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# Catch and Release Escape Hatches

## Loopholes that encourage illegal entry

By Andrew R. Arthur

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### Summary

The number of aliens apprehended entering illegally dropped precipitously after the inauguration of President Trump,<sup>1</sup> but that number skyrocketed in March 2018.<sup>2</sup> That month, 37,393 aliens were apprehended along the Southwest border after entering illegally, a more than 200 percent increase over the post-inauguration low (in April 2017), when 11,126 apprehensions occurred.<sup>3</sup>

That same month, a caravan of between 1,000 and 1,500 aliens were reported to be moving through Mexico to the United States border.<sup>4</sup>

In response to these events, on Friday, April 6, 2018, the Trump administration took three actions:

- U.S. Defense Secretary James Mattis ordered up to 4,000 National Guard troops be deployed to the Southwest border through September 30, 2018, “under the ‘command and control of their respective governors.’”<sup>5</sup>
- The president signed a memorandum ordering agencies to “expeditiously end” the practice known as “catch and release”, which allows illegal aliens to be released from detention while in removal proceedings.<sup>6</sup> He specifically ordered the Department of Homeland Security (DHS) and other agencies to submit a report to him within 45 days “detailing all measures that their respective departments have pursued or are pursuing to expeditiously end ‘catch and release’ practices.” The president requested “a detailed list of all existing facilities, including military facilities, that could be used, modified, or repurposed to detain aliens for violations of immigration law at or near the borders of the United States.”<sup>7</sup>
- Attorney General Jeff Sessions directed each United States Attorney’s Office along the Southwest border — to the extent practicable, and in consultation with DHS — to adopt immediately a zero-tolerance policy for all criminal offenses referred for prosecution for illegal entry and reentry.<sup>8</sup>

Even these steps, however, will be insufficient to stop aliens, and especially aliens from countries other than Mexico (OTM), from entering the United States illegally and being released. For example, according to DHS:

*Thus far in FY18, 13,186 [unaccompanied alien children (UACs)] were released into the interior of the United States — that’s in addition to the 42,146 UACs and 52,147 UACs who were released in FY17 and FY16 respectively, bringing the total number of UACs released from FY16 to date in excess of 107,000.<sup>9</sup>*

Furthermore, according to DHS, the number of “family units (i.e. alien children who are accompanied by an adult claiming to be a relative or guardian)” who were apprehended by U.S. Customs and Border Protection (CBP) between FY 2016 and February 2018 totals more than 167,000, “[n]early all of whom are released into the interior of the United States.”<sup>10</sup> This is in addition to the aforementioned UACs who have been released.<sup>11</sup>

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While there are many obstacles to ending “catch and release,” these are the main impediments:

- **Deficiencies in the Credible Fear System.**<sup>12</sup> Aliens caught entering the United States illegally are supposed to be “expeditiously removed” from the United States, without seeing an immigration judge.<sup>13</sup> If the alien claims a “credible fear” of return, however, the alien will be interviewed by an asylum officer.<sup>14</sup> If the asylum officer finds the alien has established a credible fear, the alien is eligible for removal proceedings to apply for asylum.<sup>15</sup> Credible fear is found in 75 to 90 percent of all cases reviewed by asylum officers.<sup>16</sup> In 2009, according to Attorney General Sessions, the Obama administration began releasing aliens found to have credible fear.<sup>17</sup> As a likely result, the number of credible fear reviews increased significantly, from 5,000 in 2009, to 94,000 in 2016.<sup>18</sup> In fact, prior to 2013, only 1 percent of arriving aliens claimed credible fear, whereas currently 10 percent make such claims.<sup>19</sup> The attorney general has stated that half of those who pass credible fear screening never file an asylum application, however.<sup>20</sup> U.S. Immigration and Customs Enforcement (ICE) lacked detention space to hold all aliens who claimed credible fear in the past, and many were released for hearings that may occur years in the future. It is unclear whether DHS will be able to find sufficient space to detain aliens who are apprehended and are found to have credible fear pending a final decision on their applications for asylum, despite the department’s best efforts.
- **The Current Iteration of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).**<sup>21</sup> Section 462 of the Homeland Security Act of 2002 vested jurisdiction over the care and placement of UACs in removal proceedings with the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS).<sup>22</sup> The TVPRA distinguishes between UACs from “contiguous” countries (Canada and Mexico) from aliens who are nationals of “non-contiguous” countries.<sup>23</sup> A UAC from a contiguous country can be returned if the alien has not been trafficked and does not have a credible fear.<sup>24</sup> Under the TVPRA, however, OTMs are to be transferred to the care and custody of HHS within 72 hours and placed in formal removal proceedings, even if they have not been “trafficked.”<sup>25</sup> According to the Congressional Research Service (CRS): “ORR reported that children spent about 34 days on average in the program as of January 2016.”<sup>26</sup> Between February 2014 and September 2015, 56,000 (80 percent) of the children were placed with sponsors illegally in the United States and an additional 700 were placed with sponsors in deportation proceedings.<sup>27</sup> In FY 2014, according to CRS, most of the UACs who were released were placed with parents or legal guardians.<sup>28</sup>
- **The Flores settlement agreement.**<sup>29</sup> The agreement, which was originally signed in 1997, has now been read to create a presumption in favor of the release of all alien minors, even those alien minors who arrive with their parents.<sup>30</sup> As DHS has stated: “Under the Flores Agreement, DHS can only detain UACs for 20 days before releasing them to [HHS] which places the minors in foster or shelter situations until they locate a sponsor.”<sup>31</sup> The agreement encourages UACs to enter the United States illegally, and encourages the parents of UACs to hire smugglers to bring them to the United States. Further, it encourages people to bring their own children (or children whom they claim to be their own) when they make the perilous journey to the United States, thinking that it will make it more likely that they (the parents or purported parents) will be more likely to be released if they travel with children.

Largely as a result of these and similar policies, today 40 percent of arriving aliens are families and children, a significant increase compared to the situation that existed prior to 2011 (when over 90 percent of arriving aliens were single adult males), and credible fear claims have increased 1,700 percent from 2008 to 2016.<sup>32</sup>

## Background on the Caravan

As my colleague, Kausha Luna, reported on March 30, 2018:

*As part of Holy Week, over a thousand Central American illegal aliens set out to complete a “Stations of the Cross”, traversing through Mexico, to reach the United States’ southern border. Upon arrival, they hope to make asylum claims.*

*The caravan, marching under the slogan “Migrantes en la lucha” (“Migrants in the Fight”), was announced about a month ago by the group Pueblo Sin Fronteras. The organization asked for donations on its Facebook page and encouraged people to send them a message if they were interested in volunteering. The organization’s mission statement reads as follows: “Our mission is to provide shelter and safety to migrants and refugees in transit, accompany them in their journey, and together demand respect for our human rights.”*

*As early as March 18, participants gathered in Tapachula, on Mexico's southern border (the point of departure). Organizers shared a video on their Facebook page that showed the migrants playing ice-breaker games. According to the post, the organization also conducted some introductory workshops.*<sup>33</sup>

The next day, BuzzFeed News reported that there were more than 1,000 Central American migrants in that caravan, 80 percent of whom were Honduran nationals.<sup>34</sup>

Press reports differed on the caravan's original plans. For example, *Deutsche Welle* reported on April 7, 2018: "The caravan of migrants from Central America [which had then reached 1,500] that prompted Trump's criticism and subsequent border troop deployment was never intended to reach the United States."<sup>35</sup> That article states:

*The migrants were said to be fleeing violence and poverty and would seek asylum, but they also sought to draw attention to the plight of immigrants. The Mexican government had allowed the caravan to pass through its territory by issuing humanitarian permits valid for 20 days.*

*The caravan began to break up in southern Mexico on April 5 and organizers said the remaining busloads of migrants ended the caravan in Mexico City's Basilica de Guadalupe late [April 6, 2018]. From there, the migrants will be on their own, though many plan to stay in Mexico, while others will try to seek asylum in the US or attempt to cross the border.*<sup>36</sup>

The *Wall Street Journal*, on the other hand, indicated that the organizers of that march (which the paper states has been an annual event since 2010) were overwhelmed by the number of migrants who took part this year.<sup>37</sup> It reports that the organizers "admit their original plan of making their way to the U.S. border has likely changed":

*"We cannot arrive to the border with 1,000 people. The group is too large, we never had seen this amount of people before," said Irineo Mujica, one of the leaders of the caravan. He said previous caravans had about 300 people.*<sup>38</sup>

The Mexican government had stopped that caravan in the town of Matias Romero, in the state of Oaxaca, during the first week of April.<sup>39</sup> The *Journal* reported:

*Mexican immigration officials are now offering most of the caravan migrants either a 20-day transit visa through Mexico or a 30-day humanitarian visa for those who want to apply for asylum in Mexico.*<sup>40</sup>

Those migrants who were given 20-day transit visas will likely make their way to the United States.

For example, in an article dated April 7, 2018, *USA Today* reported that while many of the migrants had decided to stay in Mexico, "some of the migrants are determined to continue on their journey all the way to the U.S. border to apply for asylum in this country."<sup>41</sup> The paper stated:

*By [April 6, 2018], roughly 630 migrants — about half are women and children — arrived via bus in Puebla, about a two-hour drive south of [Mexico City]. They are staying in four shelters.*

*This weekend, they will be meeting one on one with volunteer Mexican and U.S. lawyers. The lawyers will explain the asylum laws in each country to see if the migrants might qualify, according to Jordi Ruiz Cirera, a freelance photographer who said he has been traveling with the caravan.*

*On [April 9, 2018], the migrants plan to head for Mexico City, where the caravan will end after a series of demonstrations participants plan to hold at key sites to call attention to the plight of migrants fleeing Central America.*<sup>42</sup>

On April 23, 2018, Reuters reported that 600 of the foreign nationals in the caravan "were in limbo" in Hermosillo, Sonora, waiting "to board a train or take buses for the remaining 432 miles to the border with California," where many planned to apply for asylum.<sup>43</sup>

DHS was reportedly monitoring the movement of those foreign nationals.<sup>44</sup> Secretary of Homeland Security Kirstjen Nielsen stated that asylum seekers would be detained while their cases were heard, and that those without a valid claim to asylum would be "promptly removed from the United States."<sup>45</sup> Plans had also been made to send additional immigration judges and ICE lawyers to the border to handle the influx, according to NBC News.<sup>46</sup>

The network also quoted Attorney General Jeff Sessions as stating, with respect to the foreign nationals in the caravan:

*Let today's message be clear: Our nation has the most generous immigration system in the world, but this is a deliberate attempt to undermine our laws and overwhelm our system. There is no right to demand entry without justification. Smugglers and traffickers and those who lie or commit fraud will be prosecuted to the fullest extent of the law.*<sup>47</sup>

On April 26, 2018, Reuters reported that hundreds of members of the caravan had reached Tijuana, Baja California, and were preparing to cross the border.<sup>48</sup> At the same time, “Mexican Foreign Minister Luis Videgaray met with U.S. Homeland Security Secretary Kirstjen Nielsen to discuss Central American migration, the Mexican ministry said in a statement.”<sup>49</sup>

CNBC reported on April 27, 2018, that just less than 400 migrants had gathered in Tijuana, and were planning to seek asylum beginning April 29, 2018 at the San Ysidro port of entry.<sup>50</sup> Workshops in that city on the U.S. immigration system were planned by lawyers for April 27 and 28.<sup>51</sup> Secretary Nielsen warned that any migrant who made a false claim to immigration authorities would be subject to prosecution, as would anyone “who might assist or coach immigrants to make false claims in bids to enter the U.S.”<sup>52</sup>

By the evening of April 29, 2018, CBP Commissioner Kevin McAleenan announced that the port of entry at San Ysidro had “reached capacity”, likely requiring other migrants to remain in Mexico while CBP processed the aliens who had crossed, with about 100 of the migrants spending the night on the Mexican side of the port of entry.<sup>53</sup> As ABC News reported on April 30, 2018, however:

*Not all of the migrants who were a part of the caravan stayed at near the port of entry overnight.*

*San Diego CBP patrol agent Rodney Scott released a statement Sunday afternoon saying that “several groups of people” climbed over a “dilapidated scrap metal border fence.”*

*“In several of these incidents, children as young as 4 years old, and in one case a pregnant female, were detected entering the United States illegally through a dark, treacherous canyon that is notorious for human and drug smuggling,” Scott said in the statement. “As a father myself, I find it unconscionable that anyone would expose a child to these dangerous conditions, especially when there is a legitimate port of entry within a few miles of these dangerous canyons.”*<sup>54</sup>

## March Increase in Border Crossings

The caravan is not the only recent development that calls the security of the border into question.

Throughout the 2016 presidential campaign, then-candidate Donald Trump made it clear that he intended to enforce the immigration laws if elected.<sup>55</sup> Backing up this rhetoric as it pertained to those entering illegally, on January 25, 2017, President Trump issued Executive Order 13767, captioned “Border Security and Immigration Enforcement Improvements”, which in particular called for an expansion in detention, including throughout the credible-fear process.<sup>56</sup>

The theory behind that order appears to be that, if a foreign national considering illegal entry into the United States knows that he or she will be arrested and detained (and possibly prosecuted) pending a determination of removability and relief, that foreign national will be less likely to try to enter illegally. If this is true, the order ostensibly had its intended effect, at least for a while.

The number of aliens apprehended along the Southwest border dropped precipitously after the election and the issuance of this order, in the short term. Specifically, according to CBP, the number of apprehensions along the border and of inadmissible persons at ports of entry declined from 66,712 in October 2016 to 63,364 in November 2016; 58,426 in December 2016; 42,473 in January 2017; 23,563 in February 2017; 16,600 in March 2017; and to 15,780 in April 2017.<sup>57</sup> Apprehensions began to increase in May 2017 (19,940), reaching a post-inauguration high of 40,511 (in December 2017) before declining again in January 2018 (35,822), with a slight uptick in February 2018 (36,695).<sup>58</sup>

Unfortunately, after Congress began to discuss amnesty for DACA beneficiaries (and others),<sup>59</sup> the number of apprehensions and inadmissible aliens skyrocketed, reaching 50,308 in March 2018.<sup>60</sup>

Of these numbers, CBP states Southwest border apprehensions in FY 2017 dropped 76 percent from a high of 47,211 aliens in November 2016 to 11,126 aliens in April 2017, before ticking up in May (to 14,535 aliens), and increasing to 22,537 in September 2017.<sup>61</sup> Those apprehensions increased again to 29,077 (in November 2017), before dropping slightly in December 2017 (28,978), January 2018 (25,978), and trending upward again in February 2018 (26,666), and as noted in March 2018 (37,393).<sup>62</sup>

Significantly, according to CBP, total apprehensions along the Southwest border declined by 25 percent between FY 2016 and FY 2017.<sup>63</sup> The latest influx of aliens across the Southwest border threatens to reverse this trend.

## Presidential Response

The president has responded to this March 2018 influx and to the caravan by taking a number of actions.

First, he ordered that National Guard troops be sent to the border.<sup>64</sup> On Friday, April 6, 2018, Defense Secretary James Mattis ordered up to 4,000 National Guardsmen be deployed to the Southwest border through September 30, 2018, “under the ‘command and control of their respective governors.’”<sup>65</sup>

The presence of National Guard troops in support roles will free up Border Patrol agents to apprehend aliens who entered illegally.

According to news reports, during this deployment, Air National Guard helicopters will likely provide surveillance and backup, and check areas where sensors have been triggered “to determine the number of immigrants who have crossed the line.”<sup>66</sup> In addition, “Guardsmen will also repair vehicles, monitoring and maintaining video surveillance to help provide real-time intel to border agents.”<sup>67</sup>

Second, on April 6, 2018, the president ordered an end to “catch and release” policies that restricted the number of aliens who could be detained.<sup>68</sup> *The Hill* reports:

*President Trump signed a memorandum on Friday ordering agencies to “expeditiously end” the practice known as “catch and release” that allows immigrants caught in the U.S. without proper documents to be released from detention while their cases play out in court.*

*The memo signed by Trump orders [DHS], in coordination with other agencies, to submit a report to the president within 45 days “detailing all measures that their respective departments have pursued or are pursuing to expeditiously end ‘catch and release’ practices.”*

*The report instructs departments to share information on any contracts to construct or operate detention facilities along the border as well as steps taken to assign asylum officers at detention facilities, among other measures.*

*As part of the order, Trump is requesting “a detailed list of all existing facilities, including military facilities, that could be used, modified, or repurposed to detain aliens for violations of immigration law at or near the borders of the United States.”*

*Trump has also directed Attorney General Jeff Sessions and Homeland Security Secretary Kirstjen Nielsen to identify any other resources or steps “that may be needed to expeditiously end ‘catch and release’ practices.”<sup>69</sup>*

An increase in detention will make it less likely that aliens will enter the United States illegally, and make it more likely that aliens without meritorious claims for relief who entered illegally will take orders of removal or voluntary departure and go back to their home countries. Again, logic and experience suggest that aliens enter the United States illegally to remain at large and work in the United States. The longer that the alien is able to remain at large and work, therefore, the better. If the alien is detained and cannot work, however, there is no longer an incentive to remain; instead, accepting an order of removal or a grant of the privilege of voluntary departure is more advantageous to the alien than continued detention.

Also on April 6, 2018, Attorney General Sessions issued a memorandum<sup>70</sup> directing:

*[E]ach United States Attorney's Office along the Southwest border — to the extent practicable, and in consultation with DHS — to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section [275(a) of the Immigration and Nationality Act (INA)].*

The referenced provision of the INA renders an initial illegal entry into the United States a criminal misdemeanor subject to a sentence of up to six months (and a fine), and illegal reentry a felony that carries with it a fine and a sentence of up to two years.<sup>71</sup>

Prosecuting aliens under section 275(a) of the INA, particularly if those convicted receive significant sentences, will make it less likely that foreign nationals will attempt illegal entry into the United States. Logic dictates that the higher the penalty (including jail time) imposed for a criminal violation, the less likely that the criminal will attempt the offense. This is especially true in immigration, where convictions make it less likely that an alien will receive discretionary relief, and where the vast majority of aliens are coming to the United States to work. If they are detained and convicted (and subsequently deported), they will have spent money on smuggling fees that they will not be able to recoup by working in the United States.

## Loopholes in U.S. Immigration Law

Each of these actions will have a deterrent effect on foreign nationals who are considering entering the United States illegally, as set forth above. As Secretary Nielsen made clear in an April 25, 2018, statement, however: “The smugglers, traffickers, and criminals understand our legal loopholes better than Congress and are effectively exploiting them to their advantage.”<sup>72</sup> Until those loopholes in our immigration laws are addressed through legislation, even the extraordinary actions taken by the president will not be sufficient to secure the border.<sup>73</sup>

### *Credible Fear*

First, border security is undermined by our current “credible-fear” system. When they arrive at the United States border without proper documents, aliens seeking entry take one, or both, of two separate actions: entering the United States illegally across the border, or presenting themselves for admission at a port of entry.

If they present themselves at a port of entry without proper documents, they will be deemed inadmissible to the United States under section 212(a)(7)(A)(i)(I) of the INA.<sup>74</sup> If they enter the United States illegally, and are apprehended by the Border Patrol, they will likely be detained and charged with removability under section 212(a)(6)(A)(i) of the INA.<sup>75</sup>

Under section 235(b)(1)(A) of the INA,<sup>76</sup> when each of these classes of aliens are apprehended shortly after entry at the border or a port of entry, they are subject to expedited removal. Specifically, that provision states that “the [immigration] officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.”<sup>77</sup>

It appears that the aliens in the caravan who reach the United States will be requesting asylum under the “credible-fear” process. Attorney General Sessions explained that process in a speech he delivered on October 12, 2017, before the Executive Office for Immigration Review (EOIR):

*[DHS] is tasked in the first instance with evaluating whether an apprehended alien's claim of fear is credible. If DHS finds that it may be, the applicant is placed in removal proceedings and allowed to present an asylum claim to an immigration judge.*

*If, however, DHS finds that the alien does not have a credible fear, the alien can still get an immigration judge to review that determination. In effect, those who would otherwise be subject to expedited removal get two chances to establish that their fear is credible.*<sup>78</sup>

Under section 235(b)(1)(B)(v) of the INA,<sup>79</sup> “the term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.” “[S]ignificant possibility ... that the alien could establish eligibility for asylum” is lower than the standard required for asylum itself, which requires proof of either “past persecution” or “well-founded fear of persecution.”<sup>80</sup>

In the aforementioned October 2017 speech, Attorney General Sessions identified a number of key problems with the “credible-fear” system:

*[I]n 2009, the previous Administration began to allow most aliens who passed an initial credible fear review to be released from custody into the United States pending a full hearing. These changes — and case law that has expanded the concept of asylum well beyond Congressional intent—created even more incentives for illegal aliens to come here and claim a fear of return.*

*The consequences are just what you'd expect. Claims of fear to return have skyrocketed, and the percentage of claims that are genuinely meritorious are down.*

*The system is being abused to the detriment of the rule of law, sound public policy, public safety, and of just claims. This, of course, undermines the system and frustrates officers who work to make dangerous arrests in remote areas. **Saying a few simple words is now transforming a straightforward arrest and immediate return into a probable release and a hearing — if the alien shows for the hearing.***

*Here are the shocking statistics: in 2009, DHS conducted more than 5,000 credible fear reviews. By 2016, that number had increased to 94,000. The number of these aliens placed in removal proceedings went from fewer than 4,000 in 2009 to more than 73,000 by 2016 — nearly a 19-fold increase — overwhelming the system and leaving those with just claims buried.*

*The increase has been especially pronounced and abused at the border. From 2009 to 2016, the credible fear claims at the border went from approximately 3,000 cases to more than 69,000.*

*All told [EOIR] has over 600,000 cases pending — tripled from 2009.*

*And the adjudication process is broken as well. DHS found a credible fear in 88 percent of claims adjudicated. That means an alien entering the United States illegally has an 88 percent chance to avoid expedited removal simply by claiming a fear of return.*

*But even more telling, half of those that pass that screening — the very people who say they came here seeking asylum — never even file an asylum application once they are in the United States. This suggests they knew their asylum claims lacked merit and that their claim of fear was simply a ruse to enter the country illegally.<sup>81</sup> [Emphasis added.]*

Incredibly, according to DHS, prior to 2013, only about 1 percent of arriving aliens claimed credible fear, whereas today 10 percent make such a claim.<sup>82</sup>

It makes sense for an arriving alien to make such a claim, because the odds of being found to have credible fear are high. In cases in which a credible-fear determination was made in the first three months of FY 2018, credible fear was established in 90 percent of cases in October and November 2017, and in 89 percent of cases in December 2017.<sup>83</sup> This number does not include “closings”, cases in which a request for credible fear was withdrawn or some other action was taken on the alien’s case. Even when those numbers are added in, however, credible fear was found in more than 75 percent of cases in October 2017, 77 percent of cases in November 2017, and 78 percent of cases in December 2017.<sup>84</sup>

It is doubtful that DOJ will attempt to prosecute aliens who have entered illegally but who have been found to have a “credible fear” of persecution.

In fact, on April 23, 2018, NBC News quoted Attorney General Sessions as stating: “Smugglers and traffickers and those who lie or commit fraud will be prosecuted to the fullest extent of the law.”<sup>85</sup> Notably absent from this list of those who “will be prosecuted to the fullest extent of the law” are aliens who are not smugglers or traffickers, and who are not (caught) lying or committing fraud, that is, the vast majority of aliens who have entered illegally and claimed credible fear.

Therefore, the attorney general’s “zero-tolerance” policy will likely have no effect on the flow of such aliens to the United States illegally. Further, the deployment of National Guard troops to the border to supplement the efforts of the Border Patrol will likely have little effect on aliens claiming credible fear, as those aliens often turn themselves in to the first Border Patrol agent they encounter.<sup>86</sup>

It should be noted that some credible fear claims are simply fraudulent, advanced by aliens in order to gain access to the United States, and that some are legitimate. That said, many aliens claim credible fear because they are in flight from areas where there are high levels of criminal activity, some of which may have affected those aliens themselves. The lack of clear guidance on adjudicating such claims has, unfortunately, swelled the numbers of aliens found to have credible fear.

In particular, many asylum claims in recent years from Central America have been premised on the criminal violence, and in particular gang violence, in those countries, a fact magnified by the number of UACs who have entered the United States in recent years.

In a September 5, 2014, report,<sup>87</sup> the Congressional Research Service (CRS) found:

*When considered by the [Board of Immigration Appeals (BIA)] or appellate courts in light of how the INA's definition of refugee is construed, claims to asylum based on gang-related violence frequently (although not inevitably) fail. In some cases, this is because the harm experienced or feared by the alien is seen not as persecution, but as generalized lawlessness or criminal activity. In other cases, persecution has been found to be lacking because governmental ineffectiveness in controlling the gangs is distinguished from inability or unwillingness to control them. In yet other cases, any persecution that is found is seen as lacking the requisite connection to a protected ground, and instead arising from activities "typical" to gangs, such as extortion and recruitment of new members. The particular social group articulated by the alien (e.g., former gang members, recruits) may also be seen as lacking a "common, immutable characteristic," social visibility (now, social distinction), or particularity.*

Four of the five factors for asylum relief are fairly straightforward: race, religion, nationality, and political opinion.<sup>88</sup> The BIA and the courts, however, have struggled with the parameters of "membership in a particular social group". In *Matter of the M-E-V-G-*, for example, the BIA held: "The phrase 'membership in a particular social group,' which is not defined in the Act, the [United Nations Convention Relating to the Status of Refugees], or the [United Nations Protocol Relating to the Status of Refugees], is ambiguous and difficult to define."<sup>89</sup> In *Fatin v. INS*, then-Judge (now Justice) Alito, writing for the Court of Appeals for the Third Circuit, noted: "Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.'"<sup>90</sup>

In the gang violence context, this is complicated by the fact that generally, as the BIA recognized in *Matter of Sanchez and Escobar*,<sup>91</sup> "the tragic and widespread savage violence [in a general population] as the result of civil strife and anarchy is not persecution," and that, as the BIA recognized in *Matter of T-M-B-*,<sup>92</sup> victims of crime (in that case, extortion) not related to one of the five factors for asylum relief have not been subject to "persecution" for purposes of that relief as a result of such criminality.

The BIA summarized these issues as they relate to gang violence in *Matter of M-E-V-G-*:<sup>93</sup>

*The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.*

Notwithstanding this, certain courts have held that applicants have been able to establish eligibility for asylum based on gang violence. For example, in *Hernandez-Avalos v. Lynch*,<sup>94</sup> the Court of Appeals for the Fourth Circuit found that a Salvadoran national who had received death threats from Mara 18 members unless she allowed her son to join the gang had established eligibility for asylum. It held: "Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son," concluding that those "threats were ... made 'on account of' her membership in her nuclear family," a particular social group.

Nonetheless, the number of asylum denials from Mexico, El Salvador, Guatemala, and Honduras have been high in recent years. As AP has reported:

*Mexicans fared worst among the 10 countries that sent the largest numbers of U.S. asylum seekers from 2012 to 2017, with a denial rate of 88 percent, according to asylum outcome records tracked by Syracuse University's Transactional*



*Records Action Clearinghouse. El Salvadorans were close behind with a 79 percent denial rate, followed by Hondurans at 78 percent and Guatemalans at 75 percent.*<sup>95</sup>

Those denials occur, however, in removal proceedings, well after the applicants have been allowed into the United States. A lack of bright-line rules for adjudicating gang- and crime-related asylum claims is the primary reason why there is such a discrepancy between the high rate of credible fear findings and the low asylum grant rate for these applicants.

Fortunately, it appears that the attorney general is poised to address these issues, and provide clarity to the immigration courts, the BIA, and asylum officers. On March 7, 2018, he directed the BIA to refer *Matter of A-B*<sup>96</sup> to him for his review, in accordance with 8 C.F.R. § 1003.1(h)(1)(i).<sup>97</sup> In that case, the attorney general is inviting briefing on: “Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”<sup>98</sup>

By providing immigration judges, the BIA, and asylum officers with better guidance on these issues, the attorney general will be able to limit the number of claims (and in particular “credible-fear” claims) that are considered in the immigration courts, and enable immigration judges and asylum officers to decide those cases more quickly.

There is also pending legislation to address other flaws in the “credible fear” process. Specifically, the Securing America’s Future Act of 2018 (SAFA) contains two provisions that would amend section 235 of the INA to put asylum officers in a better position to make credible-fear determinations.<sup>99</sup>

Section 4402 of division B, title IV of that bill would amend the definition of “credible fear of persecution” in section 235(b)(1)(B)(v) of the INA to apply the same credibility standards that are used in asylum adjudications, and to make it clear that credible fear should only be found where “it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien’s claim are true.”<sup>100</sup> All too often, it appears that asylum officers believe they are required to accept a credible-fear applicant’s statements at face value absent significant inconsistencies. This provision would address that issue.

Second, section 4403 of division B, title IV<sup>101</sup> of that bill would direct uniformity in questioning by asylum officers in credible fear cases, and require recording of credible fear interviews, which would be made available to the immigration court considering the alien’s asylum claim. The second provision is particularly important, as aliens who have passed credible fear and are applying for asylum will often claim that they were misquoted during their credible fear interviews when confronted with inconsistencies between the record of those interviews and their testimony in court.

Absent congressional action, however, detention will be key to deterring aliens from entering the United States illegally and improperly claiming credible fear. As explained below, however, there are limits on the government’s ability to detain certain individuals, and in particular UACs.

## TVPRRA

Another factor that will frustrate the president’s border-enforcement efforts is the current application of the TVPRRA.<sup>102</sup> In fact, DHS admits that the TVPRRA limits its “ability to promptly return UACs who have been apprehended at the border and creates additional loopholes.”<sup>103</sup>

By way of background, section 462 of the Homeland Security Act of 2002<sup>104</sup> vested jurisdiction over the care and placement of UACs in removal proceedings with the Office of Refugee Resettlement (ORR) in HHS.

Section 235 of the TVPRRA distinguishes between UACs from “contiguous” countries (Canada and Mexico) and aliens from “non-contiguous” countries (all others).

Under section 235(a)(2) of that act, a UAC from a contiguous country can be returned if that UAC has not been and will not be a “victim of a severe form of trafficking in persons”, does not have a credible fear, and “is able to make an independent decision to withdraw” his or her application for admission.

As CRS has found, however:

*The TVPRA mandated that unaccompanied alien children from countries other than Mexico or Canada — along with UAC from those countries who are apprehended away from the border — are to be transferred to the care and custody of HHS and placed in formal removal proceedings.<sup>105</sup>*

Specifically, section 235(b)(3) of the TVPRA directs “any department or agency of the Federal Government that has an unaccompanied alien child in custody” to “transfer the custody of such child to [HHS] not later than 72 hours after determining that such child is an unaccompanied alien child.”<sup>106</sup>

As my colleague Joseph J. Kolb described the TVPRA in a November 3, 2016, *Backgrounder* from the Center for Immigration Studies:

*The [TVPRA] was a well-intentioned attempt to protect immigrant children from exploitation, but it actually applies to very few of the more than 200,000 unaccompanied minors that have crossed the southwest border from the Northern Triangle countries of Central America since 2013. Most of these kids are not victims of trafficking, but came to the United States voluntarily with the assistance of a human smuggler, and with the intent of being reunited with a parent or family member.*

*According to the Associated Press, with information obtained through a Freedom of Information Act request from [HHS], between February 2014 and September 2015, 56,000 (80 percent) of the children were placed with sponsors illegally in the United States and an additional 700 were placed with sponsors in deportation proceedings. Only 4,900 were placed with sponsors legally in the country.*

*The TVPRA calls for the HHS secretary to have the children promptly placed in the least restrictive setting that is in their best physical and emotional interest. This is the loophole HHS uses to place children with designated sponsors illegally in the United States. The law only refers to checking the sponsors’ immigration status, not acting upon it. The perception by ORR is that regardless of immigration status, placing the children with a parent is the preferred solution. The AP report found that more than 50 percent of the children were placed with parents.*

...

*One congressional staffer, who declined to be identified, told the author that the current policy exploits a humanitarian law to manufacture additional reasons for illegal immigrants to remain in the country instead of being returned home. And it creates a huge demand for more minors to flood across the U.S. border to take advantage of it. In some cases, these unaccompanied minors should not qualify for the protections of this law because not only were they not trafficked, they were placed with their parents or legal guardians, which by definition means they are no longer unaccompanied.*

*The Obama administration and welfare advocates have professed that UACs are attempting to escape gang violence in Central America, and many have been. But there is also an awareness of the current policies that will enable them to stay for an indefinite period. The author’s understanding, after seeing Border Patrol intel reports, news media accounts, and results of interviews by some of my colleagues, is that there was not so much awareness of DACA as just the fact that they would be released with a court date far in the future. According to one intel report, something like 90 percent of the UACs and family arrivals interviewed said they were coming because they heard they would be released with a “permiso”, which is the slang for Notice to Appear in immigration court, which is de facto permission to stay pending the conclusion of deportation proceedings. This has resulted in a massive advertising campaign throughout Central America attempting to stem the migration north by saying that their hopes for admission to the United States based on this interpretation of the law is risky.*

*Pedro Sanchez, consul at the El Salvadoran Consulate in New York City, acknowledges that many children from his country hedge their bets on this interpretation.*

*“People continue to send their children with this misunderstanding,” Sanchez told the author.<sup>107</sup>*

Section 235(g) of the TVPRA defines the term “unaccompanied alien child” by reference to section 462(g) of the Homeland Security Act of 2002.<sup>108</sup> Section 462(g) of the Homeland Security Act of 2002 defines that term as “a child who — (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom — (i)

there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.<sup>109</sup>

Therefore, it does not appear that section 235 of the TVPRA should apply to alien minors with parents or legal guardians available to provide care and physical custody in the United States, regardless of where they are apprehended. As CRS has noted, however:

*In practice ... federal officials seem to have historically based their determinations as to whether a child is unaccompanied upon the child's circumstances at and in the hours immediately following the child's apprehension. If a child is not apprehended with a parent or guardian, or cannot be reunited with a parent or guardian within a matter of hours, the child is generally treated as a UAC for purposes of the transfer from [DHS] custody to [HHS] custody, as discussed below, regardless of whether the child has a parent or parents in the United States with whom he/she could eventually be reunited. On account of policy considerations, DHS sometimes opts not to review or reconsider its initial UAC determination. Moreover, once a UAC designation has been made by DHS, HHS's ability to independently reconsider that determination may be statutorily constrained to the extent it requires a reassessment of the child's immigration status.<sup>110</sup>*

Thus, it seems that the federal government applies protections to UACs for beyond what the TVPRA requires.

In any event, it is doubtful that UACs would be prosecuted for illegal entry (or even illegal reentry), regardless of the attorney general's policies, and regardless of the definitions set forth in the TVPRA. Moreover, it would appear that "catch and release" will continue to apply to this population of aliens, regardless of the president's pronouncements, absent congressional action. Again, this law provides an incentive for older UACs to attempt to enter the United States illegally, and for the parents of younger UACs to have their children smuggled illegally to the United States.

This is particularly problematic because of the nature of smuggling, and in particular the debased nature of smugglers. ICE explains:

*While smugglers most often transport adult males, the number of women, children and family units seeking transport has increased dramatically in recent years. They often find themselves at risk for assault and abuse such as rape, beatings, kidnapping and robbery. Smugglers regularly overcrowd living and sleeping accommodations, and withhold food and water. In addition, individuals who are smuggled may be forced into human trafficking situations upon their arrival in the U.S. or their families may be extorted. Even knowing these dangers, the majority of people who travel with a smuggling organization do so voluntarily.<sup>111</sup>*

Again, SAFA attempts to plug the loopholes in section 235 of the TVPRA. Division B, title V, section 5501 of that bill eliminates the conflicting rules between nationals from contiguous and non-contiguous countries, and subjects all minors to expeditious return if they have not been trafficked and do not have a credible fear of persecution.<sup>112</sup> In addition, it ensures that minors who are victims of severe forms of trafficking are afforded a hearing before an immigration judge within 14 days, while extending the ability of DHS to hold a UAC for up to 30 days to ensure a speedy judicial process.

Moreover, that section of SAFA requires HHS to provide DHS with biographical information for the sponsors or family members to whom the UACs are released, a requirement that does not exist in current law. In the absence of such information, there is a distinct possibility that UACs could become lost in the removal system, or worse, possibly be handed over to abusers and other criminals.

Further, section 5501 of SAFA provides authority for the secretary of State to negotiate agreements with foreign countries regarding UACs, including protections for minors who are returned to their country of nationality.

Finally, section 5503 of division B, title V of SAFA<sup>113</sup> would eliminate section 208(b)(3)(C) of the INA,<sup>114</sup> which gives UACs the opportunity to have their asylum applications heard by both asylum officers at U.S. Citizenship and Immigration Services (USCIS) and immigration judges, even if they would be subject to expedited removal under section 235(b) of the INA. Again, this provision of current law provides UACs greater incentives to enter the United States illegally and make an asylum claim, regardless of its validity.

## *Flores Settlement Agreement*

Yet another factor complicating the president's border agenda is the so-called *Flores*<sup>115</sup> settlement, which governs the treatment and conditions of detention of UACs in immigration custody. As CRS has described that agreement:

*During the 1980s, allegations of UAC mistreatment by the former Immigration and Naturalization Service (INS) caused a series of lawsuits against the government that eventually resulted in the Flores Settlement Agreement (Flores Agreement) in 1997. The Flores Agreement established a nationwide policy for the detention, treatment, and release of UAC and recognized the particular vulnerability of UAC as minors while detained without a parent or legal guardian present.*<sup>116</sup>

Human Rights First has explained:

*The Flores Settlement Agreement . . . imposed several obligations on the immigration authorities, which fall into three broad categories:*

*The government is required to release children from immigration detention without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody.*

*If a suitable placement is not immediately available, the government is obligated to place children in the "least restrictive" setting appropriate to their age and any special needs.*

*The government must implement standards relating to the care and treatment of children in immigration detention.*<sup>117</sup>

The Ninth Circuit has made it clear that the *Flores* settlement agreement creates a presumption in favor of the release of alien minors.<sup>118</sup>

It should be noted that the *Flores* agreement does not apply only to UACs; rather, a July 2016 circuit court opinion<sup>119</sup> held that the 1997 *Flores* settlement applies to both accompanied and unaccompanied alien children.

DHS argues that:

*Under the Flores Agreement, DHS can only detain UACs for 20 days before releasing them to [HHS] which places the minors in foster or shelter situations until they locate a sponsor.*

*When these minors are released, they often fail to appear for court hearings or comply with removal orders.*<sup>120</sup>

This is problematic for many reasons. Most importantly, the policies set forth in the *Flores* settlement agreement encourage UACs to enter the United States illegally, and encourages the parents of UACs to hire smugglers to bring their children to the United States.<sup>121</sup> Further, it encourages people to bring their own children (or children whom they claim to be their own) with them when they make the perilous journey to the United States, thinking it more likely that they (the parents or purported parents) will be released if they are traveling with those children. As DHS asserts, the agreement "has incited smugglers to place children into the hands of adult strangers so they can pose as families and be released from immigration custody after crossing the border, creating another safety issue for these children."<sup>122</sup>

Ironically, in cases where the alien parents are detained, and their alien child is released, the child would, in fact, be a UAC; it is questionable that this is a result that Congress or the courts intended.

Again, it is doubtful that the president's efforts to end "catch and release" or the attorney general's "zero-tolerance" policy will be directed toward these UACs (and accompanied children), and therefore will have little or no effect on the illegal entry of such aliens to the United States. Moreover, it is doubtful that the presence of National Guard troops supporting Border Patrol activities will stem the flow of these UACs; with the prospect of release into the United States, they would have no reason not to turn themselves in to the Border Patrol, or at least not be inhibited by additional Border Patrol agents enforcing the laws along the border.

Further, and as a significant practical matter, almost every OTM UAC in the caravan would be able to use the *Flores* settlement agreement (and the TVPRA) to come to the United States with the expectation of being released into the interior of this country, to await a hearing that might be years in the future.

Again, SAFA provides for a fix to *Flores* as it pertains to accompanied children. Specifically, division B, title V, section 5506 of that bill clarifies that there is no presumption that an accompanied child should not be detained, and vests jurisdiction over detention determinations for accompanied children with the Secretary of Homeland Security.<sup>123</sup> It also mandates that unaccompanied children be released only to the alien's parent or legal guardian.

## Special Immigrant Juveniles

One final provision that undermines the president's border agenda relates to so-called special immigrant juveniles (SIJs), for whom a visa is available under section 101(a)(27)(J) of the INA.<sup>124</sup> USCIS's website explains:

*If you are in the United States and need the protection of a juvenile court because you have been abused, abandoned, or neglected by a parent, you may be eligible for [SIJ] classification. If SIJ classification is granted, you may qualify for lawful permanent residency (also known as getting a Green Card).*<sup>125</sup>

Again, SIJ classification (which in appropriate instances can be a necessary form of protection) provides an incentive for foreign national children and young adults to enter the United States illegally. As CRS reported in August 2014:

*There has been a tenfold increase in the number of children requesting SIJ status between FY2005 and FY2013. In terms of approvals, the numbers have gone from 73 in FY2005 to 3,432 in FY2013. While the data do not differentiate among those unauthorized children who arrived unaccompanied by their parents and those who were removed from their parents because of abuse, abandonment, or neglect, many observers point to the similarity in the spiking trends of both categories.*<sup>126</sup>

Why the increase? It is possible, if not probable, that amendments in the TVPRA are to blame. According to CRS:

*In 2008, Congress amended the SIJ provisions in the INA to broaden their applicability. The [TVPRA], among other things, amended the SIJ eligibility provisions to (1) remove the requirement that a juvenile court deem a juvenile eligible for long-term foster care and (2) replace it with a requirement that the juvenile court find reunification **with one or both parents not viable**.*<sup>127</sup> [Emphasis added.]

This means that an alien can nonetheless still be granted SIJ classification, even if another parent is present in the United States and is able and willing to care for him or her. In fact, DHS asserts:

*We must end abuse of the [SIJ] visa to ensure the applicant proves reunification with both parents is not viable due to abuse, neglect, or abandonment and that the applicant is a victim of trafficking. **This is necessary as many UACs are able to obtain a Green Card through SIJ status even though they were smuggled here to reunify with one parent present in the United States.***<sup>128</sup> [Emphasis added.]

SAFA provides, at least in part, the fix to this loophole that DHS requests. Section 5502 of division B, title V of SAFA<sup>129</sup> would make it clear that an alien is only eligible for SIJ classification if the alien is unable to reunite with either of his or her parents "due to abuse, neglect, abandonment, or a similar basis found under State law."<sup>130</sup>

## Consequences

These provisions are likely a significant reason why so many UACs have been released into the interior of the United States in recent years. According to DHS, in an April 4, 2018, release:

*Thus far in FY [20]18, 13,186 UACs were released into the interior of the United States — that's in addition to the 42,146 UACs and 52,147 UACs who were released in FY [20]17 and FY [20]16 respectively, bringing the total number of UACs released from FY [20]16 to date in excess of 107,000.*<sup>131</sup>

Similarly, with respect to the *Flores* settlement agreement, in a February 15, 2018, release, DHS asserted:

*The ... UACs who were released are in addition to the more than 167,000 family units (i.e. alien children who are accompanied by an adult claiming to be a relative or guardian) that were apprehended by [CBP] from FY [20]16 to date.*

*Nearly all of these Family Units are released into the interior of the United States because of judicially[]imposed constraints on ICE's authority to detain the entire family units as a result of recent rulings in the Flores consent decree litigation.<sup>132</sup>*

Notably, however, the *Washington Post* reported that in an April 23, 2018, memorandum, acting ICE Director Thomas Homan, USCIS Director L. Francis Cissna, and CBP Commissioner Kevin K. McAleenan, encouraged Secretary of Homeland Security Kirstjen Nielsen “to detain and prosecute all parents caught crossing the Mexican border illegally with their children.”<sup>133</sup> That policy would not affect inadmissible aliens who turn themselves into the ports of entry, and the children themselves would not be criminally detained.<sup>134</sup> That article does not state that a final decision has been made on this issue, however.<sup>135</sup>

In addition to undermining the integrity of the Southwest border, and frustrating the government's attempts to secure that border, these loopholes have dire consequences even for those aliens who exploit them, creating:

***[A] pull factor that invites more illegal immigration and encourages parents to pay and entrust their children to criminal organizations that will smuggle them in — often while abusing and molesting those children along the way.***

...

*Thousands of these unaccompanied children — particularly young teenage girls — are subjected to sexual abuse by smugglers, criminals, and even government officials along their journey to the United States. Many also never make it to the United States, instead pressed into service at brothels and bars in Mexico and Guatemala.<sup>136</sup> [Emphasis in original.]*

This wave of UACs has also reportedly benefited criminal gangs. As DHS explains:

***The influx of unaccompanied alien minors also creates recruiting opportunities for brutal gangs such as MS-13.***

*UACs provide fertile recruiting ground for violent gangs, such as MS-13. While there are no official statistics on the number of UACs involved with gangs, anecdotal evidence suggests this gang recruiting strategy is working. For example, a June 2017 review of UACs in the custody of [HHS ORR] found that 39 of 138 UACs (28%) were involved with gangs, with the vast majority of those involved voluntarily.*

*Other enforcement examples suggest similar numbers. For example, Immigration and Customs Enforcement's Operation Matador resulted in 39 MS-13 arrests in 30 days in the New York City area, 12 of whom had entered the country as unaccompanied minors. Fox News reported in November 2017 that, of 214 MS-13 members rounded up in the span of a few weeks, officials said at least a third would have been classified as UACs.<sup>137</sup> [Emphasis in original.]*

## Conclusion

After months in which a significantly lower number of aliens than in previous years attempted illegal entry into the United States following the election and inauguration of President Trump, in April 2018 more than 50,000 aliens were apprehended along the border or were deemed inadmissible of the ports of entry.<sup>138</sup> This upward trend is illustrated by the 1,000 to 1,500 foreign nationals in the Pueblo Sin Fronteras caravan,<sup>139</sup> some if not all of whom had the intention of making their way to the United States.

The Trump administration has taken steps to address the surge of aliens coming in recent weeks illegally across our Southwest border. Specifically, the president is making efforts to phase out “catch and release,”<sup>140</sup> National Guard troops will be mobilized to the border,<sup>141</sup> and the attorney general has announced a “zero-tolerance” policy for illegal entry prosecutions.<sup>142</sup> While each of these steps will serve to stem the tide of aliens entering the United States illegally, there are still loopholes in U.S. immigration law that draw aliens, and in particular alien minors, to enter the United States illegally. These shortcomings and flaws in our immigration laws still need to be addressed, which will likely require congressional action.

## End Notes

- <sup>1</sup> See [“Southwest Border Migration FY2017”](#), U.S. Customs and Border Protection, December 15, 2017.
- <sup>2</sup> See [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.
- <sup>3</sup> Compare [“Southwest Border Migration FY2017”](#), U.S. Customs and Border Protection, December 15, 2017, with [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.
- <sup>4</sup> See Kausha Luna, [“Caravan of Central American Illegal Aliens Heads to the U.S.”](#), Center for Immigration Studies blog, March 30, 2018.
- <sup>5</sup> Ellen Mitchell, [“Mattis approves sending 4,000 National Guard troops to border”](#), *The Hill*, April 6, 2018.
- <sup>6</sup> See Jesse Byrnes, [“Trump signs memo ordering end to ‘catch and release’ practices”](#), *The Hill*, April 6, 2018.
- <sup>7</sup> *Id.*
- <sup>8</sup> The attorney general, [“Memorandum: Zero Tolerance for Offenses under 8 U.S.C. § 1325\(a\)”](#), U.S. Department of Justice, April 6, 2018.
- <sup>9</sup> [“To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard”](#), U.S. Department of Homeland Security, April 4, 2018.
- <sup>10</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.
- <sup>11</sup> *Id.*
- <sup>12</sup> See Andrew Arthur, [“Fraud in the ‘Credible Fear’ Process, Threats to the Integrity of the Asylum System”](#), Center for Immigration Studies *Background*, April 2017.
- <sup>13</sup> [Section 235\(b\)\(1\)\(A\)\(i\) of the Immigration and Nationality Act \(INA\)](#).
- <sup>14</sup> [Section 235\(b\)\(1\)\(A\)\(ii\) of the INA](#).
- <sup>15</sup> [Section 235\(b\)\(1\)\(B\)\(ii\) of the INA](#).
- <sup>16</sup> See [“Credible Fear Workload Report Summary, FY 2018 Total Caseload”](#), U.S. Citizenship and Immigration Services, undated.
- <sup>17</sup> [“Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review”](#), U.S. Department of Justice, Office of Public Affairs, October 12, 2017.
- <sup>18</sup> *Id.*
- <sup>19</sup> [“To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard”](#), U.S. Department of Homeland Security, April 4, 2018.
- <sup>20</sup> [“Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review”](#), U.S. Department of Justice, Office of Public Affairs, October 12, 2017.
- <sup>21</sup> [William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. 110-457 (2008).



- <sup>22</sup> [Homeland Security Act of 2002](#), Pub. L. 107-296 (2002), § 462.
- <sup>23</sup> See [William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. 110-457 (2008).
- <sup>24</sup> *Id.* § 235(a)(2).
- <sup>25</sup> *Id.* at §§ 235(a)(3) and (b).
- <sup>26</sup> William A. Kandel, [“Unaccompanied Alien Children: An Overview”](#), Congressional Research Service, at 10, Jan. 18, 2017.
- <sup>27</sup> Joseph J. Kolb, [“Implementation of a Law to Protect Trafficking Victims Has Become a Public Safety Issue”](#), Center for Immigration Studies *Background*, November 3, 2016.
- <sup>28</sup> William A. Kandel, [“Unaccompanied Alien Children: An Overview”](#), Congressional Research Service, at 10 n.51, January 18, 2017.
- <sup>29</sup> [Flores v. Reno, Stipulated Settlement Agreement](#).
- <sup>30</sup> See [Flores v. Lynch](#), 828 F. 3d 898 (9<sup>th</sup> Cir. 2016).
- <sup>31</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.
- <sup>32</sup> See [“To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard”](#), U.S. Department of Homeland Security, April 4, 2018.
- <sup>33</sup> Kausha Luna, [“Caravan of Central American Illegal Aliens Heads to the U.S.”](#), Center for Immigration Studies blog, March 30, 2018.
- <sup>34</sup> Adolfo Flores, [“A Huge Caravan Of Central Americans Is Headed For The US, And No One In Mexico Dares To Stop Them”](#), BuzzFeed News, March 31, 2018.
- <sup>35</sup> [“US deploys troops to Mexico border, as migrant caravan ends”](#), *Deutsche Welle*, April 7, 2018.
- <sup>36</sup> *Id.*
- <sup>37</sup> Juan Montes, [“Caravan in Trump’s Crosshairs Stalls Far From Border”](#), *Wall Street Journal*, April 4, 2018.
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.*
- <sup>41</sup> Daniel González, [“Migrant caravan in Mexico smaller, but not disbanded, as travelers meet with lawyers”](#), *USA Today*, April 7, 2018.
- <sup>42</sup> *Id.*
- <sup>43</sup> Edgard Garrido, [“Migrant ‘caravan’ that angers Trump nears U.S.-Mexico border”](#), Reuters, April 23, 2018.
- <sup>44</sup> Adam Edelman and Nicole Acevedo, [“Trump warns immigrant caravan approaching U.S. border of prosecution, deportation”](#), NBC News, April 23, 2018.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> Delphine Schrank, [“Migrant ‘caravan’ at U.S.-Mexico border prepares for mass crossing”](#), Reuters, April 26, 2018.

<sup>49</sup> *Id.*

<sup>50</sup> [“Migrant ‘caravan’ gathers on US-Mexico border”](#), CNBC, April 27, 2018.

<sup>51</sup> *Id.*

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

<sup>53</sup> Meghan Keneally, [“Caravan migrants waking up on Mexican side of the border after getting refused US entry”](#), ABC News, April 30, 2018.

<sup>54</sup> *Id.*

<sup>55</sup> See Miriam Valverde, [“Compare the candidates: Clinton vs. Trump on immigration”](#), Politifact, July 15, 2016. (“Presidential candidates Donald Trump and Hillary Clinton have taken opposite roads on their quest for immigration reform. Trump calls for mass deportations, migrant bans and a wall to keep away people from coming into the country, while Clinton wants a pathway to citizenship, immigrant integration and protection from deportation.”)

<sup>56</sup> E.O. 13767, [“Border Security and Immigration Enforcement Improvements”](#), the White House, January 25, 2017.

<sup>57</sup> [“Southwest Border Migration FY2017”](#), U.S. Customs and Border Protection, December 15, 2017.

<sup>58</sup> [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.

<sup>59</sup> See Dylan Scott and Tara Golshan, [“The Senate’s failed votes on DACA and immigration: what we know”](#), Vox, February 18, 2018.

<sup>60</sup> [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.

<sup>61</sup> [“Southwest Border Migration FY2017”](#), U.S. Customs and Border Protection, December 15, 2017.

<sup>62</sup> [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.

<sup>63</sup> *Id.*

<sup>64</sup> Dave Montgomery and Manny Fernandez, [“Texas Begins Sending National Guard Troops to Mexican Border”](#), *The New York Times*, April 6, 2018.

<sup>65</sup> *Id.*

<sup>66</sup> William Lajeunesse, [“National Guard will only play supporting role to agents at the border”](#), Fox News, April 6, 2018.

<sup>67</sup> *Id.*

<sup>68</sup> Jesse Byrnes, [“Trump signs memo ordering end to ‘catch and release’ practices”](#), *The Hill*, April 6, 2018.

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

<sup>70</sup> The attorney general, [“Memorandum: Zero Tolerance for Offenses under 8 U.S.C. § 1325\(a\)”](#), U.S. Department of Justice, April 6, 2018.

<sup>71</sup> [8 U.S.C. § 1325\(a\)](#).

<sup>72</sup> [“Secretary Nielsen Statement on Arrival of Central American ‘Caravan’”](#), U.S. Department of Homeland Security, April 25, 2018.

<sup>73</sup> *Id.* (“This President fully understands the threat this poses to Americans and has been crystal clear since the beginning of his Administration that we will protect our borders and our sovereignty. I, again, ask Congress to work with me to quickly pass legislation to close the legal loopholes that prevent us from securing our borders and protecting Americans. I stand ready to work with any member who in good faith seeks to support DHS’s mission and secure our country.”).

<sup>74</sup> [Section 212\(a\)\(7\)\(A\)\(i\)\(I\) of the INA](#). (“In general.-Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission- (I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a). ... is inadmissible.”).

<sup>75</sup> [Section 212\(a\)\(6\)\(A\)\(i\) of the INA](#). (“In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

<sup>76</sup> [Sections 235\(b\)\(1\)\(A\) and \(iii\)\(II\) of the INA](#).

<sup>77</sup> *Id.*

<sup>78</sup> [“Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review”](#), U.S. Department of Justice, Office of Public Affairs, October 12, 2017.

<sup>79</sup> [Section 235\(b\)\(1\)\(B\)\(v\) of the INA](#).

<sup>80</sup> See [section 208\(b\)\(1\) of the INA](#) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).”); [section 101\(a\)\(42\)\(A\) of the INA](#) (“The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”)

<sup>81</sup> [“Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review”](#), U.S. Department of Justice, Office of Public Affairs, October 12, 2017.

<sup>82</sup> [“To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard”](#), U.S. Department of Homeland Security, April 4, 2018.

<sup>83</sup> See [“Credible Fear Workload Report Summary, FY 2018 Total Caseload”](#), U.S. Citizenship and Immigration Services, undated.

<sup>84</sup> *Id.*

- <sup>85</sup> Adam Edelman and Nicole Acevedo, [“Trump warns immigrant caravan approaching U.S. border of prosecution, deportation”](#), NBC News, April 23, 2018.
- <sup>86</sup> See Amanda Sakuma, [“Illegal Immigration Is Changing. Border Security Is Still Catching Up”](#), NBC News, October 17, 2016. (“U.S. officials have known for years that a significant number of Central American migrants are actually turning themselves in at Border Patrol stations and begging for protection. And because they’re asylum-seekers, agents can’t simply turn them away or immediately deport them. The United States has a legal obligation to accept the thousands of migrants until their asylum claims are processed.”)
- <sup>87</sup> Kate M. Manuel, [“Asylum and Gang Violence: Legal Overview”](#), Congressional Research Service, September 5, 2014.
- <sup>88</sup> See [section 101\(a\)\(42\)\(A\) of the INA](#). (“The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”)
- <sup>89</sup> [Matter of M-E-V-G-](#), 26 I&N Dec. 227 (BIA 2014).
- <sup>90</sup> [Fatin v. INS](#), 12 F.3d 1233 (3d Cir. 1993).
- <sup>91</sup> [Matter of Sanchez and Escobar](#), 19 I&N Dec. 276 (BIA 1985), *aff’d*, [Sanchez-Trujillo v. INS](#), 801 F.2d 1571 (9th Cir. 1986).
- <sup>92</sup> [Matter of T-M-B-](#), 21 I&N Dec. 775 (BIA 1997).
- <sup>93</sup> [Matter of M-E-V-G-](#), 26 I&N Dec. 227 (BIA 2014).
- <sup>94</sup> [Hernandez-Avalos v. Lynch](#), 784 F. 3d 944 (4<sup>th</sup> Cir. 2015).
- <sup>95</sup> Elliot Spagat, [“Asylum-seekers in Mexico snub warnings of stern US response”](#), AP, April 29, 2018.
- <sup>96</sup> [Matter of A-B-](#), 27 I&N Dec. 227 (A.G. 2018).
- <sup>97</sup> [8 C.F.R. § 1003.1\(h\)\(1\)\(i\)](#).
- <sup>98</sup> [Matter of A-B-](#), 27 I&N Dec. 227 (A.G. 2018).
- <sup>99</sup> [“Securing America’s Future Act of 2018”](#), H.R.4760, 115th Congress (2018).
- <sup>100</sup> *Id.* at div. B, tit. IV, § 4402.
- <sup>101</sup> *Id.* at div. B, tit. IV, § 4403.
- <sup>102</sup> [William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. 110-457 (2008).
- <sup>103</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.
- <sup>104</sup> [Homeland Security Act of 2002](#), Pub. L. 107-296 (2002), § 462.
- <sup>105</sup> William A. Kandel, [“Unaccompanied Alien Children: An Overview”](#), Congressional Research Service, at 4, January 18, 2017.
- <sup>106</sup> [William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. 110-457 (2008).

- <sup>107</sup> Joseph J. Kolb, [“Implementation of a Law to Protect Trafficking Victims Has Become a Public Safety Issue”](#), Center for Immigration Studies *Backgrounder*, November 3, 2016.
- <sup>108</sup> [Section 235\(g\) of the TVPRA](#).
- <sup>109</sup> [Section 462\(g\) of the Homeland Security Act of 2002](#).
- <sup>110</sup> William A. Kandel, [“Unaccompanied Alien Children: An Overview”](#), Congressional Research Service, at 2-3, January 18, 2017.
- <sup>111</sup> [“Human smuggling equals grave danger, big money”](#), U.S. Immigration and Customs Enforcement, updated January 16, 2018.
- <sup>112</sup> [“Securing America’s Future Act of 2018”](#), H.R.4760, 115th Congress, div. B, tit. V, § 5501 (2018).
- <sup>113</sup> *Id.* at § 5503.
- <sup>114</sup> [Section 208\(b\)\(3\)\(C\) of the INA](#).
- <sup>115</sup> [Flores v. Reno](#), Stipulated Settlement Agreement.
- <sup>116</sup> William A. Kandel, [“Unaccompanied Alien Children: An Overview”](#), Congressional Research Service, at 3, January 18, 2017.
- <sup>117</sup> [“The Flores Settlement: A Brief History and Next Steps”](#), Human Rights First, February 19, 2016.
- <sup>118</sup> [Flores v. Lynch](#), 828 F. 3d 898 (9<sup>th</sup> Cir. 2016).
- <sup>119</sup> *Id.*
- <sup>120</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.
- <sup>121</sup> *Id.* (“These legal loopholes lead to ‘catch and release’ policies that act as a ‘pull factor’ for increased future illegal immigration.”).
- <sup>122</sup> *Id.*
- <sup>123</sup> [Securing America’s Future Act of 2018](#), H.R.4760, 115th Congress, div. B, tit. V, § 5506 (2018).
- <sup>124</sup> [Section 101\(a\)\(27\)\(J\) of the INA](#).
- <sup>125</sup> [“Special Immigrant Juveniles”](#), U.S. Citizenship and Immigration Services, updated April 4, 2018.
- <sup>126</sup> Ruth Ellen Wasem, [“Special Immigrant Juveniles: In Brief”](#), Congressional Research Service, Summary, August 29, 2014.
- <sup>127</sup> *Id.* at 3.
- <sup>128</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.
- <sup>129</sup> *Id.* at § 5502.
- <sup>130</sup> [Section 101\(a\)\(27\)\(I\) of the INA](#).

<sup>131</sup> [“To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard”](#), U.S. Department of Homeland Security, April 4, 2018.

<sup>132</sup> [“Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes”](#), U.S. Department of Homeland Security, February 15, 2018.

<sup>133</sup> Maria Sacchetti, [“Top Homeland Security officials urge criminal prosecution of parents crossing border with children”](#), *The Washington Post*, April 26, 2018.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> [“Southwest Border Migration FY2018”](#), U.S. Customs and Border Protection, April 4, 2018.

<sup>139</sup> See Kausha Luna, [“Caravan of Central American Illegal Aliens Heads to the U.S.”](#), Center for Immigration Studies blog, March 30, 2018.

<sup>140</sup> Jesse Byrnes, [“Trump signs memo ordering end to ‘catch and release’ practices”](#), *The Hill*, Apr. 6, 2018.

<sup>141</sup> Dave Montgomery and Manny Fernandez, [“Texas Begins Sending National Guard Troops to Mexican Border”](#), *The New York Times*, April 6, 2018.

<sup>142</sup> The attorney general, [“Memorandum: Zero Tolerance for Offenses under 8 U.S.C. § 1325\(a\)”](#), U.S. Department of Justice, April 6, 2018.