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## LAW AND POLITICS AT THE SOUTHWEST BORDER OF THE UNITED STATES

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### I. *Introduction*

Stretching nearly 2,000 miles from the Pacific Coast to the Gulf of Mexico, the Southwest Border between Mexico and the United States is the «world’s single most crossed international boundary».<sup>1</sup> In the runup to the 2024 elections in the United States, the situation at the U.S.-Mexico border has again taken center stage in the national political debate, with accusations flying back and forth between the principal protagonists. This Article endeavors to take a dispassionate look at various legal and political questions that have arisen in the border context. After offering background information with regard to border statistics and border barriers, the Article focuses on the federal and state powers at the border.

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<sup>1</sup> C. OSBORN, *The Changing Mexico-U.S. Border*, in *Library of Congress Blogs* (online), 2015, <https://blogs.loc.gov/maps/2015/12/the-changing-mexico-u-s-border/>.

## II. *The Backdrop*

### 1. *Border Statistics*

In American immigration-enforcement parlance, border crossings are associated with migrant encounters. This term in turn falls into apprehensions and expulsions. Apprehensions, which occur when migrants are taken, at least temporarily, into custody in the United States where they could apply for asylum or other humanitarian protections,<sup>2</sup> are carried out pursuant to the Immigration and Nationality Act of 1952, which is codified in Title 8 of the United States Code. Expulsions, which take place when migrants are immediately expelled to their home country or last country in transit without being held in custody in the United States, are conducted pursuant to different authorities, such as those under the Public Health Service Act of 1944, which is codified in Title 42 of the United States Code.

In December 2023, the U.S. Border Patrol – the mobile, uniformed law enforcement arm of U.S. Customs and Border Protection within the Department of Homeland Security responsible for securing U.S. borders between ports of entry – recorded 250,000 encounters. Monthly totals have been somewhat lower in 2024, but compared to only 16,000 encounters registered in April 2020, those numbers have spiked by more than an order of magnitude. The U.S. Government estimates that there have been more than 9 million encounters since President Biden took office. Historically, most encounters have involved citizens from Mexico and the Northern Triangle – El Salvador, Guatemala and Honduras. But as of recently, one-half of the encounters involve citizens of other, historically atypical, countries, including Venezuela and China.

Americans are dissatisfied with the situation prevailing at the border. Eight-in-ten adults say that the U.S. Government is doing a bad or somewhat bad job.<sup>3</sup> According to six-in-ten Americans, orderly immigration should be a policy goal of the highest priority for the President and Congress<sup>4</sup> – a share that has gone up considerably since the start of President Biden’s term.<sup>5</sup> This change is almost entirely due to growing concern among Republicans, with more than three-quarters now saying that they are mainly concerned about immigration.<sup>6</sup> By comparison, the share of Democrats who cite immigration as a priority has remained fairly stable at just over one-third of those surveyed.

In his campaign rallies, the Republican presidential nominee, Former President Donald J. Trump, speaks of 15-20 million migrants having illegally entered the United States under President Biden’s administration.<sup>7</sup> Accusing President Biden of a “bloodbath” at the

<sup>2</sup> J. GRAMLICH, *Migrant Encounters at the U.S.-Mexico Border Hit a Record High at the End of 2023*, in *Pew Research Center* (online), 2024 <https://www.pewresearch.org/short-reads/2024/02/15/migrant-encounters-at-the-us-mexico-border-hit-a-record-high-at-the-end-of-2023/>.

<sup>3</sup> C. DOHERTY, J. KILEY & N. ASHEER, *How Americans View the Situation at the U.S. Mexico Border, Its Causes and Consequences*, in *Pew Research Center* (online), 2024, p. 4.

<sup>4</sup> A. JACKSON, *State of the Union 2024: Where Americans Stand on the Economy, Immigration and Other Key Issues*, in *Pew Research Center* (online), 2024, [https://www.pewresearch.org/short-reads/2024/03/07/state-of-the-union-2024-where-americans-stand-on-the-economy-immigration-and-other-key-](https://www.pewresearch.org/short-reads/2024/03/07/state-of-the-union-2024-where-americans-stand-on-the-economy-immigration-and-other-key-issues/#:~:text=Immigration%20resonates%20strongly%20with%20Republicans,the%20start%20of%20Biden's%20term.)

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sues/#:~:text=Immigration%20resonates%20strongly%20with%20Republicans,the%20start%20of%20Biden's%20term.](https://www.pewresearch.org/short-reads/2024/03/07/state-of-the-union-2024-where-americans-stand-on-the-economy-immigration-and-other-key-issues/#:~:text=Immigration%20resonates%20strongly%20with%20Republicans,the%20start%20of%20Biden's%20term.)

<sup>5</sup> *Ibid.* (reporting an increase by 18 points – from 39% to 57%)

<sup>6</sup> *Ibid.* (76% – up from 39% in 2021).

<sup>7</sup> Z.B. WOLF, *Trump Explains His Militaristic Plan to Deport 15-20 Million People*, in *CNN*, 2024, <https://www.cnn.com/2024/05/01/politics/trump-immigration-what-matters/index.html>. See also *Fact*

border,<sup>8</sup> Former President Trump has continued to stoke fears of what he calls “migrant crime.” Video footage that shows migrants, mostly single men, rushing a border crossing went viral in late March 2024, only adding fuel to the fire.<sup>9</sup>

Earlier this year, Secretary of Homeland Security Alejandro N. Mayorkas became the first sitting Cabinet secretary to be impeached. The two articles of impeachment, which, after much drama, passed the U.S. House of Representatives by a single vote,<sup>10</sup> alleged that the Secretary was guilty of a «willful and systematic refusal to comply with the law» and a «breach of public trust».<sup>11</sup> In the U.S. Senate, however, the charges were quickly dismissed unconstitutional by the Democrat majority.<sup>12</sup>

## 2. Border Barriers

The Trump Administration did not invent border barrier construction for the United States. As a relatively new component of the border landscape, the construction of physical barriers to deter migrants began in the 1990s and lasted into the 2000s.<sup>13</sup> This phase, which was authorized by Congress through legislation enacted in 1996 and 2006, led to the construction of 650 miles of barriers.<sup>14</sup>

The Trump Administration, which had come into office with the campaign promise to build a «big beautiful wall» on the U.S.-Mexico border,<sup>15</sup> initiated the next phase in 2017 with a presidential directive.<sup>16</sup> By executive order, President Trump announced the executive branch’s policy to «secure the southern border of the United States through the construction of a physical wall on the southern border, monitored and supported by adequate

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*Check: Donald Trump Says Nearly 15 million People Have Crossed Border*, Newsweek (online), Mar. 5, 2024, <https://www.newsweek.com/fact-check-donald-trump-says-nearly-15-million-people-have-crossed-border-1876091> (juxtaposing the former President’s estimate with government data that report 7,332,800 encounters since January 2021).

<sup>8</sup> J. CAPPELLETTI, J. COLVIN & A. GOMEZ, *Trump Accuses Biden of Causing a Border ‘Bloodbath’ as He Escalates his Immigration Rhetoric*, in *Associated Press* (online), 2024, <https://apnews.com/article/trump-immigration-crime-battleground-election-aa4b0912322dee09cf475ffad7c8cec7>.

<sup>9</sup> J. TAER & M. PALIN, *Over 100 Migrants Break through Razor Wire, Knock down Guards as They Illegally Cross El Paso Border in Wild Scene*, in *New York Post* (online), 2024, <https://nypost.com/2024/03/21/us-news/migrants-break-barriers-and-rush-border-guards-in-el-paso/>. Cf. A. KASPRAK, *Does Footage Show Migrants Storming Border in El Paso?*, in *Snope* (online), 2024, <https://www.snopes.com/fact-check/el-paso-border-migrants/>. (offering a “fact check”); A. SERRANO, *More Than 200 Migrants Arrested after Rushing an El Paso Border Gate*, in *The Texas Tribune* (online), 2024, <https://www.texastribune.org/2024/04/02/texas-el-paso-border-gate-breach/> (speaking of 425 migrants who broke away from a group of 1,000).

<sup>10</sup> J. ALEMANY, *U.S. House Impeaches Homeland Security Secretary*, in *The Texas Tribune* (online), 2024, <https://www.texastribune.org/2024/02/13/us-house-alejandro-mayorkas-impeachment/>.

<sup>11</sup> H. Res. 863: *Impeaching Alejandro Nicholas Mayorkas, Secretary of Homeland, for High Crimes and Misdemeanors*, 118th Congr., 2023-24, <https://www.congress.gov/bill/118th-congress/house-resolution/863/text>.

<sup>12</sup> K. HUBBARD, *Senate Rejects Mayorkas Impeachment Charges at Trial, Ending GOP Bid to Oust Him*, in *CBS News* (online), 2024, <https://www.cbsnews.com/news/mayorkas-impeachment-trial-senate-democrats-homeland-security/>.

<sup>13</sup> W.L. PAINTER & A. SINGER, *DHS Border Barrier Funding Through FY2021*, in *CRS Report R45888* (online), 2023 (Summary).

<sup>14</sup> *Ibid.* (referring to authorities under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Secure Fence Act of 2006).

<sup>15</sup> W. PAINTER, *DHS Border Barrier Funding Developments: FY2021-FY2024*, in *CRS Report R47979* (online), 2024 (Summary).

<sup>16</sup> Executive Order 13767 of 25 January 2017, *Border Security and Immigration Enforcement Improvement*, in *Federal Register*, 2017, vol. 82, no. 18, p. 8739.

personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism». <sup>17</sup> Under President Trump's executive order, the construction of a "physical wall" was all about achieving operational control of the southern border. <sup>18</sup> By the end of the Trump Administration, 458 miles of wall panels had been installed along the United States-Mexico border, with the funds not coming from Mexico but through direct and redirected Congressional appropriations. <sup>19</sup> Most of those miles of barriers consist of steel posts or concrete-filled barriers that are 18 to 30 feet in height – a design that is purposed to deter vehicles and pedestrians and that is referred to as bollard-style fencing. <sup>20</sup>

### III. *The Branches of Government and the Border*

The border debate among the branches of government over how to manage the record number of encounters at the southwest border has intensified considerably during election season. In this debate, three principal themes arise. What are the present legal authorities conferred upon the executive branch? What can Congress do to change the legal landscape at the border? What lawmaking powers, if any, do the States still have?

#### 1. *The Executive Branch*

Former President Trump has repeatedly declared that he will seal the border once he wins back the White House. <sup>21</sup> Meanwhile, President Biden has on several occasions signaled that he has been looking into his powers in that regard. <sup>22</sup>

In respect of the question of whether the President has the power to close the border or ports of entry, the record informs us that, prior to President Trump's Administration, significant restrictions were imposed on at least two occasions <sup>23</sup> – in 1963, after President Kennedy's assassination for the afternoon and evening; and in 1985, for a few days, after the abduction of a Drug Enforcement Administration agent. Actions to restrict border entry arrived en masse under President Trump's Administration. These actions were taken

<sup>17</sup> *Ibid.*, sec. 2(a).

<sup>18</sup> *Ibid.*, sec. 4(a).

<sup>19</sup> W. PAINTER, *DHS Border*, cit. (n. 15), p. 3; K. GREEN, *Funding for the Border Wall: Where's It Coming from and Will It Survive Legal Challenges*, in *University of Cincinnati Law Review Blog* (online), 2019, <https://uclawreview.org/2019/03/18/funding-for-the-border-wall-where-s-it-coming-from-and-will-it-survive-legal-challenges/>.

<sup>20</sup> W.L. PAINTER & A. SINGER, *DHS Border Barrier*, cit. (n. 13).

<sup>21</sup> L. DEAN & D. MENEZES, *Trump Says He Will Send the Military to Seal up the Border*, in *NewsNation* (online), 2024, <https://www.newsnationnow.com/politics/2024-election/t13rump-military-seal-border/>.

<sup>22</sup> Cf. P. ALVAREZ & M.J. LEE, *Biden Considering New Executive Action to Restrict Asylum at the Border, Sources Say*, in *CNN* (online), 2024 (noting that the situation at the border «has dogged President Joe Biden for years»); <https://www.cnn.com/2024/02/21/politics/biden-considering-executive-action-to-close-southern-border-sources-say/index.html>; C. LONG, *President Biden Has Said He'd Shut the US-Mexico Border If Given the Ability. What Does That Mean?*, in *Associated Press* (online), Jan. 29, 2024, <https://apnews.com/article/border-immigration-election-2182fec11fa008ec96c4202e5656d19e> (linking President Biden's interest to secure a border deal in Congress to unlocking funds for Ukraine).

<sup>23</sup> R.W. GARDEY & H.R. SMITH, *Can the President "Close the Border"? Relevant Laws and Considerations*, in *CRS Legal Sidebar LSB10283* (online), 2024.

through presidential proclamations, which embody announcements of policy issued by the President,<sup>24</sup> and agency rules promulgating regulations pursuant to laws enacted by Congress.<sup>25</sup>

a. “*Muslim Travel Ban*”

In September 2017, President Trump issued a presidential proclamation,<sup>26</sup> which replaced prior executive orders.<sup>27</sup> At its core, the proclamation denied entry to nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen.<sup>28</sup> The “travel ban” was ultimately upheld by the U.S. Supreme Court in *Trump v. Hawaii*.<sup>29</sup> According to the Court, there was no likelihood of success on the merits for the challengers who had alleged that the President had exceeded his executive power and that the Proclamation was fueled by anti-Muslim animus.<sup>30</sup>

On the first prong, the U.S. Supreme Court decided that travel ban under the proclamation was a valid exercise of executive authority under the Immigration and Nationality Act of 1952.<sup>31</sup> Scrutinizing first a provision that declares that the President may limit alien entry upon a finding that such entry «would be detrimental to the interests of the United States»,<sup>32</sup> the U.S. Supreme Court determined that the grant of discretion accorded to the President was broad. The proclamation, said the Court, was the result of a «worldwide, multi-agency review» yielding the assessment that the entry of certain non-citizens would be detrimental to the national interest of the United States.<sup>33</sup> Moreover, according to the U.S. Supreme Court, the proclamation did not violate another provision that, in the issuance of immigrant visas, forbids discrimination based, among others, on nationality.<sup>34</sup> This provision, said the Court, does not constrain the President’s authority to determine who may enter the Country and who should be blocked from entry – a power confirmed by historical practice.<sup>35</sup>

On the second prong, the U.S. Supreme Court decided that the proclamation did not violate the Establishment Clause of the First Amendment to the U.S. Constitution,<sup>36</sup> which provides that «Congress shall make no law respecting an establishment of a religion or prohibiting the free exercise thereof».<sup>37</sup> The Court started with the premise that the admission and exclusion of foreign nationals constitutes a fundamental sovereign attribute that is ex-

<sup>24</sup> Georgetown Law Library, *Presidential Documents Research Guide*, 2024, <https://guides.ll.georgetown.edu/c.php?g=365454&p=2468883>.

<sup>25</sup> Office of the Federal Registrar, *A Guide to the Rulemaking Process*, 2011, [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>26</sup> Proclamation 9645 of 24 September 2017, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, in *Federal Register*, 2017, vol. 82, no. 186, p. 45161.

<sup>27</sup> *Ibid.* (referring in several places of the document to Executive Order 13780 and Executive Order 13769).

<sup>28</sup> *Ibid.*, sec. 2(a)-(h).

<sup>29</sup> U.S. Supreme Court, *Trump v. Hawaii*, in *U.S. Reports*, 2018, vol. 585, p. 667.

<sup>30</sup> *Ibid.*, p. 710.

<sup>31</sup> *Ibid.*, pp. 683-697.

<sup>32</sup> United States Code 2024, tl. 8, sec. 1182(f).

<sup>33</sup> *Trump v. Hawaii*, cit. (n. 29), p. 684.

<sup>34</sup> United States Code 2024, tl. 8, sec. 1152(a)(1)(A).

<sup>35</sup> *Trump v. Hawaii*, cit. (n. 29), pp. 669-680.

<sup>36</sup> *Ibid.*, pp. 697-710.

<sup>37</sup> U.S. Const. amend. I.

exercised by the political branches and that is largely immune from judicial control.<sup>38</sup> Assessing that the Establishment Clause claim by the challengers concerned foreign national seeking entry into the United States, the Court applied a deferential standard, which is called rational basis review and tests whether the actions of the government rationally relate to a legitimate government interest.<sup>39</sup> The Court found the fact that many predominantly Muslim countries were not subject to restrictions, while, at the same time, some countries without majority Muslim populations were subject to the restrictions actually supported the contention of the U.S. Government that the proclamation was not based on anti-Muslim animus, but on «a sufficient national security justification».<sup>40</sup> A scathing dissent criticized that the majority left undisturbed a policy that had «openly and unequivocally [advertised itself] as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerade[d] behind a façade of national-security concerns».<sup>41</sup>

In January 2020, President Trump issued a follow-up presidential proclamation, adding Myanmar, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania to the travel ban.<sup>42</sup> But on his first day in office in January 2021, President Biden lifted by proclamation the two nationality-based travel bans issued by the Trump Administration.<sup>43</sup>

#### b. *Asylum Ineligibility*

In November 2018, the Homeland Security Department and Executive Office of Immigration Review issued an *interim* final rule,<sup>44</sup> which, if applied to proclamations suspending the entry of aliens who cross the southern border unlawfully, would have barred these aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed.<sup>45</sup> President Trump immediately followed up with a presidential proclamation with regard to mass migration through the southern border of the United States.<sup>46</sup>

After the challengers of the rule had won a temporary restraining order in federal district court, the Ninth Circuit ruled that the proclamation, combined with the rule, not only violated international treaty obligations of the United States under the Convention Relating to the *Status* of Refugees of 1951, but also conflicted with the eligibility dispositions for asylum applications under the Immigration and Nationality Act of 1952.<sup>47</sup> Pursuant to the statute, aliens arriving anywhere along the U.S. borders may apply for asylum.<sup>48</sup> The inter-

<sup>38</sup> *Trump v. Hawaii*, cit. (n. 29), pp. 702-704.

<sup>39</sup> *Ibid.*, pp. 704-705.

<sup>40</sup> *Ibid.*, pp. 705-710.

<sup>41</sup> *Ibid.*, p. 728 (Sotomayor J., dissenting).

<sup>42</sup> Proclamation 9983 of 31 January 2020, *Improving Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, 85 Fed. Reg. 6,699, Feb. 5, 2020.

<sup>43</sup> Proclamation 10141 of 20 January 2021, *Ending Discriminatory Bans on Entry to the United States*, in *Federal Register*, 2021, vol. 86, no. 14, p. 7005 .

<sup>44</sup> Department of Homeland Security (U.S. Citizenship and Immigration Services) & Department of Justice (Executive Office for Immigration Review), *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, in *Federal Register*, 2018, vol. 83, no. 218, p. 55934.

<sup>45</sup> *Ibid.* (amending 8 C.F.R. § 208.13(c)(3)).

<sup>46</sup> Proclamation 9822 of 9 November 2018, *Addressing Mass Migration Through the Southern Border of the United States*, in *Federal Register*, 2018, vol. 83, no. 221, p. 57661.

<sup>47</sup> U.S. Court of Appeals for the Ninth Circuit, *East Bay Sanctuary Covenant v. Trump*, in *Federal Reporter*, 3rd Series, 2018, p. 742.

<sup>48</sup> United States Code 2024, tl. 8, sec. 1158(a).

national treaty obligation pertains to the *non-refoulement* principle, which provides that certain refugees shall not be expelled or returned to the frontiers of territories where their life and liberty would be in jeopardy because of their race, religion, nationality, memberships and opinions.<sup>49</sup>

There were a few more procedural plays made by the parties. The U.S. Supreme Court denied the application by the U.S. Government to stay the injunction.<sup>50</sup> While the stay application was pending, a federal district court judge granted a universal injunction barring enforcement of the rule,<sup>51</sup> which was subsequently upheld by the Ninth Circuit.<sup>52</sup>

Finally, in May 2023, the Biden Administration's Department of Homeland Security and the Department of Justice issued a final rule to address the anticipated surge of migrants in the wake of the sunset of corona entry restrictions.<sup>53</sup> The rule, which presumes certain aliens to be ineligible for asylum if they arrive at «the southwest land border or adjacent coastal borders» without valid entry documents after having traveled through another country, has again raised questions of whether its limitations to asylum bump up against international law commitments of the United States and existing federal statutory dispositions. The legal challenges to the rule are currently suspended, while settlement negotiations are under way.<sup>54</sup>

### c. *Migrant Protection Protocols*

In December 2018, the Trump Administration enunciated a new program dubbed Migrant Protection Protocols (MPP 1.0), which came to be known in the daily political jargon as the «Remain in Mexico Policy».<sup>55</sup> Under MPP 1.0, non-Mexican nationals, who arrived at the border and asked for asylum, were sent back to Mexico after having been given

<sup>49</sup> United Nations Convention Relating to the *Status* of Refugees of 1951, July 28, 1951, 189 U.N.T.S. 150, art. 33.1 («No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.» Cf. Protocol Relating to the *Status* of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1(1) (incorporating Articles 2 through 34 of the Refugee Convention).

<sup>50</sup> U.S. Supreme Court, *Trump v. East Bay Sanctuary*, in *S.Ct. Reports*, 2016, vol. 139, p. 782 (Mem).

<sup>51</sup> U.S. District Court for the Northern District of California, *East Sanctuary Covenant v. Trump*, in *Federal Supplement Reports*, 3rd Series, 2018, vol. 354, p. 1094 (N.D. Cal. 2018).

<sup>52</sup> U.S. Court of 3rd Series, Appeals for the Ninth Circuit, *East Sanctuary Covenant v. Trump*, in *Federal Reporter*, 3rd Series, 2020, vol. 950, p. 1242.

<sup>53</sup> Department of Homeland Security (U.S. Citizenship and Immigration Services) & Department of Justice (Executive Office for Immigration Review), *Final Rule: Circumvention of Lawful Pathways*, in *Federal Register*, 2023, vol. 88, no. 94, p. 31314.

<sup>54</sup> Cf. U.S. District Court for the Northern District of California, *East Bay Sanctuary Covenant v. Biden*, in *WL Database*, 2023, 4729278 (rule vacated because arbitrary and capricious under Administrative Procedure Act and because notice procedures implementing rule insufficient under Administrative Procedure Act); Cf. U.S. District Court for the Northern District of California, *East Bay Sanctuary Covenant v. Biden*, in *WL Database*, 2023, 4943384 (emergency motion for stay pending appeal denied); U.S. Court of Appeals for the Ninth Circuit, *East Bay Sanctuary Covenant v. Biden*, in *Case No. 23-160322023* (motion to stay granted); U.S. Court of Appeals for the Ninth Circuit, *East Bay Sanctuary Covenant v. Biden*, in *Federal Reports*, 4th Series, 2024, vol. 93, p. 1130 (joint motion to place appeal in abeyance granted).

<sup>55</sup> American Immigration Council, *The Migrant Protection Protocols: an Explanation of the Remain in Mexico Program*, in *American Immigration Council Factsheet* (online), 2024, <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

notices to appear in immigration court.<sup>56</sup> According to estimates for the timeframe between January 2019 and December 2020, some 70,000 individuals were returned to Mexico under the two-year reign of MPP 1.0.<sup>57</sup>

The Biden Administration initially suspended and subsequently terminated the program after President Biden had taken office. A “reinstated” Remain in Mexico program – MPP 2.0, however, returned 7,505 people to Mexico between December 2021 and August 2022. MPP 2.0 emerged in the wake of a federal district court order that had instructed the Biden Administration to «enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the [Administrative Procedure Act] and until such a time as the federal government has sufficient detention capacity to detain all [noncitizens] subject to mandatory detention...without releasing any [noncitizen] because of lack of detention resources.»<sup>58</sup>

The district court’s order was overturned in 2022, when the U.S. Supreme Court ruled in *Biden v. Texas* that the termination of MPP did not violate the Immigration and Nationality Act and that the *memorandum* issued by the Secretary of Homeland Security constituted «final agency action» under the Administrative Procedure Act.<sup>59</sup> Not surprisingly, the Government of Mexico has declared its opposition to any effort that might be made by the United States to restart a similar type of program at some future point in time.<sup>60</sup>

#### d. Healthcare Burdens, Labor Market Risks and Corona Orders

In October 2019, President Trump issued a presidential proclamation<sup>61</sup> suspending aliens, who lacked health insurance or the means to pay medical expenses, from entry as immigrants.<sup>62</sup> The implementation of the proclamation was however enjoined by a federal district court for violating the non-delegation doctrine, the separation of powers principle as well as conflicting provisions of the Immigration and Nationality Act.<sup>63</sup> A divided Ninth Circuit reversed the district court,<sup>64</sup> but the reversal decision was later vacated as moot on denial of rehearing *en banc*.<sup>65</sup> Absent U.S. Supreme Court involvement stakeholders still await a firm precedent with regard to the President’s authority to bar immigrants who are unable to pay for their health insurance from entry into the United States.

<sup>56</sup> Cf. K.M. NIELSEN (U.S. Department of Homeland Security), *Policy Guidance for Implementation of the Migrant Protection Protocols*, 2019, p. 2 (*Memorandum*).

<sup>57</sup> American Immigration Council, cit. (n. 55).

<sup>58</sup> U.S. District Court for the Northern District of Texas, *Texas v. Biden*, in *Federal Supplement Reports*, 3rd Series, 2021, vol. 554, p. 818.

<sup>59</sup> U.S. Supreme Court, *Biden v. Texas*, in *U.S. Reports* 2022, vol. 597, p. 785.

<sup>60</sup> American Immigration Council, cit. (n. 55).

<sup>61</sup> Proclamation 9945 of 4 October 2019, *Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans*, in *Federal Register*, 2019, vol. 84, no. 196, p. 53991.

<sup>62</sup> *Ibid.*, sec. 1.

<sup>63</sup> U.S. District Court for the District of Oregon, *Doe #1 v. Trump*, in *Federal Supplement Reports*, 3rd Series, 2019, vol. 418, p. 573.

<sup>64</sup> U.S. Court of Appeals for the Ninth Circuit, *Doe #1 v. Trump*, in *Federal Reports*, 3rd Series, 2020, vol. 984, p. 848.

<sup>65</sup> U.S. Court of Appeals for the Ninth Circuit, *Doe #1 v. Biden*, in *Federal Reports*, 4th Series, 2021, vol. 2, p. 1284.



In June 2020, President Trump issued a presidential proclamation<sup>66</sup> in response to the pandemic associated with the novel corona virus. The proclamation suspended the entry of both immigrants and foreign nationals seeking admission on temporary nonimmigrant visas who allegedly posed a risk to the labor market during the COVID-19 pandemic.<sup>67</sup> Lower courts were divided on the question of whether the President had the requisite authority.<sup>68</sup>

During the COVID-19 pandemic, the Centers for Disease Control and Prevention, a component of the Department of Health and Human Services, issued a series of orders suspending the right to introduce certain noncitizens attempting to enter the U.S. from Mexico, regardless of country of origin, at or between ports of entry. These came to be known as «Title 42 orders.»

In March 2020, the Centers for Disease Control and Prevention announced its first order.<sup>69</sup> It was issued under two statutory authorities enacted for emergencies – a provision in the Public Health Service Act of 1944<sup>70</sup> and a provision in the Tariff Act of 1930.<sup>71</sup> Prior to the arrival of the Trump Administration, the most notable exercise of this power occurred under President Hoover when travel from certain countries was restricted during a meningitis outbreak.<sup>72</sup> In October 2020, the initial order was replaced with a new order suspending the right to introduce persons from countries where a quarantinable communicable disease existed.<sup>73</sup> Unaccompanied noncitizen children were subsequently excepted.<sup>74</sup>

<sup>66</sup> Proclamation 10052 of 22 June 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 in *Federal Register*, 2020, vol. 85, no. 123, p. 38263.

<sup>67</sup> *Ibid.*, sec. 2.

<sup>68</sup> Cf. U.S. District Court for the Northern District of California, *National Association of Manufacturers v. U.S. Department of Homeland Security*, in *Federal Supplement Reports*, 3rd Series, 2020, vol. 491, p. 549; U.S. District Court for the District of Columbia, *Gomez v. Trump*, in *Federal Supplement Reports*, 3rd Series, 2020, vol. 458, p. 145.

<sup>69</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, in *Federal Register*, 2020, vol. 85, no. 59, p. 17060.

<sup>70</sup> United States Code 2024, tl. 42, sec. 265 («Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose»).

<sup>71</sup> United States Code 2024, tl. 19, sec. 1318(b)(2) («Notwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat»).

<sup>72</sup> Cf. Department of Health and Human Services, *Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes*, in *Federal Register*, 2020, vol. 85, no. 177, p. 56424 (issuing final to amend the Foreign Quarantine Regulations administered by the Centers for Disease Control and Prevention and to provide a procedure for the Director of the Centers of Disease Control and Prevention «to suspend the right to introduce and prohibit introduction, in whole or in part, of persons from such foreign countries or places as the Director shall designate in order to avert the danger of the introduction of a quarantinable communicable disease into the United States, and for such period of time as the Director may deem necessary for such purpose»).

<sup>73</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, in *Federal Register*, 2020, vol. 85, no. 201, p. 65806.

In August 2021, the Centers for Disease Control and Prevention issued yet another a replacement order.<sup>75</sup> Unaccompanied noncitizen children continued to be excepted until the Centers for Disease Control and Prevention permanently excluded unaccompanied noncitizen children in March 2022.<sup>76</sup>

In April 2022, following a public health determination, the Director of the Centers for Disease Control and Prevention announced her decision to terminate, by May 2022, their order from August 2021.<sup>77</sup> Due to court proceedings,<sup>78</sup> however, the termination of the order could not take effect and the order remained in effect until the COVID-19 Public Health Emergency expired at 11:59 pm Eastern Daylight Time on May 11, 2023.<sup>79</sup> But by its own terms, the order terminated with the expiration of the public health emergency.<sup>80</sup> Lawsuits that had been brought to challenge the lawfulness of both the imposition as well as the termination of those restrictions were ultimately dismissed as moot.<sup>81</sup>

e. *Extract*

The four case studies highlight the potential for disagreement over the exact contours of the space for the President to deny entry to arriving aliens at the border. It appears that federal law affords the executive branch significant wiggle room to restrict the legal entry of people at ports of entry. Still, it remains unclear how far that envelope goes. If some future administration proffered a national security justification to close certain ports of entry on the southern border or bar specified categories of aliens, a reviewing court could be more inclined to defer and hold that the executive action does not conflict with existing statutory authority. This, however, might not be true for broader action taken by the executive branch in pursuance of other justifications.

Finally, judicial review in the interplay of congressional statutes entrusting regulatory agencies and agency interpretations of their statute has experienced a seismic shift. Forty years ago, the U.S. Supreme Court created a two-pronged analytical framework for court re-

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<sup>74</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination*, in *Federal Register*, 2021, vol. 86, no. 30, p. 9942.

<sup>75</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Public Health Re-assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, in *Federal Register*, 2021, vol. 86, no. 148, p. 42828.

<sup>76</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Public Health Re-assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children*, in *Federal Register*, 2022, vol. 87, no. 52, p. 15243.

<sup>77</sup> Department of Health and Human Services (Centers for Disease Control and Prevention), *Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, in *Federal Register*, 2022, vol. 87, no. 66, p. 19941. Cf. Centers for Disease Control and Prevention, *Media Statement: CDC Public Health Termination of Title 42 Order*, in *Newsroom Release* (online), 2022, <https://www.cdc.gov/media/releases/2022/s0401-title-42.html>.

<sup>78</sup> Cf. U.S. District Court for the District of Columbia, *Huisha-Huisha v. Mayorkas*, in *Federal Supplement Reports*, 3rd Series, vol. 642, p. 1 (offering *memorandum* opinion with procedural history).

<sup>79</sup> Cf. Centers for Disease Control and Prevention, *End of the Federal COVID-19 Public Health Emergency (PHE) Declaration*, in *CDC Archive* (online), 2023, <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html>.

<sup>80</sup> Centers for Disease Control and Prevention, cit. (n. 75), p. 42841.

<sup>81</sup> R.W. GARDEY & H.R. SMITH, *Can the President*, cit. (n. 23), p. 2.

view of an agency's interpretation of the statute that it administers. Under *Chevron*,<sup>82</sup> the reviewing court will firstly assess whether Congress itself has directly and clearly spoken to the question at issue. If this is so, then that is the end of the story and the court and the agency must give effect to Congress's intent. If, however, Congress has not spoken to the question and there is ambiguity, then, according to the second prong of the analysis, the reviewing court will defer to the congressionally created agency that has interpreted the statute, albeit only as long as the agency's construction is reasonable. In *Loper Bright*,<sup>83</sup> which was handed down in 2024, the U.S. Supreme Court overruled *Chevron* reasoning that the Administrative Procedure Act requires the reviewing court to exercise their own independent judgement when deciding whether an agency has acted within its statutory envelope. Consequently, the reviewing courts may no longer defer to an agency interpretation of questions of law simply because the statute appears ambiguous. The practical fallout of the battle over *Chevron* when it comes to the management of cross-border migration will crystalize in the next generation of cases that will reach the courts. As of now, the majority and dissenting opinions in *Loper Bright* seem to converge in that there will not be much of a dispute in two situations – when the entrusting statute expressly gives the agency broad discretion or conversely explicitly assigns the review power to the courts.

## 2. *The Legislative Branch*

Turning to the legislative branch, nothing has happened as of yet. Against the backdrop of a sharply divided pre-election U.S. Congress, neither a Republican bill nor a bipartisan compromise have come to fruition.

### a. *Republican House Bill*

In the spring of 2023, the House, with broad Republican support but without any Democrat backing, passed the Secure the Border Act of 2023.<sup>84</sup> The bill endeavors to make significant changes to federal immigration laws concerning border security, asylum and detention. In addition to requiring the Department of Homeland Security to resume activities to construct a wall along the U.S.-Mexico border,<sup>85</sup> the Secure the Border Act not only prohibits the Department of Homeland Security from processing the entry of non-U.S. nationals arriving between ports of entry, but also limits asylum eligibility to non-U.S. nationals who arrive in the United States at a port of entry.<sup>86</sup> The Secure the Border Act further allows the removal of a non-U.S. national to a “safe third country”<sup>87</sup> other than that individual's country of nationality or last lawful habitual residence whether or not there is a formal agreement with that country.<sup>88</sup> Under the Secure the Border Act, the Secretary of Homeland Security is authorized to suspend the introduction of certain non-U.S. nationals

<sup>82</sup> U.S. Supreme Court, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in *U.S. Reports*, 1984, vol. 467, p. 837.

<sup>83</sup> U.S. Supreme Court, *Loper Bright Enterprises v. Raimondo*, in *S.Ct. Reports*, 2024, vol. 11, p. 2244.

<sup>84</sup> An Act to Secure the Borders of the United States, and for Other Purposes, *H.R. 2*, in *118th Cong. 1st Sess.*, 2023, <https://www.congress.gov/bill/118th-congress/house-bill/2/text>.

<sup>85</sup> *Ibid.*, div. A, sec. 102.

<sup>86</sup> *Ibid.*, div. B, tl. I, sec. 103.

<sup>87</sup> *Ibid.*, sec. 101.

<sup>88</sup> *Ibid.*, sec. 108.

at an international border upon the determination that the suspension is necessary to achieve operational control of that border.<sup>89</sup> Finally, the Secure the Border Act enables immigration officers to permit an unaccompanied alien child to withdraw their application for admission into the United States even if the child is unable to make an independent decision in that regard.<sup>90</sup>

As a whole, the Secure the Border Act appears to envisage a return to the Trump era. It is therefore not surprising that, in a statement of administration policy, the Executive Office of the President, through the Office of Management and Budget, expressed the Biden Administration's opposition to the Secure the Border Act, declaring that, if the President were presented with the bill he would veto it.<sup>91</sup> Critics of the Secure the Border Act have offered that the bill would not only fail to fix what they call a broken immigration system but also «compromise the U.S.'s long-standing tradition of refuge, while restricting existing lawful pathways that bolster the nation's humanitarian and national security priorities».<sup>92</sup> The odds for passage of H.R. 2's Senate companion are therefore less than slim.

#### b. *Bipartisan Border Package*

Earlier this year, a critical mass of Republicans inside the U.S. Senate blocked consideration of a bipartisan compromise proposal for border security and immigration, just three days after its public release.<sup>93</sup> Some lawmakers quickly argued that Former President Trump had emerged as a vocal critic of the deal only to use the border situation as a campaign issue. The political shenanigans aside, this bill is worth understanding because it may be the starting point for major reforms in 2025 independent of the outcomes of the 2024 election.

The bipartisan compromise, which was folded into the Emergency National Security Supplemental Appropriations Act,<sup>94</sup> not only proposed to appropriate more money for border and immigration security, but also made shifts in the allocation of that money to increase the number of Border Patrol agents, asylum officers in the employ of U.S. Citizenship and Immigration Services, and detention beds for Immigration and Customs Enforcement.<sup>95</sup> A core provision of the compromise package includes a trigger mechanism, which would have required the Secretary of Homeland Security to “close” the border to asylum claims, if the number of inadmissible migrants exceeded 8,500 in a single day, or

<sup>89</sup> *Ibid.*, div. B, tl. II, sec. 201.

<sup>90</sup> *Ibid.*, div. B, tl. V, sec. 502.

<sup>91</sup> Executive Office of the President (Office of Management and Budget), *H.R. 2 – Secure the Border Act 2023* (Rep. Diaz-Balart, R-FL, and 15 cosponsors), in *Statement of Administration* (online), 2023, <https://www.whitehouse.gov/wp-content/uploads/2023/05/SAP-H.R.-2.pdf>.

<sup>92</sup> A. VILLAREAL, *Bill Analysis: The Secure the Border Act of 2023*, in *National Immigration Forum* (online), 2023, <https://immigrationforum.org/article/bill-analysis-the-secure-the-border-act-of-2023/>.

<sup>93</sup> S. GROVES & M.C. JALONICK, *Senate Republicans Block Bipartisan Border Package, Then Scramble to Find Support for Ukraine Aid*, in *Associated Press* (online), 2024, <https://apnews.com/article/congress-ukraine-aid-border-security-386dcc54b29a5491f8bd87b727a284f8>.

<sup>94</sup> Emergency National Security Supplemental Appropriations Act (H.R. 815) – Amendment in the Nature of a Substitute, H.R. 815, in *118th Cong. 1st Sess.* 2023, [https://www.appropriations.senate.gov/imo/media/doc/emergency\\_national\\_security\\_supplemental\\_bill\\_text.pdf](https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_bill_text.pdf).

<sup>95</sup> The White House, *Fact Sheet: Impact of the Bipartisan Border Agreement Funding on Border Operations*, in *Statement and Releases* (online), Feb. 29, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/29/fact-sheet-impact-of-bipartisan-border-agreement-funding-on-border-operations/>.

5,000 a day over a seven-day period.<sup>96</sup> Commentary has noted that the Convention Against Torture could still offer protection for certain migrants, albeit subject to a higher standard of proof.<sup>97</sup> According to the negotiators, the trigger mechanism would have “closed” the border to asylum seekers for several months preceding the arrival of the bill.<sup>98</sup> Proponents of the compromise have noted that, if passed and funded, the bill would lead to a significantly reduced use of “catch and release” – a practice of releasing from custody certain migrants into the community while they await their hearings in immigration court.<sup>99</sup> Under the bill, those migrants who qualified for asylum would receive a quicker determination, while those ineligible for asylum would be removed much more expeditiously.

### 3. *The States*

American checks and balances also have a vertical component embodied by the states under the American federalism paradigm. Controversies over the allocation of border powers between the Federal Government and the States pertain to the constitutionality of state legislation in the immigration enforcement arena and *locus standi* of the states when challenging federal immigration enforcement policies.

#### a. *State Legislation*

In late 2023, Governor Greg Abbott of Texas signed into law Texas Senate Bill 4 (S.B. 40)<sup>100</sup> – legislation enacted by the Republican-controlled legislature with the purpose to prohibit “sanctuary city” policies and deter people from crossing the Rio Grande after several years of historically high numbers of migrants arriving at the Texas-Mexico border.<sup>101</sup> Texas S.B. 4 makes illegally crossing the border a Class B misdemeanor, which carries a punishment of up to six months in jail.<sup>102</sup> Repeat offenders could face a second-degree felony with a punishment of two to twenty years in prison. Texas S.B.4 requires state judges to order migrants returned to Mexico regardless of their nationality if they are convicted, with local law enforcement being responsible for the transporting migrants to the border.<sup>103</sup> The Government of Mexico has made clear that they would not accept for-

<sup>96</sup> H.R. 815, cit. (n. 94), sec. 3301.

<sup>97</sup> T.S. WARRICK, *This Year's Bipartisan Immigration Bill Offers a Border Blueprint for 2025*, in *Atlantic Council Issue Brief* (online), 2024, <https://www.atlanticcouncil.org/content-series/future-of-dhs/this-years-bipartisan-immigration-bill-offers-a-border-blueprint-for-2025/#:~:text=Migrants%20could%20still%20claim%20protection,few%20migrants%20qualify%20for%20i>

<sup>98</sup> S.W. KIGHT, *Senators Zero in on High Stakes Border Deal*, in *AXIOS* (online), 2024, <https://www.axios.com/2024/01/27/senate-border-deal-biden-house-republicans>.

<sup>99</sup> T.S. WARRICK, *This Year's Bipartisan*, cit. (n. 97).

<sup>100</sup> S.B. No. 4, An Act relating to prohibitions on the illegal entry into or illegal presence in this state by a person who is an alien, the enforcement of those prohibitions and certain related orders, including immunity from liability and indemnification for enforcement actions, and authorizing or requiring under certain circumstances the removal of persons who violate those prohibitions; creating criminal offenses, <https://capitol.texas.gov/tlodocs/884/billtext/pdf/SB00004F.pdf#navpanes=0>.

<sup>101</sup> U.J. GARCÍA, *Gov. Greg Abbott Signs Bill Making Illegal Immigration a State Crime*, in *The Texas Tribune* (online), 2023, <https://www.texastribune.org/2023/12/18/texas-governor-abbott-bills-border-wall-illegal-entry-crime-sb3-sb4/>.

<sup>102</sup> S.B. No. 4, cit. (n. 100), sec. 2 (amending Title 10, Chapter 51 of the Texas Penal Code).

<sup>103</sup> *Ibid.*, sec. 1 (adding Chapter 5B to Title 1 of the Texas Code of Criminal Procedure).

eign nationals deported to their country and that the law would sour Mexico's relationship with the United States.<sup>104</sup> Proponents of Texas S.B. 4 argue that Texas had a right to step in because the Biden Administration was not doing its job in light of the record numbers of unauthorized crossings into Texas since President Biden was elected.<sup>105</sup> Opponents of Texas S.B.4 have retorted that the law would inevitably lead to racial profiling.<sup>106</sup> Texas S.B. 4 was immediately challenged in court, and the consolidated lawsuits unleashed a flurry of legal back-and-forth, with the law initially being paused,<sup>107</sup> then briefly put back in place,<sup>108</sup> and finally blocked again for the duration of the case.<sup>109</sup> The final outcome will ultimately hinge on the answer to the question of whether a state's attempt to control foreign immigration into the United States properly uses state authority, or whether it intrudes onto exclusive federal authority.<sup>110</sup> Meanwhile, other states, notably Louisiana and Oklahoma, are contemplating legislation that is similar to, or modeled on, Texas S.B. 4.<sup>111</sup>

<sup>104</sup> M.B. SHERIDAN, *Mexico, A Key U.S. Ally on Migration Pushes Back Hard on Texas Law*, in *The Washington Post* (online), 2024, <https://www.washingtonpost.com/world/2024/03/21/mexico-texas-immigration-law-sb4/>.

<sup>105</sup> B. HERLIHY, *Biden Is Wrong, Texas Has Every Right to "defend against Invasion," State AGs tell White House*, in *Fox News* (online), 2024, <https://www.foxnews.com/politics/biden-doj-is-wrong-texas-has-every-right-to-defend-against-invasion-state-ags-tell-white-house>.

<sup>106</sup> Congressman Vicente Gonzales Representing the 34th District of Texas, *Congressman Gonzales Statement on Texas Senate Bill*, in *Press Release* (online), 2020, <https://gonzalez.house.gov/media/press-releases/congressman-gonzalez-statement-texas-senate-bill-4>.

<sup>107</sup> U.S. District Court for the Western District of Texas, *United States v. Texas*, in *WL Database*, 2024, 861526 (Texas S.B. 4 likely an unconstitutional intrusion by Texas of federal jurisdiction over immigration matters because: (i) absent an authorization from the federal government, the Supremacy Clause of the U.S. Constitution and U.S. Supreme Court precedent were clear that states are barred from exercising immigration enforcement power; (ii) the law would not only conflict with central provisions of federal immigration law but it would also harm treaty obligations and foreign relations of the United States; (iii) as upticks in immigration could not be equated to an "invasion," the constitutional envelope under Article I, Section 10 of the U.S. Constitution for states to respond to an "invasion" without awaiting federal action was not triggered; and (iv) Texas was not in a position to disregard federal directives without effectively nullifying federal law and authority). Cf. U.S. Court of Appeals for the Fifth Circuit, *United States v. Texas*, in *WL Database*, 2024, 909612 (*per curiam*) (granting a temporary administrative stay).

<sup>108</sup> U.S. Supreme Court, *United States v. Texas*, in *S.Ct. Reports*, 2024, vol. 144, p. 797 (Mem). Cf. A. HOWE, *Supreme Court allows Texas to Enforce State Deportation Law*, in *SCOTUSblog* (online), 2024, <https://www.scotusblog.com/2024/03/supreme-court-allows-texas-to-enforce-state-deportation-law/> («In a brief, unsigned order, the [U.S. Supreme] Court turned down the Biden administration's request to lift the stay entered by the [Fifth] Circuit.»). Cf. U.S. Court of Appeals for the Fifth Circuit, *United States v. Texas*, in *Federal Reports*, 4th Series, 2024, vol. 96, p. 797 (dissolving the administrative stay).

<sup>109</sup> U.S. Court of Appeals for the Fifth Circuit, *United States v. Texas*, in *Federal Reports*, 4th Series, 2024, vol. 97, p. 268 (injunction upheld because Texas had not sufficiently demonstrated that Texas S.B. 4 would not be an obstacle to objectives of federal immigration law). Cf. A. SERRANO & U.J. GARCÍA, *Texas 'New Immigration law Is Blocked Again*, in *The Texas Tribune* (online), 2024, <https://www.texastribune.org/2024/03/19/texas-sb-4-illegal-immigration/>.

<sup>110</sup> Cf. U.S. Supreme Court, *Arizona v. U.S.*, in *U.S. Reports*, 2012, vol. 567, p. 387 (Arizona law designed to deter illegal immigration invalid in part, upheld in part) (5-4 vote).

<sup>111</sup> Louisiana Senate Bill 388, <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1355208> (Crimes of «unlawful entry» and «unlawful reentry» committed by an alien without lawful presence in this state that is found entering or has entered into the state without lawful presence whether by an automobile, watercraft, airplane, or by any other method of entry, either directly from a foreign nation or indirectly from another state); Oklahoma House of Representatives House Bill 4156 (senate Floor Version), [http://webserver1.lsb.state.ok.us/cf\\_pdf/2023-24%20FLR/SFLR/HB4156%20SFLR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2023-24%20FLR/SFLR/HB4156%20SFLR.PDF) (Offense of «impermissible occupation» defined as the act of a noncitizen entering and remaining in Oklahoma without legal authorization).

### b. *State Lawsuits in Federal Court*

The U.S. Supreme Court has limited the ability of the States to challenge federal immigration enforcement policies, thus not making available the “special solicitude” envelope offered in the climate change arena.<sup>112</sup> In 2023, the U.S. Supreme Court decided that Texas and Louisiana lacked the requisite legal standing to be in the federal courtroom, reversing lower court decisions<sup>113</sup> that had blocked the implementation of guidelines promulgated by the Biden Administration.<sup>114</sup> The Homeland Security Secretary’s guidelines that were the subject of the challenge in federal court limit the arrest and removal from the United States to only certain categories of noncitizens considered a priority.<sup>115</sup>

Describing the case as «an extraordinarily unusual lawsuit» – one that asks federal courts «to order the Executive Branch to alter its arrest policies so as to make more arrests»<sup>116</sup> – the U.S. Supreme Court diagnosed the absence of a «legally and judicially cognizable» injury, especially in the absence of any precedent, historical practice or tradition of courts in support of the claim advanced by Texas and Louisiana.<sup>117</sup> Also, said the Court, there were good reasons for federal courts to stay away from these types of lawsuits, including the respect for the Executive Branch’s space of discretion<sup>118</sup> and the lack of judicially manageable standards.<sup>119</sup> Other Justices concurred, with one group reasoning that the injuries alleged by the States alleged were not redressable by the federal judicial branch<sup>120</sup> and the other group reasoning that the States had not shown the federal courts could order effective relief.<sup>121</sup> The dissenting Justice offered that the majority’s holding undermined not only the constitutional allocation of powers among the three branches, but also structural principles of federalism.<sup>122</sup>

## IV. *Perspectives*

Against the backdrop of a sharply divided country, the many moving parts in the border puzzle make this topic a challenging one. Moreover, there is a panoply of germane mat-

<sup>112</sup> U.S. Supreme Court, *Massachusetts v. EPA*, in *U.S. Reports*, 2007, vol. 549, p. 497.

<sup>113</sup> U.S. District Court for the Southern District of Texas, *Texas v. United States*, in *Federal Supplement Reports*, 3rd Series, 2022, vol. 606, p. 437 (S.D. Tex. 2022); U.S. Court of Appeals for the Fifth Circuit, *Texas v. United States*, in *Federal Reports*, 4th Series, 2022, vol. 40, p. 205.

<sup>114</sup> U.S. Supreme Court, *United States v. Texas*, in *U.S. Reports*, 2023, vol. 599, p. 670.

<sup>115</sup> Cf. *Texas v. United States* (S.D. Tex), cit. (n. 113), pp. 454-459 (providing in paras. 26-74 the January Memorandum, the February Memorandum, and the Final Memorandum).

<sup>116</sup> *United States v. Texas*, cit. (n.114), p. 686.

<sup>117</sup> *Ibid.*, pp. 676, 677-678.

<sup>118</sup> *Ibid.*, pp. 679-684

<sup>119</sup> *Ibid.*, pp. 671, 679-680.

<sup>120</sup> *Ibid.*, pp. 686-704 (Gorsuch, Thomas and Barrett, JJ., concurring).

<sup>121</sup> *Ibid.*, pp. 704-709 (Barrett and Gorsuch, JJ., concurring).

<sup>122</sup> *Ibid.*, pp. 709-735 (Alito J., dissenting).

ters ripe for discussion. Take, for example, the “100 Mile Border Zone”<sup>123</sup> and the cautious contours of domestic and international law with regard to cross-border harms.<sup>124</sup>

Obviously, the chaos in this puzzle is fueled by the upcoming elections on November 5, 2024. It appears that Democrats and their presidential nominee Kamala Harris would like the border issue to go away and see it replaced by a debate over reproductive rights. In early June, right after Mexico’s general elections, President Biden announced a set of measures to salvage the scuttled bipartisan border deal by executive fiat and temporarily suspend the entry of non-citizens at the southern border and bar asylum claims from those crossing unlawfully.<sup>125</sup> Under the on-off toggle that is at the core of the Administration’s border package, the actions go into effect when the border is overwhelmed – that is, when crossings exceed a daily average of 2,500.<sup>126</sup> Once average crossings have fallen below 1,500 for seven consecutive days, the actions will be discontinued.<sup>127</sup> Not surprisingly, the American Civil Liberties Union has already challenge those measures in court.<sup>128</sup> Republicans and their nominee in turn would like the issue to remain on the front burner, highlighting what they describe as the connection between the “open border” and “migrant crime.” Should-former President Trump win, the Republican house bill will likely foreshadow the path charted by his administration.

Still, at some point, the United States will have to confront the weighty question of “legalizing” the *status* of those millions of people without documentation already here – a question similar to the one tackled by Congress and President Reagan in 1986 and 1987. The country is ready for legal order at the border and politics to recede into the background.<sup>129</sup> Maybe it is time to think of the climate of the season rather than the temperature of the day. *Sis felix!*

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<sup>123</sup> D. ANTHONY, *The U.S. Border Patrol’s Constitutional Erosion in the “100-Mile Zone”*, in *Penn. State Law Review*, 2020, vol. 124, p. 391 (asserting that border patrol operations beyond Fourth Amendments limits in locales other than the border itself skews the balance too far in favor of government intrusion).

<sup>124</sup> V. OCHOA, *Legal Black Holes at the U.S.-Mexico Border: An Evaluation of Cross-Border Harms and the Shortcomings of International and Domestic Law in Providing Remedies*, in *Georgetown Immigration Law Journal*, 2021, vol. 36, p. 325 (criticizing the lack of viable remedies, at the international and domestic levels, for individuals within border zones).

<sup>125</sup> Proclamation 10773 of 3 June 2024, *Securing the Border*, in *Federal Register*, 2024, no. 111, p. 48487 (finding under sections 212(f) and 215(a) of the Immigration and Nationality Act that the that border emergency circumstances would be detrimental to the interests of the United States); Department of Homeland Security (U.S. Citizenship and Immigration Services) & Department of Justice (Executive Office for Immigration Review), *Interim Final Rule with Request for Comments*, in *Federal Register*, 2024, vol. 89, no. 111, p. 48710 (taking up the President’s direction to consider issuing regulations).

<sup>126</sup> Cf. Proclamation 10773, p. 48491, sec. 2(b).

<sup>127</sup> *Ibid.*, sec. 2(a).

<sup>128</sup> American Civil Liberties Union (ACLU), *Immigrants’ Rights Groups Sue Biden Administration over New Anti-Asylum Rule*, in *Press Releases* (online), 2024, <https://www.aclu.org/press-releases/immigrants-rights-groups-sue-biden-administration-over-new-anti-asylum-rule>.

<sup>129</sup> J. CRIDDLE, *Legal Order at the Border*, in *University of California, Davis, Law Review*, 2023, vol. 56, p. 1503 (asserting that U.S. immigration law fails every principle of Leon Fuller’s «interactional view of law»).