

# President Biden's Immigration Policies: Between Continuity and Discontinuity

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**Abstract:** When President Biden took office, expectations of significant changes in immigration policy were high, considering that his predecessor had implemented the most extensive anti-immigration program in almost a century. During his election campaign, Biden made a solid pledge to end the Trump administration's draconian policies by building a fair and humane immigration system. And within hours of taking office, his administration began dismantling Trump's legacy. This article analyzes Biden's administration's immigration policies after two years in the presidential office.

**Keywords:** Biden administration; immigration; refugees; human rights.

## 1. Preliminary remarks

This essay aims to discuss President Joe Biden's immigration policy in the first two years of his presidential term in the United States, to assess whether and how it differs from the policies of his predecessor Donald Trump. This issue presents an interdisciplinary approach,<sup>1</sup> and scholarly literature generally emphasizes the interaction between public law and political science.<sup>2</sup> An interdisciplinary approach to the issue of immigration is necessary, as is the use of quantitative data since this is a complex and global problem. Before briefly describing the Biden administration's regulatory interventions in this field, it seems appropriate to start with some statistical data.<sup>3</sup> The *Census Bureau's monthly Current Population Survey*

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<sup>1</sup> For a general overview, see, among others, J. Husa, *Interdisciplinary Comparative Law: Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd*, 2022, Cheltenham (UK) and Northampton (MA); G. Resta, *Is Law Like Social Sciences? On 'New Private Law Theory' and the Call for Disciplinary Pluralism*, in 23 *German Law Journal*, 826–837 (2022).

<sup>2</sup> See H.R. Smith, *The Biden Administration's Immigration Enforcement Priorities: Background and Legal Considerations*, Washington, 2022; L. Ries, *President Trump and Joe Biden: Comparing Immigration Policies*, in *Backgrounder*, 3547, October 21, 2020, 1–17; D. Meissner and M. Mittelstadt, *At the Starting Gate: The Incoming Biden Administration's Immigration Plan*, *Migration Policy Institute Papers*, November 2020, 1–12.

<sup>3</sup> See M. Siems, *Comparative Law*, 3<sup>rd</sup> ed., Cambridge and New York, 2022, 373–376; M. Infantino, *Numera et impera. Gli indicatori giuridici globali e il diritto comparato*, Milan, 2019.

(CPS) shows that the total foreign-born or immigrant population (legal and illegal) in the US hit 47.9 million in September 2022 – a record high in American history – and an increase of 2.9 million since January 2021. The substantial increase in immigrants from the Western Hemisphere indicates that illegal immigration has played a considerable role in the growth of the foreign-born population since the beginning of 2021. Both as a candidate and as a new president, Biden aggressively distanced himself from policies of his predecessor that had limited legal immigration. President Biden insisted that while Trump “waged an unrelenting assault on our values and our history as a nation of immigrants,” he would adopt a more open approach consistent with his belief that “immigration is essential to who we are as a nation, our core values, and our aspirations for our future.”<sup>88</sup> He quickly made it clear that under his governance, the US immigration system would be less discriminatory against specific ethnic and religious groups, less restrictive on legal entry and visa issuance, and more hospitable to visa holders already present in the country. Biden has also prioritized fundamental and long-term reforms to legal immigration through legislation.

President Biden took office on 20 January 2021 and, as he had promised during the campaign, on his first day, he changed many of the immigration policies of the previous presidential administration, considering that expectations of change were very high.<sup>4</sup> During the past presidency, the most far-reaching anti-immigration program in almost a century had been implemented, supported by xenophobic attitudes of the most conservative wing of the Republican Party. These restrictive policies had no strong public or congressional approval, nor even from the substantial majority of Americans who opposed Trump’s immigration agenda.<sup>5</sup> Based on solid popular and Democratic Party support, the new President has pledged to end the Trump administration’s draconian policies and build a fair and humane immigration system.

The substantial increase in immigrants from the Western Hemisphere indicates that illegal immigration has played a considerable role in the growth of the foreign-born population since the beginning of 2021. Starting from the measures signed by President Biden on 20 January 2021, we will highlight his administration’s attitude in the period between his presidential election and the mid-term elections to ascertain whether the announced discontinuity with the Trump administration has been realized.

## 2. President Biden’s First Regulatory Measures

Before the US midterm elections approached, immigration remained one of the country's most contentious political issues, especially regarding the number of people trying to enter the US at the southwestern border. While a record number of migrants arrive at the US-Mexico border, data

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<sup>4</sup> See A. Kalhan, *Judicial Illiberalism: How Captured Courts are Entrenching Trump-Era Immigration Policies*, *Lex*, September 2022, 2-36.

<sup>5</sup> See A.B. Cox and C. Rodríguez, *The President and Immigration Law*, New York, 2020.

analyzed by the *Migration Policy Institute* (MPI) show that the Biden administration has been active on immigration, issuing 296 executive orders in the first two years of its presidency. It is difficult in a limited space to address all these measures, and we will only highlight a few references.

On 20 January 2021, President Biden sent an immigration bill to Congress as part of his pledges to modernize and restore ‘humanity and American values’ in the immigration system. In doing so, he would end the national emergency declared by the Trump Administration in February 2019 by blocking the construction of the wall at the US-Mexico border. This proposal was aimed at building a path to citizenship for some 11 million undocumented immigrants in the United States. This plan, which would immediately protect millions of foreign citizens from deportation, marks a radical change from President Trump’s intransigent policies that have made life increasingly hard. On the same day, he signed Presidential Proclamation 10141 on Ending discriminatory bans on entry to the United States imposed by Trump on 14 foreign countries, most of them of the Muslim religion.<sup>6</sup>

As part of Proclamation 10141, President Biden directed the State Department, within 45 days, to provide a report including a proposal for individuals whose immigrant visa applications were denied due to Proclamations 9645 or 9983 and seek to have their applications reconsidered. He signed another Executive Order, n. 13993 of January 20, 2021, about *Revision of Civil Immigration Enforcement Policies and Priorities*, pointing out that “[t]he task of enforcing the immigration laws is complex and requires setting priorities to best serve the national interest”.<sup>7</sup> Biden made clear that he wanted to support and welcome asylum seekers. A significant part of that effort must effectively re-orient the *US Citizenship and Immigration Services* (USCIS) to its original welcoming mandate and humanitarian mission.<sup>8</sup>

## 2.1. The US Citizenship Act of 2021

The *US Citizenship Act* of 2021 is one of the most sweeping immigration reforms in the US in 30 years. It includes some essential provisions to improve several existing immigration rules. One of the main issues

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<sup>6</sup> Available at <https://www.presidency.ucsb.edu/documents/proclamation-10141-ending-discriminatory-bans-entry-the-united-states>, accessed November 10, 2022. President Biden revoked Executive Order 13780 of March 6, 2017 (*Protecting the Nation From Foreign Terrorist Entry Into the United States*); Proclamation 9645 of September 24, 2017 (*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*); Proclamation 9723 of April 10, 2018 (*Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*); Proclamation 9983 of January 31, 2020 (*Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*).

<sup>7</sup> Available at <https://www.federalregister.gov/documents/2021/01/25/2021-01768/>, accessed November 10, 2022.

<sup>8</sup> See L.M. Harris, *Asylum Under Attack*, in 67 *Loyola Law Review* 1, 55 (2021).

addressed in the legislation concerns the labor status of immigrants who entered the US illegally and without documents and how to initiate a process for their regularisation. The law establishes a five-year path to temporary legal status, or a green card, for those living in the United States as of January 1, 2021, if they pass background checks, pay taxes, and meet other basic requirements under the law. The requirement of residence in the United States starting from this date may be waived in some instances for reasons of family reunification.

The subjective scope of the measure encompasses the protection of more than 11 million undocumented workers in the United States, including those under *Deferred Action for Childhood Arrivals* (DACA), known as ‘dreamers’, those under *Temporary Protected Status* (TPS), and migrant farm workers. Dreamers are long-term undocumented residents who first came to the US as children.<sup>9</sup>

Regarding this *Action*, one can point out that it protects against deportation and allows some undocumented immigrants who arrived in the United States as children to be granted a work permit.<sup>10</sup> In addition, it establishes a subsequent 3-year period for transition from green cards to naturalization, pending further screening and application for citizenship. The language with which illegal immigrants have been defined changes from ‘alien’ to ‘non-citizen’ in immigration laws, particularly in the *Immigration and Nationality Act* of 1952 (INA). The adjective ‘alien’ might be considered offensive. This term encompasses several subjects, including aliens who entered the United States illegally, temporary visitors, and lawful permanent residents.<sup>11</sup> Changing these two different terms would erase these distinctions, although the *Citizenship Act* needs to address this order of problems.

The Biden administration also appealed court decisions that denied the establishment of the *Deferred Action for Childhood Arrivals* (DACA) program and the termination of *Migrant Protection Protocols* (MPPs). Nevertheless, the same administration changed previous policies, such as doubling the refugee cap by 2022, expanding a program that allows some children from Northern Triangle countries to apply for refugee status, and reopening US borders to most vaccinated travelers.

### 3. Immigration, Asylum, and Administrative Law

After the 2020 presidential election, the Biden administration was anxious to address the large backlog of asylum claims and to accelerate the timeline for introducing new rules. More than forty years after the passage of the

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<sup>9</sup> Presidential Mem., 86 Fed. Reg. 7,053 (Jan. 20, 2021). From a diachronic point of view, see V.C. Romero, *Alle the Presidents’ Dreamers: Immigration Reform that Biden and Trump Can Agree on (and Why that Reform May Be Elusive)*, in 9 *Belmont Law Review* 2, 317-356 (2022).

<sup>10</sup> See L.M. Harris, *Asylum Under Attack*, in 67 *Loyola Law Review* 1, 55 (2021).

<sup>11</sup> The term “illegal alien” appears in only six provisions of the *Immigration and Nationality Act* (INA). Still, the Act does not use the term to define the categories of persons subject to deportation. See J.L. Koh, *Rethinking Removability*, in 65 *Florida Law Review*, 1805 (2013), at n. 4.

*Refugee Act*, the procedures originally envisaged had shown their ineffectiveness in adequately dealing with a vast and growing number of asylum claims. From this perspective, administrative law is a litmus test for agencies interpreting legislative and non-legislative immigration rules.<sup>12</sup> We point out that in early 2019, President Trump’s Department of Homeland Security (DHS) implemented a policy known as the Migrant Protection Protocols (MPP), which requires certain noncitizens arriving at the southwest border to remain in Mexico during the pendency of their immigration proceedings. A few weeks after entering office, Biden issued an Executive Order requiring the Department of Home Security (DHS) Secretary to “begin a review of procedures for individuals placed in expedited removal proceedings at the United States border”, and within four months to report “recommendations for creating a more efficient and orderly process that facilitates timely adjudications and adherence to standards of fairness and due process”.<sup>13</sup> In June 2021, President Biden’s Secretary of Homeland Security issued a memorandum terminating MPP based on several considerations, including the extent of resources needed to implement the program, the availability of other more effective and humane border-management approaches, and the impact of MPP on the country’s relationship with Mexico.

In its first months in office, the Biden administration followed up with several essential reversals of Trump administration policies that had imposed significant barriers to asylum. However, changing agency policy often requires more than presidential transition alone. The moratorium on deportations never went into effect due to federal court order in a lawsuit filed by the State of Texas.<sup>14</sup>

Biden administration did not change its policy to remove the migrants under the Title 42 of the US Code at the beginning of the presidential term. The Code deals with public health, social welfare, and civil rights and, in this case, with the deportation of migrants. This provision prevents entry into the United States of persons from certain countries because a communicable disease in a foreign country provokes a danger of introducing such disease into the United States. Suspension is necessary for the interest of public health. Despite widespread recognition that deportations of asylum seekers without due process are unfair and violate the Refugee Act of 1980, the Biden administration has relied on Title 42 to deport many of these migrants. At the southern US border, the number of migrants passed from around 69,000 to 75,000 during the last months of the Trump administration to over 169,000 in March 2021, under the Biden presidency.

The administrative procedures related to granting asylum to immigrants highlight how discretion is only sometimes congruent with the principles governing administrative action. Courts, public officials, and

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<sup>12</sup> About this relation, generally see J.E. Family, *Administrative Law to the Lens of Immigration Law*, in 64 *Administrative Law Review* 3, 565-618 (2012).

<sup>13</sup> See Biden-Harris, *The Biden Plan for Securing our Values as a Nation of Immigrants*, October 2016, available at <https://perma.cc/WXE8-ANA5>, accessed November 10, 2022.

<sup>14</sup> See J.L. Koh, *Immigrants as Injuries*, in *American University Law Review* (forthcoming 2023).

legal scholars have rarely distinguished between ‘regulatory’ and ‘protective’ discretion. The first facilitates the exclusion and removal of non-citizens, while the second safeguard their reliance interests. In immigration law, discretion has become contested terrain.<sup>15</sup>

### 3.1 Ending the ‘Remain in Mexico’ Program

On February 2, 2021, Biden issued Executive Order 14,010 on ‘Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border’.<sup>16</sup> The order aimed to ‘review and determine whether to terminate or modify’ the MPP, a program whereby asylum seekers from third countries arriving at the US border remained in Mexico while processing their asylum claims.<sup>17</sup> In May 2022, the Biden administration announced it would end Title 42. Republican-led states sued the administration, and some court’s decisions kept Title 42 provisions in place without defining an expiration date. The Biden administration succeeded in ending another Trump-era policy known as Migrant Protection Protocols (MPP), which required asylum seekers to wait in Mexico for an immigration court to hear their case. Those already registered with the MPP and are waiting in Mexico will be able to enter the US for their next hearing and will not have to return to Mexico. On 31 May 2022, the administration began implementing a change in handling certain asylum claims. The new guidelines aim to streamline the asylum process and send fewer cases to the US immigration courts, which are already full of backlogs. US asylum officials will adjudicate the asylum claims of migrants subject to expedited removal procedures after May 2022. The Biden administration has returned to focus on protecting asylum seekers, issuing guidelines on applying the INA and a final rule on DACA. Some courts have blocked the implementation of DAPA, the cancellation of DACA, and the INA implementation guidelines and DACA rule adopted by the Biden administration. As a result, Department of Homeland Security Secretary Mayorkas was forced to issue a new memorandum on 29 October 2021 to end the MPP program.

## 4. The Supreme Court’s 2021-2022 immigration cases

During the 2021-2022 presidential term, the Supreme Court decided on a number of cases that had a significant impact on immigration laws and policies. Depending on the subject matter, these decisions can be divided into five different areas: a) cases involving the Biden administration’s decision to end certain Trump-era immigration policies; b) cases involving bond hearings for detained immigrants; c) cases involving the personal

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<sup>15</sup> See M. Sohoni, *The Supreme Court, 2021 Term – Comment: The Major Questions Quartet*, in 136 *Harvard Law Review*, 262-318 (2022).

<sup>16</sup> Executive Order 14,010, in 86 *Fed. Reg.* 8, 267 (Feb. 2, 2021).

<sup>17</sup> See K.E. Eichenseher (ed.), *Contemporary Practice of the United States Relating to International Law*, in 115 *The American Journal of International Law* 2, 344 (2021).

liability of border patrol agents and federal officers for unconstitutional actions; d) cases involving appellate review of immigration-related decisions; e) cases involving immigration enforcement priorities.

Before briefly reviewing the Supreme Court's major decisions on immigration, it seems appropriate to note that its composition is majority conservative. This majority has hindered President Biden's policies in this area, and the Court's orientation would not likely change in the final two years of the presidential term.

#### 4.1 Biden administration's decision to end certain Trump-era immigration policies

The Supreme Court analyzed two Trump-era immigration policies: the Migrant Protection Protocols (MPP) and the 2019 Public Charge Rule. The first of the rulings in this group is *Biden et al. v. Texas et al.*, No. 21–954, June 30, 2022.<sup>18</sup> By a 5–4 vote, the Supreme Court ruled that the Biden administration can rescind the Trump-era program – MPP, also known as 'Remain in Mexico' – which required asylum seekers to remain in Mexico for the duration of their immigration proceedings.

The States of Texas and Missouri filed suit against the Biden administration in federal court, arguing that the termination of MPP was unlawful. The district court ruled in favor of the states, and the US Court of Appeals for the Fifth Circuit affirmed. Among other things, the Fifth Circuit held that 8 USC. § 1225 imposes a statutory obligation to return to a contiguous territory – like Mexico – all arriving noncitizens who are not clearly admissible and whom it lacks the capacity to detain, and that DHS needed to reinstate MPP to comply with this obligation.<sup>19</sup> The Fifth Circuit held that the Biden Administration's justification for terminating in June 2021 the provisions mentioned above of the previous administration failed the 'reasoned analysis' test decided by the Supreme Court on 18 June 2020 in *Department of Homeland Security v. Regents of University of California*. The Court held that the new memoranda had no legal effect, upholding the district court's ruling that the DHS had violated the *Administrative Procedure Act* (APA) and immigration law in how it terminated the *Migrant Protection Protocols program*. The Biden administration appealed to the US Supreme Court, which ruled that the government's revocation of the *Migrant Protection Protocols* did not violate Section 1225 of the *Immigration and Nationality Act* and that the 29 October memoranda constituted a final act with legal effects.

The Biden administration asked the Supreme Court to hear the case, and the Court agreed to do so. In its ruling, the Court first addressed the issue of jurisdiction, holding that the lower court lacked jurisdiction to issue the injunction requiring the government to enforce the MPP in good faith until its lawful revocation. On June 30, 2022, the Supreme Court gave

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<sup>18</sup> Available at [https://www.supremecourt.gov/opinions/21pdf/21-954\\_7l48.pdf](https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf), accessed January 17, 2022.

<sup>19</sup> U.S. Court of Appeals for the 5th Circuit, *Texas v. Biden*, decided on December 13, 2021, available at [https://ballotpedia.org/Biden\\_v.\\_Texas](https://ballotpedia.org/Biden_v._Texas), accessed January 17, 2022.

the Biden administration a victory, holding that its rescission of MPP did not violate the INA. This decision was also a victory for immigrant communities. The Court remanded the case to the district court to address remaining Administrative Procedure Act (APA) issues, leaving some questions unresolved. The Supreme Court's June 2022 decision, by a vote of 5-4, gave Secretary Mayorkas initial but certainly important victory in his attempt to revoke the MPP. Chief Justice Roberts's opinion for the Court and Justice Kavanaugh's concurrence opinion did not definitively address the sufficiency under the *Administrative Procedure Act* (APA) of Secretary Mayorkas's stated reasons for ending the Trump Administration program. In particular, the Court left for another day whether Secretary Mayorkas's October 2021 memorandum, which the Court agreed to consider, had adequately addressed border states' reliance interests in MPP's continuation. However, the Court held that neither the text nor the structure of the INA precluded MPP's termination. Moreover, the Court indicated that foreign policy justifications for ending MPP should trigger judicial deference.

Another case ruled by the Supreme Court concerning the reversal of the Trump administration's immigration measures is *Arizona, et al. v. City and County of San Francisco, California, et al.*, No. 20-1775, June 15, 2022.<sup>20</sup> The Trump administration's 2019 Public Charge Rule redefined and expanded the meaning of 'public charge', applying it to encompass a much larger population of those immigrants who previously accessed and are deemed likely to rely on certain forms of public assistance. In the same year, the US District Court for the Northern District of Illinois struck down the rule, with the US Court of Appeals for the Seventh Circuit subsequently staying the district court's ruling. The government appealed the decision. The 2019 Rule generated extensive litigation across the United States. Plaintiffs who had opposed the adoption of the Rule, including 21 states and numerous local governments and non-governmental organizations, filed suits in five district courts in four circuits alleging that the Rule was unlawful on numerous grounds. The Supreme Court dismissed an attempt by Arizona and twelve other states to defend a Trump-era immigration policy that sought to deny green cards to immigrants based on their potential reliance on federal public benefits.<sup>21</sup>

## 4.2 Bond hearings for detained immigrants

The Supreme Court decided on two leading cases that restricted access to bond hearings for detained immigrants. The first is *Johnson v. Arteaga-Martinez*, No. 19-896, June 13, 2022.<sup>22</sup> Antonio Arteaga-Martinez is a

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<sup>20</sup> Available at [https://www.supremecourt.gov/opinions/21pdf/20-1775\\_4425.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1775_4425.pdf), accessed January 17, 2022. See A. Liptak, *Supreme Court Rejects Bail Hearings for Jailed Immigrants*, in *New York Times*, June 13, 2022.

<sup>21</sup> The 2019 Public Charge Rule does not define 'public charge'. It provides that the Secretary 'shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills'.

<sup>22</sup> Available at [https://www.supremecourt.gov/opinions/21pdf/19-896\\_2135.pdf](https://www.supremecourt.gov/opinions/21pdf/19-896_2135.pdf), accessed January 17, 2022.

citizen of Mexico who was removed in July 2012 and reentered the United States in September 2012. US Immigration and Customs Enforcement (ICE) issued a warrant for Arteaga-Martinez's arrest in 2018. ICE reinstated Arteaga-Martinez's earlier removal order and detained him pursuant to its authority under the Immigration and Nationality Act. In an 8-1 vote, the US Supreme Court held that federal law does not require the government to provide bond hearings to noncitizens detained for six months or longer. Reversing the Third Circuit, which held that the government bears the burden of proving that detained noncitizens pose a flight danger to the community. The ruling confirms that the government is not required to provide bond hearings to detained immigrants, opening up the possibility of leading up to removal proceedings. One can point out that the Court did not answer whether extended detention violates the due process clause of the Constitution.

The second case ruled by Supreme Court is *Garland v. Aleman Gonzalez*, No. 20-322, June 13, 2022.<sup>23</sup> The Court held that a provision of the Immigration and Nationality Act<sup>6</sup> (INA), 8 USC. § 1252 (f), forbids lower federal courts from granting classwide injunctive relief. Esteban Aleman Gonzalez entered the United States and was removed to Mexico on the same day in the year 2000. he reentered the United States, where he has since resided, and started a family. In 2017, immigration officers arrested Aleman Gonzalez at his home in California, reinstated his prior order of removal, and placed him in detention, 10 under 8 USC. § 1231(a)(6). Mr. Arteaga-Martinez was detained while he waited for an immigration judge to consider his request to halt his deportation on that basis. After four months without a hearing, he challenged his detention in federal court. The district court held that the class members were entitled to bond hearings after six months of detention and issued injunctive relief. The Ninth Circuit affirmed, and the federal government appealed to the Supreme Court.<sup>24</sup>

There are two issues before the Court: first, whether a noncitizen in immigration custody is entitled to a bond hearing after six months of detention; and second, whether lower courts can issue class-wide relief for all similarly situated detainees. The Court ruled that granting class-wide relief on behalf of individuals challenging their detention was prohibited and that lower courts may not enter an injunction that instructs federal immigration officials to act in a specific way with respect to decisions to enforce provisions of the law. Despite the absence of injunctive relief, other types of relief – such as declaratory relief – may continue to be available.

#### 4.3 Personal liability of Border Patrol agents and federal officers for unconstitutional actions

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<sup>23</sup> At [https://www.supremecourt.gov/opinions/21pdf/20-322\\_m6hn.pdf](https://www.supremecourt.gov/opinions/21pdf/20-322_m6hn.pdf), accessed January 17, 2022.

<sup>24</sup> See A. Liptak, *Supreme Court Weighs Jailed Immigrants' Rights to Bail Hearings*, in *New York Times*, January 11, 2022. For a critical position, see the commentary on the judgment in 136 *Harvard Law Review*, November 10, 2022, 410-419.

In *Egbert v. Boule*, No. 21–147, June 8, 2022, the US Supreme Court ruled by a 6-3 majority that a private citizen may not seek damages against a Border Patrol agent who uses excessive force and unlawful retaliation in violation of the Fourth and First Amendments, respectively.<sup>25</sup> Robert Boule is an innkeeper who filed suit against Border Patrol Agent Erik Egbert for retaliation and excessive force. Egbert threw Boule to the ground after being asked to leave after attempting to conduct enforcement activities at the inn. Egbert subsequently attempted to retaliate against Boule by filing a complaint against him, reporting Boule to law enforcement and tax authorities.

The decision established the immunity of agents from private lawsuits and limited the ability of citizens to sue law enforcement agencies in the absence of a specific law authorizing such a claim. The Court declined to make its remedies available to Boule, stating that Congress would be ‘better suited to authorize a damages remedy’. The Supreme Court’s decision had implications beyond the immigration field, making it much more difficult for individual citizens to hold Border Patrol agents and other federal officials accountable for violations of their constitutional rights.<sup>26</sup>

#### 4.4 Appellate review of immigration-related decisions

Another case argued and decided in the Supreme Court is *Patel v. Garland*, No. 20–979, May 16, 2022.<sup>27</sup> Pankajkumar Patel, entered the US as an undocumented immigrant, but later applied for lawful permanent resident status after spending decades in the US. Patel, who was eligible for a Georgia driver’s license, checked a box indicating that he was a US citizen on his renewal application. Before an immigration judge, Patel argued that he had mistakenly ticked the ‘citizen’ box on the state application and thus had no subjective intent to falsely represent himself as a US citizen. The immigration judge denied Patel’s request for a discretionary adjustment of status and ordered his deportation.

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<sup>25</sup> Available at [https://www.supremecourt.gov/opinions/21pdf/21-147\\_g31h.pdf](https://www.supremecourt.gov/opinions/21pdf/21-147_g31h.pdf), accessed January 17, 2022. See J. Mascott and R.T. McCotter, *Egbert v. Boule: Federal Officer Suits by Common Law* (August 9, 2022), in *Cato Supreme Court Review*, 2021–2022, George Mason Legal Studies Research Paper No. LS 22-27; Id., Amicus Brief of Professor Jennifer L. Mascott in *Egbert v. Boule*, 21-147 (December 27, 2021). Gray Center Separation of Powers Brief, 1-21; A. Liptak, *Supreme Court Sides With Border Agent Accused of Using Excessive Force*, in *New York Times*, June 8, 2022.

<sup>26</sup> This violence by border police is also evidenced by recent videos published by US news agencies see J. Ainsley, *Video shows border agents, police arresting migrants sleeping outside church shelter in El Paso ahead of Biden’s visit*, at <https://www.nbcnews.com/politics/immigration/video-border-agents-police-arrest-migrants-church-shelter-rcna64718>.

<sup>27</sup> Available at [https://www.supremecourt.gov/opinions/21pdf/20-979\\_h3ci.pdf](https://www.supremecourt.gov/opinions/21pdf/20-979_h3ci.pdf), accessed January 17, 2022.

Subsequent appeals to the Board of Immigration Appeals and the Eleventh Circuit failed as they were declared incompetent. In a 5-4 decision, the Supreme Court agreed that the inability of federal courts to review findings of fact regarding the granting of discretionary immigration relief. The Supreme Court held that these determinations of fact were not reviewable on appeal. This decision has negative implications for other immigration cases, preventing many non-citizens from seeking review of agencies' errors.

#### 4.5 Immigration enforcement priorities

After the 2021-22 term ended, by a 5-4 vote – including newly sworn-in Justice Ketanji Brown Jackson in dissent, – the Supreme Court in the case *Texas v. United States*, No. 22-58, Docket, July 21, 2022, refused to lift an injunction blocking the Biden administration's immigration enforcement 2021 guidelines articulating the priorities and focus in the apprehension and removal of noncitizens. Several states, in two separate lawsuits, challenged these enforcement priorities.<sup>28</sup> This case began as a suit by Texas and Louisiana against the federal government in a federal district court. The plaintiffs complained of adverse effects from a Department of Homeland Security (DHS) enforcement policy, embodied in a memorandum issued by Secretary Alejandro Mayorkas.<sup>29</sup>

In June 2022, a federal judge in Texas enjoined the enforcement priorities, with the U.S. Court of Appeals for the 5th Circuit subsequently declining to stay the injunction. This opinion was issued as part of the Supreme Court's so-called shadow docket, issued as a matter of urgency before a full trial and oral arguments begin. The Court will hear oral arguments in this case in December 2022, at which point it may reconsider whether to overturn the lower court's decision. In the meantime, the Biden administration is ordered to implement its immigration enforcement guidelines.

#### 5. Concluding remarks

President Biden and his predecessors have grappled with the complexity of the migration problem, a global phenomenon. Immigration impacts American society in cultural, fiscal, economic, demographic, and political

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<sup>28</sup> US Department of Homeland Security's (DHS) September 2021 Guidance, available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>29</sup> See previous paragraph 3.1. From an administrative law point of view, particularly with reference to section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), see J. Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, *University of Virginia Law & Economics Research Paper Series*, No. 4247173, 2022, available at file:///C:/Users/82FG00HMIX/Downloads/SSRN-id4247173.pdf, accessed January 17, 2022.

terms. The effect is directly related to the magnitude of the phenomenon itself. The most recent data show that the scale of immigration into the country was enormous in the first two years of the Biden presidency. If regulatory measures to better guarantee the human rights of immigrants characterized the administration on a formal level, one has to ask how these measures worked on an operational level. We cannot overlook that the administration's continued use of the Public Health Act to deport migrants caused a particular uproar when it was used to repatriate thousands of migrants to Haiti, a country struggling with political instability and natural disasters. Claims for refugee status and arrests of migrants in Mexico increased dramatically during the Biden administration, as the president continued the policy of restricting access to asylum at the southern US border.

Mr Biden pushed Mexican President López Obrador to heavily regulate travel to and within Mexico to prevent non-Mexican migrants from reaching the United States. Those who cross Mexico's southern border fleeing violence and persecution struggle to obtain protection, suffer severe abuse and delays and are often forced to wait for months in inhumane conditions near Mexico's southern border as they struggle to find work or housing. The Biden administration reached a sad and stunning milestone by deporting or deporting 20,000 migrants from Haiti. It received bipartisan criticism for handling Haitian migrants in September 2021, which led to more than 12,000 people piling up under an international bridge in Del Rio, Texas.

In squalid conditions, the US Border Patrol detained thousands of people in a temporary staging area under the Del Rio International Bridge, with little access to drinking water and food and only a few portable toilets. Approximately two-thirds of those sent back to Haiti were deported under Title 42, which, on a questionable legal basis, uses the risk of a pandemic as a pretext to send migrants away as quickly as possible, even when they seek asylum or protection. It is indeed hard to believe that the conditions in which the migrants found themselves were in harmony with the principles of the Constitution. In sum, the administration has kept Title 42 in force, unamended, and used it to quickly deport more than 1.1 million migrants while avoiding the principle of due process. These negative events, condemned by President Biden, have highlighted the many critical issues that regulatory interventions fail to overcome, even with appreciable regulatory achievements.

Another problem that the Biden administration has yet to resolve concerns the prison situation in which immigrants, including children, find themselves, pending the determination of their legal status. However, what is happening in immigrant prisons constitutes a violation of human rights if one considers that children are still locked up and separated from their families.<sup>30</sup> The Biden administration reopened an emergency immigration detention facility used during the Trump administration for

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<sup>30</sup> See e.g., *Number of Migrant Children Detained at Border Has Tripled in Two Weeks*, in *New York Times*, (Apr.22, 2021), in <https://www.nytimes.com/live/2021/03/08/us/joe-biden-news>, accessed November 7, 2022.

unaccompanied child migrants at the border. In this regard, according to the principles of international law, deprivation of liberty due to immigration status can amount to torture under certain conditions.<sup>31</sup> For example, regarding Georgia's Irwin Detention Center, there was talk of human rights infringement, including 'forces sterilization and sexual abuse.'<sup>32</sup>

This complex problem in terms of human rights violations is not quickly resolved politically. The Biden administration has also said that it supports, at least in part, the recommendations to stop incarcerating child migrants, further stressing that laws enacted by Congress bind the executive branch. As a result, it is unsurprising that in June 2022, more than 24,000 migrants were detained by the federal agency *US Immigration and Customs Enforcement (ICE)* and Border Patrol.

Immigration represents a complex problem and a political commitment of states globally, whose efforts cannot be limited only to implementing national public policies. However, US agencies need the necessary infrastructure to house detainees. Instead, the Department of Homeland Security – to which the ban in Biden's executive order does not extend – outsources this responsibility to private companies. As a result, 79 percent of detained immigrants are held in privately owned or operated facilities. The border crisis with Mexico has forced the President to envisage new immigration programs in 2023, anticipating, on the one hand, a plan to take in 30,000 migrants per month from Cuba, Nicaragua, Venezuela, and Haiti, provided they do not enter illegally from the Mexican border. On the other hand, the Biden administration will introduce vast new restrictions on the right to claim asylum, making more extensive use of Title 42 deportations. As in the case of the Trump administration, President Biden is forced to confront federal judges and the US Supreme Court, on the one hand, and Congress, on the other, to resolve the complex problems arising from immigration, balancing open policies with restrictive asylum measures, such as Title 42. The issues it has to address are numerous: from guaranteeing the fundamental rights of asylum seekers to their defense in administrative proceedings before the agencies, from the violent behavior of police officers to the rejection of migrants to the issue of prisons and the detention of children. These are just some aspects that the Covid-19 pandemic and the current economic crisis have particularly accentuated, demonstrating the almost impossibility of solving global problems with national measures. In conclusion, we can emphasize that the result of the midterm elections, which determined the Republican majority in the House of Representatives, and the swings in the decisions of the federal courts and the Supreme Court on the matter could make it very difficult for President Biden to effectively resolve the complex problems of its immigration policy, determining, from a material

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<sup>31</sup> See E.L. Bartlett, *One of the Greatest Human Tragedies of Our Time: The U.N., Biden, and a Missed Opportunity to Abolish Immigration Prisons*, in 43 *Mitchell Hamline Law Journal of Public Policy and Practice* 1, 37-63 (2021-2022).

<sup>32</sup> See A. Shahshahani & P.Bhatt, *ICE Shut Down One Gruesome Detention Center – Then Transferred Immigrants to Another*, in *The Progressive Mag.*, June 18, 2021.

perspective, mechanisms of continuity, rather than discontinuity, with respect to the previous administration.

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