111–12 (2013) (exploring Hoover’s career and involvement in the Palmer Raids). Palmer was the Attorney General of the United States from 1919 to 1921. *A. Mitchell Palmer*, *ENCYC. BRITANNICA*, <https://www.britannica.com/biography/A-Mitchell-Palmer> (last visited Apr. 12, 2021). At the time of the raids, Hoover was the head of the “Alien Radical” division of the Justice Department. *ENEMY ALIENS BOOK*, *supra* note 1, at 116.
  3. See *ENEMY ALIENS BOOK*, *supra* note 1, at 118–22, 127 (noting that “[t]he first of the ‘Palmer Raids’ was conducted in eighteen cities on November 7, 1919 and directed at suspected members of . . . a social organization of Russian immigrants,” and that another set of raids “directed at the Communist Party and the Communist Labor Party . . . w[as] planned for January 2, 1920”). The Raids resulted in “mass arrests produc[ing] hundreds . . . of deportations” of individuals who were “arrested for being members (or suspected members) of Communist organizations,” and not for the terrorist bombings. *Id.*; see also Gage, *supra* note 2 (noting that the Palmer Raids were targeted “against anarchists and communists”).
  4. *ENEMY ALIENS BOOK*, *supra* note 1.
  5. See David Cole, *What’s a Metaphor?: The Deportation of a Poet*, 1 *YALE J.L. & LIBERATION* 6 (1989) [hereinafter *What’s a Metaphor?*] (noting that Randall’s application for permanent residence was denied because her “writings [went] far beyond mere dissent” and she was “barred from living in the U.S. permanently . . . because her writings ‘advocate[d] the economic, international, and governmental doctrines of world communism’”); see also *ENEMY ALIENS BOOK*, *supra* note 1, at 159 (noting that the author, David Cole, was “[f]resh out of law school” and that Randall’s case “was [his] first trial”). See generally *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988) (denying Randall’s application for permanent residence in the United States).

Margaret Randall was a prolific writer.<sup>6</sup> As you might imagine from her name, she was actually born a U.S. citizen.<sup>7</sup> But she found herself in deportation proceedings because she had given up her American citizenship in order to obtain Mexican citizenship in the 1960s, while married to a Mexican poet and living with her family in Mexico.<sup>8</sup> After residing for many years in Mexico, Cuba, and Nicaragua, she ultimately sought to return to the United States as a Mexican citizen, and applied for permanent resident status.<sup>9</sup> An immigration official denied her application on the ground that she had espoused world communism in her writings, and she was placed into deportation proceedings.<sup>10</sup>

Randall's 1984 deportation hearing, in El Paso, Texas, largely consisted of immigration attorneys questioning her about her writings.<sup>11</sup> They had effectively underlined in red every time she had written anything vaguely communist, including a journal entry expressing pride in her three-year-old son "becoming [a] communist" by learning how to share his toys with others.<sup>12</sup> Sometimes it's not so good to be prolific. At one point, Guadalupe Gonzalez—the immigration lawyer cross-examining Randall—confronted her with the fact that a magazine she had once co-edited with her husband "has been described in print as 'a revolutionary weapon.'"<sup>13</sup> Randall

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6. See *What's a Metaphor?*, *supra* note 5, at 8 ("[Margaret Randall] is an internationally acclaimed author of more than 40 books, including many oral histories documenting the daily lives of women, religious workers, and writers in contemporary Cuba and Nicaragua.").
  7. *Id.* at 6.
  8. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 998 (2002) [hereinafter *Enemy Aliens Article*].
  9. *What's a Metaphor?*, *supra* note 5, at 8–9.
  10. *Id.* at 6; see also *Randall*, 854 F.2d at 475–76 (providing that the immigration official "reported that five of Margaret Randall's books . . . revealed Randall's exuberant praise of Fidel Castro and the Cuban Revolution, her applause for the 'Vietnamese victory,' and her condemnation of the United States" and that "[h]er books advocate the doctrines of communism and support the Communist governments of Cuba, Vietnam and Nicaragua from 1966 to 1981"). Some of Randall's writings that supposedly "advocat[e] the doctrines of communism" include *Cuban Women Now*, which tells the stories of women who were members of the Cuban Communist Party, *Sandino's Daughters: Testimonies of Nicaraguan Women in Struggle*, which tells the stories of women in Nicaragua and their experiences with communism and the Nicaraguan Communist Party, and works found within Randall's *El Corno Emplumado/The Plumed Horn*, "a bilingual quarterly of poetry, short story, essay, visual art, letters and various combinations of these," which often "showcas[ed] work by communist guerrillas, Catholic priests, indigenous poets, consecrated masters and those publishing for the first time, irrespective of whatever style or group was fashionable." MARGARET RANDALL, *CUBAN WOMEN NOW* (1974); MARGARET RANDALL, *SANDINO'S DAUGHTERS: TESTIMONIES OF NICARAGUAN WOMEN IN STRUGGLE* (1981); *Lost & Found: Selections from El Corno Emplumado/The Plumed Horn 1962-1964*, MARGARET RANDALL (May 22, 2011), <http://www.margaretrandall.org/LOST-FOUND-Selections-from-EL>.
  11. See *ENEMY ALIENS BOOK*, *supra* note 1, at 159 (providing that "[g]overnment attorneys had obtained much of Randall's prodigious literary output of oral histories, journals, poetry, and essays" and confronted her "again and again with things she had said in print").
  12. *Id.*
  13. See *What's a Metaphor?*, *supra* note 5, at 5.

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replied, “[Revolutionary weapon] is a metaphor, Ms. Gonzalez . . . .”<sup>14</sup> Gonzalez’s next question: “What’s a metaphor?”<sup>15</sup>

If Randall’s case marked the dying embers of anti-communist deportation efforts, the Palmer Raids were its beginning. In late 1919 and early 1920, federal officials rounded up several thousand immigrants, denied them access to lawyers, interrogated them, and held them in inhumane conditions.<sup>16</sup> Of the thousands rounded up, approximately five hundred were deported.<sup>17</sup> That there were not more deportations was due to the courage of a single man, Louis Post.<sup>18</sup>

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14. *Id.* (alteration in original).

15. *Id.*

16. See Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 *MASS. L. REV.* 72, 78 (2002) (footnote omitted). In addition to warrantless arrests and withholding access to lawyers, “there were several allegations of federal agents beating detainees, forging documents to prove [the detainees] were anarchists, and holding [the detainees] in inhumane conditions.” Adam Quinn, *The Long Red Scare: Anarchism, Antiradicalism, and Ideological Exclusion in the Progressive Era* 2 (2016) (M.A. thesis, University of Vermont) (on file with Graduate College Dissertations and Theses) (using arrestee Gaspare Cannone’s allegations that although he was not involved with the terrorist bombing, “federal agents beat him when he claimed not to know those involved with [the terrorist bombings] earlier that year, forged his signature on a document claiming he was an anarchist, and lied under oath to discredit him” as an example of the hardships arrestees endured during the Palmer Raids). It is unknown how many people were arrested, but “a careful study . . . estimates the total arrested . . . at ten thousand.” See Adam Hochschild, *When America Tried to Deport Its Radicals*, *THE NEW YORKER* (Nov. 4, 2019), <https://www.newyorker.com/magazine/2019/11/11/when-america-tried-to-deport-its-radicals> (“More than five hundred of those arrested were jammed into quarters at Ellis Island, which ran out of cots and bedding. Several inmates died of pneumonia. In Detroit, some eight hundred men and women were held . . . in a narrow, windowless corridor . . . with a bare stone floor to sleep on and one toilet and one drinking fountain. They were without food for twenty hours . . .”).

17. *ENEMY ALIENS BOOK*, *supra* note 1, at 123.

18. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 16–17 (2003); see also Lenni B. Benson, *As Old As the Hills: Detention and Immigration*, 5 *INTERCULTURAL HUM. RTS. L. REV.* 11, 32–34 (2010) (noting that Post “reviewed the administrative hearings in 1,600 cases and cancelled the arrest warrants for lack of evidence or violations of procedure in 1,141 of those,” and “further ordered the release of hundreds who had been arrested without warrants”). Benson quoted a 1920 *New York Post* story, which said:

The simple truth is that Louis F. Post deserves the gratitude of every American for his courageous and determined stand in [sic] behalf of our fundamental rights. It is too bad that in making this stand he found himself at cross-purpose with the Attorney General, but Mr. Palmer’s complaint lies against the Constitution and not against Mr. Post.

*Id.* at 34 (citing LOUIS F. POST, *THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE* 271 (Da Capo Press 1970) (1923)). After spending several decades advocating for workers’ rights, Post accepted a position offered to him by President Woodrow Wilson, and joined the “brand new Department of Labor” in 1913. See Hochschild, *supra* note 16 (noting that Post’s early years included running “the opinion pages of a lively pro-labor daily, . . . support[ing] the campaign that established Labor Day,” and “crusad[ing] against industrial monopolies and in favor of workers’ rights”). During the Palmer Raids, in 1920, Post “became the acting Secretary of Labor” and “invalidated nearly three thousand . . . arrests.” *Id.*

Post was acting Secretary of Labor, whose responsibilities at that time included reviewing deportation decisions.<sup>19</sup> He personally overturned thousands of deportation orders.<sup>20</sup> For doing so, the U.S. House of Representatives summoned him for an impeachment inquiry in 1920.<sup>21</sup> He was ultimately acquitted.<sup>22</sup> Reflecting on the Palmer Raids after the fact, Post wrote that “the force of the delirium [caused by the bombings] turned in the direction of a deportations crusade with the spontaneity of water flowing along the course of least resistance.”<sup>23</sup>

Targeting non-citizens is the “course of least resistance” precisely because they have no vote. In some sense, we have been following this course ever since. In this essay, I examine four points about that phenomenon. First, it is often illusory to think that what we do to foreign nationals in the “course of least resistance” will not affect citizens. Second, this tendency to pursue the “course of least resistance” helps to explain the governmental overreach we saw during the Palmer Raids, and have seen on many occasions since. The checks that might otherwise exist in a democracy are absent when the targets are non-voting immigrants. Third, the double standard that we impose on foreign nationals, treating them in ways we would not tolerate for ourselves, is both morally and constitutionally wrong.<sup>24</sup> Finally, while the anti-immigrant initiatives led by President Donald Trump<sup>25</sup> were in some respects similar

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19. ENEMY ALIENS BOOK, *supra* note 1, at 122; *see also* Hochschild, *supra* note 16 (describing Post as a “shrewd investigator and decisive reformer” who reviewed not only how the raids were conducted, but also how the detainees were being treated during the deportation process).
  20. Benson, *supra* note 18, at 32–33.
  21. *See id.* at 33 (noting that Post was accused of “obstructing the work of the immigration commissioner” and that “by April 27, 1920, Post was called before the House Rules Committee . . . to defend his deportation cancellations”).
  22. *See id.* at 33–34 (stating that after Post defended his actions for three days, “the House Rules Committee . . . told Post that he need not attend [the hearing]” and “ultimately issued a citation warning Post of obstructing the removal of dangerous aliens”); *see also* Hochschild, *supra* note 16 (noting that Post was called “for ten hours of testimony” and “acquitted himself brilliantly, and the [House Rules Committee] could find no grounds for impeachment” even though the House was supplied with a “three-hundred-and-fifty-page file on Post [that] attempted to tarnish him”).
  23. LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE 307 (Da Capo Press 1970) (1923).
  24. *See Enemy Aliens Article, supra* note 8, at 957–58 (explaining that “[t]he basic rights at stake—political freedom, due process, and equal protection of the laws—are not limited to citizens, but apply to all ‘persons’ subject to our laws” and that such basic constitutional principles apply to the “war on terrorism” because “[t]his war is more akin to the metaphorical . . . ‘war on drugs’ or ‘war on crime’ than to a conventional war”); *see also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 369 (2003) [hereinafter *Are Foreign Nationals Entitled to the Same Constitutional Rights?*] (examining the “citizen/noncitizen distinction” and concluding that “there is far less to the distinction than commonly thought” because “foreign nationals are generally entitled” to the same basic constitutional rights that citizens enjoy, including the equal protection of the laws, political freedoms of speech and association, and due process requirements).
  25. Beginning with the implementation of the so-called “Muslim ban” on January 27, 2017, the Trump administration implemented a vast number of policies and orders which directly and negatively affected immigrants. *See Timeline of Federal Policy on Immigration, 2017–2020*, BALLOTPEDIA, [https://ballotpedia.org/Timeline\\_of\\_federal\\_policy\\_on\\_immigration,\\_2017-2020](https://ballotpedia.org/Timeline_of_federal_policy_on_immigration,_2017-2020) (last visited Apr. 12, 2021) (listing the

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to the post-Palmer Raids initiatives, they were also different in important ways—and those differences presented both distinct challenges and real opportunities.

First, what we do to immigrants has almost always come back to hurt citizens more broadly. While water seeks out the course of least resistance, it also tends to erode the surrounding soil. When the government targets immigrants, it almost always insists that they do not deserve the same rights and guarantees as U.S. citizens. That was Vice President Dick Cheney’s justification when the George W. Bush administration first began detaining people indefinitely at the Guantanamo Bay Naval Base in 2002, in the so-called “War on Terror.”<sup>26</sup> As he put it, “They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.”<sup>27</sup>

Similar justifications have been advanced for the introduction of virtually every method of political repression that this country has experienced, including guilt by association, preventive detention, ethnic profiling, the use of “secret evidence” to deprive individuals of their liberty, and charges of “material support” to disfavored groups.<sup>28</sup> Tactics of political repression have generally been introduced against foreign nationals with the assurance to the citizenry that it’s not “your rights” that we’re taking away—it’s “their rights.” We’re sacrificing “their” rights for “your” security.

Whether to give up one’s own rights for a promise of greater security is a difficult question. But when the government says, instead, “We’ve got a better deal for you, we’ll make these people give up their rights for your security”—that’s an easy choice. However, as I detail in my book *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, history demonstrates that what we do to foreign nationals often extends to U.S. citizens, too.<sup>29</sup>

For example, in the 1950s, millions of U.S. citizens were subject to anti-communist measures that had their origins in the Red Scare of the 1920s.<sup>30</sup> J. Edgar

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“major events and policy announcements on immigration” made by the Trump administration). Among other things, the Trump administration rescinded the Deferred Action for Parents of Americans (DAPA) policy, limited the number of refugees that would be allowed into the United States, attacked the Deferred Action for Childhood Arrivals (DACA) policy, and increased Immigration and Customs Enforcement (ICE) immigration-related arrests by more than 38 percent in a single year (from 2016 to 2017). *Id.*

26. See Dick Cheney, Vice President of the United States, Address at the U.S. Chamber of Commerce (Nov. 14, 2001) (transcript available in the White House archives); see also *Enemy Aliens Article*, *supra* note 8, at 959–60.

27. See Cheney, Address at the U.S. Chamber of Commerce, *supra* note 26.

28. See generally *ENEMY ALIENS BOOK*, *supra* note 1 (exploring the different examples of political repression the government has used).

29. *Id.* at 5 (“[W]hat we do to foreign nationals today often paves the way for what will be done to American citizens tomorrow. . . . [H]istory suggests that the transition [from denying the rights of enemy aliens to infringing on those of American citizens] is virtually inevitable, and . . . the rights of all of us are in the balance when the government selectively sacrifices foreign nationals’ liberties.”).

30. See *Enemy Aliens Article*, *supra* note 8, at 995–97 (footnote omitted) (noting that the Palmer Raids were a response to the first “Red Scare” and that the “McCarthy era of the 1940s and 1950s essentially replicated the abuses of [the] first ‘red scare,’ but this time [was] directed at citizens as well”). The “Red

Hoover took what he learned in the Red Scare and worked assiduously as director of the FBI for many years to extend those tactics, especially guilt by association, to U.S. citizens.<sup>31</sup> Similarly, the Japanese internment during World War II had its origins in the Alien Enemies Act of 1798,<sup>32</sup> which gives the government during wartime the power to detain any national above the age of fourteen from a country with which we are at war, without any showing of suspicion or danger.<sup>33</sup> That authority was used in World War I to lock up German and Austrian immigrants, among others,<sup>34</sup> but in World War II the practice was effectively extended, through the prism of race, to detain seventy thousand U.S. citizens of Japanese descent, as well as about forty thousand Japanese nationals.<sup>35</sup>

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Scare” is a phrase used to describe the “paranoia about the internal Communist threat” which “reached a fever pitch between 1950 and 1954” when American leaders, including Senator Joseph McCarthy of Wisconsin, “repeatedly told the public that they should be fearful of subversive Communist influence in their lives.” *McCarthyism and the Red Scare*, UNIV. OF VA.: MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mccarthyism-red-scare> (last visited Apr. 12, 2021). American leaders were told that “[c]ommunists could be lurking anywhere, using their positions as school teachers, college professors, labor organizers, artists, or journalists to aid the program of world Communist domination.” *Id.* Senator McCarthy “launched a series of highly publicized probes into alleged Communist penetration of the State Department, the White House, the Treasury, and even the US Army.” *Id.*

31. See ENEMY ALIENS BOOK, *supra* note 1, at 129–31, 139–40 (explaining that the Palmer Raids were a “brief prologue to the much more extensive Cold War of the 1940s, 1950s, and 1960s,” during which Hoover applied “similar measures to citizens,” including “[g]uilt by association, . . . loyalty oaths, blacklists, registration requirements, and congressional inquiries . . . [to] identify and penalize those who were sympathetic to or associated with the Communist Party”); see also James T. Patterson, *The Enemy Within*, THE ATLANTIC (Oct. 1998), <https://www.theatlantic.com/magazine/archive/1998/10/the-enemy-within-9810/377272/> (describing Hoover as an “obsessive Red-hunt[er]” and asserting that the FBI “became ‘the single most important component of the anticommunist crusade’”).
32. The Alien Enemies Act of 1798 is one of the four laws that made up the Alien and Sedition Acts, which placed restrictions on aliens. *Alien and Sedition Acts*, HISTORY (Nov. 9, 2009), <https://www.history.com/topics/early-us/alien-and-sedition-acts> (last updated Mar. 5, 2020); see also ENEMY ALIENS BOOK, *supra* note 1, at 91–92 (“The Alien Act gave the president the power to deport any noncitizen he deemed dangerous without judicial review.”). Though “the Alien and Sedition Acts were short-lived[,] . . . the Enemy Alien Act remains on the books to this day.” *Id.* (footnote omitted); see also Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified as 50 U.S.C. §§ 21–24).
33. See *Enemy Aliens Article*, *supra* note 8, at 959 (“In World War II, the government extended [the Enemy Alien Act] logic to intern 110,000 persons of Japanese ancestry . . . .”); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1230 n.2 (2018) (Gorsuch, J., concurring) (compiling sources that address the Alien and Sedition Acts’ effect on noncitizens’ due process rights).
34. See Theodore M. Cooperstein, “Keep Your Friends Close, But Your Enemies Closer:” *Internment of Enemy Aliens in the Present Conflict*, 7 DARTMOUTH L.J. 295, 300 (2009) (noting that President Woodrow Wilson invoked the Alien Enemies Act during World War I to detain about sixty-three hundred “enemy aliens”).
35. See *Enemy Aliens Article*, *supra* note 8, at 989–91 (explaining that “the ‘enemy alien’ concept was extended not to all citizens, but to a distinct subset, through the prism of race” and that “[t]he Japanese alien could not be distinguished from the Japanese-American citizen” because “for all practical purposes” all persons of Japanese descent were “likely to be loyal to Japan”); see also Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 560 (2005) (stating that after the authorization of

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More recently, the prohibition on “material support” to an organization labeled terrorist—regardless of whether one’s support actually furthers any terrorist acts—was first introduced into our law in the Immigration Act of 1990.<sup>36</sup> This Act made such “material support” a deportable offense for immigrants and did not reach support by citizens.<sup>37</sup> In 1996, however, the prohibition was extended to U.S. citizens in the Antiterrorism and Effective Death Penalty Act (AEDPA), which made it a crime to provide such “material support.”<sup>38</sup>

The Supreme Court upheld the application of this principle to U.S. citizens in 2010, in *Holder v. Humanitarian Law Project*,<sup>39</sup> in which I represented U.S. citizens who were assisting a Kurdish group in Turkey with human rights complaints and peace talks.<sup>40</sup> The Court held that Congress could make such activity a crime for

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“internment of enemy aliens and sympathizers . . . [,] relocation orders result[ed] in the forcible evacuation of approximately 120,000 Japanese-Americans, including 70,000 citizens, to concentration camps”).

36. The Immigration Act of 1990—which some considered to be “the most sweeping reform in U.S. legal immigration law in the past sixty-six years”—provided “a substantial number of new provisions to the Immigration and Nationality Act” that affected “family immigration, business immigration, naturalization, and exclusion and deportation grounds and procedures.” Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 *FORDHAM INT’L L.J.* 328, 328 (1990). The Act explicitly permitted deporting aliens for “mere membership in or affiliation with ‘a Communist or any other totalitarian party’” and aliens who “engaged in ‘terrorist’ activities or who are likely to engage in such activities after entering the United States.” *Id.* at 337–38; *see also* Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.). To “engage in terrorist activity” within the Act means that the individual commits “an act that the actor knows, or reasonably should know, affords material support” for terrorist activity or to a terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).
37. *See* David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 *INT’L J. LEGAL INFO.* 290, 306–07 (2003) (“To this day . . . the government continues to seek the aliens’ deportation, notwithstanding its initial admission that [the aliens] have engaged in no illegal or terrorist activity. From the government’s perspective . . . any support to a ‘terrorist group,’ even to its wholly lawful activities, should be a legally sufficient basis for deportation.”).
38. *Enemy Aliens Article*, *supra* note 8, at 1000; *see also* Natsu Taylor Saito, *Interning the “Non-Alien” Other: The Illusory Protections of Citizenship*, 68 *LAW & CONTEMP. PROBS.* 173, 199–201 (2005) (“Despite the fact that the FBI had reported only two incidents of international terrorism on U.S. soil between 1985 and 1996, Congress passed the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) . . .”). The AEDPA, which applies to U.S. citizens and noncitizens, “mak[es] it a crime, punishable by ten years in prison and a substantial fine, to provide material support to a designated terrorist organization.” *Enemy Aliens Article*, *supra* note 8, at 1000 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 303(a), 110 Stat. 1214 (codified at 18 U.S.C. § 2339B and 8 U.S.C. § 1189)).
39. 561 U.S. 1 (2010).
40. *See id.* at 9–10, 14–15 (identifying and describing the plaintiffs as two U.S. citizens and six U.S. domestic organizations who want to “provide support for the humanitarian and political activities of” two foreign organizations that the Secretary of State designated foreign terrorist organizations); *see also* Transcript of Oral Argument at 4–6, *Humanitarian Law Project*, 561 U.S. 1 (No. 08–1498) (providing that Humanitarian Law Project is seeking “to advocate for legal reform in Congress and the [United Nations], to write and distribute articles supportive of Kurdish rights, to inform the Kurds of their international human rights and remedies, and to advise them on peaceful conflict resolution,” all of which are “lawful, peaceable activities”).

U.S. citizens and foreign nationals alike.<sup>41</sup> The Court's decision recalls James Madison's comment to Thomas Jefferson: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions [against] danger[,] real or pretended[,] from abroad."<sup>42</sup>

Second, targeting foreign nationals as the course of least resistance inevitably leads to governmental overreach because elected officials need not justify measures that leave the rights and privileges of the voting public intact.<sup>43</sup> As Justice Robert Jackson said in *Railway Express Agency v. New York* in 1949, "nothing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation[,] and thus[,] to escape the political retribution that might be visited upon them if larger numbers were affected."<sup>44</sup>

The absence of the check that general applicability offers in the immigration context contributes to the overreach that we saw in the Palmer Raids. Federal officials arrested every member of a Lithuanian socialist chorus, all thirty-nine bakers who had gathered in Lynn, Massachusetts to discuss forming a co-operative, and every customer at the Trotsky Vegetarian Restaurant in Chicago.<sup>45</sup> Yet, as noted above, no one responsible for the terrorist bombings that sparked the Raids was ever captured.<sup>46</sup>

More recently, after 9/11, U.S. officials detained over five thousand foreign nationals, virtually all of them Arab or Muslim men, on the hope that they might

41. See *Humanitarian Law Project*, 561 U.S. at 7–8 ("We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue."); see also David Cole, Opinion, *Chewing Gum for Terrorists*, N.Y. TIMES (Jan. 2, 2011), <https://www.nytimes.com/2011/01/03/opinion/03cole.html> ("[T]he Supreme Court ruled against us, stating that all such speech [the plaintiffs were advocating for] could be prohibited, because it might indirectly support the group's terrorist activity.").

42. Letter from James Madison to Thomas Jefferson (May 13, 1798), in 17 THE PAPERS OF JAMES MADISON 130–31 (David B. Mattern et al. eds., Univ. Press of Va.) (1991).

43. See David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1262 (2012) ("While investigating potential terrorists is indisputably important, the heavy-handed way in which the federal government has gone about it has undermined the freedom of members of Arab and Muslim communities to speak out and be heard—and that in turn increases the likelihood of executive overreaching.").

44. 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

45. Hochschild, *supra* note 16.

The Palmer Raids reached their climax on January 2, 1920, with night sweeps in more than thirty cities and towns. Their professed targets were the two Communist parties . . . . Many of those arrested had only a tangential connection, if any, to the Communists, including, in Nashua, New Hampshire, a hundred and forty-one Socialists. In nearby Manchester, it was everyone dancing at the Tolstoi Club; in Chicago, all the patrons at the Tolstoy Vegetarian Restaurant; in Lynn, Massachusetts, thirty-nine bakers, a third of them American citizens, in the middle of a meeting to discuss forming a coöperative; in New Jersey, a group of Polish-Americans soliciting money for a funeral; in Philadelphia, the members of the Lithuanian Socialist Chorus, mid-rehearsal.

*Id.*

46. See *supra* note 1 and accompanying text.

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find some Al Qaeda suspects.<sup>47</sup> Not one of the detainees was ever convicted of a terrorist offense.<sup>48</sup> Or consider Guantanamo Bay Naval Base, where the U.S. held only—we were told—the “worst of the worst.”<sup>49</sup> Of the approximately 775 people held there, over five hundred had been released by the time President George W. Bush left office in 2009, suggesting that they were not in fact so dangerous.<sup>50</sup> Forty detainees remain today.<sup>51</sup>

The mass surveillance that Edward Snowden disclosed to the world in 2013 was also largely targeted at foreign populations, not at the American public itself, and here—again—the principal lesson is that the United States, without meaningful checks, was routinely collecting massive amounts of information.<sup>52</sup> The one part that did target Americans, the telephone metadata program, was the only part Congress rejected once it was disclosed.<sup>53</sup> There, and there alone, political checks operated to rein in the government. Where political checks do not operate, overreach is virtually certain.<sup>54</sup>

Third, imposing certain practices on immigrants that we would not tolerate for ourselves is wrong as a constitutional and moral matter. With the exception of the rights to vote and run for certain federal offices, the rights protected in the Constitution are not limited to “citizens,” but extend generally to “persons” or “the people.”<sup>55</sup> They were understood at the time of the founding as natural rights, given

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47. See ENEMY ALIENS BOOK, *supra* note 1, at 25–26, 49–50 (stating that the Justice Department “targeted the Arab and Muslim immigrant community” when it identified, selected, and detained Arab and Muslim men on “nothing more than the fact that [the detainees] were young men from countries where Al Qaeda support is thought to exist”).
  48. See *id.* at 26 (“[B]y the government’s own account, nearly all the thousands it has detained in the war on terrorism have turned out to have nothing to do with terrorism.”).
  49. Robert Bejesky, *Closing Gitmo Due to the Epiphany Approach to Habeus Corpus During the Military Commission Circus*, 50 WILLAMETTE L. REV. 43, 53, 56 (2013) (internal quotations omitted) (footnote omitted) (quoting former Secretary of Defense Donald Rumsfeld).
  50. *Id.* (“There were 250 prisoners held at Guantánamo when President Bush exited office . . .”); *Guantanamo by the Numbers*, HUM. RTS. FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers>.
  51. *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/guantanamo> (last updated Jan. 21, 2020).
  52. See SUNÉ VON SOLMS & RENIER VAN HEERDEN, THE CONSEQUENCES OF EDWARD SNOWDEN NSA RELATED INFO. DISCLOSURES 360–61 (2015) (discussing the effect of Snowden’s disclosures on communities in the United States, Europe, and South America); see also David D. Cole, *After Snowden: Regulating Technology-Aided Surveillance in the Digital Age*, 44 CAP. U.L. REV. 677, 682–83 (2016) [hereinafter *After Snowden*] (noting that Snowden revealed that the U.S. government had “intercepted and collected not just metadata, but the actual contents of all manner of electronic communications . . . including texts, phone calls, emails, contact lists, and internet browsing”).
  53. See *After Snowden*, *supra* note 52, at 687–88 (noting that Congress changed its position once Snowden’s findings were released to the public).
  54. See David D. Cole, *Assessing the Leakers: Criminals or Heroes?*, 8 J. NAT’L SEC. L. & POL’Y 107, 109–11 (2015) (“The only parties kept out of the ‘checks and balances’ so often lauded by the [U.S. government’s] defenders were the American and global publics . . . . As long as the program was kept under wraps, all three branches of government were willing to tolerate it.”).
  55. See, e.g., U.S. CONST. amends. I–II, IV–V.

to us by God.<sup>56</sup> As such, they were surely given to all human beings, not just to those with an American passport.

One of my earliest victories—of which I am most proud—involved the First Amendment rights of foreign nationals.<sup>57</sup> In 1989, I represented a group of Palestinian foreign nationals in Los Angeles whom the government sought to deport for their political associations under the McCarran-Walter Act,<sup>58</sup> which authorized the deportation of people for associating with groups that advocated world communism.<sup>59</sup> We argued that the First Amendment protects all persons in the United States, not just citizens. The district court agreed and struck down the McCarran-Walter Act provisions making people deportable for communist advocacy and associations.<sup>60</sup> Congress repealed the law shortly thereafter.<sup>61</sup>

Just as there is no reason to distinguish between citizens and noncitizens with respect to speech rights, there is also no reason why, under the Due Process Clause, a foreign national ought to be subject to preventive detention when a U.S. citizen would not. No matter a person's passport, the government's interests in preventive detention are the same: avoiding the risk of flight or danger to the community.<sup>62</sup> And no matter a person's passport, the individual's interest in not being locked up is the

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56. *The Declaration of Independence and Natural Rights*, CONST. RTS. FOUND., <https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html> (last visited Apr. 12, 2021) (noting that in drafting the Declaration of Independence, Thomas Jefferson relied heavily on John Locke's philosophy that all people are born with certain natural, God-given, inalienable rights, such as life, liberty, and property).

57. *See generally* *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989).

58. The McCarran-Walter Act, also known as the Immigration and Nationality Act of 1952, was enacted “[t]o revise the laws relating to immigration, naturalization, and nationality.” Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952); *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/immigration-act> (last visited Apr. 12, 2021). However, the “historical legacy of the Act is overwhelmingly negative” because it permits the “exclusion or deportation of any alien who engaged or had purpose to engage in activities prejudicial to the public interest or subversive to national security” and it upheld the “rigid immigration quota system based on national origins and racial categories.” Alicia J. Campi, *The McCarran-Walter Act: A Contradictory Legacy on Race, Quotas, and Ideology*, IMMIGR. POL’Y CTR. (June 2004), <https://www.ilw.com/articles/2004,0708-campi.shtml>; *see also* *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, *supra*.

59. *Am.-Arab Anti-Discrimination Comm.*, 714 F. Supp. at 1060–64; *see also* David Cole, *9/11 and the LA 8*, THE NATION (Oct. 9, 2003), <https://www.thenation.com/article/archive/911-and-la-8/> (noting that “David Cole represent[ed] the LA 8” who were charged with “being affiliated with the Popular Front for the Liberation of Palestine,” which “[t]he government claimed . . . advocated world communism”).

60. *See Am.-Arab Anti-Discrimination Comm.*, 714 F. Supp. at 1082–85 (holding that “aliens lawfully residing in the United States are protected by the First Amendment” and that “the McCarran-Walter provisions are substantially overbroad in contravention of the First Amendment”).

61. David Cole, *McCarran-Walter Act Reborn?*, WASH. POST (Nov. 18, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/18/mccarran-walter-act-reborn/389a81bf-00ac-434b-b869-3d3e29b13eae/> (noting that while Congress repealed most parts of the McCarran-Walter Act, “[i]ts spirit lives on” in the Immigration Act of 1990).

62. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (exploring the government's interests in preventative detention in the context of the Immigration and Nationality Act).

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same.<sup>63</sup> Yet, under current Supreme Court jurisprudence, the government may detain at least some foreign nationals without any showing that they pose a risk of flight or danger to the community, a practice that would plainly violate due process were it applied to citizens.<sup>64</sup> The Court has never adequately justified this double standard.<sup>65</sup>

From a political process perspective, foreign nationals need constitutional rights protection as much or even more than the rest of us. If the Constitution is designed to protect the most vulnerable and least likely to be protected by the majority, then that is paradigmatically the foreign nationals among us.<sup>66</sup> For similar reasons, there is little moral justification for denying basic civil liberties to noncitizens living among us. These rights, often said to be inalienable and inherent in human dignity, are not the exclusive province of citizens.

Fourth, in what ways do these patterns persist today, and in what ways are they different? A quick review of the Trump administration's treatment of foreign nationals reveals many common patterns. President Trump scapegoated immigrants from the outset of his administration, when he issued the so-called "Muslim ban" in the first week of his presidency, on January 27, 2017.<sup>67</sup> That ban excluded hundreds of thousands of people from entering the United States simply because they were from countries that are predominantly Muslim, not because they individually posed any risk.<sup>68</sup>

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63. See ENEMY ALIENS BOOK, *supra* note 1, at 218 ("It is generally just as much an imposition on a foreign national's physical freedom to be locked up as it is an imposition on a citizen's freedom.").

64. See *Demore v. Kim*, 538 U.S. 510, 521 (2003) (citations omitted) (recognizing that the lawful requirement of the Attorney General to detain "deportable criminal aliens pending a determination of their removability" would be unacceptable if applied to U.S. citizens).

65. See generally David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002) (demonstrating the importance for the Court to apply the same due process principles to immigration detention as it does to civil preventative detention).

66. See *Are Foreign Nationals Entitled to the Same Constitutional Rights?*, *supra* note 24, at 388 ("[T]he true test of justice in a democratic society is not how it treats those with political power, but how it treats those who have no voice in the democratic process. How we treat foreign nationals, the paradigmatic other in this time of crisis, ultimately tests our own humanity.").

67. See Jamie R. Abrams, *The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities*, 56 CAL. W.L. REV. 69, 76–79, 85–86 (2019) (alteration in original) (footnotes omitted) (noting that Trump began targeting immigrants during his election campaign—blaming them for "infest[ing] the country"—and once elected, issued his first travel ban on January 27, 2017 as "a signature policy initiative," which "flatly excluded citizens from seven Muslim majority countries . . . leading it to be described as a 'Muslim Ban'"); see also Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (indicating that the purpose of the ban was "to protect the American people from terrorist attacks by foreign nationals admitted to the United States"). By the end of 2017, Trump issued a total of three different travel bans—two via executive order and one via proclamation—after facing legal challenges with each. Abrams, *supra*, at 86–87; Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (issuing the first travel ban); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 16, 2017) (revoking the first travel ban and issuing the second, providing a list of six countries instead of the original seven); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (increasing the number of countries subject to the ban to eight).

68. See David Cole, *The Most Important Story of Trump's First 100 Days*, THE NATION (May 4, 2017), <https://www.thenation.com/article/archive/the-courts-are-fighting-back-against-trump/> (noting that Trump

The former president launched a series of measures designed to deter people from coming to this country to apply for asylum, without regard to whether they actually deserved that protection.<sup>69</sup> The first and cruelest initiative was “family separation,” taking and detaining children as young as four months away from their parents, often without telling the families where the children were being held.<sup>70</sup> In many instances, the immigration authorities did not even keep records of where the children were taken.<sup>71</sup>

Another way to deter people from applying for asylum is to take their liberty. Asylum processing takes time. Under our system, foreign nationals arriving without a visa must first show that they have a credible fear of persecution in their home country, at which point they are entitled to a full adjudication of their asylum application before an immigration judge.<sup>72</sup> But because of backlogs, a hearing before

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explained that the first travel ban was issued “to favor Christian over Muslim refugees”); *see also* Abrams, *supra* note 67, at 85–87 (“[T]he travel bans reflect a ‘tail wagging the dog’ effort to bring the policy into alignment with national security, sound public policy, and factual evidence only after asserting the policy to first appease the masculinities of a segment of [Trump’s] voter base.”).

69. *See* Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.html> (describing the newest presidential order at the time, which “direct[ed] immigration judges to deny some migrants a chance to post bail” even if the migrant established that they needed protection, and which “ordered that some asylum seekers be required to wait in Mexico,” as “the latest effort by the Trump administration to reduce the number of immigrants who are able to seek protection from violence, poverty and gangs”).
70. *See* Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [hereinafter *Hundreds of Immigrant Children Taken*] (reporting that between October 2017 and April 2018, “more than 700 children have been taken from adults claiming to be their parents . . . including more than 100 children under the age of 4”); *see also* Caitlin Dickerson, *The Youngest Child Separated From His Family at the Border Was 4 Months Old*, N.Y. TIMES (June 16, 2019), <https://www.nytimes.com/2019/06/16/us/baby-constantine-romania-migrants.html> (focusing on the story of four-month-old Constantin Mutu, “the youngest of thousands of children taken from their parents under a policy that was meant to deter families hoping to immigrate to the United States”); *see also* Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> (“[An advocate at Kids in Need of Defense] had been searching for a six year-old Guatemalan girl whose father was being held in Arizona, awaiting deportation, and had no idea where his daughter was.”).
71. *See* Blitzer, *supra* note 70 (illustrating how the records of the families separated were inaccurate, lost, erased, or never created); *see also* *Hundreds of Immigrant Children Taken*, *supra* note 70 (reporting that immigration officers working in the shelters for children were “often unable to locate the parents of separated children because the children arrive without proper records”).
72. *See* 8 U.S.C.A. §§ 1101, 1158 (outlining some of the requirements for asylum in the United States and stating that one way an asylum applicant can be found to be a refugee is on the basis of past persecution). *See generally* Executive Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections*, U.S. DEP’T OF JUST. (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf> (discussing the difference between asylum and refugee seekers and providing “basic information on forms of relief and protection for aliens in the United States who fear persecution or torture in . . . their homeland”).

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an immigration judge will often not take place for a year or more.<sup>73</sup> Under Presidents George W. Bush and Barack Obama, foreign nationals who showed a credible fear and were awaiting their immigration hearing were generally entitled to be free in the United States, unless they posed a risk of flight or were a threat to the community.<sup>74</sup> President Trump, by contrast, sought to presumptively detain all people applying for asylum, again as a way of deterring those applications in the first place.<sup>75</sup>

Trump also sought to deny asylum to anyone who did not enter the country from Mexico through a port of entry.<sup>76</sup> In 2018, he issued a rule making anyone who crossed the border illegally ineligible for asylum, even though the asylum statute says that those who fear persecution at home are entitled to asylum, whether they are here legally or illegally.<sup>77</sup> Other policies required asylum applicants at the southern border to return to

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73. See Lindsay M. Harris, *Withholding Protection*, COLUM. HUM. RTS. L. REV., Spring 2019, at 1, 31 n.105 (noting that in 2019, there was “an average of more than 750 days for adjudication of immigration court cases nationwide”); see also *Immigration Court Backlog Tool*, TRAC IMMIGR., [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) (last updated Nov. 2020) (showing a nationwide average of 840 days for adjudication of immigration court cases as of November 2020).

74. See Dara Lind, “Catch and Release,” *Explained: The Heart of Trump’s New Border Agenda*, VOX (Apr. 9, 2018), <https://www.vox.com/2018/4/9/17190090/catch-release-loopholes-border-immigrants-trump> (stating that Border Patrol agents during the George W. Bush and Obama administrations routinely practiced “catch and release,” a policy of “catching” immigrants who are in the United States unlawfully and “releasing” them to be free in the United States, instead of detaining them, while they awaited their official order of removal from an immigration judge); see also Nicole Narea, *The Demise of America’s Asylum System Under Trump*, *Explained*, VOX (Nov. 5, 2019), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp> (“Historically, most asylum seekers apprehended while trying to cross the southern border would have been placed into deportation proceedings, but released into the US while awaiting a decision on their immigration cases. Under the Trump administration, that changed dramatically.”).

75. See Narea, *supra* note 74 (explaining that “[t]he Trump administration has . . . set[] out to indiscriminately prosecute and detain anyone who tries to cross the border without authorization, even if they ask for asylum” because “keeping [the asylum seekers] in detention while their immigration cases were underway would deter further migration”); see also AMY VOLZ ET AL., HARV. L. SCH. IMMIGR. & REFUGEE CLINICAL PROGRAM, *THE IMPACT OF PRESIDENT TRUMP’S EXECUTIVE ORDERS ON ASYLUM SEEKERS* 1–3 (Feb. 2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> (discussing the effects of President Trump’s “three executive orders on immigration,” including the “[l]arge-scale detention of asylum seekers”).

76. See *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> (“[I]n November 2018, President Trump issued a proclamation that . . . barred anyone from seeking asylum if they entered the U.S. from Mexico between official ports of entry.”).

77. Compare *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, THE WHITE HOUSE (Nov. 9, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/> (“[A]liens who enter the United States unlawfully through the southern border . . . will be ineligible to be granted asylum . . .”), with 8 U.S.C.A. § 1158(a)(1) (2009) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum.”).

very dangerous parts of Mexico to await their asylum hearings<sup>78</sup> and barred people from seeking asylum if they traveled through a third country, such as Mexico, without having first applied for and been denied asylum in that third country.<sup>79</sup>

The Trump administration also raised the legal standards for asylum applications for persons fleeing domestic or gang violence.<sup>80</sup> In 2019, the administration expanded expedited removal, a summary deportation procedure that expels foreign nationals in short order without meaningful judicial review.<sup>81</sup> All of these measures were aimed at deterring people from coming to this country, whether they have a justified reason to come or not.<sup>82</sup>

78. *How the Trump Administration is Eliminating Asylum in the U.S.*, *supra* note 76. For example, the “metering” policy “placed an arbitrary daily limit on the number of asylum seekers . . . forc[ing] some to wait weeks and even months in border towns in Mexico . . .” *Id.* Additionally, under the Migrant Protection Protocols, asylum seekers “are sent right back to Mexico even after they are able to make their claim to U.S. border officials . . . until their case can be heard by an immigration judge . . .” *Id.* *But see* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1077, 1095 (9th Cir. 2020) (granting a preliminary injunction to prevent the implementation of Migrant Protection Protocols because these protocols are inconsistent with provisions of the Immigration and Nationality Act), *cert. granted*, 141 S. Ct. 617 (2020).

79. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

80. *See How the Trump Administration is Eliminating Asylum in the U.S.*, *supra* note 76 (discussing how an opinion issued by then-Attorney General Jeff Sessions increased the evidentiary burden for “asylum seekers fleeing gang violence, severe domestic violence, and other forms of generalized violence”). Asylum law was originally designed to protect individuals against persecution committed by a government actor, but it also protects persons “fleeing harm by a nongovernment actor” if the claimant “could demonstrate that her home country’s government was *unable or unwilling* to protect her from this nongovernmental harm” and if the claimant can meet the other elements of asylum. Kaci Bishop, *Unconventional Actors*, 44 N.C. J. INT’L L. 519, 520–21 (2019) (emphasis in original) (footnotes omitted). However, in 2018, Sessions issued a decision which changed the language from “unwilling” to prevent or protect against certain harms to “condoning” those harms.” *Id.* at 527–28; *see also* Matter of A-B-, 27 I. & N. Dec. 316, 316 (U.S. Dep’t of Just., June 11, 2018) (Attorney General’s opinion); *see also* Grace v. Whitaker, 344 F. Supp. 3d 96, 104–06 (D.D.C. 2018) (addressing plaintiffs’ arguments that “the standards articulated in *Matter of A-B-* . . . unlawfully and arbitrarily imposed a heightened standard to their credible fear determinations” and holding that “with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws”). Commentators have argued that this shift effectively raised an asylum seeker’s burden of proof in the context of gang violence and domestic violence. *See* Michelle Mount, “Turn That Plane Around!”: *The Pending Decision on the Deportation of Asylum Seekers*, 33 GEO. IMMIGR. L.J. 149, 151–52 (2018) (“[The Attorney General’s] decision *In re A-B-* tightened standards for adjudicating asylum claims related to domestic and gang violence. Later guidance issued by U.S. Citizenship and Immigration Services . . . specified that the new standard should apply in credible-fear determinations . . .”).

81. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019); *see also* Padilla v. Immigr. & Customs Enf’t, 953 F.3d 1134, 1148 (9th Cir. 2020) (citing Designating Aliens for Expedited Removal, 84 Fed. Reg. at 35,413–14) (noting that the “number of individuals currently in expedited removal proceedings . . . may have increased dramatically” because the government “expand[ed] expedited removal to the statutory limit”). *But see* Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 11 (D.D.C. 2019), *rev’d sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020) (enjoining the DHS from enforcing the expedited removal expansion).

82. *See generally* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707 (2019) (exploring the different actions of the Trump administration that have affected immigration law, including “policies that prohibit or deter asylum seekers from exercising the statutory right to apply for asylum”).

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Much of this is familiar. President Trump pursued the course of least resistance with a vengeance. And in at least one instance—the Muslim ban—the Supreme Court enabled precisely that approach.<sup>83</sup> If the federal government put up a sign saying “No Muslims Allowed” in any other setting, it would be a blatant violation of the Establishment Clause.<sup>84</sup> But in 2018 in *Trump v. Hawaii*, by a vote of five to four, the Court upheld the Muslim ban, and largely disregarded Trump’s admissions of anti-Muslim intent, precisely because it was an immigration measure.<sup>85</sup>

The presumptive detention policy that the Trump administration instituted for those seeking asylum also rests on a double standard. Under no circumstance may citizens be subject to preventative detention without a showing that they pose either a risk of flight or danger to the community.<sup>86</sup> Intentionally separating families to deter people from pursuing relief they are lawfully entitled to seek would also be inconceivable with respect to American citizens.<sup>87</sup>

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83. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (upholding the Muslim ban and reasoning that “[f]or more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’”); see also Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 U.C. DAVIS L. REV. ONLINE 121, 122–24 (2019) (explaining that the Supreme Court upheld the Muslim ban because immigration laws “exude[]’ deference to the president”). See generally Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 490, 494–502 (2018) (noting that “immigration law has long operated in the shadows of the ‘plenary power’ doctrine” and describing the “various limitations on judicial enforcement of constitutional norms in immigration law”).

84. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”); see also *County of Allegheny v. ACLU Greater Pittsburgh Cnty.*, 492 U.S. 573, 590 (1989) (footnote omitted) (“[T]his Court has come to understand the Establishment Clause to mean that government . . . may not discriminate among persons on the basis of their religious beliefs and practices . . .”). See generally Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, 56 CAL. W.L. REV. 135, 149–84 (2019) (discussing why the Muslim ban is “so different from other recent controversies concerning religious discrimination and religious neutrality,” resulting in the ban being upheld); Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 407–10 (2018) (analyzing the Establishment Clause jurisprudence and explaining why and how the Muslim ban “does not run afoul of any of the principles established by the decisions of the Supreme Court dealing with the scope of the First Amendment”). Notably, although the “Bill of Rights [including the First Amendment] is a futile authority for [an] alien seeking admission for the first time to [the United States], . . . once an alien lawfully enters and resides in this country[,] he becomes invested with the rights guaranteed by the Constitution to all people within our borders.” *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

85. See 138 S. Ct. at 2418–21 (“[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”).

86. See 18 U.S.C.A. § 3142 (2008) (providing the standards for whether a defendant shall be released or detained while they await trial). See generally *United States v. Salerno*, 481 U.S. 739 (1987) (contemplating the Bail Reform Act and noting that while “[i]n our society liberty is the norm,” preventative detention “is the carefully limited exception”).

87. See Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 206–10 (2019) (book review) (illustrating that “[t]here is no question that the Constitution operates differently in different contexts” and noting that “family separation and detention policies . . . illustrate how immigration status can alter settled constitutional law”). See generally Stephen Lee, *Family Separation As Slow Death*, 119 COLUM. L.

The vilification of foreign nationals, especially along racial lines, is also familiar.<sup>88</sup> President Trump called Mexicans criminals and rapists, and dismissed Haiti, El Salvador, and African nations as “shithole countries.”<sup>89</sup> His anti-immigrant posturing calls to mind Attorney General A. Mitchell Palmer’s description of the foreign nationals swept up in the Palmer Raids: “out of the sly and crafty eyes of many of them leap cupidity, cruelty, insanity, and crime; from their lopsided faces, sloping brows, and misshapen features may be recognized the unmistakable criminal type.”<sup>90</sup> Trump’s barbs lacked Palmer’s rhetorical flair, but the sentiment remains the same.

At the same time, there are also important differences between the Palmer Raids and the Trump attacks. One of the most significant differences is that there is no real national security threat stemming from immigration today—although Trump did his best to manufacture one.<sup>91</sup> The Palmer Raids were conducted shortly after

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REV. 2319 (2019) (describing the outcry from critics on how the separation of immigrant families at the border is un-American). Of course, there is a sort of de facto family separation in the United States through the enforcement of criminal laws, but that is the incidental effect, not the intentional purpose. *See, e.g., id.* at 2325 (noting how past laws and policies in American history, such as the “internment of Japanese Americans” and the “enslavement of Black Americans,” have resulted in family separation even though that was not the primary objective).

88. *See generally* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019) (“Putting together . . . [Trump’s] claims of cultural threat from immigration with his vilification of nonwhite immigrants, these statements suggest support for white nationalist ideas. Even if certain remarks might be challenged as insufficiently proven or susceptible of non-racist meanings, the record as a whole cannot be read in race-neutral terms.”).

89. Eli Rosenberg & Paul Schemm, *Here is What My #Shithole Looks Like: African Countries and Haiti React to Trump’s Remark*, WASH. POST (Jan. 12, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/01/11/here-is-what-my-shithole-looks-like-african-countries-and-haiti-react-to-trumps-remark/>; *see* Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 38 (2019) (listing examples of “bigoted government language” heard during the Trump administration, including “[President Trump’s] contention that Mexico sends rapists to the United States”). Snow described President Trump’s “bigoted [] language” toward ethnic and religious minorities as

beyond all possible ‘bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.’ A reasonable person would expect the President to uphold the laws and Constitution of the United States, including the First and Fourteenth Amendments. She would also expect the President to neither promote nor use bigoted speech, particularly speech that repeatedly sparks violence against target groups.

*Id.* (quoting *Bernstein v. Fernandez*, 649 A.D.2d 1064, 1075 (D.C. 1991)).

90. *Enemy Aliens Article*, *supra* note 8, at 996 (internal quotations omitted) (citations omitted); *see* Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 467 (2015) (noting that Attorney General Palmer gave this description of the deportees during his congressional testimony).

91. *See* Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 624–27 (2019) (“The implementation of the Travel Ban shows that the ban was created to serve a manufactured political emergency and not an organic policy crisis.”).

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the Bolshevik Revolution<sup>92</sup> and in the midst of revolutions throughout Europe.<sup>93</sup> There were massive strikes across the United States, many of which had turned violent.<sup>94</sup> Mail bombs had been sent to Oliver Wendell Holmes, John D. Rockefeller, JP Morgan, and others.<sup>95</sup> On June 2, 1919, eight bombs went off on a single day

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92. On November 6 and 7, 1917, leftist revolutionaries, led by the Bolshevik Party leader Vladimir Lenin, launched a “nearly bloodless coup d’État against Russia’s ineffectual Provisional Government.” *Bolsheviks Revolt in Russia*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/bolsheviks-revolt-in-russia>. This coup—now known as the Bolshevik Revolution—resulted in the Bolsheviks and their allies forming a new government within two days, “with Lenin as its head.” *Id.* “Bolshevik Russia, later renamed the Union of Soviet Socialist Republics (USSR), was the world’s first Marxist state.” *Id.*
93. See ENEMY ALIENS BOOK, *supra* note 1, at 117 (explaining that after World War I, America’s fears were “simply redirected from Germany to Communism, which in 1919 appeared to be on the verge of conquering much of Europe” based on the several revolutions across the continent, factory seizures in Italy, and “radical Communist movements” in France and Britain); Murray & Wunsch, *supra* note 16, at 76–78 (discussing how the “first major ‘Red Scare’ coincided with” World War I, and that the “Anti-Red hysteria grew after the Communists came to power in Russia through the November 1917 Bolshevik Revolution”); *Continuing Conflict: Europe After the First World War*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/continuing-conflict-europe-after-the-first-world-war> (last visited Apr. 12, 2021) (noting that “the end of the First World War did not mean an end to fighting” and chronicling wars and revolts across Europe between 1917 and 1923, including the Russian Civil War (1917–1923), the German Revolution (1918–1919), and the Polish-Soviet War (1919–1921)); *Famous Cases & Criminals: Palmer Raids*, FBI, <https://www.fbi.gov/history/famous-cases/palmer-raids> (last visited Apr. 12, 2021) (explaining that just before the Palmer Raids began, “[i]t was already a time of high anxiety in America—driven by a deadly wave of the pandemic flu, the Bolshevik revolution in Russia and ensuing over-hyped ‘Red Scare,’ and sometimes violent labor strikes across the country”).
94. ENEMY ALIENS BOOK, *supra* note 1, at 117; see also David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 15–16 (2016) (explaining the growth of trade unions and noting that “the newly formed class of wealthy industrialists who had grown frustrated by the growing power of the organized labor movement also fed the fear of communism” and reporting that in 1919 alone, there were “3,600 strikes involving over four million workers”).
95. Lily Rothman, *Mail Bombs Rocked American Politics a Century Ago. Here’s What a Historian Thinks That Moment Has to Teach Us*, TIME (Oct. 26, 2018), <https://time.com/5436477/mail-bombs-1919-history/> (internal quotations omitted) (recalling “one of American history’s earliest major incidences of mail bombs making news” and noting that “[i]t was a coordinated mail-bomb campaign” that had “targeted a pretty wide range of people”); see also Bruce Watson, *Crackdown! When Bombs Terrorized America, the Attorney General Launched the “Palmer Raids”*, SMITHSONIAN MAG. (Feb. 2002), <https://www.smithsonianmag.com/history/crackdown-58818380/> (reporting that in April 1919, a bomb was mailed to a Georgia senator and “[o]ver the course of the next several days,” thirty-four more identical mail bombs were discovered and intercepted, all of which were targeting “influential figures”). Oliver Wendell Holmes, Jr. (1841–1935), a veteran of the Civil War, was appointed to the U.S. Supreme Court in 1902 by President Theodore Roosevelt, and served until retirement in 1931. *Oliver Wendell Holmes Jr.*, BIOGRAPHY (Apr. 2, 2014), <https://www.biography.com/law-figure/oliver-wendell-holmes-jr>. John D. Rockefeller (1839–1937), an American industrialist, founded the Standard Oil Company in 1870, leading to him having a “near-monopoly of the oil business in the United States” by 1882. *John D. Rockefeller*, BIOGRAPHY (Aug. 19, 2015), <https://www.biography.com/business-figure/john-d-rockefeller>. J.P. Morgan, Jr. (1867–1943), American banker and financier, became head of J.P. Morgan and Company in 1913 after his father passed away, and was “the most important American financier of his day.” *John Pierpont Morgan, Jr.*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/John-Pierpont-Morgan-Jr> (last visited Apr. 12, 2021).

within an hour in eight different cities, a remarkable feat of coordination in the days before modern telecommunication.<sup>96</sup> World Wars I and II involved global conflict of unprecedented proportions. And most recently, on September 11, 2001, approximately three thousand civilians died in a single attack.<sup>97</sup> Although these events do not justify the anti-immigrant hysteria they prompted, what is most remarkable is that Trump indulged similar xenophobia without any similar threat.<sup>98</sup>

Instead, we had fake emergencies. Trump used emergency authority to implement the Muslim ban<sup>99</sup> and declared an “emergency,” widely construed as fake, in order to divert funds to build a border wall that Congress refused to support.<sup>100</sup> Trump exploited and manipulated longstanding and deep-seated anxieties about the foreigner. It is not the fear that we might be blown up that drove these measures—as it did during Palmer Raids, the two World Wars, or 9/11—but a more amorphous anxiety that we will be overrun by others. We are not the only nation in which this fear has been a prevalent and potent political force.<sup>101</sup>

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96. See *Enemy Aliens Article*, *supra* note 8, at 995.

97. See *Commemoration, 9/11 MEMORIAL & MUSEUM*, <https://www.911memorial.org/connect/commemoration> (last visited Apr. 12, 2021) (“The 9/11 terrorist attacks killed 2,977 people and injured thousands . . .”); see also *September 11 Terror Attacks Fast Facts*, CNN, <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> (last updated Sept. 18, 2020) (discussing the events of September 11, 2001 and reporting that “[a] total of 2,977 people were killed in New York City, Washington, D.C. and outside of Shanksville, Pennsylvania”).

98. See Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 256–77 (2018) (comparing President Trump’s immigration policies with past enforcement actions, including the Palmer Raids). See generally Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004) (analyzing how “since 9/11, immigration policy has become intertwined with and subordinated to terrorism policy”).

99. See *Family*, *supra* note 91, at 626 (“Because a border wall requires congressional authorization, an announcement like Travel Ban One allowed for quicker action because President Trump invoked his authority to act under immigration statutes.”).

100. See Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019) (“I, Donald J. Trump . . . hereby declare that a national emergency exists at the southern border of the United States . . .”); see also *Sierra Club v. Trump*, 977 F.3d 853, 862 (9th Cir. 2020) (citation omitted) (“The President explained that, even though he had obtained some border wall funding, he declared a national emergency because although he ‘could do the wall over a longer period of time’ by going through Congress, he would ‘rather do it much faster.’”).

101. See, e.g., Amir Hassan, *Brexit and the Fear of Immigrants*, PULITZER CTR. (Sep. 14, 2016), <https://pulitzercenter.org/reporting/brexit-fear-of-immigrants>. (“To many the ability to keep immigrants from entering the country made Brexit appealing.”); Amanda Quinn, Note, *The Cost of Terror: How Terrorism and the Anti-Terror Legislation in the European Union May Hinder Business*, 41 SUFFOLK TRANSNAT’L L. REV. 437, 463–65 (2018) (footnotes omitted) (noting that “[o]ne of the central aspects of the Brexit leave campaign was to curb immigration in an attempt to protect the United Kingdom” and that Brexit supporters were “concerned about protecting cultural identity and regulating the flow of immigrants”). Those in favor of Brexit were reported to be partially fueled by the prospect of stopping immigrants from entering the country. Hassan, *supra*. There were many instances of hate crimes and discrimination against minorities in tandem with the Brexit vote, and Prime Minister Boris Johnson (along with President Trump) was accused of fearmongering to glean votes and develop support. *Id.* Additionally, in the era of climate change, this fear is likely to get worse, not better, as the number of climate refugees increases. See OLI BROWN, INT’L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 11 (2008)

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A second difference can be found in civil society's response to the government's initiatives. In 1920, when the federal government rounded up foreign nationals by the thousands, *The Washington Post* proclaimed that "[t]here is no time to waste on hairsplitting over infringement of liberty."<sup>102</sup> Today, *The Washington Post* has a new motto: "Democracy dies in darkness."<sup>103</sup> *The Washington Post*, the *New York Times*, and many other major media outlets were outspoken critics of President Trump's anti-immigrant measures.<sup>104</sup> In contrast, there was little organized civil society

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(noting that since 1990, when the Intergovernmental Panel on Climate Change predicted that "the greatest single impact of climate change could be on human migration," there has been a "crisis in the making"). Professor Norman Myers of Oxford University—"perhaps the best known" analyst—estimates there could be as many as two hundred million climate migrants by 2050. *Id.* Though Professor Myer's estimate "has become the accepted figure," due to the uncertainty of "what climate change will mean for human population distribution," estimates of the number of climate refugees by 2050 range between twenty-five million and one billion. *Id.* at 11–12.

102. Olivia B. Waxman, *A Century Before Trump's ICE Raids, the U.S. Government Rounded Up Thousands of Immigrants. Here's What Happened*, TIME (July 18, 2019), <https://time.com/5625012/palmer-raids/>.
103. See Joe Concha, *The Washington Post: 'Democracy Dies in Darkness'*, THE HILL (Feb. 22, 2017), <https://thehill.com/homenews/media/320619-the-washington-post-democracy-dies-in-darkness> ("The Washington Post has a new slogan on its homepage: 'Democracy Dies in Darkness.'"). *But see* John Bat, *Washington Post Sells Itself to Readership with New Slogan*, CBS NEWS (Feb. 22, 2017), <https://www.cbsnews.com/news/the-washington-post-introduces-its-new-slogan/> (reporting that the Communications Director from *The Washington Post* said the motto was "not in response to President Trump's freewheeling Thursday afternoon press conference, but instead for the paper's launching of . . . a Silicon Valley-style reinvention in line with Amazon CEO Jeff Bezos' vision of building a younger, more mobile readership"); Paul Farhi, *The Washington Post's New Slogan Turns Out to be an Old Saying*, WASH. POST (Feb. 24, 2017), [https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html) ("The addition of the dramatic and alliterative phrase was generally misinterpreted as an indirect reply to President Trump's phrasemaking about the news media . . . . But that's not the case. The Post decided to come up with a slogan nearly a year ago, long before Trump was the Republican presidential nominee . . . .").
104. See, e.g., Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants Than Any American in History*, WASH. POST (Nov. 7, 2019), [https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8\\_story.html](https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html) ("Trump has attacked and scapegoated immigrants in ways that previous presidents never have—and in the process, has spread more fear, resentment and hatred of immigrants than any American in history."); Ted Hesson & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14, 2020), <https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W> (explaining that Trump "won the White House in large part due to his hard-line stance on immigration" and that his administration "has maintained that focus despite" the "coronavirus outbreak and nationwide protests against police brutality and racism"); Emma Newburger, *President Trump and GOP Unleash Anti-Immigrant Onslaught, As Democrats Keep Focus on Health Care Ahead of Midterm Elections*, CNBC (Oct. 23, 2018), <https://www.cnn.com/2018/10/23/trump-and-gop-unleash-anti-immigrant-onslaught-to-sway-midterm-voters.html> ("Trump's strong rhetoric to stoke fears about foreigners mirrors his strategy in his 2016 presidential bid."); Zolan Kanno-Youngs & Michael D. Shear, *Trump Virtually Cuts Off Refugees as He Unleashes a Tirade on Immigrants*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/trump-refugees.html> ("The Trump administration said it would cut its already rock-bottom refugee admissions still deeper into record territory for the upcoming year, as President Trump returned to his anti-immigrant themes in the closing month of his re-election campaign.").

resistance to the Palmer Raids. The American Civil Liberties Union (ACLU) was founded in 1920, partially in response to the Palmer Raids themselves.<sup>105</sup> But it was a small, fledgling organization, and there were few other voices of opposition.

Today, there is a robust civil society presence defending the rights of immigrants. The ACLU is just one part of it. There are scores of organizations from coast to coast which make it their mission to defend the rights of immigrants, including the American Immigration Lawyers' Association, Make the Road New York, United We Dream, National Immigration Law Center, and the International Refugee Assistance Center.<sup>106</sup> And the ACLU itself has never been more robust. It had four hundred thousand members before Trump was elected.<sup>107</sup> That already made it the largest civil liberties organization in the world.<sup>108</sup> But after Trump was elected, its membership grew to 1.8 million.<sup>109</sup>

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105. See Nadine Strossen, President of the ACLU, Preserving Safety and Freedom Post 9-11, Address to the Counter-Terrorism and Civil Liberties Conference (Mar. 19, 2003), *in* 3 J. INST. JUST. INT'L STUD. 1, 7 (2003) ("The ACLU did a report shortly after the anniversary of 9-11 where we're kind of doing a historical overview of what had happened with government over-reaching since then and we traced it back to World War I which was the time when our organization was founded out of a series of very similar national crises, including terrorist attacks, bombs by anarchists all over the country, leading to the very same kinds of civil liberties violations. There are very uncanny parallels with the Palmer Raids: Mitchell Palmer, John Ashcroft."); see also *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history> (last visited Apr. 12, 2021) ("In November 1919 and January 1920, in what notoriously became known as the 'Palmer Raids,' Attorney General Mitchell Palmer began rounding up and deporting so-called radicals. . . . In the face of these egregious civil liberties abuses, a small group of people decided to take a stand, and thus was born the American Civil Liberties Union.")

106. "The American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members." *About*, AM. IMMIGR. LAWS. ASS'N, <https://www.aila.org/about> (last visited Apr. 12, 2021). Make the Road New York "provide[s] a full range of services to 17,000 people each year, including legal representation in immigration, housing, and worker exploitation cases. . . . [and] led or co-led most of the post-election mobilizations in New York City to drive the broader immigrant rights resistance." *Immigration*, MAKE THE RD. N.Y., <https://maketheroadny.org/issue/immigration/> (last visited Apr. 12, 2021). "United We Dream is the largest immigrant youth-led community in the country. [It] create[s] welcoming spaces for young people—regardless of immigration status—to support, engage, and empower them . . ." *About UWD*, UNITED WE DREAM, <https://unitedwedream.org/about/> (last visited Apr. 12, 2021). The National Immigration Law Center's "mission is to defend & advance the rights & opportunities of low-income immigrants and their family members." *About Us*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/about-us/> (last visited Apr. 12, 2021). "The International Refugee Assistance Project (IRAP) organizes law students and lawyers to develop and enforce a set of legal and human rights for refugees and displaced persons. Mobilizing direct legal aid, litigation, and systemic advocacy, IRAP serves the world's most persecuted individuals and empowers the next generation of human rights leaders." *Mission & Values*, INT'L REFUGEE ASSISTANCE PROJECT, <https://refugeerights.org/our-work/mission-values/> (last visited Apr. 12, 2021) (parenthesis in original).

107. Aris Folley, *ACLU Membership Grew From 400,000 to 1.84 Million After Trump was Elected*, THE HILL (July 4, 2018), <https://thehill.com/blogs/blog-briefing-room/news/395525-aclu-membership-grew-from-400000-to-184-million-months-after>.

108. See *ACLU History*, *supra* note 105 ("The ACLU today is the nation's largest public interest law firm, with a 50-state network of staffed, autonomous affiliate offices.")

109. Folley, *supra* note 107.

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Citizens today have resisted the notion that they need not get involved because their own rights are not at stake. Recall the Muslim ban. Here, again, the implicit message to the citizenry was that “we’re not targeting you, we’re targeting foreign nationals, so your rights are not at stake.” Yet the first weekend that the Muslim ban was issued, tens of thousands of people went out to airports to protest that ban, even though it applied only to immigrants from select Muslim countries.<sup>110</sup> The same thing happened again in the 2018 demonstrations opposing the revocation of the Deferred Action for Childhood Arrivals (DACA) program<sup>111</sup> and family separation.<sup>112</sup> Even former First Lady Laura Bush spoke up, publishing an op-ed opposing family separation.<sup>113</sup> These civil society responses, in which citizens see attacks on immigrants as attacks on our own principles, not just on “the other,” present an important opportunity to bridge the “us-them” divide and advance the rights of immigrants as human rights more generally.

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110. See Nathan Heller, *The Promise of J.F.K.: The Place Where America Meets the World*, THE NEW YORKER (Jan. 29, 2017), <https://www.newyorker.com/news/news-desk/the-promise-of-j-f-k-the-place-where-america-meets-the-world> (reporting that protests and demonstrations broke out at airports in New York City, Chicago, Dallas, Denver, Los Angeles, Portland, San Diego, San Francisco, Seattle, Washington D.C., and elsewhere in a “broad statement of solidarity and resistance” to the Muslim ban); see also Madina Toure, *As Trump’s New Travel Ban Set to Begin, Muslim and Immigrant Advocates Return to JFK*, OBSERVER (June 29, 2017), <https://observer.com/2017/06/as-trumps-new-travel-ban-set-to-begin-muslim-and-immigrant-advocates-return-to-jfk/> (“Immigrant and Muslim advocates who were among thousands protesting President Trump’s travel ban at John F. Kennedy International Airport in January [2017] returned to the same spot this morning, hours before the ban is set to take effect.”).
111. Introduced by the Obama administration in 2012, the DACA program is a discretionary immigration policy that defers the deportation of certain undocumented aliens who entered the United States as children. See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file with the U.S. Dep’t of Homeland Sec.), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (“[S]etting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people . . . .”); see also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (providing a brief overview of the DACA program).
112. See Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> (reporting that “organizers anticipated more than 700 protests, in all 50 states and even internationally” in response to President Trump’s “zero tolerance” immigration policy that separated immigrant children from their parents).
113. See Laura Bush, Opinion, *Separating Children from Their Parents at the Border ‘Breaks My Heart’*, WASH. POST (June 17, 2018), [https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549\\_story.html](https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html) (“Our government should not be in the business of warehousing children in converted box stores or making plans to place them in tent cities in the desert outside of El Paso.”); see also Billy Perrigo, *Here Are All the Republicans Who Criticized the Trump Administration’s Family Separation Policy This Weekend*, TIME (June 18, 2018), <https://time.com/5314681/republicans-criticized-trump-family-separation-border/> (listing all of the Republicans who opposed “the Trump administration’s policy of separating parents who cross the United States illegally from their children”).

A third difference is evident in the reactions of the courts; they did not stand in the way of the Palmer Raids.<sup>114</sup> Generally, they have only rarely protected the rights of immigrants against the “plenary power” of the federal government.<sup>115</sup> By contrast, courts have issued injunctions against most of the measures that Trump put in place to deter people from applying for asylum, including family separation, detention without individualized assessments of risk, the “return to Mexico” policy, and the bans on asylum for those who entered illegally or transited through a third country without seeking asylum there.<sup>116</sup> The Supreme Court stayed some of these injunctions, but it is still the government’s burden to prevail on appeal.<sup>117</sup> And in June 2020, the

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114. Aside from one ruling issued by Judge George Anderson in 1920, finding that the government had violated the rights of twenty individuals detained solely because of their membership in communist parties, courts generally did not intervene in similar cases. *See Colyer v. Skeffington*, 265 F. 17, 20, 79 (D. Mass. 1920) (holding that the Attorney General’s decision to treat all Communist Party and Communist Labor Party members as radicals was misguided and overbroad), *rev’d sub nom.* *Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922). *See also Colyer*, 265 F. at 43 (“I refrain from any extended comment on the lawlessness of these proceedings by our supposedly law-enforcing officials. The documents and acts speak for themselves. It may, however, fitly be observed that a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.”).
115. The “plenary power doctrine” refers to the judicial deference afforded to the political branches in the realm of immigration law, including the plenary authority “to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (quoting *Boutilier v. Immigr. and Naturalization Serv.*, 387 U.S. 118, 123 (1967)); *see Enemy Aliens Article*, *supra* note 8, at 981 (“[I]mmigrants are subject to the immigration power, which the [Supreme] Court has historically treated with substantial deference as a ‘plenary power.’”).
116. *See* STEFANIE HERWECK & SCOTT NICOL, *ACLU, DEATH, DAMAGE, AND FAILURE: PAST, PRESENT, AND FUTURE IMPACTS OF WALLS ON THE U.S.-MEXICO BORDER* 113 (Sept. 12, 2018), [https://www.aclu.org/sites/default/files/field\\_document/aclu-report-updates\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/aclu-report-updates_0.pdf) (noting that “in response to a successful legal challenge,” a majority of the “separated parents detained along the border from their children” have “since been reunited”); *see also* SARAH PIERCE & JESSICA BOLTER, *MIGRATION POL’Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 69–70* (July 2020), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_US-Immigration-Trump-Presidency-Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf) (discussing injunctions pertaining to asylum policies); *see also* Amrit Cheng, *Family Separation in Court: What You Need to Know*, *ACLU* (July 10, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/family-separation-court-what-you-need-know> (discussing the family separation injunction); *see also* Ted Hesson, *Judge Halts Trump Administration’s “Remain in Mexico” Policy*, *POLITICO* (Apr. 8, 2019), <https://www.politico.com/story/2019/04/08/judge-trump-mexico-asylum-1261832> (discussing the Remain in Mexico policy); *see also* Miriam Jordan, *Judges Strike Several Blows to Trump Immigration Policies*, *N.Y. TIMES* (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/us/immigration-public-charge-injunction.html> (discussing the injunction issued to prevent the border wall construction).
117. *See* Adam Liptak, *Supreme Court Says Trump Can Bar Asylum Seekers While Legal Fight Continues*, *N.Y. TIMES* (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/us/politics/supreme-court-trump-asylum.html> (“The Supreme Court, in a brief, unsigned order, said the administration may enforce new rules that generally forbid asylum applications from migrants who have traveled through another country on their way to the United States without being denied asylum in that country.”). *But see* *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 4 (2019) (Sotomayor, J., dissenting) (“Because I do not believe the Government has met its weighty burden for such relief, I would deny the stay.”).

## REFLECTIONS ON IMMIGRATION

Supreme Court invalidated President Trump's revocation of DACA, saving seven hundred thousand undocumented immigrants from potential deportation.<sup>118</sup>

In November 2020, the American people, by a large margin, chose Joe Biden over Donald Trump, rejecting the politics of fear that Trump had stoked.<sup>119</sup> Among President Biden's first steps were reversals of many of Trump's worst anti-immigrant initiatives, including the Muslim ban, family separation, the border wall, and the "return to Mexico" policy.<sup>120</sup> Yet a growing number of immigrants arriving at the U.S.-Mexico border has already led to criticism that the Biden administration has not been tough enough in enforcing immigration restrictions at the border.<sup>121</sup> Only time will tell whether we can respond to the latest challenge by rejecting and rising above the patterns of the past.

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118. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 492 (9th Cir. 2018) (noting that as of the day before the rescission, "approximately 689,800 individuals were enrolled in DACA"), *rev'd in part, vacated in part*, 140 S. Ct. 1891, 1910–15 (2020) (vacating the rescission of DACA, finding that "the total rescission was arbitrary and capricious").

119. Jennifer Rubin, *Opinion: The Size of Joe Biden's Victory Matters. And It Is Huge*, WASH. POST (Dec. 4, 2020, 10:30 AM), <https://www.washingtonpost.com/opinions/2020/12/04/size-bidens-win-matters-it-is-huge/>.

120. Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021) (rescinding the 2017 travel bans); Exec. Order No. 14011, 86 Fed. Reg. 8273 (Feb. 2, 2021) (establishing the "Interagency Task Force on the Reunification of Families"); Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021) (terminating "the emergency with respect to the southern border" and halting construction of the border wall); Memorandum from DHS on the Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf) (eliminating the "return to Mexico" policy).

121. Michael D. Shear & Zolan Kanno-Youngs, *Surge in Migrants Defies Easy or Quick Solutions for Biden*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/03/16/us/politics/biden-immigration.html> (noting that the "administration is scrambling to find additional space" for the climbing numbers of minors arriving at the border).