AILA

Law Journal

A Publication of the American Immigration Lawyers Association

Cyrus D. Mehta
Editor-in-Chief

Volume 6, Number 2, October 2024

fastcase FULL COURT PRESS

AILA Law Journal

Volume 6, Number 2, October 2024

AILA Doc. No. 24110402. (Posted 11/4/24)

AILA Doc. No. 24110402. (Posted 11/4/24)

AILA LAW JOURNAL (ISSN 2642-8598 (print)/ISSN 2642-8601 (online)) is published two times per year by Full Court Press, a Fastcase, Inc., imprint. Individual issues may be purchased for $60.00, or subscriptions for $99.00 a year. Discounts are available for AILA members and Fastcase legal research users.

Publishing Staff
Publisher: Leanne Battle
Production Editor: Sharon D. Ray
Cover Design: Morgan Morrissette Wright and Sharon D. Ray

The cover of this journal features a painting known as *The Sea* by French artist Jean Désiré Gustave Courbet. A leader of the Realist movement, Courbet is also remembered for his political content and activism. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

Cite this publication as:

AILA Law Journal (Full Court Press, Fastcase, Inc.)

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, DC 20005
https://www.fastcase.com

POSTMASTER: Send address changes to AILA LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, DC 20005

Disclaimer

The articles featured in the AILA Law Journal do not necessarily represent the views of AILA or the publisher, nor should they be regarded as legal advice from the association or authors. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional.

Likewise, the articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors, or their firms or organizations.

Submissions

Direct editorial inquires and send material for publication to:

ailalawjournal@aila.org

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys, law firms, and organizations working in immigration law.

Questions About This Publication?

For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Leanne Battle, Publisher, Full Court Press, at leanne.battle@vlex.com or at 866.773.2782

For questions about Sales, or to reach Customer Service:

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

ISSN 2642-8598 (print)
ISSN 2642-8601 (online)

Letter from the Editor-in-Chief

There has been an unfortunate and misplaced focus on the border during this election cycle, which has resulted in restrictions on asylum in violation of the law and a backing away from America's long-held promise to give protection to people fleeing persecution. No solution concerning the border will be complete if our immigration system is not comprehensively reformed to afford people more pathways to come to the United States lawfully to work and unite with family members. Such a reformed system should provide for more efficient processing of asylum claims and eliminate years of backlogs. Mass deportations will not fix our broken immigration system and nor will scapegoating immigrants through false rhetoric and plain lies. The pressure on the Southern border will only be alleviated if there are alternative ways to come to the US and the ossified visa caps and quotas are increased.

This *AILA Law Journal* carries a wide variety of articles that, while they do not focus explicitly on the border, still give readers pause to reflect on ways to improve our system. For instance, Ted R. Bromund and Sandra A. Grossman's "How to Challenge an INTERPOL Red Notice—Five Years Later: What Immigration Attorneys Need to Know About INTERPOL" is an update to a pathbreaking article on the Red Notice that the authors published five years ago in the *AILA Law Journal* and reflects important developments. The Red Notice is not conclusive evidence of criminality. Its purpose instead is to request law enforcement anywhere in the world to seek the location and arrest of an individual wanted for prosecution or to serve a sentence. Unfortunately, Red Notices are too often issued in an abusive manner to harass noncitizens perceived to be opponents of a regime who are seeking asylum and other immigration benefits such as adjustment of status. These changes have included new national legislation aiming to curb INTERPOL abuse, new U.S. Immigration and Customs Enforcement guidance on how Red Notices should be handled by the agency, and reforms within INTERPOL. Practitioners will greatly profit from this article especially when the Red Notice has become an obstacle in the path of their clients seeking an immigration benefit.

Kristin Hommel's "From a Skeleton Key to a Deadbolt: Why the American Passport Is No Longer the Most Powerful in the World, and Why the Door Needs to Open" extols the benefits of a visa-free regime, and compares the U.S.' Visa Waiver Program with that of Singapore and the United Arab Emirates. Visa-free regimes expand access to global opportunities while also facilitating open trade and commerce. The Henley Passport Index (HPI)—an authoritative data index analyzing global relations policies—has rated the United States as eighth in their 2024 global passport ranking. But as the HPI lumps multiple countries in the same rank, there are 27 countries that are ahead of the United States. The lower ranking has weakened the American

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 201–203.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

passport and also diplomatic relationships with other countries along with the ability to attract more business visitors, tourists, and investors.

Yuu Shibata's "Understanding EU Immigration Law: The Schengen Visa Scheme and the Latest EU Immigration Updates" aims to provide immigration practitioners with a comprehensive understanding of the technical and legal aspects of EU immigration law, with a particular focus on the Schengen visa scheme and related border management systems. The core of the article examines the Schengen visa scheme in detail, covering key aspects such as the types of Schengen visas, general requirements, application process, visa refusal, and appeal rights. It also explores the Schengen visa waiver system for certain non-EU countries that are not required to obtain a short-term visa to enter the Schengen Area. Shibata's article, along with Hommel's on visa-free regimes, ought to spark the idea for a similar Schengen-like system between the United States and countries south of our border that will ensure more unrestricted travel resulting in greater economic benefits.

Nicole Dillard's "Same Time Next Year: How History Repeats Itself in Joy and Pain" is a powerful and poignant essay reflecting on how primarily Venezuelan asylum seekers were tricked into going to Martha's Vineyard from Florida in 2022 and how intertwined this episode was with her own history as a Black American immigration attorney, especially in light of events in 1962, when a racist organization tricked Black Americans into going to northern cities, including Martha's Vineyard, in a brazen attempt known as the Reverse Freedom Rides to "get liberals to tie themselves in knots." Dillard observes that the marginalization of the immigrant population is a continuation of a historic trend that started with the dehumanization of Black Americans, which should have no place in America. If the United States aspires to be a just society, then it should treat all people within—and at—its borders fairly. "Otherwise," according to Dillard, "the United States needs to openly acknowledge and take unapologetic ownership of its harsh disparate treatment of its people of color and be prepared to defend its actions in the face of global scrutiny."

Craig Shagin and Maria Vejarano, in "This Makes No Sense," rightly lament that there are numerous provisions in our immigration laws that make no sense, causing unnecessary delay and expenses. Yet many of these problematic provisions are easily remediable without a congressional fix. Their practical article proposes three easy, noncontroversial fixes. We invite others to submit similar short articles proposing similar fixes to our immigration system in the hope that "This Makes No Sense" becomes a permanent column in the *AILA Law Journal*.

I thank all the authors for their singularly unique contributions that make this Fall 2024 edition a fascinating read. I also thank my colleagues on the Editorial Board for their tireless efforts in selecting and editing the articles, and also thank Ana Garicano Solé who graciously agreed to serve as a guest editor to review Shibata's article on EU immigration law. Last and not the least, this edition would not have been so well produced without the expertise

and dedication of our managing editor, Danielle Polen, and our new editorial product manager, Morgan Morrissette Wright, who is a wonderful addition to the team.

Cyrus D. Mehta
Editor-in-Chief

How to Challenge an INTERPOL Red Notice

Five Years Later: What Immigration Attorneys Need to Know About INTERPOL

Ted R. Bromund and Sandra A. Grossman*

Abstract: The purpose of an INTERPOL Red Notice is to request law enforcement worldwide to seek the location and arrest of an individual wanted for prosecution or to serve a sentence. A Red Notice is not conclusive evidence of criminality. Unfortunately, U.S. immigration authorities have utilized these Notices to target noncitizens in the United States, including asylum seekers, leading to a denial of immigration benefits, prolonged detention, and other significant human rights concerns. How can immigration attorneys best advocate for their clients with Red Notices and what should they know about INTERPOL and its role in global law enforcement?

Five years have passed since the *AILA Law Journal* published our initial article on the intersection between INTERPOL and U.S. immigration law, and how attorneys could most effectively challenge persecutory and illegitimate Red Notices. Since then, critical changes have altered the landscape for attorneys handling Red Notice cases. These changes have included new national legislation aiming to curb INTERPOL abuse, significant developments in national case law involving INTERPOL communications, and new U.S. Immigration and Customs Enforcement guidance on how Red Notices should be handled by the agency, as well as reforms within INTERPOL itself. All these changes are taking place amid rising concern about the broader problem of transnational repression, and how this phenomenon is impacting immigrants in the United States. This article will provide AILA members with essential updates and information in all these areas, laying the groundwork for effective advocacy for noncitizens who may be the target of a persecutory or otherwise illegitimate Red Notice.

Introduction

The International Criminal Police Organization—officially ICPO-INTERPOL, commonly known simply as INTERPOL—plays an important role in international law enforcement, and its publications are often used in U.S. immigration and asylum cases. But neither INTERPOL nor its publications, such as its famous "Red Notice," are well understood. This can lead attorneys to fail to appropriately challenge Department of Homeland Security

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 205–226.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

(DHS) or immigration judge (IJ) assertions about INTERPOL communications that are often incorrect. IJs too often defer uncritically to INTERPOL publications in their decisions, resulting in extended denials of bonds and other requests for immigration benefits, and in particular asylum.

The existence of an INTERPOL issue in a case thus provides immigration attorneys with opportunities for advocacy before an IJ, the DHS, and, at an international level, before the Commission for the Control of INTERPOL's Files (CCF).[1] This article will educate attorneys on the meaning of INTERPOL Red Notices and other INTERPOL communications, provide background on INTERPOL as an organization, and give attorneys the tools and knowledge they need to effectively advocate for their clients when an INTERPOL issue arises.

What INTERPOL Is and What It Isn't

To understand INTERPOL's communications and how its actions might intersect with U.S. immigration law, attorneys must first understand INTERPOL itself. Contrary to the image fostered by Hollywood, INTERPOL is not an international law enforcement agency. No one who works for INTERPOL has the power to make an arrest because of their position in INTERPOL.

Rather, INTERPOL is the world's largest international police organization that has the primary aim of advancing international police cooperation. It is based on the sovereignty of its member nations, and therefore respects the independence of their separate judicial and law enforcement systems. It works by holding databases of nation-provided information, by maintaining a communications system for messages between law enforcement agencies in different nations (called I-24/7), and by publishing notices and other communications—including Red Notices.

INTERPOL currently has 196 member nations. North Korea is one of the few well-known nations that is not a member of INTERPOL. Since 2019, INTERPOL has added Palau and the Federated States of Micronesia as member states. INTERPOL's supreme body is its one-nation, one-vote general assembly. Below the assembly, INTERPOL has a president, a 13-member executive committee (including the president) that is chosen on a geographically representative basis, a Secretary General who has operational control of INTERPOL, and, finally, INTERPOL's staff in its General Secretariat.

All INTERPOL member nations are required to establish a National Central Bureau (NCB) to manage all liaison with INTERPOL. In the United States, the NCB is co-managed by the DHS and the Department of Justice (DOJ). Many U.S. state and local law enforcement agencies have "read access" to databases held by INTERPOL, but only the U.S. NCB can request a Red

Notice or other INTERPOL communication, or transmit messages on behalf of the United States.

All INTERPOL activity, including all communications over its network, must respect its Constitution and subsidiary rules adopted by its General Assembly, including INTERPOL's Rules on the Processing of Data (RPD).[2] All of INTERPOL's foundational texts and other relevant legal documents can be found on INTERPOL's website at https://www.interpol.int/Resources/Documents.

The purpose of the Constitution and the subsidiary rules is to ensure that INTERPOL is used only against "ordinary-law crime,"[3] and is not involved in politics, or for purposes of political, and therefore illegitimate, persecution.[4] In this way, INTERPOL is supposed to be beholden to a general principle also contained in U.S. asylum law, which establishes that while any country has the right to prosecute its own citizens, it must do so for legitimate purposes.[5]

The Constitution's most-cited portions are its Article 2, which requires that international police cooperation be conducted within the "spirit of the Universal Declaration of Human Rights,"[6] and its Article 3, sometimes referred to as the neutrality clause, which states that it is "strictly forbidden for the Organization [INTERPOL] to undertake any intervention or activities of a political, military, religious, or racial character."[7]

INTERPOL cannot stop its sovereign member nations from creating and prosecuting political offenses. All it can and is required to do by its Constitution is ensure that it is used only in connection with genuinely criminal, ordinary-law offenses. Unfortunately, as discussed below, INTERPOL's communications are subject to abuse by its member nations.

INTERPOL Publications: Introduction to the Red Notice

The value of INTERPOL rests largely in the structured communications system it provides. This system facilitates three kinds of messages. First, there are simple messages between one or more NCBs. A message is analogous to an everyday email and is only seen by the INTERPOL headquarters in Lyon, France, if the sending nation includes it in the recipient list.

Second, there are "diffusions," a more structured email that can be sent to one or more NCBs, and can concern a wide variety of subjects, up to and including (in the case of a Wanted Person Diffusion (WPD), sometimes called a "Red Diffusion") identifying an individual as a suspect and requesting his or her arrest.[8] A diffusion is copied automatically to INTERPOL, but can be reviewed by INTERPOL for compliance with its rules only after it has been sent.

Finally, there is INTERPOL's system of colored notices, including Red Notices. Any NCB can request the publication of a notice. By rule, all notices must be published to all INTERPOL member nations.[9]

Yellow Notices (to alert police to a missing person), Blue Notices (to collect additional information about a person in relation to a crime), and Green Notices (to provide warnings about persons who have committed criminal offenses and are likely to repeat those offenses in other countries) are all relatively common, but by far the most-used type of notice is the Red Notice, of which 12,260 were published in 2023.[10] The number of Red Notices published annually has remained roughly steady in recent years: in 2017, Interpol published 13,048 Red Notices.[11]

The purpose of a Red Notice, according to INTERPOL, is to "seek the location and arrest of wanted persons wanted for prosecution or to serve a sentence."[12] The requesting NCB can choose to make public a highly redacted version of the Red Notice on the INTERPOL website (https://www.interpol.int/How-we-work/Notices/Red-Notices/View-Red-Notices) but by default, Red Notices are visible only to law enforcement agencies, such as DHS.

This means that an individual who is the subject of a Red Notice may not be aware of it until they are confronted by U.S. law enforcement—for example, when crossing an international border into the United States or when appearing for a visa interview before a U.S. Consular Officer, or before U.S. Citizenship and Immigration Services (USCIS), such as for an asylum or adjustment of status hearing. Other individuals may become aware of a Red Notice, or suspect that one exists, if they have a particularly high-profile case or if their home country publicizes its request for or use of a Red Notice in local media.

A Red Notice is sometimes described as an "international arrest warrant." This is incorrect. As INTERPOL itself states, a Red Notice "is not an international arrest warrant."[13] Rather, a Red Notice is intended "to simultaneously alert police in all our member countries about internationally wanted fugitives."[14]

Red Notices must comply with specific conditions set out in RPD Articles 82-87: Red Notices must concern serious ordinary-law crimes not related to behavioral or cultural norms, family or private matters, or private disputes that are not serious or are not connected with organized crime, and must meet a penalty threshold.[15]

The requesting NCB must also adequately identify the individual sought; must provide judicial data on the facts of the case, the charge, the laws covering the offense, and the maximum penalty possible; and must refer to a valid arrest warrant or comparable judicial decision.[16] While the requesting NCB is asked to provide a copy of the warrant or decision, and it is best practice for the NCB to supply this documentation, the NCB is not required to do so.

All communications over the INTERPOL system are subject to review for compliance with INTERPOL's Constitution. [17] But only requests for Red Notices are reviewed prior to publication; WPDs are reviewed after transmission, and other diffusions and other colored notices are not reviewed either before or after publication unless doubt arises about their compliance

with Article 2 or Article 3 of INTERPOL's Constitution or other applicable requirements.[18]

How INTERPOL Reviews Red Notice and Wanted Person Diffusion Requests

In conducting its review of Red Notice requests, INTERPOL operates, as it is required to do, on the assumption that, as all its member states are sovereign, they are all equal, and that therefore all of their requests must be presumed to have equal validity. This assumption is written into the RPD. As Article 128(1) of the RPD states, "Data are, a priori, considered to be accurate and relevant when entered by a National Central Bureau . . . into the INTERPOL Information System and recorded in a police database of the Organization."[19]

The importance of this presumption cannot be over-emphasized. It means that, in the INTERPOL system, the state—not the individual—gets the benefit of the doubt. This, in turn, means that while INTERPOL is required by RPD Article 86 to review Red Notices for compliance with specific requirements, and while all INTERPOL communications are subject to Articles 2 and 3 of INTERPOL's Constitution, INTERPOL begins with the assumption that a request for a Red Notice is compliant. INTERPOL's review therefore focuses on the administrative task of ensuring that the requested Red Notice meets the conditions set out in the RPD.

If INTERPOL becomes aware—either during or after its review—that a request for a Red Notice might be invalid because it violates the RPD's requirements, and/or Article 2 or Article 3, it will subject that request to additional scrutiny. But this additional scrutiny is not automatically applied to all requests, and even when it is applied, it has considerable and inherent limits, not least the fact that INTERPOL has no power to conduct its own investigations. Absent the intervention of an attorney, INTERPOL is reliant on information contributed by its member nations (primarily the nation that requested the Red Notice in the first place) or on public source information. It is not an investigative agency.[20]

In 2018, INTERPOL publicly acknowledged this fact. When then-INTERPOL President Meng Hongwei of the People's Republic of China was arrested in China in October 2018, INTERPOL's Secretary-General Jürgen Stock of Germany was asked if INTERPOL would investigate Meng's forced resignation. Stock replied that INTERPOL could not do so, as it is "not an investigative body."[21] If INTERPOL could not investigate the circumstances surrounding the disappearance of its own president, it cannot and does not investigate other purported offenses. Individuals who are fleeing persecution, including illegitimate and politically motivated persecutions in their home countries, must rely on their attorneys to make this fact, and its implications, clear to an IJ, and to challenge a Red Notice before the IJ and through the CCF.

The Notices and Diffusions Task Force

In 2016, INTERPOL created the Notices and Diffusions Task Force (NDTF) to conduct its internal review of Red Notices and WPDs. According to INTERPOL's website, the Task Force is comprised of lawyers, police officers, and operations specialists with a wide range of experience and skills.[22] In 2018, the NDTF became responsible for reviewing existing Red Notices and WPDs, including those published before 2016.[23] INTERPOL—and others—will often cite the existence of the NDTF as evidence that the problems of INTERPOL abuse have been solved, or at least significantly reduced.[24]

This is incorrect. While NDTF has systematized and formalized the review procedures that existed before it was created and has improved the operation of INTERPOL's systems through systematic review, it is subject to many of the same constraints as INTERPOL as a whole. The NDTF too is required to begin with the assumption that national submissions are "accurate and relevant," and it has access to the same limited sources of information as the rest of INTERPOL.[25]

The NDTF has the enormous job of examining over 12,000 Red Notices annually (as well as a similar number of WPDs), so it operates under severe time as well as informational constraints.[26] As INTERPOL acknowledges, the NDTF only reviews WPDs after they have been sent, and it only reviews other colored notices (in particular, Blue Notices) well after the fact, if at all.[27] Finally, the fact that the NDTF is still reviewing Red Notices and WPDs from before 2016 demonstrates that it has a substantial backlog.[28]

INTERPOL has published partial statistics on the operation of the NDTF.[29] For example, in 2022, the NDTF refused to issue, or cancelled, 105 notices and diffusions because the requests were not in line with the spirit of the Universal Declaration of Human Rights.[30] There were 199 notice and diffusion requests cancelled because they were of a political, military, or racial character.[31] While somewhat helpful, these statistics run years together, and do not include the results of the more thorough reviews conducted by the CCF, so they cannot be used to derive a percentage of INTERPOL Red Notices that are abusive.

Transnational Repression and INTERPOL Abuse

INTERPOL abuse, which is the misuse by an INTERPOL member nation of INTERPOL's otherwise legitimate data-sharing technology to illegitimately or unlawfully persecute an individual, is on the rise.[32] This type of abuse regularly affects innocent clients who are processing a visa, a green card, a naturalization case, or an asylum case, among other applications for immigration benefits. In the case of asylum, the allegations in the Red Notice itself may be evidence of an illegitimate persecution, rather than a valid prosecution.

INTERPOL abuse also is part of a wider, increasingly more recognized phenomenon known as transnational repression (TNR), which many immigration attorneys may just refer to as "persecution."[33] TNR encompasses a broad array of practices—ranging from threatening text messages to the imprisonment of family members to murder—carried out by a government against its nationals living in other countries with the intention of silencing them, intimidating them, or forcing them to return to face trial or imprisonment.[34] In this wider context, INTERPOL abuse can serve three primary purposes. It can secure the return of a victim, harass or persecute a victim, or prevent a victim from traveling and thus increase the victim's vulnerability to other measures.

Much of the reporting and legislation on INTERPOL abuse since 2016 has been framed as a response to TNR. The early leader in assessing INTERPOL's systems and abuse was the nongovernmental organization Fair Trials, yet while its work remains valuable as a reference, especially as objective evidence in prosecution versus persecution-based asylum claims, Fair Trials has moved on to other issues.[35] The most useful analysis of TNR, including but not limited to INTERPOL abuse, now comes from Freedom House, which has produced a series of valuable reports on the subject. These reports may be helpful evidence in an asylum case, for example.[36]

The U.S. response to TNR has been particularly robust. The Senate Foreign Relations Committee held a hearing on the subject in December 2023.[37] The DOJ has begun to bring criminal charges in cases of TNR,[38] and the State Department now includes information on TNR, including INTERPOL abuse, in its annual Country Reports on Human Rights Practices, which are also often referred to in asylum cases.[39] But the U.S. response has shortcomings, and even pitfalls. The State Department reports are incomplete: just because the reports do not condemn a nation for committing INTERPOL abuse does not mean that no abuse occurred.

Even more regrettable has been the United States's handling of the provisions on INTERPOL abuse included in the 2022 National Defense Authorization Act (NDAA). On December 15, 2021, the U.S. Congress signed into law the Transnational Repression Accountability and Prevention (TRAP) provision of the NDAA.[40] This fairly recent and hard-fought legislation is based on congressional findings uncovering the reality of INTERPOL abuse.[41] TRAP requires the publication of regular reports identifying the abusive nations.[42] The legislation also makes fighting abuse of INTERPOL a key goal of the United States, and mandates that the United States name the worst abusers of INTERPOL and protect the U.S. judicial system from authoritarian abuse, among other important monitoring mechanisms.[43]

Nevertheless, the Departments of Justice and State have stonewalled by refusing to publicly identify any abusers in their jointly produced 2022, April 2023, and December 2023 reports.[44] Attorneys representing clients before USCIS and Department of State should be ready to rebut assertions that these disappointing NDAA reports prove that INTERPOL abuse has waned or disappeared.[45]

Transnational repression is a large and growing phenomenon. Attorneys should be aware of TNR's existence as it may help strengthen persecution arguments and allows for a new reference point and language in advocacy efforts. For example, in cases with an INTERPOL dimension, attorneys can set INTERPOL abuse in a broader context by demonstrating to the IJ that TNR is yet another way in which regimes seek to control and persecute expatriates, dissidents, or diaspora opponents.

The Evolution of ICE Policy on Red Notices

Introduction: The Legal Significance of Red Notices in the United States

The United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the Fourth Amendment to the Constitution. Instead, the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to "be on the lookout" for the fugitive in question, and to advise if they are located.[46]

The U.S. DOJ's *Justice Manual* states that:

> In the United States, national law prohibits the arrest of the subject of a Red Notice issued by another INTERPOL member country, based upon the notice alone. If the subject for a Red Notice is found within the United States, the Criminal Division will make a determination if a valid extradition treaty exists between the United States and the requesting country for the specified crime or crimes. If the subject can be extradited, and after a diplomatic request for provisional arrest is received from the requesting country, the facts are communicated to the U.S. Attorney's Office with jurisdiction which will file a complaint and obtain an arrest warrant requesting extradition.[47]

The National Defense Authorization Act for Fiscal Year 2022 states:

> No United States Government department or agency may extradite an individual based solely on an INTERPOL Red Notice or Diffusion issued by another INTERPOL member country for such individual.[48]

While a Red Notice cannot be the sole basis for arresting or extraditing an individual, and while there is no removability ground specific to Red Notices in the Immigration and Nationality Act (INA), U.S. Immigration and Customs Enforcement (ICE) officers have broad discretion to arrest noncitizens found in the United States.[49] Most of the relevant cases discussing the immigration

consequences of a Red Notice involve a noncitizen respondent who has been arrested, and who was likely targeted by ICE due to the Red Notice. Upon arrest, especially if there is no foreign conviction linking the target of the Red Notice to a more specific criminal inadmissibility or deportability ground, the individual is commonly charged with an immigration violation such as under INA § 212 and INA § 237.[50]

The New ICE Directive on INTERPOL Communications

On August 15, 2023, with an effective date of September 30, 2023, ICE issued Directive 15006.1 on "INTERPOL Red Notices and Wanted Person Diffusions." Notably, the Directive is framed as an effort to support "the U.S. Department of Homeland Security's (DHS) broader efforts to combat transnational repression by helping ensure Red Notices and Wanted Person Diffusions are issued for legitimate law enforcement purposes and comply with governing rules," a statement that highlights the importance of placing abusive Red Notices within the wider context of transnational repression.[51]

The Directive sets out a policy that is worth quoting in full:

> A Red Notice or Wanted Person Diffusion is not an international arrest warrant and conveys no legal authority to arrest, detain, or remove a person. Therefore, ICE personnel will not rely exclusively on Red Notices or Wanted Person Diffusions to justify enforcement actions or during immigration proceedings. If ICE personnel intend to rely on a Red Notice or a Wanted Person Diffusion to help inform whether an enforcement action should be taken or during immigration proceedings, they should do so sparingly, and only if the threshold criteria have been met, as outlined in this Directive.[52]

There is much to appreciate in the Directive. It requires ICE personnel to verify that a Red Notice (or WPD) is still active, to conduct a preliminary review of the Red Notice to check for potential abuse, to obtain supervisory approval before using a Red Notice in legal proceedings, and to request any documentation underlying the Red Notice (such as an arrest warrant) from the nation that originated the Red Notice. Finally, before using the Red Notice in legal proceedings, ICE personnel are required (to comply with INTERPOL's rules) to request use authorization from INTERPOL or the requesting nation.

After an arrest is made, ICE personnel are then required to provide the detained individual with any underlying documentation previously obtained and to "give the person a meaningful opportunity to respond or contest its contents."[53] ICE personnel are not allowed to "represent or imply that a Red Notice or Wanted Person Diffusion is a U.S. arrest warrant, conveys independent legal authority, or represents an independent judgment by

INTERPOL concerning probable cause or the validity of the underlying criminal proceedings."[54] This reflects a more nuanced understanding of Red Notices in general.

The Directive also includes training requirements for ICE personnel, contains a sensible summary of types of non-compliant Red Notices as prohibited by RPD Article 83(1), sets out a procedure for reviewing Red Notices suspected to be abusive, and is even alive to the danger of asking a requesting nation to supply underlying documentation if the Red Notice is potentially abusive, as "doing so could alert the member country to the person's location and possibly facilitate an illegitimate and impermissible use of Red Notices and Wanted Person Diffusions."[55]

But for all its sensible precautions, there are indications that the ICE Directive will pose new challenges as well as opportunities for attorneys. The Directive does not cover INTERPOL Blue Notices, a type of INTERPOL publication that is now more commonly abused than it was in the past.[56] More subtly, and damagingly, while the Directive requires ICE personnel to provide arrested individuals with any underlying documentation, it does not require them to provide the Red Notice or WPD itself. Although an individual can file a "Request for Access"[57] for a Red Notice or WPD with Commission for the CCF, discussed below, and learn the allegations against them, this process may take many months, and the nation that requested the Red Notice or WPD has the power to deny the request.

Worse, the Directive makes it clear that ICE personnel should attempt to conceal any indications that they targeted an individual for arrest as the result of a Red Notice. To quote the Directive, ICE personnel are required to:

> "[properly document] a person's arrest and articulat[e] the associated immigration violations to make clear ICE personnel did not engage in an enforcement action based solely on the existence of a Red Notice or Wanted Person Diffusion. For example, notation on Form I-213, Record of Deportable/Inadmissible Alien, should indicate the person is a foreign fugitive and not explicitly reference the Red Notice or Wanted Person Diffusion."

ICE has stated in the past that it uses Red Notices to guide its removal operations.[58] This implied that even individuals who are seeking asylum could be arrested should they be named in a Red Notice.

Regrettably, there is ample evidence from past cases—in which one or both of the authors of this article were involved—that this was indeed ICE's practice. None of the safeguards the new Directive introduces into ICE procedures prevent ICE from using Red Notices to decide who to target for removal. Indeed, the new ICE Directive clearly implies that this practice will continue but will now be concealed from attorneys. This process risks turning ICE, and any IJ who participates in the process, into agents of the abusive nation, a point that attorneys should bring up if it is relevant.

It is too soon to conclude that the ICE Directive is either a net positive or a net negative for immigration attorneys and their clients. But the Directive could be a step forward for ICE, as it is an important recognition by ICE that INTERPOL abuse can and does happen, and that it has a role and responsibility in curbing and monitoring this abuse. For practitioners, the Directive creates new opportunities for advocacy, as well as potentially making old pitfalls in the process even more dangerous.[59]

Challenging INTERPOL Red Notices Before the Immigration Courts

Red Notices and the Serious Nonpolitical Crime Bar to Asylum and Withholding of Removal

The development of law in INTERPOL-related cases over the past half-decade has substantially centered around the application of the serious, nonpolitical crime (SNPC) bar to asylum and withholding. The INA bars an applicant from obtaining these forms of relief when "there are serious reasons" to believe that they "committed a serious nonpolitical crime" before arriving in the United States.[60]

Most Circuits have interpreted the INA's "serious reason for believing" standard to be equivalent to probable cause.[61] Under this standard, a court need not find proof that the alien actually committed the alleged crime, only that there is probable cause "for believing that the alien has committed a serious nonpolitical crime," thereby shifting the burden of proof to the noncitizen to prove beyond a reasonable doubt that they did not commit the crime in question.[62]

For example, in *Villalobos Sura v. Garland*, the Ninth Circuit upheld a Board of Immigration Appeals decision, finding probable cause where the evidence against the noncitizen consisted of a Red Notice, an arrest warrant, and the noncitizen's own testimony, which "taken together, identified the petitioner and described the crime of which he was accused, including the specifics of the event and the names of the victims."[63] The court substantially relied on the IJ's finding that the respondent's testimony had been "self-serving" and "unpersuasive," when compared to the evidence presented by the government.[64]

Conversely, in general, most circuits have found that a Red Notice alone may not establish the requisite probable cause to meet DHS's burden under the serious nonpolitical crime bar.[65] For example, in *Gonzalez Castillo v. Garland*, a 2022 Ninth Circuit case, the DHS presented a Red Notice as the sole evidence that a noncitizen had committed a serious nonpolitical crime in El Salvador, barring him from asylum.[66] Critically, to the court at least, there was no underlying arrest warrant in the evidentiary record.[67] While the court declined to adopt a per se rule that Red Notices alone are never sufficient to

warrant application of the SNPC bar, it did find that the particular Red Notice at issue in the case before it failed to establish probable cause "both because of the contents of the particular Red Notice and because of the features of Red Notices generally."[68] The case contains helpful dicta for practitioners who are calling into question the veracity and reliability of the factual summary contained in a Red Notice.

Despite some more favorable circuit court decisions, the DHS may continue to argue, pursuant to the Board's decision in *Matter of W-E-R-B*, that all the government needs to show that it has met its burden under the bar is "some evidence" that the bar might apply.[69] Again, numerous courts have squarely rejected the Board's reasoning based on a reading of the burden-shifting statute itself, which clearly requires the government to present more than just the Red Notice alone to meet the applicable evidentiary standard.[70] Practitioners should also carefully distinguish their clients' cases from the facts in *W-E-R-B*. For example, the petitioner in *W-E-R-B* failed to submit court documents providing the criminal charges against him had been dismissed, and petitioner's counsel also conceded there was no political persecution.[71] For attorneys representing clients in asylum proceedings, the Red Notice, and any underlying arrest record, is often the evidence of pretextual prosecution forming the basis of the protection claim.

Red Notices and Bond Cases

Attorneys must continue to challenge any claim that a Red Notice demonstrates or increases flight risk. Since the purpose of a Red Notice is to prevent the named individual from fleeing across national borders, a Red Notice actually acts to reduce international flight risk, not to increase it. As INTERPOL states, a Red Notice is important in part because "[c]riminals and suspects are flagged to border officials, making travel difficult."[72] As officials routinely consult INTERPOL-maintained databases when controlling a national border, a Red Notice—as it is designed to do—decreases flight risk.

The position of courts on flight risk evolved, with *Kharis v. Sessions*[73] allowing reliance on a Red Notice but finding for respondent because of ICE's failure to "grapple with a substantial, well-supported argument that Kharis's Red Notice was at most minimally probative as to whether he was a flight risk," to *Torres Murillo v. Barr*,[74] which also found that Red Notices deserve at least some weight in determining flight risk, to *Malam v. Adducci*,[75] where the court concluded that a Red Notice diminished respondent's flight risk. Attorneys advocating for bond in Red Notice cases may acknowledge the truly "minimal" probative value of a Red Notice in the sense that the only fact established by the existence of the notice is that the person is wanted for prosecution or to serve a sentence. Nevertheless, the fact that Red Notices themselves are inherently correct or reliable should be a notion that is challenged before an IJ.

Red Notices are the result of an administrative process, not a judicial procedure. They are not based on any INTERPOL investigation. They are not an arrest warrant. In part because they are based on the presumption that the purported facts presented by the accusing state are (in the words of Article 128(1) of the RPD) "accurate and relevant," they do not meet the probable cause standard.[76]

If they concern an individual accused of a crime, they do not denote any assumption of guilt. They are not based on any evidence other than the unsupported allegation of the NCB that made the request. They have no independent probative value. They can be published without a valid arrest warrant from the requesting nation, and if even if that nation provides an arrest warrant, a Red Notice offers no proof that the arrest warrant is valid, that the purported crime has been committed, or that the crime has not been concocted by the authorities for political purposes.

The only facts a Red Notice proves are that the requesting nation is a member of INTERPOL, that it has completed the online form requesting the Notice, that any administrative flaws in its request were not so egregious as to result in its rejection, and that the case did not on its face raise concern about political or other improper motives in the INTERPOL vetting process. All of these arguments may be made to an IJ in the context of a removal proceeding.

Other Arguments and Strategies to Impeach the Veracity of a Red Notice

If it is available, attorneys should begin by carefully examining the full, original Red Notice. Reviewing the full Red Notice—visible preliminarily only to law enforcement agencies, even if a redacted version has been made public—is essential. If a Red Notice is not available, attorneys may file a Request for Access before the CCF, as described below, and receive a copy of the Notice.

Attorneys should verify that the Notice has been correctly translated into English; ensure it meets all the conditions and contains all the judicial data required by INTERPOL as set out in the RPD and INTERPOL's *Repository of Practice on Article 3*;[77] and check if the Notice contains data or assertions that indicate carelessness, abuse, or bias on the part of the requesting authorities or that violate INTERPOL's rules.

An attorney must consider the charge underlying the Red Notice, and the (very limited) information contained in a Red Notice that purportedly justifies the charge. Any seemingly legitimate criminal charge may be pretextual, and may constitute evidence of persecution, and not lawful prosecution.[78]

INTERPOL is not allowed to publish a Red Notice that violates its Constitution or one on certain categories of offenses set out in the RPD, such as those that might raise "controversial issues relating to behavioral or cultural norms," and for those "relating to family/private matters," among other categories.[79]

But, in practice, Red Notices that do not meet these conditions are sometimes published nonetheless. By making a strong argument, informed by references to INTERPOL's rules, that a Red Notice does not meet INTERPOL's own requirements, an attorney can substantially reduce any credibility the Red Notice may possess in the eyes of an IJ.

The end goal of effective advocacy in a case with an INTERPOL dimension is to demonstrate that the fact that INTERPOL has published a Red Notice on an individual should not mystify anyone, including an IJ, into accepting that the named individual is guilty, or that the named individual is the subject of charges that are supported with evidence that is on its face credible and sufficient. A Red Notice is not by itself a sufficient basis for arresting anyone in the United States, much less detaining or removing anyone, or denying them asylum.

Challenging a Red Notice Directly Through the Commission for the Control of INTERPOL's Files

It is also possible, and often necessary, to challenge or delete a Red Notice through the Commission for the Control of INTERPOL's Files.[80] The CCF is an independent body made up of attorneys with data protection and international human rights experience, whose mandate is to "ensure[] that all personal data processed through INTERPOL's channels conform[] to the rules of the Organization."[81] In 2021, the last year for which data is available, the CCF deleted 296 Red Notices or other INTERPOL communications.[82]

The process of challenging a Red Notice through the CCF is in some respects similar to presenting an asylum case—it is rooted in international human rights law, as well as INTERPOL's foundational documents and the CCF's published case excerpts. On the other hand, the CCF bears little resemblance to an actual court of law: there is no discovery process, the accused has no right to testify before the CCF, there is no body higher than the CCF to which an attorney can appeal, and the requesting state gets the benefit of the doubt. Critically, the CCF will also not decide on the merits of any criminal accusation; only whether the request for police cooperation is anathema to its Rules and Constitution.

It will normally take at least nine months after a request is found admissible for the CCF to reach a decision and for the INTERPOL General Secretariat to implement it.[83] But the CCF meets only a minimum of three times a year, and it is not required to adhere to this nine-month timeline if it decides that an extension of the deadline is warranted (though it is required to notify applicants if it extended the deadline).[84] As a result, it is relatively common for applicants to wait a year to receive the CCF's reply, and delays of two years or even more can occur. Troublingly, nations are increasingly taking a

non-cooperative approach in answering inquiries from the CCF, which can impose further delays.

It is advisable to begin the CCF process as soon as possible, and to ensure that it includes a request for provisional measures, which can be taken within less than three months.[85] In the asylum or removal process, providing documentary evidence to the IJ or to the DHS that the INTERPOL Red Notice is being challenged as illegitimate may provide critical support to a request for a continuance, or requests for other immigration benefits or a bond.

The Statute of the Commission for the Control of INTERPOL's Files[86] is essential background reading, and an application form to begin the process is available on the CCF's website.[87] Nevertheless, because the CCF has, to date, published only 56 decision excerpts, the publicly available case law is limited, and heavily redacted. Attorneys should strongly consider engaging the services of a colleague with experience in this specialized area.[88]

Broadly, the process of submitting such a request through the CCF's Requests Chamber has three stages. The applicant—or the applicant's attorney—must submit an "application form for access and/or correction/deletion" to the CCF, including a power of attorney.[89] First, within a month or so of receipt, the CCF will check the admissibility of the request and inform the applicant of its decision, deeming the request admissible or not.[90] Second, presuming the application is admissible, the CCF will render a decision on deletion within nine months unless it determines that exceptional circumstances warrant an extension of that time limit.[91] Finally, the INTERPOL General Secretariat will implement the CCF's decision within no more than two months.[92]

In submitting a request to the CCF, attorneys will often have to walk a narrow line of casting doubt on the legal processes (if any) that resulted in the request for the Red Notice, while at the same time not seeking to put the police, legal, and judicial systems of the requesting country on trial. The CCF does not respond well to applications that consist only of generalized assertions of corruption, bias, or wrongdoing on the part of the requesting country, no matter how well-founded these assertions may be. Successful applications focus on the specifics of the case and cite copiously to INTERPOL's rules.

Even successfully requesting the deletion of a Red Notice may not on its own end legal proceedings that make use of the Red Notice in the United States, as any proceedings should be based on more than a Red Notice.[93] But applying to the CCF testifies to a belief on the part of a client and attorney that the charges that led to the Red Notice are political (or racial, religious, or military) in nature, or a violation of INTERPOL's technical rules on the processing of data. If the CCF deletes the Red Notice as the result of a successful application, and the CCF includes sufficient explanatory language in its decision, the CCF's action may provide powerful evidence that this belief was correct.

Paradoxically, therefore, while the publication of a Red Notice is not proof of an individual's guilt, the cancellation of a Red Notice may offer considerable evidence that the purported underlying offense was not a crime in ordinary law.[94] This is particularly true if the CCF accompanies its decision with a letter that states that the applicant's information was removed from INTERPOL-maintained databases because the request by the member country violated Article 3 of INTERPOL's Constitution. This kind of letter is extremely valuable evidence in the context of an asylum case.[95]

The CCF restricts the length of submissions and only allows appeals if the existence of new facts can be demonstrated. Attorneys must work in the context of limited and poorly developed case law and complex facts that must be explained with some brevity, while understanding that the role of the CCF is to assess compliance with INTERPOL's rules, not to assess the requesting nation's legal or judicial system or determine guilt or innocence. Attorneys will only be successful if they understand and navigate these challenges.

Conclusion

The past several years have shown an evolution among U.S. immigration agencies and adjudicators, reflecting, in some cases, a more nuanced understanding of INTERPOL Red Notices and diffusions and how INTERPOL functions as an organization, as well as of the broader issue of transnational repression. But despite this evolution, INTERPOL communications are too often taken as conclusive proof of criminality by the DHS and by IJs. Inclusion in an INTERPOL-maintained database continues to have tremendous negative consequences on an individual's application for U.S. immigration benefits and on their life in general. In cases where INTERPOL abuse is perpetrated by authoritarian governments, it is up to immigration attorneys to educate IJs and the DHS to safeguard their client rights and ensure that the U.S. government does not become complicit in these tactics.

Notes

* Ted R. Bromund (theodore.bromund@gmail.com) is the Founder and Proprietor of Bromund Expert Witness Services LLC, which provides advice and expert witness statements on INTERPOL and INTERPOL abuse. Sandra A. Grossman (sgrossman@grossmanyoung.com) is a founding partner at Grossman Young & Hammond LLC, a full-service immigration law firm operating in Bethesda, Maryland. She is the recipient of AILA's Edith Lowenstein Memorial Award for excellence in advancing the practice of immigration law. A special thanks to Ariel Rawls, Associate Attorney at Grossman Young & Hammond LLC, who provided critical assistance and support to this publication.

1. For a guide on how to advocate for Clients with INTERPOL notices before the U.S. Consulates, *see* Sandra A. Grossman, *The Impact of Interpol Red Notices on pending*

U.S. Visa petitions; *What Every Attorney Needs to Know to Best Advocate for Their Clients*, *in* The Consular Practice Handbook 299-313 (5th ed. 2023).

2. INTERPOL's Rules on the Processing of Data, III/IRPD/GA/2011, art. 5, www.interpol.int/en/content/ download/5694/file/INTERPOL%20Rules%20on%20the%20Processing%20of%20 Data-EN.pdf (last updated 2023) [hereinafter RPD].

3. *Id.* art. 1 ("'Ordinary-law crime' means any criminal offenses, with the exception of those that fall within the scope of Application of Article 3 of the Constitution and those for which specific rules have been defined by the General Assembly.").

4. INTERPOL, *Repository of Practice: Application of Article 3 of INTERPOL's Constitution in the Context of the Processing of Information via INTERPOL's Channels*, § 2.2 (2d ed. 2013), https://www.interpol.int/content/download/12626/file/article-3-ENG-february-2013.pdf (stating that a primary objective of INTERPOL's Constitution is "[t]o protect individuals from persecution") [hereinafter Repository of Practice].

5. Prosecution under laws that are not in conformity with accepted human rights standards or those that are applied in a discriminatory manner may constitute persecution. *See, e.g.*, *Chanco v. I.N.S.*, 82 F.3d 298, 302 (9th Cir. 1996); *Li v. Holder*, 559 F.3d 1096, 1108-1113 (9th Cir. 2009); *Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1151 (6th Cir. 2010).

6. Constitution of the ICPO-INTERPOL, I/CONS/GA/1956, art. 2, www .interpol.int/en/content/download/590/file/ Constitution%20of%20the%20ICPO-INTERPOL-EN.pdf (last updated 2023).

7. *Id.* art. 3.

8. RPD, *supra* note 2, art. 97.

9. RPD, *supra* note 2, art. 79.

10. *About Notices*, INTERPOL, https://www.interpol.int/en/How-we-work/Notices/About-Notices.

11. *2017 Annual Report*, INTERPOL, 2018, p. 23, https://www.interpol.int/en/content/download/5258/file/Annual%20Report%202017-EN.pdf?inLanguage=eng-GB.

12. *Notices*, INTERPOL, https://www.interpol.int/How-we-work/Notices.

13. *Red Notices*, INTERPOL, www.interpol.int/INTERPOL-expertise/Notices/Red-Notices.

14. *Id.*

15. RPD, *supra* note 2, art. 83(1)(a)(ii) (noting that if the subject of the Red Notice is sought for prosecution, "the conduct constituting an offense [must be] punishable by a maximum deprivation of liberty of at least two years or a more serious penalty; if the person is sought to serve a sentence, he/she [must be] sentenced to at least six months of imprisonment and/or there is at least six months of the sentence remaining to be served").

16. *Id.* art. 83(2).

17. *Id.*, arts. 10-12, 51, 77 (outlining several mechanisms for assessing compliance with INTERPOL's Constitution and Rules).

18. *Compliance and Review*, INTERPOL, https://www.interpol.int/en/How-we-work/Notices/Compliance-and-review.

19. *Id.* art. 128(1).

20. *See, e.g.*, Commission on the Control of INTERPOL's Files, Decision No. 2023-02, ¶ 16 ("[I]t is recalled that the Commission's function is not to conduct an investigation, to weigh evidence, or to make a determination on the merits of a case. Only the competent national authorities may do so."); Commission on the Control of INTERPOL's Files, Decision No. 2023-03, ¶ 30 ("The Commission is not empowered

to conduct an investigation, to weigh evidence, nor to make a determination on the facts or merits of a case; such is the function of the competent national authorities.").

21. Elaine Ganley, *Interpol: Rules Forbid Probe of Ex-President's Fate in China*, AP News (Nov. 8, 2018), https://apnews.com/general-news-870d378bf47c4777a9599877f25418a6.

22. *Compliance and Review*, *supra* note 18.

23. *Id.*

24. For a significant example of such a claim, *see Assessment of INTERPOL Member Country Abuse of INTERPOL Red Notices, Diffusions, and Other INTERPOL Communications for Political Motives and Other Unlawful Purposes*, U.S. Dep't of Just. & U.S. Dep't of State (Sept. 2022), https://www.state.gov/wp-content/uploads/2022/09/2022-Transnational-Repression-Accountability-and-Prevention-Act-Report.pdf. For a rebuttal, *see* Sandra Grossman, *Conflicting Accounts on Interpol Abuse: Comparing US Government reports*, Red Notice Monitor (Sept. 29, 2023), https://www.rednoticemonitor.com/post/conflicting-accounts-on-interpol-abuse-comparing-us-government-reports.

25. According to INTERPOL, the NDTF will also review "other information from INTERPOL databases, exchanges with member countries or external sources that indicate non-compliance." *Compliance and Review*, *supra* note 18. According to a recent conversation between one of the authors and an INTERPOL official, this could also include reports and letters by human rights organizations and non-governmental organizations monitoring INTERPOL abuse.

26. *Id.*; *see also INTERPOL: New Data Reveals 1,000 Red Notices and Wanted Person Diffusions Rejected or Deleted Each Year*, Fair Trials (Nov. 7, 2022), https://www.fairtrials.org/articles/news/interpol-new-data/.

27. *Compliance and Review*, *supra* note 18.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Jane Bradley, *Strongmen Find New Ways to Abuse Interpol, Despite Years of Fixes*, N.Y. Times (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/world/europe/interpol-strongmen-abuse.html; Ben Keith & Rhys Davies, *Russia and China's Abuse of Red Notices Could Break Interpol Beyond Repair*, Euro News (Apr. 6, 2023), https://www.euronews.com/2023/04/06/russia-and-chinas-abuse-of-red-notices-could-break-interpol-beyond-repair.

33. The U.S. Department of State's Office of Foreign Missions has called the attention of all foreign missions to its heightened concern and condemnation of transnational repression activities occurring in the United States and elsewhere. *Notice: Transnational Repression*, U.S. Dep't of State (July 8, 2022), https://www.state.gov/wp-content/uploads/2022/07/2022-07-08-Notice-Counter-Transnational-Repression.pdf.

34. *See generally "We Will Find You": A Global Look at How Governments Repress Nationals Abroad*, Human Rights Watch (Feb. 22, 2024), https://www.hrw.org/report/2024/02/22/we-will-find-you/global-look-how-governments-repress-nationals-abroad.

35. *INTERPOL*, Fair Trials, https://www.fairtrials.org/campaigns/.

36. While all of Freedom House's reports are valuable, its 2022 report, *Unsafe in America: Transnational Repression in the United States*, at https://freedomhouse.org/report/transnational-repression/united-states, is a useful place to begin; *see, e.g.*, *PACE Sets Out Steps to Curb "Transnational Repression"*, Parliamentary

Assembly of the Council of Eur. (June 23, 2024), https://pace.coe.int/en/news/9165/pace-sets-out-steps-to-curb-transnational-repression-.

37. *Transnational Repression: Authoritarians Targeting Dissenters Abroad*, Senate Foreign Rels. Comm. (Dec. 6, 2023), https://www.foreign.senate.gov/hearings/transnational-repression-authoritarians-targeting-disssenters-abroad.

38. *40 Officers of China's National Police Charged in Transnational Repression Scheme Targeting U.S. Residents*, U.S. Dep't of Just. (Apr. 17, 2023), https://www.justice.gov/opa/pr/40-officers-china-s-national-police-charged-transnational-repression-schemes-targeting-us.

39. *Country Reports on Human Rights Practices*, U.S. Dep't of State, https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/.

40. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81. § 6503(c).

41. *Id.* § 6503(a) ("It is the sense of Congress that some INTERPOL member countries have repeatedly misused INTERPOL's databases and processes, including Notice and Diffusion mechanisms, to conduct activities of an overtly political or other unlawful character and in violation of international human rights standards, including by making requests to harass or persecute political opponents, human rights defenders, or journalists.").

42. The NDAA reports can be found at *Transnational Repression Accountability and Prevention (TRAP) Act Reports*, U.S. Dep't of State, https://www.state.gov/transnational-repression-accountability-and-prevention-trap-act-reports/ (last updated December 2023).

43. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81. § 6503(b)(3).

44. *See, e.g.*, *Biannual Assessment of INTERPOL Member Country Abuse of INTERPOL Red Notices, Diffusions, and Other INTERPOL Communications for Political Motives and Other Unlawful Purposes*, U.S. Dep't of Just. & Dep't of State (Dec. 2023), https://www.state.gov/wp-content/uploads/2024/03/20231204-Third-TRAP-Act-Report-Accessible-3.21.2024.pdf; *Biannual Assessment of INTERPOL Member Country Abuse of INTERPOL Red Notices, Diffusions, and Other INTERPOL Communications for Political Motives and Other Unlawful Purposes*, U.S. Dep't of Just. & Dep't of State (Apr. 2023), https://www.state.gov/wp-content/uploads/2023/06/April-2023-Transnational-Repression-Accountability-and-Prevention-Act-Report.pdf; *Biannual Assessment of INTERPOL Member Country Abuse of INTERPOL Red Notices, Diffusions, and Other INTERPOL Communications for Political Motives and Other Unlawful Purposes*, U.S. Dep't of Just. & Dep't of State (Aug. 2022), https://www.state.gov/wp-content/uploads/2022/09/2022-Transnational-Repression-Accountability-and-Prevention-Act-Report.pdf.

45. Grossman, *supra* note 1. For an assessment of the reports deriving from the NDAA, *see* Grossman, *supra* note 24.

46. *Frequently Asked Questions*, INTERPOL Wash., U.S. Dep't of Just., www.justice.gov/interpol-washington/frequently-asked-questions.

47. *Justice Manual, Organization and Functions Manual*, U.S. Dep't of Just., § 3, ¶ A, https://www.justice.gov/jm/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests. Numerous courts acknowledge that while a Red Notice is not a formal international arrest warrant, "it is reliable when offered 'for what it purports to be—namely a request by a member country . . . to provisionally

arrest a specifically identified person … pending extradition based on a valid national arrest warrant for a crime that is not political in nature.'" *See, e.g.*, *Liv. v. Garland*, 859 F. App'x 584, 586-97 (2d Cir. 2021) (*citing Matter of W-E-R-B-*, 27 I&N Dec. 795, 798-99 (BIA 2020) (declining to find that the Board violated the Respondent's due process rights in relying on a Red Notice to deny adjustment of status as a matter of discretion, where the Agency did not rely solely on the Notice and where the Agency made an adverse credibility finding)); *Radiowala v. Att'y Gen.*, 930 F.3d 577, 580 n.1 (3d Cir. 2019) ("Congress has not seen fit to prescribe that an INTERPOL Red Notice alone is an independent basis for removal …"); *Hernandez Lara v. Barr*, 962 F.3d 45, 48 n.3 (1st Cir. 2020) (concluding that "a Red Notice alone is not sufficient basis to arrest the subject of the notice").

48. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81. § 6503(d).

49. *See* Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law*, U.S. Dep't of Homeland Sec., 2 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf ("It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders. The exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition."); Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, U.S. Dep't of Homeland Sec. (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf ("Prosecutorial discretion is an indispensable feature of any functioning legal system.").

50. INA § 212(a)(6)(A)(i) (finding noncitizens who were not admitted or paroled into the United States inadmissible); INA § 237(a) (listing grounds for deportation); *see e.g.*, *Barahona v. Garland*, 993 F.3d 1024, 1026 (8th Cir. 2021) (describing how respondent was taken into custody after DHS discovered the Red Notice for him, charging him under INA § 212); *Matter of W-E-R-B-*, 27 I&N Dec. 795, 796 (BIA 2020) (noting respondent was charged under INA § 208 and INA § 212).

51. *ICE Updates Guidance for use of INTERPOL Red Notices During Law Enforcement Actions*, U.S. Imm. & Customs. Enf't (Sept. 29, 2023), https://www.ice.gov/news/releases/ice-updates-guidance-use-interpol-red-notices-during-law-enforcement-actions.

52. *ICE Directive 15006.1: INTERPOL Red Notices and Wanted Persons Diffusions*, U.S. Imm. & Customs. Enf't (Aug. 15 2023), https://www.ice.gov/doclib/foia/dro_policy_memos/15006.1_InterpolRedNoticesWpDiffusions.pdf.

53. *Id.* § 5.1(6).

54. *Id.* § 5.1(7).

55. *Id.* §§ 5.2-5.3.

56. Bradley, *supra* note 32.

57. *See How to Submit a Request*, INTERPOL, https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/How-to-submit-a-request.

58. Ted R. Bromund, *ICE Wrongly Continues to Use Interpol Red Notices for Targeting*, Forbes (Dec. 19, 2018), www.forbes.com/sites/tedbromund/2018/12/19/ice-wrongly-continues-to-use-interpol-red-notices-for-targeting/#19a5d3ff175e.

59. For a fuller assessment of the Directive, see Meg Hobbins & Ted R. Bromund, *ICE Issues Updated Guidance on Use of INTERPOL Red Notices*, Int'l Enf't L.

Rep., Vol. 39 (Nov. 30, 2023). A full copy of the article can be found at https://www.grossmanyoung.com/wp-content/uploads/sites/577/2020/06/IELR-Vol-39-Iss-11-MH-and-Bromund.pdf.

60. INA § 208(b)(2)(A)(ii) (asylum); INA § 241(b)(3)(B)(iii) (withholding).

61. *See, e.g.*, *Gonzalez-Castillo v. Garland*, 47 F.4th 971, 977 (9th Cir. 2022); *Barahona*, 993 F.3d at 1027; *Guo Qi Wang v. Holder*, 583, F.3d 86, 90 (2d Cir. 2009); *Whyte v. Garland*, 2023 WL 3092977, *3 (4th Cir. 2023); 8 C.F.R. 1240.8(d) (explaining that the burden shifts to the respondent if record evidence triggers a mandatory bar to relief, including the serious nonpolitical crime bar in asylum and withholding proceedings).

62. 8 U.S.C. § 1158(b)(2)(A)(iii).

63. *See* 8 F.4th 1161, 1186 (9th Cir. 2021).

64. *Id.* at 1168.

65. *See id.* at 1167; *Whyte*, 2023 WL 3092977, *4; *Barahona*, 993 F.3d at 1028.

66. *Gonzalez Castillo*, 47 F.4th at 975.

67. *Id.* at 978.

68. *Id.* at 976.

69. For a fuller analysis of *Matter of W-E-R-B-*, see Sandra Grossman & Meg Hobbins, *Matter of W-E-R-B- and the Reliability of Red Notices: How to Successfully Advocate for Victims of Persecution*, Bender's Immigr. Bull. (June 15, 2020). A full copy of the article can be found at https://www.grossmanyoung.com/wp-content/uploads/sites/577/2020/06/Grossman-and-Hobbins-Matter-of-WERB-25-BIB-875_june-15_2020.pdf.

70. *See, e.g.*, *Villalobos Sura*, 8 F.4th at 1167; *Whyte*, 2023 WL 3092977, *4; *Barahona*, 993 F.3d at 1028.

71. Grossman Young & Hammond tracks evolving case law regarding treatment of INTERPOL Red Notices in the United States on its website, and attorneys should consult this page for the latest cases. *INTERPOL Resources*, Grossman Young & Hammond, https://www.grossmanyoung.com/interpol-resources/. A 2022 report from the Congressional Research Service also contains a useful summary. *An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two)*, Cong. Rsch. Serv. (Sept. 7, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10816.

72. *Red Notices*, *supra* note 13; *see also Malam v. Adducci*, 2020 WL 5891394, *2 (S.D. Mich. 2020) (slip copy) (granting a bail application for a habeas litigation applicant, even where an IJ denied bond due in large part to the existence of a Red Notice, holding that same notice "diminishes any right of flight by al-Araj, and he will not be a flight risk" nor a danger to the community).

73. *Kharis v Sessions*, 2018 WL 5809432, *8, 10 (N.D. Cal. 2018).

74. *Torres Murillo v Barr*, 2019 WL 8723753, *3 (N.D. Cal. 2019).

75. *Malam v. Adducci*, 2020 WL 5891394, *2 (S.D. Mich. 2020) (slip copy).

76. RPD, *supra* note 2, art. 128(1).

77. Repository of Practice, *supra* note 4.

78. *See, e.g.*, Dree K. Collopy, AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure, 94 (9th ed. 2023) ("Whether the harm inflicted or feared is prosecution for an unlawful act, rather than persecution on account of one of the protected grounds in [sic] a common issue in asylum claims. This is because individuals fleeing legitimate criminal prosecution are generally not able to meet the definition of "refugee" as defined in domestic and international law."); *supra* note 3.

79. RPD, *supra* note 2, art. 83(1)(a)(i).

80. *Commission for the Control of INTERPOL's Files (CCF)*, INTERPOL, https://www.interpol.int/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF.

81. *Id.*

82. Activity Report of the Commission for the Control of INTERPOL's Files for 2021, INTERPOL, Appendix ¶ 16, https://www.interpol.int/en/content/download/18398/file/CCF%20Annual%20Report%20for%202021-ENG.pdf?inLanguage=eng-GB.

83. *See* Statute of the Commission for the Control of INTERPOL's Files, II.E/RCIA/GA/2016, art. 40(2).

84. *CCF Sessions and Decisions*, INTERPOL, https://www.interpol.int/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/CCF-sessions-and-decisions. For the flexibility of the CCF's deadline, *see* Statute of the Commission for the Control of INTERPOL's Files, INTERPOL, II.E/RCIA/GA/2016, art. 40(3), https://www.interpol.int/content/download/5695/file/Statute%20of%20the%20CCF-EN.pdf?inLanguage=eng-GB.

85. *Procedural Guidelines for Applicants to the Commission*, The Comm'n for the Control of INTERPOL's Files, § 2.1.5, https://www.interpol.int/content/download/13876/file/Guidelines%20for%20Applicants%20on%20procedure%20-%20update%202023%20-%20EN.pdf (last updated Apr. 28, 2023).

86. Statute of the Commission for the Control of INTERPOL's Files, *supra* note 80.

87. *How to Submit a Request*, *supra* note 57.

88. Decision excerpts are available at *CCF Sessions and Decisions*, *supra* note 81.

89. *How to Submit a Request*, *supra* note 57.

90. *Procedural Guidelines for Applicants to the Commission*, *supra* note 82, § 2.1.3(a).

91. *Id.* § 2.1.6; Statute of the Commission for the Control of INTERPOL's Files, *supra* note 80, art. 40(3).

92. *Procedural Guidelines for Applicants to the Commission*, *supra* note 82, § 2.1.6.

93. *See, e.g.*, *Gonzales v. Garland*, 29 F.4th 993-94, 989 (2022) (denying Petitioner's motion to remand based on deletion of Red Notice where INTERPOL deleted Red Notice due to violations of INTERPOL's RPD versus because the case was "of a predominantly political character"). *But see Jessica Barahona-Martinez*, A209 217 604, 2-3 (BIA Apr. 12, 2024) (unpub.) (reopening Respondent's removal proceedings because of INTERPOL's deletion of the Red Notice for her and finding Respondent to have demonstrated by a preponderance of the evidence that she did not commit a serious nonpolitical crime).

94. *See* CCF Dec. No. 2019-07, ¶ 43 (finding the offense listed in the Red Notice to constitute a mere "petty crime"); CCF Dec. No. 2018-04, ¶ 42 ("[T]here is no indication that the alleged criminal activity was aimed at facilitating a serious crime or is suspecting of being connected to organized crime . . . ."); CCF Dec. No. 2017-14, ¶ 34 ("[I]t also appears to the Commission that the key element concerning the Applicants possible intent and influence to issue the fictitious grants was not provided in this case, and could amount to a private contractual dispute.").

95. *See* Nicole Acevedo, *A Mother Got Ensnared by an Interpol List. She Ended Up in Immigration Detention*, NBC News (Feb. 22, 2024), https://www.nbcnews.com/news/latino/interpol-mothers-immigration-case-detention-edited-rcna137904; *Jessica Barahona-Martinez*, A209 217 604, 2-3 (BIA Apr. 12, 2024) (unpub.) (reopening removal proceedings based on INTERPOL's deletion of the Red Notice).

From a Skeleton Key to a Deadbolt

Why the American Passport Is No Longer the Most Powerful in the World, and Why the Door Needs to Open

Kristin Hommel*

Abstract: The Visa Waiver Program, once among the most power visa reciprocity programs in the world, has slowed its expansion to a snail's pace, while other, more forward-thinking countries like Singapore and the United Arab Emirates diligently treat with other states to improve their political, economic, and social status in the world. As a result, those countries have reaped uncounted benefits, solidifying their political alliances and securing related benefits for their citizens. This research examines the hindrances to the Visa Waiver Program's expansion and proposes several solutions.

Introduction

The Visa Waiver Program (VWP) operates as the U.S.' siren song, inviting dozens of designated nations to enter its borders and inundate the economy with tourism and business travelers, facilitating more than 23 million visits per year,[1] generating nearly $190 billion in economic output, and supporting nearly 1 million jobs in the United States in the pre-pandemic period.[2] Yet, this exact policy generates some of the most polarizing debates within the American government. The VWP—and immigration in general—arguably challenges other top contenders such as healthcare or gun control as the most deeply divisive issue in the United States.

The Immigration Question is one that is deeply embedded in our nation's history, and to this day remains a question mark in the U.S.' foreign policy regime. The debate has consistently centered around three central issues: national security, protection of American jobs, and humanitarian considerations.[3] While often misplaced, fears over the first concern continue to plague the Visa Waiver Program conversation, often resulting in stalled negotiations and lack of bipartisan cooperation.[4]

In 1986, Congress established the VWP, a reciprocity agreement permitting citizens of accepted countries to travel to the United States without a visa for up to 90 days, for either business or tourism purposes.[5] Currently, there are 41 countries that have been designated to the VWP, Israel being the most recent addition.[6] The benefits of designation into the VWP flow bidirectionally,

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 227–252.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

both from and to the designated state: the citizens of the state are empowered to travel to the United States without applying for a visa through the onerous process currently in place for non-designated states, while the designated state simultaneously benefits from unfettered tourism and business activities flowing from Americans traveling visa-free through its borders.

Despite the manifold benefits that the United States accrues from the VWP, since 2001—and especially under the Trump administration—the United States has increasingly adopted a policy of nationalism to concentrate more on domestic affairs, citing concerns for national security, economic job security for U.S. citizens, and potential drains on public health benefits and reserves.[7]

Increasingly, other countries have grown frustrated with the reticence of the United States in extending reciprocal visa-free travel to their own citizens and have begun implementing their own visa programs for U.S. citizens in response; most recently, for example, Brazil reinstituted visa requirements for U.S. citizens just four years after granting visa exemptions to the United States.[8] Some countries, such as the United Arab Emirates and Singapore, err toward reciprocal open-door policies with friendly nations to enhance their citizens' access to global opportunities while also facilitating open trade and commerce. The Henley Passport Index (HPI)—one of the authoritative data indexes analyzing global relations policies—has rated the United States as eighth in their 2024 global passport ranking.[9] The HPI will often lump multiple countries into the same rank if they have visa-free access to the same number of countries; therefore, while the United States is currently ranked eighth in the world on the HPI, there are 27 countries that possess stronger passports than Americans, claiming higher rankings on the HPI.[10]

It is becoming apparent, however, that the closed-door policies of the United States are weakening both the American passport and friendly diplomatic relations with other states in an increasingly interconnected world. It is almost certain that, without adjusting its position, the United States will be left behind as the rest of the world increasingly approaches a symbiotic, cosmopolitan existence.

It would nevertheless be foolish to argue that the United States should extend the VWP indiscriminately to all countries and would certainly be politically unsound in practice. Rather, the future of the VWP rests on the ability of the United States to delicately balance international/domestic security concerns with the benefits of tapping into an increasingly globalized economy. It is undisputed that xenophobia, ethnocentrism, and nationalism—often couched in discourse concerning "national security"[11]—have formed the bedrock of immigration law in the United States, stemming even into today's immigration policy discourse. For meaningful change to be made, any potential amendments to the VWP must necessarily address those concerns while also rejecting the ethnocentrism upon which the immigration system is based.

Balancing National Security and Passport Power

Traditional National Security Concerns Associated with Immigration and the Visa Waiver Program

Since the terrorist attacks across the United States on September 11, 2001, the VWP has become one of the sharpest arrows in the U.S.' quiver in its fight against global terrorism. Since its 2007 amendment, the VWP requires open information and intelligence flow between the United States and participating countries.[12] Indeed, the United States has been extremely successful in creating an exclusive club out of the VWP: many nations clamor for admission into the program to reap the economic benefits of participation, and so the United States leverages membership in the VWP to further its intelligence-gathering goals to fight terrorism.[13]

Yet, although there is no evidence that the VWP has been used by U.S. enemies to gain easy entry into the United States, the program remains a target for projecting national security concerns. The 2015 terrorist attacks in Paris prompted President Barack Obama to modify the Electronic System for Travel Authorization (ESTA) to determine an individual's travel history to countries considered to be a "terrorist safe haven."[14] The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 prohibited people who had either traveled to a country supporting acts of international terrorism, or who had dual citizenship with such countries.[15] Notably, the debate of the time centered around the fact that six of the Paris terrorists were French and Belgian nationals, with representatives voicing concerns that any of these terrorists might have gained streamlined, visa-free access to the United States as nationals of countries accepted into the VWP.[16]

Eight years later, the VWP continues to fend off attacks to impose greater requirements on designated countries—for example, in February 2023, the "Securing the Visa Waiver Program Act of 2023" was introduced by Florida Senator Marco Rubio, imposing requirements that, if not followed by participating countries, would result in their termination from the program.[17]

Thus, national security concerns deeply influence the development and growth of the VWP, forming the most formidable portion of the bulwark stemming the designation of additional countries into the program.

The Henley Passport Index as a Marker of Economic and Global Power

Passports have historically been understood as representing the "arm" of a nation, extending over a citizen who travels throughout the world. As

an extension of a nation's protection, the acceptance or denial of a passport, particularly for purposes of visa-free travel, implicates the acceptance or condemnation of the nation's sovereignty, politics, security, or form of governance. Henley & Partners, a global law firm recognizing the importance of the passport in a foreign relations context, has made a name for itself with the development and publication of the Henley Passport Index.[18] The HPI relies on exclusive data provided by the International Air Transport Authority and ensures its accuracy through constant and rigorous monitoring of global current events concerning visas as well as an ongoing, year-round research process cross-checking passports against all global travel destinations.[19]

Long-term studies have shown that expansion of the VWP to more countries provides substantial economic benefits to both the VWP-designated country and the United States: for example, after South Korea gained admission to the program in 2008, the spending by South Korean visitors nearly doubled from $2.7 billion to $4.2 billion within four years and supported 36,200 U.S. jobs in 2012.[20] In 2014, experts theorized that extending the VWP to just six more countries—namely, Brazil, Hong Kong, Turkey, Poland,[21] Israel,[22] and South Africa—would generate an additional $7.66 billion and create at least 50,000 jobs within five years.[23]

The fact remains, however, that the United States has fallen behind in its global economic power as a major destination for tourists and business travelers: in 2000, America's market share of international tourism stood at around 17 percent,[24] but that number dropped to 5.1 percent in 2022.[25] This drop-off has cost the United States billions in lost tourism revenue and spending by international visitors, and hundreds of thousands of jobs; for example, in 2022, the travel surplus dropped to $3 billion (a drastic decline from $86 billion in 2015), with 2022 international travel spending directly supporting at least 700,000 jobs, only a 55 percent recovery from 2019 levels.[26] These drops correlate directly to the United States' slipping in the HPI rankings—while the United States held the top spot on the HPI in 2014, it sank to seventh place in 2023 and to eighth place in 2024.[27] VWP travelers injected $231 million per day into local economies across the nation in 2014,[28] but slow expansion of the VWP, combined with a nation still struggling to attract visitors in the wake of the pandemic, record-slow B-1/2 tourist visa processing times,[29] and perceived low friendliness of the nation will inevitably hurt America's tourism industry. The United States continues to struggle with attracting the same volume of international visitors that it enjoyed before the pandemic, stagnating at 80 percent of pre-pandemic arrivals. Further, for some countries, the B-1 (temporary business) or B-2 (tourist) visa application processes can take two years or longer, depending on the city or post in which the U.S. embassy or consulate is located.[30]

Failure of the United States to make serious changes to increase reciprocity and establish continued friendly relationships with other countries is proving to weaken the American passport and strain foreign relationships with countries

frustrated with the lack of reciprocity. For example, in 2023, Brazil announced that, beginning on April 10, 2025, Americans will be unable to enter Brazil without a visa, terminating visa-free access for U.S. citizens.[31] Brazil's explicit hope for originally waiving visa requirements in 2019 for the United States,[32] Canada, Japan, and Australia was to boost tourism between the countries and to encourage those countries to reciprocate with a similar visa waiver for Brazilian citizens.[33] However, only Japan has negotiated a reciprocal visa waiver, and frustrated, Brazil President Luiz Inácio Lula da Silva made the decision to reintroduce the visa requirements and "reaffirm its foreign policy."[34]

Clearly, then, the HPI marks the successes and failures of foreign policy-making. The evidence is crystal clear that expansion of the VWP would result in increased tourism to the United States, with studies indicating that tourism from countries like Brazil, South Africa, Hong Kong, and Turkey could potentially double upon their designation.[35] Openness and reciprocity are the hallmarks of tourism and commerce, but without them, potential tourists from such wealthy, developed nations are deterred by the strict visa policies and perceived unfriendliness of the United States toward tourists.[36]

Immigration and Visa Reciprocity Programs Internationally: A Comparison Study

Singapore

Singapore presents a fascinating case study: while it is a relatively young state—gaining independence only 57 years ago—it now tops the HPI for the strongest passport in the world,[37] actively and aggressively seeking to establish positive, reciprocal relationships with many countries across the globe. Perhaps crucial to the country's success are its policies on immigration, viewing immigration as a powerful foreign policy tool[38] as well as an economic measure to expand and uplift its economy.[39] Further, the country rejects the heavy dose of skepticism that the United States rests on when forming its immigration policies.

Much like the United States, Singapore is built and peopled almost entirely of immigrants, with its first-ever recorded population statistic reporting that its population of 10,683 people in 1924 was "entirely as a result of migrational surplus."[40] Similarly to the United States, Singapore's favor toward lenient immigration policies has waxed and waned, correlative to periods of economic strength or weakness.[41] Even during the post-independence period, when Singapore struggled with an immigrant unemployment crisis, the Singaporean government rejected the type of isolationism that characterized U.S. foreign policy when navigating similar straits, with the Deputy Prime Minister noting, "I do not believe that Singapore by just becoming independent can remain isolated from our neighbour [sic], much less from the rest of the world."[42]

Singapore, recognizing its economy's reliance on foreign investment, tourism, and talent, has demonstrated through its proactive foreign relations approach its desire to drive tourists and business investors into its borders, negotiating 25 reciprocal visa-free travel treaties with other states in the past decade;[43] by comparison, the United States has only negotiated three since 2014.[44]

One of the ways that Singapore ensures security at its borders, both for its visa-free travelers and all other citizens for whom a visa is required, is the implementation of automated immigration lanes under its Automated Clearance Initiative (ACI).[45] Through the ACI, the Immigration and Checkpoints Authority (ICA—Singapore's immigration department) collects biometric data from all travelers, including iris, facial, and fingerprint images, which are then cross-referenced with the identification information associated with the traveler's passport to verify their identity.[46] Further, such biometric information is collected even when passing through traditional, manual border control lanes. Singapore expects that 95 percent of all arrivals to Changi Airport—the largest airport in Singapore and one of the largest in Asia—will be cleared through the automated lanes.[47]

The use of automated biometric immigration lanes serves many purposes, in addition to ensuring security at the border; it makes the customs and immigration process much simpler and enjoyable for tourists, takes up less physical space, requires less manpower, and allows the ICA to take those border control officers and upskill them to crucial immigration tasks, such as profiling, assessment, and investigative work.[48] In essence, the system creates a secure and tourist-friendly clearance experience without sacrificing national security.

The implementation of such automated checkpoint lanes demonstrates Singapore's commitment to attracting travelers and ensuring a streamlined experience for tourists and visitors.[49] Meanwhile, travelers to the United States are sent the message that they are unwelcome here through extraordinarily long visa processing times, strenuous and sometimes invasive border control check-in procedures, and a seeming apathy to the plight of foreign travelers.[50]

United Arab Emirates

Perhaps unsurprisingly, the United Arab Emirates is the only Middle Eastern country to crack the top 10 in the HPI global ranking, sitting prettily in the number 9 spot (notably, only one ranking below the United States).[51] Most striking is how significant the UAE jumped up the rankings, and how aggressively the country has been negotiating reciprocal open-border policies with other nations. As mentioned previously, the United States designated only three additional countries to the VWP in the past decade, and Singapore had negotiated an impressive 25; the UAE, however, has negotiated 106 new visa-free countries for its citizens in the past decade *alone*.[52] Even Israel is ranked lower than the UAE.[53]

This impressive foreign relations drive is part of the Ministry of Foreign Affairs' (MoFA) UAE Passport Force Initiative.[54] This initiative declared the UAE's intention to make the UAE passport one of the five most powerful passports in the world by 2021.[55] By some metrics, the UAE has already succeeded in this initiative.[56] Further, a MoFA goal, titled UAE 2021 Vision, expressed the UAE's goal of becoming one of the best countries in the world.[57] The UAE Minister of Foreign Affairs underscored the country's emphasis on what he calls "positive diplomacy," and the goal of keeping "the UAE as a confident and engaged force on the global stage."[58] The country is particularly concerned with improving the strength of its passport and its global image,[59] and has implemented a number of measures in addition to the UAE Passport Force Initiative to not only improve the global reputation and accessibility for its citizens but also to make the UAE an appealing and welcoming tourist destination.[60]

In particular, the MoFA has utilized Dubai's growing global status and desirability for tourism, business, and residency to negotiate reciprocal visa waivers for UAE nationals.[61] Significantly, even the United Kingdom has bowed in its strict immigration policies to offer visa-free travel to the UAE in exchange for reciprocal benefits.[62]

With its population peopled almost entirely of immigrants, the UAE shares a similar history to both Singapore and the United States when it comes to immigrant populations.[63] Just as in Singapore and the United States, the UAE has a troubled and sometimes discriminatory history toward its immigrants, historically restricting the earning capacity, benefits eligibility, and civil rights of migrant workers,[64] especially those low-income migrant workers who fall low on the totem pole.[65] One particularly prevalent issue that remains relevant today is the arbitrary arrest and deportation of migrant workers, even in cases where the migrants expressed fears of violence in their home countries and a desire to seek asylum in the UAE.[66]

Nevertheless, the UAE government, recognizing the country's heavy reliance on migrant labor to "sustain economic growth and high standard of living,"[67] has historically enacted various policies and reforms in an attempt to draw in migrant workers and tourists, such as the Kafala Sponsorship System in 1971.[68] Reform is a delicate subject within the UAE, however, as policymakers must navigate the classic concerns surrounding immigration, often chief among them sufficient employment and economic opportunities for UAE citizens.[69] Further, it is not uncommon for low-income migrant workers especially to be taken advantage of by employers, prompting the UAE to enact various measures in an attempt to protect migrant workers, such as outlawing employer confiscation of employee passports and wage protection.[70]

Among such reforms has been the UAE's drive to become a tourism and investment destination, prompting the UAE's Passport Force Initiative and its goal to rise to the top of the passport indices. Whereas even a decade ago, the UAE's status as a Middle Eastern country prompted concerns about its safety and protection of tourists, today it is known for its welcoming and liberal visa

policies, beneficial taxation policies that appeal especially to investors, and its growing status as a global crypto hub.[71] Crucial to healing anti-immigrant tensions in the UAE has been the Emiratization campaign of 2012, which was an initiative aiming to place more UAE citizens into "stable and fulfilling" career opportunities, with some large private-sector companies even partnering with government programs to this end.[72]

As with the United States, the UAE is at constant threat from militant groups in Yemen, Libya, Syria, Iraq, Somalia, and Afghanistan because of its cooperation with Western countries in the U.S.-led War on Terrorism.[73] The threat is so ongoing that the U.S. State Department has issued a Level 2 Travel Advisory warning that "[m]ilitant groups operating in Yemen have stated an intent to attack neighboring countries, including the UAE, using missiles and drones."[74] Even so, the UAE has grown its visa reciprocity program more than any other country (including Singapore), despite this heightened risk of attack by terrorists and militant groups.[75]

Given the clear national security concerns, it is impressive just how much the UAE has managed to expand its visa reciprocity program while still actively engaging in the War on Terror and maintaining tight control over its borders and national security. This may be due in part to the country's continuous revamping of its border control technologies; for example, the UAE was the first to utilize revolutionary iris-recognition technologies for all arriving passengers as early as 2004, which caught at least 9,500 individuals traveling under forged documents or identities by "comparing the iris biometric of all arriving passengers against a 'negative watch list'" with an extremely low false-match rate.[76]

Further, it was the first country to develop and deploy a multi-biometric entry/exit system in 2011 to collect face, iris, and fingerprint biometrics at its borders, calling this comprehensive multi-biometrics border management system its "e-Border."[77] Then, in 2016, the UAE began implementing a new "iris at a distance" technology that enabled border control to collect iris and facial scans from as far as one meter using an "on-the-move," non-intrusive system; again, this system was the first in the world to "integrate new, on-the-fly technology for both iris and fingerprint."[78] In 2020, the UAE continued to develop innovative border control systems, the most impressive of which is Morphowave technology, which is used by the UAE at the border to "capture four fingerprints in less than one second with just a wave of the hand."[79] This same technology rollout also included the design and implementation of ABC e-Gates, which, similarly to Singapore's automated lanes, allow passengers to pass through border control effortlessly without the need for human contact.[80] In order to use the ABC e-Gates, travelers must check in at semi-automated eCounters to allow for "multi-biometric capture, identity verification, background check, and eligibility check [for the system]."[81]

Finally, in furthering efforts to secure its borders, the UAE's airline, Emirates Airlines, rolled out iris scanners in 2021 authenticating passengers'

identities prior to boarding; the system "links the passenger's biometrics data with their boarding pass and other flight information, allowing them to pass through security [and] immigration … without any supporting documentation."[82] Emirates then passes on the data to the UAE to link each passenger's biometrics to its facial recognition database.[83]

The UAE's efforts in developing efficient and effective border control technologies has reaped dividends for its citizens: for instance, the UAE was recently offered visa-free travel to the United Kingdom, a significant achievement considering the UK's tight border control policies and its historical reticence in allowing any non-Western country into its borders without a visa.[84] Further, the UAE's proactive approach to developing positive diplomatic relations made it the first Arab nation to obtain a Schengen visa waiver, allowing UAE citizens access to all 25 Schengen countries.[85]

Important to note is that the UAE's border control measures indicate that the country does not believe that creating a hospitable and welcoming border-crossing experience requires sacrificing national security and border security.[86] By trailblazing new and innovative methods of biometric border control, the UAE has demonstrated how a state might implement a noninvasive border security system that respects cultural norms, streamlines the border crossing process, and safeguards the identities and welfare of its citizens by apprehending identity thieves and forgers with a great degree of accuracy.[87]

The Impact of Reciprocity (or Lack Thereof) on Foreign Political Relations and Global Power

In the United States, the stated purpose of visa reciprocity (as represented in the Foreign Affairs Manual) is to "obtain visa regimes consistent with U.S. laws, regulations, and national interests and *to encourage international travel that benefits U.S. travelers and business*."[88] However, the process of actually negotiating the designation of a country to the U.S.' visa reciprocity schedule has proven to be a herculean task, as the Department of State advises that even if a country meets the requirements of the VWP (which seem to be fairly subjective and highly discretionary), this is not a guarantee that the country will be designated to the VWP.[89] As it currently stands, the United States has only designated 44 countries to the VWP,[90] but has visa-free access to 187.[91]

Countries that have negotiated and established strong visa reciprocity programs, on the other hand, have benefitted from what the creator of the Henley Passport Index likes to call "passport power," which he says is more than just the measure of the number of countries an individual can travel to without getting a visa; rather, a strong passport with a high rate of visa freedom is strongly correlated to greater economic, business, and investment freedom.[92] For example, Singapore, with the strongest passport on the HPI, also has claimed the highest ranking in nearly all economic indicators.[93]

Henley & Partners' research has shown that countries with open economies (i.e., who enact broad visa-free or adjacent programs) enjoy greater opportunities for their citizens while also enhancing growth opportunities and encouraging foreign investment and international trade.[94] Countries with more restrictive economies and borders, on the other hand, lose access to the global economic market and experience less growth across industries that benefit hugely from innovation and diversity of perspective.[95]

United Arab Emirates and Its Realpolitik

As mentioned previously, the UAE added over 100 countries to its visa reciprocity program over the past decade. Disregarding the 2020 anomaly resulting in a 35.92 percent decline in tourism from the previous year, implementation of the UAE Passport Initiative, combined with its multi-biometric e-Borders, resulted in a staggering 317.35 percent increase in expenditures made by international inbound visitors to the UAE from 2011 to 2019.[96] Before the pandemic, tourism revenue constituted an impressive 9.2 percent of the UAE's gross national product, up from just 0.96 percent in 1995.[97] Further, the tourism sector was on the rebound in 2021, with the rate of spending nearly reaching pre-pandemic levels, incredibly so even with less than half the number of tourists coming to the country.[98] Perhaps more impressive is the fact that Dubai, one of the largest cities in the UAE, ranked second among the world's most popular cities.[99]

With its proactive foreign policy measures, the UAE possesses an "uncontested" measure of soft power in the Gulf Cooperation Council.[100] Further, by pursuing and nurturing positive relationships with over 100 countries over the past decade, the UAE has (arguably successfully) positioned itself as a non-aligned international mediator "with contacts to everyone and shunning no one," with the goal of serving a more pivotal role on the global stage both diplomatically and economically.[101] In many ways, the UAE is seeking to become the "Switzerland of the Middle East," a neutral peacemaker facilitating relations and negotiations between decades-long mortal enemies. To this end, UAE representatives to the UN Security Council have carefully noted the ways in which global powers behave and have begun to reject U.S. attempts to impose its Western narratives on global political situations and powers, such as the Russian war on Ukraine, and China in general,[102] in order to eke out its own realpolitik,[103] and establish a strong position on the world stage. Indeed, the UAE has been quietly easing tensions with many of its former enemies (such as Iran, Turkey, Israel, and Qatar) to create profitable economic thoroughfares across the globe.[104]

The UAE's open border policymaking over the past decade has paved the way for positive diplomatic relations with a rapidly growing number of countries, which in turn grants the country access to the economic benefits of

open borders with wealthy countries. This, in turn, has allowed the country to stabilize itself in a world of ever-fluctuating global relations.

Singapore's Rising Soft Power as the Trade Hub and Security Ally of the East

Since the country's creation in the twentieth century, Singapore's leadership has strongly fixated on securing its place in the global economy by facilitating trade deals, diplomatically managing regional tiffs, and supporting "international efforts to reduce trade barriers."[105] With international trade making up the majority of its gross domestic product (GDP), Singapore has utilized its passport power to criticize and address global conflicts that negatively impact global trade; for example, in 2018, Singapore criticized the lack of trust between China and the United States, as well as the unilateral tariffs the United States imposed on China, calling attention to the trade war's impact beyond the two countries.[106] Singapore sought to bring attention not only to the trade war's impact on Singapore, with its heavy dependence on foreign trade but also on the world as a whole.[107]

Singapore's strong trade relationships across the globe have also allowed the country to strengthen its military power, develop positive diplomatic ties with competing world powers, create jobs domestically, and fortify state infrastructure and security. For example, the United States has collaborated heavily with Singapore militarily, conducting naval exercises together, housing operations in Singaporean naval facilities, and allowing Singapore to field highly advanced U.S. fighter jets.[108] The U.S. State Department has also lauded Singapore as one of its "strongest bilateral partners in Southeast Asia," speaking to the country's crucial cooperation on national and global security issues,[109] despite the fact that Singapore is not a U.S. treaty ally and maintains strong trade relations with China.[110]

Similarly to the UAE, Singapore has carefully toed the line during times of global conflict in order to maintain positive relations with its trade allies, often refraining from commenting on matters implicating China in particular.[111] Instead, Singapore has maintained a neutral stance on such matters and engages in activities seeking to strengthen close diplomatic ties with its neighbors, including through its membership in both the Association of Southeast Asian Nations and the Commonwealth (due to its status as a former British colony), benefitting from the Five Power Defense Arrangements to collaborate on military affairs.[112]

Impressively, Singapore has one of the strongest defense networks in the world by creating strong security partnerships without entering into any formal alliances, as measured by the Lowy Institute Asia Power Index (LIAPI).[113] The LIAPI credits Singapore's position to its strong network and its "externally focused" approach to political and foreign affairs.[114] Ranking third on LIAPI's

2023 "Power Gap" score,[115] Singapore, because it is "highly networked and externally focused," exerts more influence and power on the world stage than its small size or resources would suggest because of its "ability and willingness to work collaboratively with other countries to pursue collective interests."[116]

By the measure of several different indices (including the HPI and the LIAPI), Singapore owes its current powerful position to its willingness to facilitate trade, military, security, and tourism relationships with other countries. By so engaging in fruitful negotiations with other states, Singapore has secured for its citizens access to global opportunities, a strong domestic economy, and safety and security despite its avoidance of formal treaty agreements. Singapore thus serves as the perfect case study for the type of economic and military strength a state can achieve by facilitating positive, reciprocal agreements with other countries.

Possible Options for Expansion of the Visa Waiver Program

With national security concerns and fears of increased competition with foreign workers leading the resistance to expansions of the VWP, any proposed or contemplated options must necessarily address these issues. The pervasiveness of global and domestic terrorism combined with an economy struggling to regain its pre-pandemic strength has made both the public and lawmakers wary of initiatives that encourage migration or immigration to the United States. This article will now explore an avenue of effectuating expansions to the VWP that are cognizant of and thoroughly mitigate concerns of economic and national security.

Reinstitute a Waiver of the Nonimmigrant Visa Refusal Rate Requirement and Implement a Biometric Exit System

One of the strongest hurdles a non-designated country faces when seeking designation into the VWP is the nonimmigrant visa refusal rate requirement. Essentially, this requirement mandates that a country is not eligible for designation into the VWP unless the country has an annual nonimmigrant visitor visa refusal rate of less than 3 percent,[117] meaning that at least 97 percent of applications for entry into the United States from that country are approved in a given year.[118]

In 2008, Congress passed Section 711 of the Implementing the 9/11 Commission Recommendations Act of 2007,[119] which allowed the Secretary of the Department of Homeland Security (DHS)—with consultation to the Secretary of the Department of State—to waive this nonimmigrant refusal rate requirement for admission to the VWP as long as the DHS Secretary certified the implementation of an air-exit system with a high rate of accuracy in confirming the airport departure of foreign nationals.[120] Specifically, Section 711 reflected Congress's desire to "modernize and strengthen the

visa waiver program" by enabling countries who otherwise satisfy the VWP security requirements to receive designation into the program, particularly with the intent of benefitting those foreign countries that are "partners in the war on terrorism."[121] The idea was that the risks and threats that resulted in the 3 percent or more nonimmigrant visa rejections would be alleviated if a system were in place that could bridge the security gap.

This waiver was only available for about one year before it was suspended on July 1, 2009, due to the existing air exit system's failure to verify the departure of the requisite 97 percent of foreign nationals who leave through U.S. airports.[122] Until the air exit system is updated to "verify the departure of not less than 97 percent of foreign nationals who exit through [U.S.] airports,"[123] and which can "match an alien's biometric information with relevant watch lists and manifest information,"[124] the waiver is unavailable for countries that might otherwise qualify for designation into the VWP.

Interestingly, U.S. Customs and Border Protection (CBP) announced in 2019 its plan to implement biometric air exit systems in at least 20 airports by 2022, with the goal of capturing 97 percent of all commercial air travelers traveling internationally.[125] As of 2024, facial biometrics systems are in place at 48 airports and 38 seaports, as well as all pedestrian lanes at the northern and southwest border ports.[126] CBP further confirmed that this technology has processed over 300 million travelers and prevented more than 1,800 individuals from entering the country using fraudulent information.[127] According to an independent analysis of the facial recognition technology conducted by the National Institute of Standards and Technology, false positive differentials were undetectable, and the match rate is upward of 97 percent.[128]

Despite the widespread deployment of the biometric technology, no movement has been made toward reinstating the nonimmigrant visa refusal waiver, even though CBP had estimated that instituting the technology in 20 of the 48 airport locations would capture 97 percent of commercial air travelers, as required previously by the suspended waiver.[129] By such estimates, it is likely that the biometric exit technology now present in 48 airports should more than satisfy the prerequisites needed to reinstitute the waiver. However, the statute mandates that, once the standard has been met, that the Secretary of Homeland Security must certify to Congress "*on the date*" that such an air exit system is in place—the absence of such certification indicates that some hindrance nevertheless exists that prevents the reinstitution of the nonimmigrant visa refusal waiver.[130]

In light of such technological advances, it is curious that, evidently, the exit systems currently in place are as yet unable to "match an alien's biometric information with relevant watch lists and manifest information,"[131] such that the DHS Secretary can certify the reinstitution of the waiver. If it truly is the case that the current systems continue to fall short, then the United States would do well to follow Singapore and UAE's lead and implement a multi-factor biometric entry-exit system that interfaces with and compares information with similar systems utilized by its allies. Such technologies have

proven successful in those countries in mitigating national security concerns, despite the manifold threats each respective country faces.

Congress has increasingly recognized that the nonimmigrant visitor visa refusal rate requirement is undoubtedly one of the greatest hindrances to aspiring VWP countries,[132] primarily because it is a discretionary measurement that is entirely based on U.S. policy, and not based on the behavior of the noncitizens seeking entry into the country. Some advocates have argued that a far more effective metric would be a country's overstay rate, which would enumerate the percentage of noncitizens from the aspiring country that have overstayed the terms of their entry.[133]

However, it would be fairly difficult to implement the overstay rate because DHS would struggle to accurately calculate overstay rates, since the current system accounts only for persons who are accounted for on passenger manifests, and not those who enter by air/sea but exit through a land port at the northern or southern borders.[134] In order for the overstay rate to take the place of the nonimmigrant visitor visa refusal rate, DHS would still need to implement an effective entry-exit multi-factor biometric system at all points of entry, at possibly a greater rate of efficiency and accuracy than required for the nonimmigrant visa refusal rate. While DHS and CBP have been engaging in efforts to expand the collection of biometric data from land travelers, the data is still insufficient to justify usage of an overstay rate with a sufficient degree of accuracy.[135] Regardless of whether Congress replaces the nonimmigrant visa refusal rate requirement with an overstay rate requirement, the institution of biometric systems at all airports and points of entry into the United States would undoubtedly facilitate the expansion of the VWP to more countries, satisfy national and border security concerns, and ultimately increase the U.S.' global economic and political position.

The investment in such technology, while admittedly steep, would empower the United States to reinstitute the nonimmigrant refusal rate waiver, designate more countries to the VWP, and infuse the economy with tourism and business investments. The long-term benefits of the preliminary investment would pay extensive dividends both in gross GDP and in forging stronger global partnerships.

Mitigate or Eliminate the "No Contest" Waiver of the Visa Waiver Program

As demonstrated throughout this article, the United States has a vested interest in modernizing and strengthening the VWP, not only to bolster the economy with increased tourism and business investment revenue but also to forge strong political relationships with other countries and secure greater global opportunities for U.S. citizens. However, even if the United States implements the type of advanced biometric screening systems used by the UAE and Singapore and reinstitutes the nonimmigrant visa refusal rate waiver,

interested countries may yet balk at accepting VWP designation due to the (grossly unfair at best, unconstitutional at worst) caveat that VWP entrants are stripped of their rights if they exercise their visa-free entry privileges.

The VWP's language explicitly provides that a foreign national waives his or her right to challenge removal, which contains within it the right to a trial or to contest any action for removal except on the basis of asylum.[136] Any foreign national who does not agree to the waiver is not permitted to enter under the VWP.[137] The effect of the waiver is that a foreign national does not even have access to a trial or hearing before an immigration judge unless the foreign national is an asylum applicant, and further, the foreign national is often unable to file an affirmative asylum application with the DHS; further, the waiver bars any right to a hearing to victims of domestic violence under the Violence Against Women Act, or to victims of crimes in the United States who might otherwise qualify for a U Visa.[138]

While the purpose of the waiver is fairly reasonable,[139] the effect is that the waiver imposes what some call an unconstitutional bar to constitutional protections.[140] It is undisputed that Congress has plenary power over immigration law, and that noncitizens seeking admission into the United States have no due process rights beyond what Congress determines.[141] The Supreme Court has held that foreign nationals only acquire due process rights after they have gained admission into the United States[142]—it seems somewhat nonsensical that entrance under the VWP requires a waiver of such rights before the foreign national has ever had the opportunity to fully understand the rights they are waiving.[143] Particularly when immigration law itself is a labyrinth of complex forms and difficult-to-understand pathways, there is certainly a question of an intelligent waiver of those rights.

While the Supreme Court has ruled that, because noncitizens do not have the same rights as citizens, Congress can pass laws that would be "unacceptable if applied to citizens,"[144] Congress should be cognizant that forcing designated countries to engage in such an extreme waiver of their citizens' rights, albeit constitutionally, might nevertheless cause interested countries to take pause in accepting an offer of designation into the program. To alleviate such concerns, Congress might consider modifying this strict waiver to opt for a more discretionary measure that limits the scope of the waiver, such as by allowing noncitizens to challenge their removal for reasons other than asylum (such as extreme hardship to a lawful permanent resident or U.S. citizen qualifying relative, for instance, which is already permitted for noncitizens applying for withholding of removal).[145]

Alternatively, Congress could limit the scope of the waiver only to those VWP entrants who either entered the United States in bad faith (i.e., with an intent to remain or entering under a false identity), who committed a misdemeanor or crime in the United States, who committed crimes outside of the United States, or who was discovered to be engaging in foreign intelligence or espionage activities. For those who entered under the VWP and then wished to adjust status for any other reason, Congress could extend a grace period

to those noncitizens to challenge removal, seek representation, and argue their case before an immigration judge. As it currently stands, if a noncitizen overstays their visa under the VWP, they waive and lose their right to contest removal, even through an adjustment of status that would have been valid if applied for before overstaying.[146]

Any modification to the no-contest waiver, however, must comport with the purpose of the VWP to facilitate travel while still maintaining national security.[147] While a complex issue, maintaining the purpose of the VWP while also extending enough grace to entice more countries to engage in visa reciprocity with the United States is by no means an insurmountable task. Such a modification would doubtless remedy the negative perceptions other countries currently harbor of U.S. immigration policies and would facilitate enhanced global relations and beneficial treaty engagements as a result.

Conclusion

The global reputation of the United States has been on a steady decline in recent years, with policies that are increasingly perceived as unfriendly, unwelcoming, and undeserving of international patronage. Countries such as Singapore and the United Arab Emirates, meanwhile, have become economic and political forces both regionally and globally by adopting laws and policies that serve to entice and welcome positive foreign relations and facilitate treaty-making for mutual benefit. National security concerns have been mitigated in these countries through the adoption of multi-factor biometric entry-exit systems. Although facial recognition systems have been implemented in a select number of airports in the United States, they do not capture nearly the same depth and breadth of data as analogous systems in Singapore and the UAE. By implementing multi-factor biometric systems in the majority of U.S. international airports, the United States might not only achieve the required certification from the Secretary of Homeland Security needed to reinstitute the nonimmigrant visa refusal rate waiver, but also alleviate Congress's concerns about terrorists and international criminals abusing the VWP to gain entry into the United States.

By reinstituting the nonimmigrant visa refusal rate waiver, implementing multi-factor biometric entry-exit systems, and/or modifying the scope of the no-contest waiver, the United States would benefit both economically and geopolitically. The benefits of adopting such measures have been demonstrated through the case studies of Singapore and the UAE, which have been able to take advantage of increased economic commerce, strengthened security cooperation, and reinforced inter-state relations. The United States should follow Singapore and the UAE's lead in expanding its visa reciprocity program as not only a tool against the War on Terrorism, but also as an olive branch breaching the divide of nations.

Notes

* Kristin Hommel (khommel@psu.edu) is a Third Year Law Student at Penn State Law.

1. *See* Amy Pope, *Immigration and U.S. National Security: The State of Play Since 9/11*, Migration Policy Institute, at 23 (Apr. 2020), https://www.migrationpolicy.org/sites/default/files/publications/Immigration-NatlSecurity_Final.pdf.

2. *See generally The Visa Waiver Program Makes America More Secure*, U.S. Travel Association (2018), https://www.ustravel.org/system/files/media_root/document/VWP-Qualified-Countries_final.pdf; *see also* Ruth E. Wasem, *The US Visa Waiver Program Facilitating Travel and Enhancing Security*, The Royal Institute of International Affairs (Oct. 2017), https://www.chathamhouse.org/sites/default/files/publications/research/2017-10-25-us-visa-waiver-wasem.pdf; *see also* Abigail Kolker & Michaela Platzer, *Adding Countries to the Visa Waiver Program: Effects on National Security and Tourism*, Congressional Research Service, 12 (Apr. 1, 2020), https://www.everycrsreport.com/files/20200401_R46300_ba7d75b06ca2e23a0a39706b36e5dee8bce5a6cf.pdf ("In FY2018, 22.8 million nonimmigrant visitors . . . arrived through the VWP . . . [and] generated an estimated $190 billion in economic activity and supported close to 1 million jobs in the United States in 2017.").

3. Claire Klobucista, Amelia Cheatham & Diana Roy, *The U.S. Immigration Debate*, Council on Foreign Relations (June 6, 2023), https://www.cfr.org/backgrounder/us-immigration-debate-0 ("Immigration has been a touchstone of the U.S. political debate for decades, as policymakers have weighed economic, security, and humanitarian concerns.").

4. *See, e.g.*, Jobs Originated Through Launching Travel (JOLT) Act, H.R. 2187, 116th Cong. (2012) (introduced in 2019 and declared "dead" in 2020); *see also, e.g.*, Allied Nations Travel Modernization Act of 2019, H.R. 2946, 116th Cong. (introduced in 2019 but died without a vote); *see also* Kolker *supra* note 2.

5. 8 U.S.C. § 1187; *see also U.S. Visa Waiver Program*, Department of Homeland Security, https://www.dhs.gov/visa-waiver-program#_ftn1.

6. Designation of Israel for the Visa Waiver Program, 88 Fed. Reg. 188,67063-65 (Sept. 29, 2023) (to be codified at 8 C.F.R. pt. 217).

7. *See* Robert Schertzer & Eric Taylor Woods, *The New Nationalism in America and Beyond*, 88-112 (2022), https://academic.oup.com/book/41499/chapter/352912101?login=true.

8. Eléonore Hughes, *Brazil Reintroduces Visa Requirement for US Tourists, Others*, AP News (Mar. 15, 2023, 11:58 AM), https://apnews.com/article/brazil-us-tourism-visas-lula-bolsonaro-e206025994b64fa5695484b99a807971 (The foreign ministry of Brazil asserting that "Brazil does not grant unilateral exemption from visiting visas, *without reciprocity*, to other countries." (internal quotations omitted) (emphasis added)).

9. *The Henley Passport Index: Global Passport Ranking*, Henley & Partners (2024), https://www.henleyglobal.com/passport-index/ranking.

10. *Id.*

11. *See* 1717: 4 George 1 c.11: The Transportation Act; *see also The Burlingame-Seward Treaty, 1868*, U.S. Dep't of State Off. of the Historian, http://history.state.gov/milestones/1866-1898/Burlingame-SewardTreaty; *see also* The Page Act, 18 Stat. 477, 43 Cong. Ch. 141 (prohibiting the employment of "unfree" laborers and the immigration of prostitutes, but which functionally served to restrict immigration of

Chinese citizens because Chinese individuals were perceived to be immoral, and their labor perceived to be coerced); *see also* The Chinese Exclusion Act, 22 Stat. 58, 47 Cong. Ch. 126 (1882) (repealed 1943) (imposing a blanket ban on Chinese immigrants; this act's effect was extended by Congress until 1943); *see also Edye v. Robertson*, 112 U.S. 580; *see also United States Immigration and Refugee Law, 1921-1980*, U.S. Holocaust Memorial Museum, https://encyclopedia.ushmm.org/content/en/article/united-states-immigration-and-refugee-law-1921-1980; *see also* Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone AWOL*, 15 Cardozo Int'l Comp. Pol'y & Ethics L. 371, 378 (2007) (discussing how even House Representatives at the time opposed the bills because their primary purpose was to restrict "the alien stream" due to the "necessity for purifying and keeping pure the blood of America"); *see also* Daniel Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing that They Were Nazi Spies*, Smithsonian Mag. (Nov. 18, 2015), https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/ (noting that suspicion and paranoia were "not only directed at ethnic Germans" but also all foreigners, including Jews).

12. *See* 8 U.S.C. § 1187(c)(2)(F) ("The government of the country enters into an agreement with the United States to share information regarding whether citizens and nationals of that country traveling to the United States represent a threat to the security or welfare of the United States or its citizens, and fully implements such agreement"); *see generally* 8 U.S.C. § 1187(c) (providing that a country desiring to participate in the VWP must provide sufficient information to the United States that the Secretary of Homeland Security is satisfied that the country's law enforcement are effective; that mechanisms are in place to safeguard the sanctity of the country's passports; that its citizens do not frequently violate U.S. immigration laws; that the country provides information about citizens traveling into the United States, as necessary, if such citizen might pose a threat to U.S. national security or welfare; and that the country has screening measures in place for noncitizens of that country); *see also* 8 U.S.C. § 1187(c)(12)(C) (providing the designation of a country may be suspended if it determined that the country "presents a high risk to the national security of the United States").

13. *See* Wasem, *supra* note 2, at 2.

14. *Id.*

15. *See generally* Act Dec. 18, 2015, P. L. 114-113, Div O, Title II, 129 Stat. 2988.

16. *See Terrorism and the Visa Waiver Program: Joint Hearing Before the Subcomm. on Nat'l Sec. & the Subcomm. on Health Care, Benefits, & Admin. Rules of the Comm. on Oversight & Gov't Reform*, 114th Con. 114-45 (2015) (statement of Hon. Ron Desantis, Chairman, S. Comm. on Nat'l Sec.) (arguing that the Visa Waiver Program was vulnerable to infiltration by nationals of VWP countries, and that "many Islamic jihadists in places such as Syria are actually Western passport holders who could then come to this country with those Western passports after fighting jihad in Syria and Iraq."); *contra* Alison Siskin, *Visa Waiver Program*, Congressional Research Service, RL32221 (2015), https://tracfed.syr.edu/tracker/dynadata/2010_12/RL32221.pdf (arguing that, although the VWP opts for a *biographic* rather than *biometric* security screenings, the VWP nevertheless strengthens national security because of its requirements that participating countries engage in active information sharing with the United States, establish and maintain strict standards for travel documents and reporting measures for lost or stolen passports.).

17. *See* Securing the Visa Waiver Program Act of 2023, S. 493, 118th Cong. § 2 (2023) (requiring designated countries to exchange biometric and biographic data of citizens who had been or *were suspected* of engaging in criminal activity, and providing for the termination of VWP designation of any country that failed to comply with such information-sharing requirements.).

18. *The Henley Passport Index*, Henley & Partners, https://www.henleyglobal.com/passport-index.

19. *The Henley Passport Index: Methodology*, Henley & Partners, https://www.henleyglobal.com/passport-index/about.

20. *See* Wasem *supra* note 2, at 5.

21. *See Acting Secretary McAleenan Announces Designation of Poland into the Visa Waiver Program*, U.S. Department of Homeland Security (Nov. 6, 2019) (designating Poland into the Visa Waiver Program in 2019).

22. *See DHS Announces Start of Applications for Visa-Free Travel to U.S. for Eligible Israeli Citizens and Nationals*, U.S. Department of Homeland Security (Oct. 19, 2023), https://www.dhs.gov/news/2023/10/19/dhs-announces-start-applications-visa-free-travel-us-eligible-israeli-citizens-and (designating Israel into the Visa Waiver Program in 2023).

23. *See* Stephen Bronars, *Passport to Future Economic Growth: How Expanding the Visa Waiver Program Will Strengthen the U.S. Economy and Create American Tourism Jobs*, Partnership for a New American Economy, 2 (Dec. 2014), http://research.newamericaneconomy.org/wp-content/uploads/2014/12/PNAE_US_Visa_Waiver.pdf.

24. *Id.* at 3.

25. *Fast Facts: United States Travel and Tourism Industry*, International Trade Administration (2022), https://www.trade.gov/sites/default/files/2023-10/US-Travel-and-Tourism-Fast-Facts.pdf.

26. *See* Bronars *supra* note 23, at 3: *see also The State of the Travel Industry*, U.S. Travel Association, at 4 (Apr. 2023), https://www.ustravel.org/sites/default/files/2023-04/answersheet_2023_final.pdf.

27. Greg Lindsay, *Prepare for Descent: The Relative Decline of the US Passport*, Henley & Partners (2023), https://www.henleyglobal.com/publications/global-mobility-report/2023-q3/global-insights/prepare-for-descent-relative-decline-us-passport; *see also The Henley Passport Index supra* note 18.

28. Annie Pforzheimer, *US Visa Waiver Program Growth Will Remain Glacial*, Henley & Partners (2023), https://www.henleyglobal.com/publications/global-mobility-report/2023-q3/global-insights/us-visa-waiver-program-growth-will-remain-glacial.

29. *See Global Visa Wait Times*, U.S. Department of State—Bureau of Consular Affairs (last updated Oct. 19, 2023), https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/global-visa-wait-times.html.

30. *See* Lindsay *supra* note 27 ("estimated wait times for B1 and B2 visa interviews remain well over a year in Dubai (391 days), Mumbai (570 days), Lagos (411 days), and Mexico City (751 days)."); *see also* Annie Pforzheimer, *Increased Movement into the US Despite Continued Visa Delays*, Henley & Partners (Jan. 2024), https://www.henleyglobal.com/publications/global-mobility-report/2024-january/annie-pforzheimer ("[W]ait times remain over two years in Mexico and one year in India."); *see also Global Visa Wait Times*, U.S. Dep't of State (last updated Aug. 23, 2024), https://travel.state.gov/content/

travel/en/us-visas/visa-information-resources/global-visa-wait-times.html (noting that current wait times for B1/B2 interviews range anywhere from 1 day to 850 days).

31. Charlie Hobbs, *Brazil Reinstates Visa Requirements for Travelers From the US, Canada, and Australia*, Conde Nast Traveler (Sept. 12, 2023), https://www.cntraveler.com/story/brazil-visa-requirement; *see also Brazil International Travel Information*, U.S. Department of State, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Brazil.html ("Effective midnight on April 10, 2025, a visa will be required for U.S. citizens to travel to Brazil.").

32. *See Message for U.S. Citizens: Visa Waiver for U.S. Citizens*, U.S. Embassy & Consulates in Brazil, Department of Homeland Security (2019), https://br.usembassy.gov/message-for-u-s-citizens-visa-waiver-for-u-s-citizens-2/.

33. *See* Hobbs *supra* note 31; *see also* Hughes supra note 8.

34. *See* Hobbs supra note 31.

35. Stephen Bronars, *Passport to Future Economic Growth: How Expanding the Visa Waiver Program Will Strengthen the U.S. Economy and Create American Tourism Jobs*, Partnership for a New American Economy, 8 (Dec. 2014), http://research.newamericaneconomy.org/wp-content/uploads/2014/12/PNAE_US_Visa_Waiver.pdf.

36. *See id.* at 4.

37. Dalia Wong, *The Evolution of Singapore's Immigration Policies*, Fragomen, Del Rey, Bernsen & Loewy, LLP: Insights (Oct. 20, 2022), https://www.fragomen.com/insights/the-evolution-of-singapores-immigration-policies.html.

38. Jessica Pan & Walter Theseira, *Immigration in Singapore*, World Dev. Rep. 2023: Migrants, Refugees, & Societies, 2 (Apr. 2023), https://thedocs.worldbank.org/en/doc/080a4bc64cc8a9eb8a2a0e98d97a260a-0050062023/original/WDR-Immigration-in-Singapore-FORMATTED.pdf.

39. *See* Wong *supra* note 37.

40. *See* Pan & Theseira *supra* note 38, at 2.

41. *See id.* at 3.

42. *See id.*

43. Lee Y. Shan, *Singapore's Passport Is Now the Most Powerful in the World. Here's How Other Countries Ranked*, CNBC Travel (July 18, 2023, 10:15 PM, updated July 19, 2023, 11:08 AM), https://www.cnbc.com/2023/07/19/henley-passport-index-2023-singapore-germany-italy-spain-rank-top-.html.

44. *See* Pforzheimer *supra* note 28 (Note: since this article's publication, Israel was designated to the Visa Waiver Program, bringing the total up to three).

45. *More Foreign Visitors Able to Clear Immigration Through Automated Lanes*, Immigration & Checkpoints Authority (Apr. 25, 2023), https://www.ica.gov.sg/news-and-publications/newsroom/media-release/more-foreign-visitors-able-to-clear-immigration-through-automated-lanes#ftn1.

46. Yun Xuan Poon, *How Singapore Will Use Biometrics for Immigration*, Gov Insider, Asia (Oct. 21, 2019), https://govinsider.asia/intl-en/article/how-singapore-will-use-biometrics-for-immigration.

47. *See More Foreign Visitors Able to Clear Immigration Through Automated Lanes supra* note 45.

48. *See More Foreign Visitors Able to Clear Immigration Through Automated Lanes supra* note 45.

49. *See* Poon *supra* note 46.

50. *See* Pforzheimer *supra* note 28.

51. *See The Henley Passport Index supra* note 18.

52. Monica Pitrelli, *Not All Passports Are Created Equal. Here's a List of the Most Powerful Ones*, CNBC Travel (Mar. 2, 2023, 4:50 AM), https://www.cnbc.com/2023/03/02/which-countries-have-the-best-passports-see-the-ranking-from-1-to-199.html.

53. *See The Henley Passport Index supra* note 18 (Ranking Israel's passport as the eighteenth most powerful in the world).

54. *See One of the Best Passports in the World*, Telecommunications & Digital Gov. Regulatory Authority, U.A.E. (Jul. 28, 2023), https://u.ae/en/information-and-services/passports-and-traveling/the-emirati-passport/one-of-the-best-passports-in-the-world-.

55. *UAE Passport Strength*, Ministry of Foreign Affairs, U.A.E. (last updated Nov. 14, 2023), https://www.mofa.gov.ae/en/the-UAE/UAE-the-achiever/Passport-Strength.

56. The Henley Passport Index is the original and authoritative ranking of global passports; however, other passport indexes evaluate additional criteria that may cause some shifts in the rankings of some countries. The Passport Index (www.passportindex.org) and the Nomad Passport Index (www.nomadcapitalist.com), both of which ranks the UAE as the number 1 passport in the world, includes different data in their respective analyses to rank passport strength; the Passport index factors global perception of the country in its analysis to settle tiebreakers, while the Nomad Passport Index assesses five factors, including taxation of citizens and ability to hold dual citizenship. Notably, the Nomad Passport Index relies on data from the Henley Index (as well as other sources) in its ranking system. As opposed to the Henley Passport Index, the Passport Index does not allow multiple countries to share the same spot. *See UAE Passport Strength*, U.A.E. Ministry of Foreign Affairs, https://u.ae/en/information-and-services/passports-and-traveling/the-emirati-passport/one-of-the-best-passports-in-the-world-; *see also About: Passport Index*, Passport Index, https://www.passportindex.org/about.php; *see also Nomad Passport Index 2023*, Nomad Capitalist, 6-7 (2023), https://nomadcapitalist.com/nomad-passport-index/.

57. *See* Emadeddin Khalil, *UAE Passport Regains Its Top Place Globally with Visa Waiver for 26 Schengen Countries*, Gulf Today (Aug. 1, 2023), https://www.gulftoday.ae/news/2023/08/01/uae-passport-regains-its-top-place-globally-with-visa-waiver-for-26-schengen-countries.

58. *UAE Passport Strength supra* note 56.

59. *See UAE Passport Strength supra* note 56 ("[The UAE administration has adopted] a far-sighted policy and prudent leadership that is working hard to build the country's image abroad and make it a place of prudence, moderation, coexistence and peace.").

60. *See UAE's Multi-Biometric Entry/Exit Program Enabling Seamless Border Crossing While Ensuring Maximum Security*, Idemia (Dec. 19, 2019) ("[The Government is] targeting economic diversification and promot[ion of] the UAE as a center for global trade and tourism").

61. *See* Saahil Menon, *UAE Passport Power Is a Critical Tool on the Road to Success*, Arabian Gulf Bus. Insight (Feb. 13, 2023).

62. Andy Sambidge, *UK's Offer of Visa-Free Travel to UAE Hailed as "Historic" Step*, Arabian Gulf Bus. Insight (June 28, 2022).

63. Rishika Pardikar, *How the United Arab Emirates, A Country of 90 Percent Immigrants, Handles Immigration*, Sojourners (Mar. 20, 2018), https://sojo.net/articles/how-united-arab-emirates-country-90-percent-immigrants-handles-immigration.

64. *See id.*; *see also* Janae Cummings, Note: *The Price Is Rights: Getting the United Arab Emirates Up to International Speed in the Labor Law Department*, 44 Brooklyn J. Int'l L. 410, 414-15.

65. *Id.* ("Low-wage laborers … are therefore systematically ostracized from the upward mobility afforded to the ruling Emirati elite and the more educated expatriate population.").

66. Dirk Waem, *United Arab Emirates: Events of 2021*, Human Rights Watch (Oct. 24, 2021), https://www.hrw.org/world-report/2022/country-chapters/united-arab-emirates.

67. Froilan T. Malit Jr. & Ali Al Youha, *Labor Migration in the United Arab Emirates: Challenges and Responses*, Migration Policy Inst. (Sept. 18, 2013), https://www.migrationpolicy.org/article/labor-migration-united-arab-emirates-challenges-and-responses.

68. *Id.* ("[The Kafala Sponsorship System] allows nationals, expatriates, and companies to hire migrant workers.").

69. *Id.*

70. *Id.*

71. *See* Pitrelli *supra* note 52.

72. *Id.*

73. *See* Rajiv Chandrasekaran, *In the UAE, the United States has a Quiet, Potent Ally Nicknamed "Little Sparta*," Wash. Post (Nov. 9, 2014, 6:20 PM), https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67_story.html ("Emirati fighters have conducted more missions against the Islamic State since the air war began than any other member of the multinational coalition.").

74. *United Arab Emirates Travel Advisory*, U.S. Department of State, Bureau of Consular Affairs, Travel Advisories (July 13, 2023), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/united-arab-emirates-travel-advisory.html.

75. *Compare* Pitrelli *supra* note 52, *with* Shan *supra* note 43.

76. John Daugman OBE & Imad Malhas, *Iris Recognition Border-Crossing System in the UAE*, 2 Int'l Airport Rev. (2004), https://www.cl.cam.ac.uk/~jgd1000/UAEdeployment.pdf.

77. *See UAE's Multi-Biometric Entry/Exit Program Enabling Seamless Border Crossing While Ensuring Maximum Security*, Idemia (Dec. 19, 2019), https://www.idemia.com/uaes-multi-biometric-entryexit-program-enabling-seamless-border-crossing-while-ensuring-maximum-security?export=pdf&post_id=4194&force.

78. Justin Lee, *UAE Airports Implementing Morpho's Iris at a Distance Technology*, Biometrics Research Group (Apr. 25, 2016, 4:41 PM), https://www.biometricupdate.com/201604/uae-airports-implementing-morphos-iris-at-a-distance-technology.

79. *UAE's Multi-Biometric Entry/Exit Programme Enables Seamless Crossings*, Int'l Airport Rev. (Jan. 31, 2020), https://www.internationalairportreview.com/whitepaper/111101/uaes-multi-biometric-entry-exit-programme-enables-seamless-crossings/.

80. *Id.*

81. *Id.*

82. Mack DeGeurin, *Airport Biometric Data Collection Takes Off Despite Public Concerns*, Insider Intel. (Mar. 12, 2021), https://www.insiderintelligence.com/content/airport-biometric-data-collection-takes-off-despite-public-concerns.

83. *Id.*

84. *See Visa and Immigration Information*, Visit Britain, https://www.visitbritain.com/en/plan-your-trip/visa-and-immigration-information ("nationals of … the UAE require an ETA to travel to the UK."); *see also* Andy Sambidge, *UK's Offer of Visa-Free Travel to UAE Hailed as "Historic" Step*, Arabian Gulf Bus. Insight (June 28, 2022), https://www.agbi.com/articles/uk-uae-visa-free-travel-tourism-trade-britain/ ("Today's historic achievement … indicates the high regard in which the UAE is held in the UK and internationally.").

85. *See One of the Best Passports in the World supra* note 54.

86. *See UAE's Multi-Biometric Entry/Exit Programme Enables Seamless Crossings supra* note 60.

87. *See id.*

88. Nonimmigrant Visa Reciprocity, 9 FAM 403.8 (2022) (emphasis added).

89. *Visa Waiver Program*, Bureau of Consular Affairs., U.S. Department of State, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html (Establishing the minimal but unexhaustive requirements as heightened information sharing with the U.S. of law enforcement and security-related data, the issuance of e-passports, having a low visitor visa refusal rate, effective and timely reporting of stolen/lost passports, and maintaining "high counterterrorism, law enforcement, border control, and document security standards.").

90. *Id.*

91. *See The Henley Passport Index supra* note 9.

92. *It's the Age of Asia When It Comes to Passport Power*, Henley & Partners (Oct. 1, 2019), https://www.henleyglobal.com/newsroom/press-releases/its-the-age-of-asia-when-it-comes-to-passport-power.

93. *Id.*

94. *See* Juerg Steffen, *The Predictors of Passport Power*, Henley & Partners, https://www.henleyglobal.com/publications/global-mobility-report/2023-q3/global-insights/predicators-passport-power.

95. *See* Tina Savic, *How Open Borders Enhance Economic Opportunities for Countries*, Henley & Partners ("California's Silicon Valley … is an example of how relatively open borders can also be beneficial for fostering innovation and creativity.").

96. *UAE Tourism Statistics 1995-2023*, Macrotrends, https://www.macrotrends.net/countries/ARE/uae/tourism-statistics (Utilizing data from the World Bank to demonstrate an increase from $9,204,000,000 in 2011 to $38,413,300,781.25 in 2019).

97. *Tourism in the United Arab Emirates*, World Data, https://www.worlddata.info/asia/arab-emirates/tourism.php (marking a gradual but drastic increase on the country's dependence on tourism).

98. *Id.* (Denoting 25.28 million tourists spending $38.41 billion in 2019, a drop of 8.08 million tourists spending $24.62 billion in 2020, and bouncing back 11.48 million tourists spending $34.44 billion in 2021).

99. *Id.*

100. *See It's the Age of Asia When It Comes to Passport Power supra* note 92.

101. *See* Joshua Krasna, *Big Changes in United Arab Emirates Foreign Policy*, Foreign Policy Research Institute (Apr. 18, 2023), https://www.fpri.org/article/2023/04/big-changes-in-united-arab-emirates-foreign-policy/.

102. *Id.* ("[T]he UAE, like Saudi Arabia, has been irritated, but unmoved, by US attempts to enlist or coerce them into supporting the nation's policies on Russia and

China. They reject Western narratives regarding these powers and are similarly making efforts to insulate these relationships with them from that with the Americans.").

103. *Realpolitik*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/realpolitik ("[P]olitics based on practical and material factors rather than theoretical or ethical objectives").

104. *See* Krasna *supra* note 101 ("The Emiratis reportedly do not see any contradiction between their improved relations with Israel and with Iran, which are largely driven by a similar logic: reducing tension while opening economic possibilities.").

105. Ankit Panda, *Singapore: A Small Asian Heavyweight*, Council on Foreign Relations (last updated Apr. 16, 2020), https://www.cfr.org/backgrounder/singapore-small-asian-heavyweight.

106. *Id.*

107. *Id.*

108. *Id.*

109. *U.S. Security Cooperation with Singapore*, U.S. Department of State, Bureau of Political-Military Affairs (Apr. 12, 2023), https://www.state.gov/u-s-security-cooperation-with-singapore/.

110. *U.S.-Singapore Relations*, Congressional Research Service (Sept. 28, 2023), https://sgp.fas.org/crs/row/IF10228.pdf.

111. *See Panda supra* note 105.

112. *Id.*

113. *Singapore*, Lowy Institute Asia Power Index (2023), https://power.lowyinstitute.org/countries/singapore/ (ranking Singapore at fourth place for economic relationships and top five for defense networks).

114. Susannah Patton, Jack Sato & Hervé Lemahieu, 2023 *Key Findings Report*, Lowy Institute Asia Power Index, 29 (2023), https://power.lowyinstitute.org/downloads/lowy-institute-2023-asia-power-index-key-findings-report.pdf.

115. *Id.* (defining a Power Gap score as the "difference between its overall power and what its power would be expected to be given its available resources) (note: 2024 ranking data is not yet available).

116. *Id.*

117. *See* 9 U.S.C. § 1187 (c)(2)(A); *see also U.S. Visa Waiver Program*, U.S. Department of Homeland Security (Oct. 4, 2023), https://www.dhs.gov/visa-waiver-program.

118. *See Follow-up Report on the Visa Waiver Program*, U.S. Department of Justice, at n.5 (Dec. 2001), https://oig.justice.gov/reports/INS/e0202/intro.htm.

119. P.L. 110-53 (H.R. 1), signed into law on August 3, 2007.

120. *See* Siskin *supra* note 16, at 3 (outlining the requirements for eligibility for the waiver to the nonimmigrant refusal rate, including primarily the existence of an air exit system "that can verify the departure of not less than 97% of foreign nations that exit through U.S. airports.").

121. *See* National Transit Systems Security Act of 2007, 110 P.L. 53, 121 Stat. 266, 338.

122. *See* Abigail Kolker, *Visa Waiver Program*, Congressional Research Service, 8 (Oct. 12, 2021), https://sgp.fas.org/crs/homesec/RL32221.pdf.

123. National Transit Systems Security Act of 2007, 110 P.L. 53, 121 Stat. 266, 339

124. *See* Kolker *supra* note 122.

125. *Id.*

126. *See Say Hello to the New Face of Efficiency, Security and Safety*, U.S. Customs & Border Protection (Jan. 4, 2024), https://www.cbp.gov/travel/biometrics.

127. *Id.*

128. *U.S. Customs and Border Protection (CBP) Use of Biometrics*, U.S. Customs & Border Protection (Jun. 21, 2023), https://help.cbp.gov/s/article/Article1704?language=en_US.

129. *See* Kolker *supra* note 122 ("[CBP's] goal is to deploy biometric exit at 20 airports by 2022, which would capture 97% of all commercial air travelers departing the United States.").

130. National Transit Systems Security Act of 2007, 110 P.L. 53, 121 Stat. 266, 339.

131. *See* Kolker *supra* note 122.

132. See Kolker & Platzer *supra* note 2, at 3.

133. *Id.*

134. *Id.*; *see also Department of Homeland Security: Review of the Fiscal Year 2017 Entry/Exit Overstay Rep.*, GAO-19-298R Overstay Rep., U.S. Gov. Accountability Off., 3 (Feb. 22, 2019), https://www.gao.gov/products/GAO-19-298R (stating there are "existing limitations in collecting departure data in the land environment").

135. *Id.*; *see also Review of the Fiscal Year 2022 Entry/Exit Overstay Rep.*, U.S. Customs & Border Protection, 4 (June 21, 2023), https://www.dhs.gov/sites/default/files/2023-07/23_0707_FY22_FY23_CBP_Integrated_Entry_Exit_Overstay_Report.pdf ("There are major physical, logistical, and operational obstacles to collecting an individual's biographic and biometric data upon departure. Due to the existing limitations in collecting departure data in the land environment, this report provides limited departure and overstay information for land POEs.").

136. 8 USCS § 1187(b).

137. *Id.*

138. *See Asylum Applications Under the Visa Waiver Program*, MyAttorneyUSA.com, at https://myattorneyusa.com/asylum-applications-under-the-visa-waiver-program ("normally, an alien is permitted to apply for asylum with the DHS and have his or her application considered there. However, aliens covered by 8 C.F.R. 217.4(a) and (b) may only have their asylum applications considered by an immigration judge"); *see also Construction and Application of Visa Waiver Program*, 58 A.L.R. Fed. 2d 291, 2.

139. *Id.* (quoting Handa v. Clark, 401 F.3d 1129, 1135 (9th Cir. 2005)) ("The VWP's 'linchpin … is the waiver, which assures that a person who comes here with a VWP visa will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays.'").

140. *See generally*, *Article: A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595.

141. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 ("[T]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.").

142. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (affirming that a noncitizen seeking entry and admission into the country has no rights conferred upon him, and no protections under the Constitution).

143. *See Ferry v. Gonzales*, 457 F.3d 1117, 1129 ("By signing the VWP waiver, Ferry received all of the due process to which he was entitled.").

144. *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

145. *Chapter 5—Extreme Hardship Considerations and Factors*, U.S. Citizenship & Immigration Service Policy Manual (Jan. 24, 2024), https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-5.

146. *See Bayo v. Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010), ("After the visitor overstays her 90-day visit, however, the effect of the VWP waiver kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status.").

147. *See generally* 8 U.S.C.S. § 1187.

Understanding EU Immigration Law

The Schengen Visa Scheme and the Latest EU Immigration Updates

Yuu Shibata*

Abstract: This article aims to provide immigration practitioners with a comprehensive understanding of the technical and legal aspects of EU immigration law, with a particular focus on the Schengen visa scheme and related border management systems. The core of the article examines the Schengen visa scheme in detail, covering key aspects such as the types of Schengen visas, general requirements, application process, visa refusal, and appeal rights. It also explores the Schengen visa waiver system for certain non-EU countries that are not required to obtain a short-term visa to enter the Schengen Area. The article also discusses the digitalization of EU border control systems, including the Visa Information System, Schengen Information System, Entry/Exit System, and European Travel Information and Authorisation System. Finally, it highlights the latest updates to the Schengen Borders Code, which was revised in 2024 to strengthen border security.

Introduction

EU immigration law is a complex topic with several competing factors. On one hand, non-EU nationals are considered an integral part of the labor market within the European Union. During the past few years, the European Union has been increasingly competing, either at a global level[1] or among EU member states[2] themselves, to attract highly qualified workers, particularly in sectors facing skill shortages. Conversely, they may also be perceived as posing cultural, political, and social risks, leading member states to seek to exercise their prerogatives of national sovereignty and security. EU immigration law covers various aspects of immigration, such as border control (crossing of the external border, securing free movement to all persons), the use of technology and digitalization of the control systems, the humanitarian aspect of immigration, that is, refugee, asylum, and subsidiary protection.

Besides, when speaking about visas within the scope of EU immigration law, it should be clarified and specified the laws governing the long-term visas and short-term visas issued by the member states.

This article will not cover the political, economic, humanitarian, etc., aspects of immigration. Instead, it will focus on the technical aspects of EU

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 253–270.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

visa policy (i.e., the Schengen visa scheme, visa waivers) and the new rules introduced in the revised Schengen Borders Code.

The aim of this article is to offer a practical overview for immigration practitioners about EU immigration law and policy, with a special focus on the Schengen visa scheme.

Background Information

The abolition of border controls within the Schengen area is one of the main achievements of the European Union.

Article 26(2) of the TFEU[3] establishes that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

Also, article 77(1) of the TFEU indicates that "the Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring on the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders."

The historical background of the EU's competence on immigration is complex. The field of immigration policy has historically been resistant to supranational policymaking.

The topic was initially introduced at the Maastricht treaty (in force from 1993 to 1999),[4] and at that time this matter was primarily discussed at an intergovernmental level. Despite the European Commission's efforts to promote common policies in this domain since the 1990s, member states have been perceived as reluctant to cede national sovereignty and discretionary authority over the admission of Third-Country Nationals (TCNs).[5] This tension between supranational ambitions and member state preferences for retaining national control has presented a key challenge in the development of a cohesive European migration policy framework.

However, the Union has gradually developed its immigration law and policy (or policies to manage the different aspects of immigration) trying to achieve the harmonization of EU immigration law following the Treaty of Amsterdam (in force from 1999 to 2003),[6] the Treaty of Nice (in force from 2003 to 2009),[7] and with the Treaty of Lisbon (in force since 2009).[8]

Short-Term Visas Versus Long-Term Visas

When speaking about short-term visas and long-term visas within the scope of EU immigration law, there is a clear difference in their legal basis.

Short-term visas, known as Schengen visas, are regulated at the EU level through the Schengen Visa Code.[9] The Schengen Visa Code is an EU Regulation,[10] and this means that it shall be binding in all EU member states from the day it enters into force.

On the other hand, long-term visas are governed by the national law of the member states. However, this does not mean that the European Union is not involved in this area. Despite the member states' sovereign authority over long-term visa policies, the European Union has sought to harmonize certain aspects of this area through legislative acts, such as EU Directives.[11] (It should be mentioned that the European Union has another legal act that is binging, which is EU Decisions.[12] However, EU Decisions are not a common instrument used in the field of EU immigration.)

For instance, the EU Blue Card Directive[13] and the Directive on intra-corporate transferees[14] are, as their titles indicate, EU Directives. Both of them establish common standards and procedures for the respective categories of long-term visas across the Union.

An EU Directive is not directly binding like an EU Regulation, but it shall be binding, as to the result to be achieved, and the choice of form and methods to achieve such results are left to each member state.

Consequently, while the ultimate authority over long-term visa regimes remains with national governments, the EU's involvement in this field, through directives, indicates a degree of supranational coordination and integration pertaining to select categories of long-term migration.

The EU Blue Card Directive and the Directive on intra-corporate transferees are a clear example of the EU's effort to facilitate the mobility of specific groups, such as highly skilled workers and intracompany transferees, as part of a broader agenda of EU immigration law and policies.

As we have made the distinction between an EU Regulation and a Directive, it is worth mentioning that, exceptionally, member states can opt out from a particular field of EU Policy.

In the specific case of EU immigration law, Ireland (initially, the Protocols applied to the United Kingdom and Ireland) and Denmark have signed a special protocol separately and decided to opt out from the fields that affect border checks, visa policy, etc. In the case of Ireland, it has the possibility to "opt in" and participate in the adoption and application of proposed measures within three months of the Commission's publication of a proposal.[15] The case of Denmark is somewhat more complex, as it is part of Schengen, but it opted out of the EU policy on Justice and Home Affairs, and therefore does not benefit from some aspects of EU immigration law (e.g., the EU's Asylum, Migration and Integration Fund). So, generally speaking, it can be said that Denmark's immigration and asylum policies are not governed by EU law, but it is bound by international law commitments.[16] Denmark has six months (after the Council of the European Union has decided on a proposal or initiative to build upon the *Schengen acquis*[17]) to decide whether to implement

it or not. If it decides to do so, that measure will create an obligation under international law between Denmark and the other member states.[18] Unlike Ireland, Denmark does not have the possibility to opt in.

The Schengen Visa Scheme

A Schengen visa is a short-term visa with a validity of a maximum of 90 days (in any 180-day period). It allows TCNs to transit and/or travel freely within the Schengen Area for the purposes of tourism, family visits, business, study or training, and medical reasons. It also applies to journeys of members of official delegations to participate in meetings, consultations, negotiations, or exchange programs, as well as in events held in the territory of a member state by intergovernmental organizations.

The Schengen visa is valid for 29 European countries, of which 25 are EU member states (Austria, Belgium, Bulgaria,[19] Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania,[20] Slovakia, Slovenia, Spain, and Sweden) and four are non-EU European States (Iceland, Norway, Switzerland, and Liechtenstein).

Certain TCNs are exempted from the requirement to obtain a Schengen visa and can enter the Schengen Area under the 90/180 days rule.

Key Aspects of the Schengen Visa

The Schengen Visa Code is the main legal basis for the issuance of the Schengen visa.

In 2020, the European Commission issued a Handbook[21] for the administrative management of visa processing and local Schengen cooperation. This Handbook has been drawn up pursuant to Article 51 of the Visa Code[22] and it does not create any legally binding obligations on member states, nor does it establish any new rights or obligations for the persons who might be concerned by it. Yet, it contains useful guidelines for organizing visa sections and local Schengen cooperation.

This section of the article will cover the Schengen visa scheme in detail, covering key aspects such as the types of Schengen visas, general requirements, the application process, visa refusal, and appeal rights. It will also examine the specifics of the Schengen visa waiver program, which allows nationals of certain non-EU countries to enter the Schengen Area without requiring a short-term visa.

Types of Schengen Visa

Basically, there are three types of Schengen visa:

1. *Uniform visa*, which is valid for the entire Schengen Area, with a duration of no more than three months in any six-month period. Uniform visas are usually issued with a maximum validity of 90 days with a single entry, two entries, or multiple entries. Exceptionally, a multiple entry Schengen visa with long validity can be issued (for a maximum of five years validity) only if the applicant demonstrates a valid rationale for frequent travel to the Schengen Area, possesses a positive Schengen visa history, demonstrates appropriate financial standing in his or her home country, and shows a genuine intention to depart the Schengen Area before the expiration of the visa. It is highly important to note that even if a multiple-entry Schengen visa with long validity has been issued, the 90 days rule within the 180-day period shall be always respected.
2. *Airport transit visa*, which allows transit through the international transit areas of one or more airports within the Schengen Area. It does not allow entry into the Schengen territory. Multiple airport transit visas may be considered for individuals who demonstrate no potential risk of unauthorized migration or threat to security and can justify the necessity for frequent airport transits. However, the validity period of such multiple airport transit visas should not exceed six months.[23]
3. *Visa with limited territorial validity*, which is a visa valid for the territory of one or more member states but cannot be valid for the entire Schengen Area. It has a duration of no more than three months in any six-month period. This type of Schengen visa can be issued when the member state concerned considers it necessary on humanitarian grounds, for reasons of national interest, or because of international obligations.

Competent Authorities

Articles 4 to 8 of the Schengen Visa Code establish the competent authorities responsible for examining and issuing Schengen visas.

The general rule indicates that visa applicants must submit their application at the consulate of the Schengen member state they intend to visit. The competent jurisdiction is the consulate located in the country where the applicant legally resides.

However, the Visa Code does allow for exceptions. If the Schengen visa applicants can provide sufficient justification, they may lodge the visa

application at a consulate where they are legally present, even if it is not their country of residence.

If the planned visit includes multiple Schengen destinations, the consulate of the Schengen country that represents the applicant's primary destination, in terms of either duration or purpose of the trip, is responsible for processing the visa application. Failing that, the consulate of the Schengen country at whose external border the applicant plans to first enter the Schengen Area becomes the competent authority.

Also, the Visa Code allows for flexible arrangements where one member state can act on behalf of another in the visa application and issuance process. This can involve full representation of the entire examination and decision-making or a more restricted role limited to administrative tasks like receiving applications and collecting biometric data.

Lastly, it should be mentioned that the Schengen Visa Code allows Member States to cooperate with external service providers[24] and commercial intermediaries for the lodging of visa applications, excluding the collection of biometric identifiers.[25] Such cooperation is contingent on the commercial intermediary obtaining accreditation from the relevant national authorities. However, the involvement of third parties in the evaluation process may cause additional service fees.[26]

About the General Requirements and the Application Process

In the context of Schengen visa applications, the applicant is responsible for gathering all the required documentary evidence as specified in the Visa Code. The standard requirements include:[27]

- A valid travel document (passport) with a minimum validity of three months beyond the intended date of departure from the Schengen Area.
- Documentation indicating the purpose of the journey and the intended accommodation arrangements.
- Evidence that the applicant possesses or has access to sufficient financial means to cover the costs of the intended stay and return travel.
- Information that allows for an assessment of the applicant's intention to leave the Schengen territory before the expiry of the requested visa.
- A recent passport-size photograph of the applicant.
- Medical insurance.
- A filled visa application form (harmonized form).

The application process for a Schengen visa entails the following steps.

Booking an appointment at the competent consular authority, as specified on the respective consulate's website. On the day of the scheduled appointment,

the applicant must bring all the required supporting documents. This includes allowing for the collection of fingerprints and paying the applicable visa fee.[28]

The competent authority will then evaluate the visa application. A decision must be taken within 15 calendar days of the application being lodged. Exceptionally, this decision-making period may be extended up to 45 calendar days if a more detailed examination of the application and/or additional documentation is required.[29]

If the application is complete and meets all the requirements, the competent authority will issue the requested visa.

Conversely, if the application is found to be incomplete or not fulfilling the criteria, the competent authority has the right to refuse the issuance of the visa. Also, before taking the final decision, authorities may request additional information and/or documentation to clarify the applicant's situation, eligibility, and intention.

Schengen Visa Refusal, the Right to Appeal, and the Right to an Effective Remedy

Article 32(1) of the Visa Code specifies the grounds for refusal of a Schengen visa, which are as follows:

A visa shall be refused if the applicant:

- presents a travel document that is false, counterfeit, or forged;
- does not provide justification for the purpose and conditions of the intended stay;
- does not provide proof of sufficient means of subsistence;
- has already stayed for three months during the current six-month period in the Schengen territory;
- is a person for whom an alert has been issued in the Schengen Information System (SIS);
- is considered to be a threat to public policy, internal security, or public health;
- does not provide proof of holding adequate and valid travel medical insurance; or
- if there are reasonable doubts as to the authenticity of the supporting documents submitted by the applicant or the veracity of their contents.

In the event the decision results in a visa refusal, the competent authority shall notify the applicant of the reason for the outcome by means of the standard form. Additionally, applicants shall be informed about the procedure to be followed in the event of an appeal.

Regarding the effective remedy against a decision refusing a Schengen visa issuance, there is interesting EU case law.

In the joint cases *R.N.N.S. (C-225/19) and K.A. (C-226/19) v. Minister van Buitenlandse Zaken*,[30] the European Court of Justice has clarified that when a member state rejects a visa application due to an objection from another member state on grounds of public policy, internal security, public health, or international relations, the member state that examined the visa application must communicate the decision to the applicant using the standard form.

In this communication, the competent national authorities are required to:

- identify the member state that raised the objection,
- specify the grounds for the refusal, and
- where appropriate, indicate the authority the applicant can contact to appeal the decision.

In this way, the European Court of Justice clarified to what extent Member States are required to be clear in order to guarantee the applicants' right to an effective remedy.

Schengen Visa Waiver Countries and the 90/180 Days Rule

In order to facilitate the travel of legitimate travelers between the European Union and certain non-EU countries, as part of EU Visa Policy, visa waiver agreements have been signed on a reciprocal basis (with the exception of the United States, as citizens of Bulgaria, Cyprus, and Romania still need a visa to visit the country).[31] The agreements establish visa-free travel for EU citizens and TCNs when traveling to the territory of the other party.

Key Aspects of the Schengen Visa-Free System

- The 90-day period is calculated independently of any stay in a non-Schengen member state.
- The agreements typically do not affect the possibility for the parties to extend the period of stay beyond 90 days in accordance with their respective national laws and EU law.
- The agreements generally do not apply to the non-European territories of France or the Netherlands.
- The visa waiver does not apply to persons traveling for the purpose of carrying out a paid activity unless decided otherwise on a country-by-country basis by the parties.
- The member states involved reserve the right to refuse entry if the conditions for entry or short stay are not met.

Schengen Visa Waiver Countries

The following is a list of Schengen visa waiver countries:[32]

North Macedonia	Moldova
Andorra	Montenegro
United Arab Emirates	Marshall Islands
Antigua and Barbuda	Mauritius
Albania	Mexico
Argentina	Malaysia
Australia	Nicaragua
Bosnia and Herzegovina	Nauru
Barbados	New Zealand
Brunei	Panama
Brazil	Peru
Bahamas	Palau
Canada	Paraguay
Chile	Serbia[34]
Colombia	Solomon Islands
Costa Rica	Seychelles
Dominica	Singapore
Micronesia	San Marino
Grenada	El Salvador
Georgia	Timor-Leste
Guatemala	Tonga
Honduras	Trinidad and Tobago
Israel	Tuvalu
Japan	Ukraine
Kiribati	United States
Kosovo[33]	Uruguay
Saint Kitts and Nevis	Holy See
United Kingdom	Saint Vincent and the Grenadines
South Korea	Venezuela
Saint Lucia	Vanuatu
Monaco	Samoa

Also, the following states and regions are exempt from the Schengen visa:

- Special administrative regions of the People's Republic of China:
  - Hong Kong SAR
  - Macao SAR
- Entities and territorial authorities that are not recognized as states by at least one member state:
  - Taiwan

Lastly, British citizens who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of union law, that is,

- British nationals (overseas),
- British overseas territories citizens (BOTC),
- British overseas citizens (BOC),
- British protected persons (BPP),
- British subjects (BS).

The citizens of the above listed countries are allowed to enter the Schengen Area without a visa for short stays under the 90/180 days rule, which can be continuous or non-continuous (divided into more than one trip).

During their stay in the Schengen Area, it is possible to perform the same activities as TCNs entering with a Schengen visa (i.e., purposes of tourism, family visit, business, study, etc. See above).

Digitalization of the Schengen Visa Application

In 2020, the European Commission proposed digitalizing the Schengen visa application process as part of the New Pact on Migration and Asylum.[35] In June 2023, the European Parliament and Council reached a political agreement on this proposal.[36] The initial plan estimated that the development of the platform to start in 2024 and become operational in 2026. Considering the additional five-year transition period, all member states could use the platform in 2031. This is a complex process that will require time and effort from various sectors to fully implement.

The proposed digitalization of the Schengen visa process aims to modernize, simplify, and standardize the system across member states. The current visa application procedures rely heavily on paper-based processes, resulting in additional costs for both travelers and member states. Furthermore, physical visa stickers are more susceptible to forgery, fraud, and theft. The transition to digital visas in the form of encrypted barcodes is intended to address these issues and streamline the overall Schengen visa system.

With this project, the Commission proposes to gradually replace the existing visa application portals with a single European portal. Member states will have a five-year transition period to phase out their national systems and join the new EU Visa Application platform.

The main elements of the proposed digitalization are:

- Establishing an EU-wide online visa application platform, allowing applicants to apply for Schengen visas online regardless of which Schengen country they are visiting.
- Replacing physical Schengen visa stickers with digital visas in the form of encrypted 2D barcodes.

EU Immigration, Security, and the Digitalization of the Control System

Currently, there are three systems used by national competent authorities. These are:

1. Visa Information System (VIS),[37]
2. Schengen Information System (SIS),[38] and
3. European Dactyloscopy (EURODAC).[39]

This article does not cover the EURODAC as this is an information technology (IT) system that helps with the management of European asylum applications and therefore falls outside of the scope of this article.

VIS and SIS: Definition and Differences

VIS and SIS are both IT systems (databases) that allow the exchange of information between member states. The main differences among them are the type of information they store and to which each of them applies.

VIS information and decisions relate to short-stay visa applications. It connects consulates in non-EU countries and external border-crossing points of Schengen member states and only applies to TCNs that applied to a Schengen visa.

On the other hand, SIS allows the exchange of information related to people and objects between national law enforcement, border control, customs, visas, and authorities. It applies to people and objects wanted by the competent national authorities of member states. It includes the information of all non-EU nationals who have been refused entry, of those who have been deported from the European Union, and of those who are considered to be a security risk.

Both VIS and SIS are currently operative systems.

EES and ETIAS: New Tools for EU Border Control

Entry and Exit System (EES)[40] and European Travel Information and Authorisation System (ETIAS)[41] are two new tools that will be officially introduced to the EU border control system. The introduction of these two is to further strengthen European security.

- *EES*: The Entry and Exit System is an electronic system that registers the time and place of entry and exit of travelers into the territory of European countries using the EES. It also calculates the duration of their authorized stay.

The system records the traveler's name, type of travel document, biometric data (fingerprints and facial images), and the date and place of entry and exit. This replaces the requirement for border authorities to stamp travel documents.

EES helps to more efficiently and automatically identify overstayers (travelers who have exceeded the maximum duration of their authorized stay), as well as cases of document and identity fraud.

The EES will be used by 29 European countries, including 26 EU member states and three non-EU countries: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

- *ETIAS*: Starting in mid-2025 (expected),[42] TCNs who do not require a visa to travel to the Schengen Area (see above on Schengen Visa Waiver Countries) will need to apply for travel authorization through the ETIAS before their trip. The ETIAS system, established by Regulation (EU) 2018/1240, aims to conduct pre-travel screening for security and migration risks of visa-exempt visitors. This travel authorization will become a mandatory pre-condition for entry to the Schengen member states.

When applying for the ETIAS, travelers are required to provide the following personal information:

- name(s), surname, date and place of birth, nationality, address, phone number, etc.;
- travel document details;
- level of education and current occupation;
- details about the intended travel and stay in any of the countries requiring ETIAS;
- details about any criminal convictions;
- details about any past travels to war or conflict zones; and
- information about whether the traveler has recently been subject to a decision requiring leaving the territory of any country.

EES and ETIAS are not operative yet. EES should be implemented first, followed by the rollout of the ETIAS system within a few months after the EES is in place. EES is expected to be introduced at the end of 2024 and ETIAS is expected to be introduced in mid-2025; however, it should be mentioned that their actual implementation date has already been postponed several times.

Latest Updates on the Schengen Area: The Revised Schengen Borders Code

On May 24, 2024, the Council of the European Union approved the amendments to the Schengen Borders Code,[43] which will enter into force on the twentieth day following its publication in the *Official Journal of the European Union*. The proposal of the revised Schengen Borders Code was presented on December 14, 2021 by the European Commission and the Council presidency and European Parliament reached a provisional agreement on the final law on February 6, 2024.[44]

The revised version of the Schengen Borders Code has not been published in the *Official Journal* yet. However, in the final law approved by the Council, it is possible to identify interesting changes. The main updates are as follows:

- *Harmonized Temporary Travel Restrictions*. Article 21a introduces the possibility of adopting measures at the EU level that restrict the access of TCNs to the European Union in the event of a large-scale public health emergency.[45]
    - Also, the Council can impose testing, quarantine, self-isolation, and other health-related measures for non-EU citizens entering the European Union.
- Clearer rules when reintroducing border controls: Articles 25, 25a, and 26 clarify the applicable rules and criteria for the reintroduction of border controls.[46]
    - It is possible to reintroduce border controls when there is a serious threat to public policy or internal security.
    - Principle of proportionality: member states are required to assess the necessity when reintroducing border control. They should consider that the objectives pursued cannot be attained by alternative measures, such as police checks and cross-border cooperation. In other words, border controls shall remain a measure of last resort.
    - The maximum duration of the reintroduction of controls shall be two years. In exceptional circumstances, these can be prolonged by another six months, which is renewable once for a total duration of one year.
- *Limiting Border Crossing Points*. Article 5 introduces the possibility of limiting the number of border-crossing points or reducing their opening hours and allows for enhanced border surveillance measures.[47]
- Secondary movement of migrants and the new transfer procedure: Article 23a allows a member state to transfer TCNs apprehended in the border area and staying illegally in its territory to the member state from which they arrived directly.[48]

Conclusion

In order to offer a general overview of EU immigration law, this article explored the technical aspects of the EU Regulations and Directives regarding EU immigration law, with a special focus on Schengen visas (short-term visas).

Since the 1990s, the European Union has taken a long journey to gradually harmonize EU immigration law and policy among the member states. However, compared to other areas of EU actions,[49] the immigration sphere has been a challenging area, and the intergovernmental aspect plays a strong role.

Taking into consideration the constant position of the European Union regarding immigration aspects, and the latest developments, it is possible to perceive that many strategies for further harmonization of EU immigration law are being taken. In this regard, clear examples have been discussed in this article, such as the introduction of EU Directives that show a clear interest of the European Union to coordinate and integrate at a supranational level the long-term migration of specific categories, the introduction of digital systems at the EU level (e.g., single European portal, ETIAS, etc.), the possibility of adopting measures at the EU level that restrict access of TCNs to the European Union in the event of a large-scale public health emergency, and clearer rules managing the reintroduction of border controls.

Given the sensitive nature of immigration and border control issues for individual member states, the European Union appears to be strategically navigating this policy domain aiming for further harmonization of some aspects of EU immigration, securing the external borders, and facilitating travel to the Schengen Area.

However, empirical data indicates that the measures implemented thus far have not been effective in curbing irregular immigration.[50] Addressing the challenge of irregular migration is an objective that generally holds broad interest for the European Union and its member states, with implications across legal, economic, political, and social domains.

While there are ongoing initiatives, such as the European Travel Information and Authorization System and the European Entry/Exit System, being developed to address this issue, it remains to be seen how successful these projects will ultimately be. More time and evaluation will be required to assess the efficacy of these new policy interventions.

Notes

* Yuu Shibata (ys@mazzeschi.it) is a lawyer and holds a Ph.D. in European Union Law (University of Bologna). Since 2018, she has been dedicated to the field of immigration, specializing in Italian inbound immigration and EU immigration law at Mazzeschi SRL (Italian Immigration firm). She is an active contributor and author of articles regarding EU law and Italian law with a special focus on immigration and business matters.

1. For example, the EU introduced the "EU Blue Card" scheme in 2009, which was last updated in 2021 with Directive (EU) 2021/1883 of the European Parliament and the Council of October 20, 2021, on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC.

2. Member states introduced their own national strategies to attract global talent, which include providing digital platforms, career counseling, introducing specific national visas (e.g., start-up visas, visas for highly skilled workers), etc.

3. Consolidated version of the Treaty on the Functioning of the European Union (2012) *Official Journal* C326.

4. Treaty on European Union Law (1992), *Official Journal* C191, pp. 1-112.

5. See, for example, G. Menz, The Political Economy of Managed Migration, Non-State Actors, Europeanization, and Politics of Designing Migration Policies (2018).

6. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997), *Official Journal* C340, pp. 1-144.

7. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001), *Official Journal* C80, p. 1-87.

8. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), *Official Journal* C306.

9. Regulation (EC) No. 810/2009 of the European Parliament and of the Council Establishing a Community Code on Visas (2009), *Official Journal* L243, pp. 1-58.

10. Article 288 of the TFEU establishes that: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

11. Article 288 of the TFEU establishes that: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

12. Article 288 of the TFEU establishes that: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

13. Directive (EU) 2021/1883 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (2021), *Official Journal* L382, pp. 1-38.

14. Directive 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (2014), *Official Journal* L157, pp. 1-22.

15. Consolidated version of the Treaty on the Functioning of the European Union Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the area of freedom, security, and justice (2016), *Official Journal* C202, pp. 295-97, article 3 [hereinafter referred to as Schengen Visa Code].

16. D. Chalmers, G. Davies & G. Monti, European Union Law, second edition (2011), p. 492.

17. The Schengen acquis refers to the set of legislation, including treaties, regulations, directives, and case law, that governs the functioning of the border-free Schengen Area. This acquis encompasses the original Schengen Agreement, as well as subsequent Conventions and Accession Agreements. The acquis enables the abolition of internal

border controls and the regulation of external border controls. Acceptance of the Schengen acquis is a requirement for States that are willing to join the European Union.

18. Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No. 22) on the position of Denmark (2012), *Official Journal* C326, pp. 299-303, Article 4(1).

19. On December 30, 2023, the Council agreed to fully integrate Bulgaria and Romania into the Schengen Area. Since March 2024, all air and sea border controls between these member states and the rest of the Schengen zone have been lifted. A further Council decision is expected soon to establish a timeline for the removal of internal land border checks.

20. *Id.*

21. Annex to the Commission Implementing Decision, establishing the Handbook for the administrative management of visa processing and local Schengen cooperation (Visa Code Handbook II) and repealing Commission Decision C(2010) 3667, C(2020) 1764 final.

22. Article 51 of the Visa Code requires the European Commission to adopt operational instructions on the practical application of the provisions established in the Visa Code.

23. Annex to the Commission Implementing Decision, amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I), June 26, 2024, p. 96.

24. Schengen Visa Code, at Article 43. However, Article 13(6) provides for the possibility that external entities collect biometric identifiers only under the supervision of the consulates.

25. Schengen Visa Code, at Article 45.

26. Article 17 of the Schengen Visa Code, *see Id.*, at Article 17.

27. *Id.*, at Article 12, 14 and 15.

28. As of June 11, 2024, the Schengen visa application fee has been updated. For adult applicants (12 years and above), the fee has increased from €80 to €90. For children aged 6 to below 12 years, the fee has increased from €40 to €45. Additionally, the visa fee for nationals of Cabo Verde, under the EU's visa facilitation agreement, has increased from €60 to €67.50. However, the visa fees for applicants covered by other EU visa facilitation agreements remain unchanged at €35.

29. Article 23(1) and (2) of the Schengen Visa Code (*See* 3).

30. Judgment of the Court (Grand Chamber) of 24 November 2020, Joined Cases C-225/19 and C-226/19 *R.N.N.S. and K.A. v Minister van Buitenlandse Zaken*.

31. European Commission, Migration and Home Affairs, Visa Policy, https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-policy_en#which-countries-nationals-need-a-visa-to-enter-the-schengen-area.

32. Annex II of the Regulation (EU) 2018/1806 of the European Parliament and of the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) (2018) *Official Journal* L303, pp. 39-58.

33. Starting from January 1, 2024, Kosovo passport holders are allowed to travel to the European Union without a visa, for up to 90 days in any 180-day period.

34. Excluding holders of Serbian passports issued by the Serbian Coordination Directorate.

35. European Commission, Pact on Migration and Asylum, *A Common EU System to Manage Migration*, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

36. Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EC) No. 767/2008, (EC) No. 810/2009, and (EU) 2017/2226 of the European Parliament and of the Council, Council Regulations (EC) No. 1683/95, (EC) No. 333/2002, (EC) No. 693/2003, and (EC) No 694/2003 and Convention implementing the Schengen Agreement, as regards the digitalization of the visa procedure, COM/2022/658 final.

37. Regulation (EC) No. 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between member states on short-stay visas (VIS Regulation) (2008), *Official Journal* L218, p. 60-81.

38. SIS is governed by three regulations. Regulation (EU) 2018/1861 of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No. 1987/2006 (2018) *Official Journal* L312, pp. 14-55; Regulation (EU) 2018/1860 of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third-country nationals (2018), *Official Journal* L312, pp. 1-13; Regulation (EU) 2018/1862 of the European Parliament and of the Council on the establishment, operation, and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No. 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (2018), *Official Journal* L312, pp. 56-106.

39. Regulation (EU) No. 603/2013 of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person and on requests for the comparison with Eurodac data by member states' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security, and justice (recast) (2013), *Official Journal* L180, pp. 1-30.

40. Regulation (EU) 2017/2226 of the European Parliament and of the Council establishing an Entry/Exit System to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the member states and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) No. 1077/2011 (2017), *Official Journal* L327, pp. 20-82.

41. Regulation (EU) 2018/1240 of the European Parliament and of the Council establishing a European Travel Information and Authorisation System and amending Regulations (EU) No. 1077/2011, (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/1624, and (EU) 2017/2226 (2018), *Official Journal* L236, pp. 1-71.

42. European Council, Justice and Home Affairs Council, October 19-20, 2023, https://www.consilium.europa.eu/en/meetings/jha/2023/10/19-20/.

43. Document containing the text of the legislative act in the wording agreed between co-legislators on the Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, May 13, 2024, *PE-CONS 40-24*.

44. Council of the European Union, Schengen: *Council and European Parliament Agree to Update EU's Borders Code*, Press Release, https://www.consilium.europa.eu/en/press/press-releases/2024/02/06/schengen-council-and-european-parliament-agree-to-update-eu-s-borders-code/.

45. Paragraph 6 of the amendments introduced by *PE-CONS 40-24*, *see supra* note 43.

46. *Id.*, at paragraph 10, 11, and 12.

47. *Id.*, at paragraph 2 and 3.

48. *Id.*, at paragraph 8.

49. For example, the European Union has exclusive competences in competition rules, monetary policy, trade, etc. It also has shared competences with member states in the fields of single market, agriculture, energy, etc. In some areas such as public health, tourism, etc., it has supporting competences.

50. Eurostat, *Third-Country Nationals Ordered to Leave by Citizenship, Age and Sex—Quarterly Data (Rounded)*, https://ec.europa.eu/eurostat/databrowser/view/migr_eiord1/default/table?lang=en.

Same Time Next Year

How History Repeats Itself in Joy and Pain

Nicole C. Dillard*

Abstract: This legal essay examines the intersection of race, ethnicity and civil rights in the United States. The United States has a storied tradition that continues to this day of inhumanely treating Black and Brown communities due to their race and ethnicity. Reflecting from Martha's Vineyard, historically a summer haven for Black vacationers, the author draws connections between the historical mistreatment of Black individuals and contemporary challenges faced by migrants from the southern border. The essay argues that while various ethnic groups experience differing levels of assimilation in the United States, Black and Brown communities remain marginalized. The essay critiques the tendency of the United States to assert moral superiority while neglecting its own human rights issues. Ultimately, the essay calls for the nation to confront its history of mistreatment and reconsider its approach to racial justice and the humane treatment of marginalized populations.

Introduction

As a Black American,[1] immigration attorney, and professor at a Historically Black College and University (HBCU), I occupy an underrepresented position within the immigration bar. Black immigration attorneys make up only 5.4 percent of the profession, in stark contrast to 76 percent White, 7.6 percent Hispanic or Latino, and 6.3 percent Asian attorneys.[2] Since the 5.4 percent figure is not further divided by ethnicity, it is likely that only a fraction of these attorneys are Black Americans with ancestral ties to U.S. slavery. As a minority member of a profession and a historically oppressed group, I grapple with the dual challenge of advocating for the rights and opportunities of other marginalized individuals while also striving for equality within my own community. Indeed, the American Immigration Lawyers Association has endorsed the proposition that diversity of perspectives in the immigration bar is necessary to fully serve the clients of its members.[3] The following reflection gives insight as to how I grapple with such challenges.

The immigrant population is comprised of groups that are routinely marginalized. Marginalized communities, specifically Black and Brown people, have historically and consistently faced severe injustice by the U.S. government[4] despite its proclaimed commitment to democracy and human rights on a global stage. The systemic nature of this mistreatment underscores a troubling continuity in American history: from the dehumanization of

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 271–291.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

Black Americans to the present-day plight of Black and Brown migrants, the patterns of inhumanity remain disturbingly persistent. The contrast between America's ideals and its actions calls for a critical reflection on whether true justice and humanity can ever be realized while such disparities persist. This essay reflects my experiences as a Black American immigration attorney. It was inspired by my recent visit to Martha's Vineyard and my observations of how marginalized people of color continue to be mistreated in this country.

> There is a long history of the intersection of immigration, race, and civil rights in America.[5]

Martha's Vineyard—A Summertime Sanctuary

During the summer of 2023, I found myself in the town of Oaks Bluff on Martha's Vineyard, Massachusetts, for the first time in five years. I sipped my coffee, overlooking the marina and early risers enjoying a morning run, and I could not help but reflect on the island's rich history. It was the Fourth of July weekend and a new observation not apparent during my previous visits caught my attention. I noticed an influx of foreign-born individuals, predominantly employed in the establishments catering to me and other vacationers. While I recognized that the surge in foreign workers could be attributed to the rising number of vacationers on the island, particularly as the pandemic restricted international travel, leading to a greater demand for seasonal employees in restaurants and hotels, their presence remained noteworthy.

A Sanctuary Emerging from America's Troubled Past

The irony of me celebrating the Fourth of July while on Martha's Vineyard was not lost on me. As Frederick Douglass explained in his famous speech, "What to a Slave is the Fourth of July," the history of the holiday is complicated for Black Americans. "I am not included within the pale of this glorious anniversary! . . . The rich inheritance of justice, liberty, prosperity, and independence bequeathed by your fathers is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth [of] July is yours, not mine."[6] While I have always seen the island as a privileged vacation spot, predominantly known in my circles as a summertime retreat for the Black bourgeoisie, it has deeper historical significance. Martha's Vineyard has long been a sanctuary for Black Americans,[7] providing a refuge[8] when other beaches would not allow us to comfortably exist there, if at all.

Black Americans have been part of Martha's Vineyard since the early eighteenth century, initially as enslaved individuals brought by white

enslavers.[9] Over time, as some enslaved Blacks gained their freedom, a small community of free people of color developed, and the island evolved into a renowned getaway for Black American families.[10] Today, the elite mingle with the middle class. Notable visitors include the Obamas and Henry Louis Gates Jr.. Maya Angelou once described the Martha's Vineyard town of Oak Bluffs, which includes Inkwell Beach,[11] as "a safe place where we can go as we are and not be questioned."[12] Despite its name's possible pejorative origins, mocking Black American visitors who frequented the area,[13] the Black community has embraced "Inkwell" with pride. Summer on the island is marked by concerts, book signings, and Black film festivals, while also providing a nostalgic retreat of beach days, board games, and bike rides amid limited cell phone service that encourages far less texting and more . . . communicating.

Yet, despite the nostalgic sentiments, a sobering reality check prompted me to acknowledge that the sanctuary we find in these places stems from a deep-seated injustice that compelled Black individuals to create spaces where acceptance was granted during times when the broader society denied it. From my vantage point as a Black American woman functioning outside of my own caste, which has been described as "a fixed and embossed ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and immutable traits,"[14] I know what I and those who came before me have endured to be here in this place of privilege. I move uncomfortably in the subtle and not-so-subtle challenges we continue to face in order to fully appreciate the escape that a place like Martha's Vineyard provides. I live on the peripheries, enduring presumptions of not measuring up—whether in intellect, readiness, or overall worth. Despite these challenges, I have persevered and find myself now existing arguably beyond my comfort zone yet comfortably seated in my status. From my vantage point atop the metaphorical mountaintop of success as an attorney and professor at a prestigious HBCU in the United States, I stand as living proof of the history of my ancestors and our 400-year journey in this new world, marked by the persistent experience of being "othered."[15]

A Sanctuary That Realizes the American Promise

As an immigration attorney,[16] I am consistently fascinated by the immigration stories of foreign workers, contemplating the paths that led them to where they are—whether driven by business, pleasure, or literal survival. During my recent visit to the island, the diversity of inhabitants caught my attention, specifically the apparent increase in Spanish speakers.[17] This observation prompted me to ponder their stories and experiences—What brought them here, and what narratives shaped their presence on the island?

Recalling news stories about Governor Ron DeSantis of Florida sending an airplane full of migrants who had entered the United States via the Texas

border to Martha's Vineyard without their seemingly knowing consent, my thoughts took a somber turn.[18] The stories reported that a Spanish-speaking woman working for DeSantis deceived approximately 48 migrants into boarding a flight to Massachusetts. The community in Martha's Vineyard, unaware of their pending arrival and without migrant services like major urban centers, found themselves scrambling to find shelter, food, and accommodations for the migrants upon arrival, which included children.[19] This was a politically motivated act by Governor DeSantis, who exclaimed, "Our message is, we're not a sanctuary state. We don't have benefits or any of that. There are some sanctuary jurisdictions and that would be better. Now, what would be the best is for Biden to do his damn job and secure the border."[20] *Ohhhh, that makes sense, now*, I thought. And for at least the Latino people I noticed on the island, I thought, *Maybe THAT is their story*.

Reflecting later on the connections that other minority groups have to this land, I was reminded how deeply intertwined our histories are in a country that marginalizes and subjugates groups that do not resemble the majority.[21] Following DeSantis's stunt, *The Texas Observer* reported that in "1962, a nearly identical political stunt was pulled by a racist organization in Louisiana, sending hundreds of Black Southerners to Northern cities in a brazen attempt to get liberals to tie themselves in knots. Back then, the trips were called the 'Reverse Freedom Rides' . . . [I]t wasn't until DeSantis's copycat flights landed migrants on Martha's Vineyard that the media took note of how nearby Hyannis, Massachusetts had also been a target of the Reverse Freedom Rides."[22] Similarly, "[i]mmigration laws have operated in a manner to maintain homogeneity to the exclusion of immigrants of color [and religious minorities]. Immigration laws throughout America's history have traditionally utilized fear and exclusion to define what America should look like and have privileged some immigrants over others."[23] Thus, despite my current state of solace on an island symbolizing status and sanctuary, I recognize that despite our varied histories, all minority groups grapple with the same divisive forces. Lest we forget that refuge often harks back to the same ugly origins.

America's Long History of Dehumanizing Marginalized People

The inhumane treatment of migrants entering the United States is a stark reflection of the country's deep-rooted history of marginalization and systemic injustice. The irony of my visit over the Fourth of July holiday is that it was a week that traditionally celebrates our nation's birthday. However, in recent years, many Black Americans have revisited their relationship with the Fourth of July,[24] specifically since the national acknowledgment of Juneteenth,[25] the day that we *all* were finally free from enslavement. So, we celebrate *that* day. We have cookouts and set off fireworks.[26] Many Black Americans now stand in protest, acknowledging out loud that *we* were not free on July 4, 1776.[27]

In an article exploring the intersection of racism, immigration, and policing, the authors explain how, historically, "[Black people] were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." The authors further discuss the implications of the U.S. Supreme Court decision in *Dred Scott*, which held, "all people of African descent, free or enslaved, were not United States citizens and therefore had no right to sue in federal court. In addition, the decision states that the Fifth Amendment protected slave owner rights because enslaved workers were their legal property."[28] This ruling underscored that the rights and privileges enshrined in the Constitution were initially intended only for the propertied White men, excluding women, non-Whites, enslaved people, and those people who did not own property. Thus, *we* were still enslaved people who were treated no better than the animals we worked alongside to plow the earth. We justify our reluctance to partake in Fourth of July celebrations by reminding ourselves that as a people, we were forcibly brought here with no knowledge of the language, with no home awaiting us, and compelled to toil to make a better life for the majority . . . *Oh, wait! Let me go back and reread that newspaper article about Governor DeSantis again*.

While it is true that Black people eventually found freedom in a place like Martha's Vineyard, how long did it take?[29] What did we have to go through to get that far?[30] And now, alongside the enduring oppressive treatment that Black Americans continue to face even after 400 years since their forced migration into this nation,[31] Americans are now witnessing a similar wanton disregard for humanity being imposed on a new subset of people: the dehumanizing and disparate treatment of migrants. Although many migrants have come to the United States desperate for survival from life-threatening dangers in their home countries,[32] immigration policy diverges based on country of origin, which many argue is often simply a pretext for race. Take, for example, the disparate treatment of migrants from Cuba versus those from Haiti. Historically, Cuban migrants, who are primarily White, have often been met with more welcoming and favorable conditions and faster paths to permanent residency.[33] Haitian migrants, on the other hand, who are primarily Black, frequently face harsher and inhumane treatment.[34] Another example is Black immigrants consist of about 7 percent of the immigrant population in the United States, yet are over 20 percent of the immigration population charged with removability on criminal grounds despite no evidence indicating that Black Immigrants offend at greater rates.[35] "The same relentless criminal legal system that targets Black people in America from arrest rates to sentencing also affects Black Immigrants and makes them more vulnerable to deportation as a result."[36] The contrast underscores the broader pattern of inequity and disregard for the humanity of those seeking to build a better life in the United States.[37] Thus, on the Fourth of July, while Americans commemorate

their freedoms and liberties and flaunt the Constitution in the face of allies and enemies alike, they must also acknowledge the shame and "fraud, deception, impiety, and hypocrisy"[38] that permeates our country.

Dehumanizing Renewed (Cruelty Is the Point!)

"I believe we have stepped over a line into the inhumane."[39] Despite these sentiments, our country has been going through a racial reckoning.[40] Pundits and politicians acknowledged this [w]as a time for some optimism during tragedy. 'The optimism was rooted in the belief that if there was ever a moment to unsettle America's racial hierarchy, this was it. Now was the time . . . to bring relief to those who had long lived under a regime of racial oppression."[41] Unfortunately, it took the repeated and graphic broadcasts of Black people,[42] such as Ahmaud Arbery and George Floyd, being killed on the streets for our nation to take notice. The standardized brutality of these murders, as well as others, forced a nation on lockdown to have a microscopic focus on the systemic treatment of people of color in this country.

Similarly, following the politically motivated efforts to use migrants as pawns to demonize the political left, news story after news story, along with a 45-minute documentary, *Martha's Vineyard v. DeSantis*,[43] highlighted how DeSantis used an undercover recruiter to lure vulnerable migrants to Martha's Vineyard as a part of a broader political strategy. This brazen act yielded a political and media firestorm. The international spotlight on these events left Americans rightfully embarrassed by the public airing of our dirty laundry.

As a result of the increased tensions regarding the surge of migrants at the border, while highlighting conversations around harsh detention facilities and inhumane treatment, efforts to prevent entry on our soil by the Border Patrol and U.S. Coast Guard crept into our social consciousness. Simultaneously, conversations around reparations became commonplace, along with recognizing the microaggressions in everyday life, which led to the surge of diversity, equity, and inclusion (DEI) groups.[44]

Now, however, some of these progressive initiatives have faced dismantlement because of resistance by the dominant (white) group seeking to maintain their majority status because progress was too threatening.[45] The 2008 election of our first Black president marked a significant milestone by appearing to provide minority groups with a voice. This progress was met with a resurgence of white nationalists and extremists, later resulting in the election of political leaders who pander to such ideologies, highlighting the ongoing struggle for racial equity and justice in our society.[46]

As a result of the pendulum swing of progress, our highest court has now overturned one of our cornerstone pieces of case law that managed to balance the playing field—affirmative action. After more than 50 years of precedent that permitted colleges and universities to use race as one piece of data in evaluating applications from racial minorities, the U.S. Supreme Court in *Students*

for Fair Admissions v. Harvard[47] has dismantled these practices. This decision has dramatically altered the landscape of college admissions and potentially impacted diversity efforts nationwide.

Currently, as Kamala Harris—a biracial woman of Indian and Jamaican descent,[48] an HBCU graduate,[49] and a member of Alpha Kappa Alpha Sorority Inc., a historically Black sorority[50]—runs for president of the United States, she faces derogatory labels suggesting she is only a "DEI" hire despite her extensive qualifications.[51] This contrasts sharply with her opponent, Donald Trump, a White male with generational wealth. This situation underscores both progress in diversity and the ongoing challenges in the fight for racial equity and representation in American politics.

The systemic nature of the cruelty exhibited by the United States[52] toward marginalized groups underscores a troubling pattern in American history: from the dehumanization of Black Americans to the present-day plight of Black and Brown migrants, the patterns of brutality and marginalization remain disturbingly persistent. As the Trump administration "continuously dropped racist narratives about … Black [and] Latino … communities in the United States and abroad, we are vigorously reminded that the social construct of race and racism is not a thing of the past."[53] As a result, such racist rhetoric has increasingly normalized violent imagery of abusive behavior. To wit, not even three years after a Black man was killed in broad daylight with a police officer kneeling on his neck,[54] emphasizing our nation's tendency to treat minority groups as subhuman,[55] we once again bore witness to the mistreatment of a minority group, this time southern migrants desperately attempting to enter the United States. The news reports of a "pregnant teenager writhing in pain as she suffered a miscarriage while trapped in barbed wire that Texas has strung along miles of the southern border"[56] create a distressing mental image that is challenging to ignore. The story of a "four-year-old girl collapsing from heat exhaustion after Texas National Guard members pushed her away from the wire as she tried to cross it with her family"[57] is too much for any parent to bear. Learning about "Texas state troopers receiving orders to deny water to migrants in triple-digit temperatures"[58] strikes at our most basic needs. Each of these incidents, reported by a Department of Public Safety trooper on duty that day, had been authorized by the Texas governor and the state law enforcement officials to deter efforts by undocumented migrants seeking to cross the U.S. border from Mexico. While sympathy is welcomed, where is the outrage? The protests? The marching? Does the inhumane treatment at the border warrant the same attention as Black people being senselessly killed at the hands of police? Or are migrants only deserving of apathy because they are unlawfully entering this country?

Enough Is Enough!

The American public's attitudes concerning the [in]humane treatment of migrants are largely subdued. It remains uncertain whether the silence stems

from apathy or an acceptance of the offensive notion that Mexicans were indeed "rapists,"[59] and thus, keeping them out by any means necessary was a legitimate security precaution. Examining the genesis behind this subdued response prompts considerations of whether it is due to a lack of awareness, indifference, or a tacit acceptance of harmful stereotypes.

This backdrop of indifference stands in sharp contrast to the height of the civil rights movement in 1964 and 1965. During that period, Congress passed the Immigration and Nationality Act of 1965, which eliminated race and national origin as a selection criterion for immigrants. This Act, along with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, was passed as a matter of "principled anti-racist legislation."[60] However, recent immigration policies reminiscent of pre-1965 race-based exclusionary practices have emerged reminiscent of those efforts light the demographic makeup of America."[61] These policies, influenced by the Trump administration, attempted to exclude immigrants of color,[62] leading to the sharp rise in deportations of migrants from African countries. These policies were part of a broader effort to shape America's demographic makeup by preventing the blackening and browning of America. Although at the time of writing, Trump is no longer in office,[63] attitudes and policies established during his administration have continued to influence current U.S. immigration practices, particularly at the southern border, where the inhumane treatment of migrants persists.[64] This ongoing effort reflects an effort to continue to exclude and marginalize groups who do not resemble the dominant group. Unfortunately, we see history repeating itself.

Much like the enduring oppressive treatment that Black Americans have faced for centuries, our country underwent its first racial reckoning since the Civil Rights era, and the nation witnessed this transformative period unfold through a 24-hour news cycle. While there should be reasons for outrage and support by all marginalized groups, it is understandable that many Black Americans feel overlooked in this renewed fight for civil rights because too many of us are dying based on a system that was not created to protect us. And not that this is a sudden occurrence. The mistreatment of marginalized groups, specifically people of color, has persisted for generations. While the issue has always existed, a more "conscious" America has brought it back into the spotlight, giving it the attention it has always deserved.

Isabel Wilkerson's widely acclaimed book *Caste* examines the mistreatment of marginalized groups within the United States and on a global scale. Wilkerson argues that the oppression stems not solely from racism but from a caste system that dehumanizes certain groups.[65] Although the United States has a well-documented history of marginalizing and dehumanizing Black individuals, it has also subjected diverse immigrant communities to discrimination. Groups such as the Irish, Italians, Japanese, Chinese, and Eastern Europeans (specifically Jewish communities) faced mistreatment despite their contributions to shaping our nation.

Over time, however, most of these groups eventually assimilated fully into American society, particularly following their integration into the labor market.[66] While occasional instances of ethnic stereotyping and even hate crimes remain for people of these groups, their "white" skin has facilitated their assimilation into the dominant "white" culture.[67] Ultimately, the dominant group, in this case descendants of White Europeans, decide whether a group remains at the bottom of the caste and is, therefore, marginalized or whether members of the group are allowed to integrate or assimilate with the dominant group.[68] Even Asian Americans, specifically Chinese and Japanese, who are decidedly racialized[69] in the United States, have begun to integrate into the dominant society and have been stigmatized with the label of "model minority."[70] The stereotype generalizes Asians in the United States as intelligent, well off, and able to excel in fields such as math and science. Additionally, the "model minority" myth also positions Asian Americans in comparison with other non-White groups such as Black and Hispanic Americans, thus pitting groups against one another. But, while many European "ethnic" groups have been allowed to assimilate (or for Asians, to integrate), Black people[71] and Latinos (specifically those people originating in Latin America) remain substantially segregated and subordinated, thus continuing to marginalize these groups as the "other."[72]

Now, with the recent surges in immigration, particularly from the southern border, we turn our ire and direct our public atrocities against an oldie but a goodie[73]—the Latino migrant.

> I tell my students, "When you get these jobs that you have been so brilliantly trained for, just remember that your real job is that if you are free, you need to free somebody else. If you have some power, then your job is to empower somebody else. This is not just a grab-bag candy game."[74]

This Is Not Who We Are. It's Not America! . . . Or Is It?

During discussions with friends and colleagues, I frequently encounter the question, *So now what? How do we address crime if we do not convey that certain actions will not be tolerated? How do we discourage "illegal immigration" without sending inadvertent messages that dangerous journeys across land and sea will be embraced, thereby allowing unrestricted entry?* To be frank, I do not have all the answers.

What I do know is this: the actions taken by our government to address crime and immigration have not only been centered on enforcement but have also waded into realms of inhumanity, with a notable bias against racial and ethnic minority groups. As Wilkerson poignantly explains, "[p]eople and groups who seek power and division do not bother with dehumanizing an

individual. Better to attach a stigma, a taint of pollution to an entire group."[75] Thus, in the marginalization of both Blacks and Latinos, the United States has historically demonized these groups to rationalize their subjugation. The racist tropes and stereotypes perpetuated over the years have enabled society to willfully ignore the inhumane mistreatment that these marginalized groups have suffered. How long are we as a society going to allow this to continue?

In the meantime, the United States sends conflicting messages. On the one hand, the United States has criticized other nations for what it perceives as the inhumane treatment and human rights violations of their citizens.[76] This scrutiny is accompanied by promoting democracy, protecting individual freedoms, and upholding the principles outlined in international human rights agreements.[77] On the other hand, the United States has faced criticism and scrutiny, both domestically and internationally, for its treatment of certain groups or individuals.[78] Instances of police violence and debates surrounding immigration policies[79] have prompted external scrutiny and calls for the United States to address its own human rights shortcomings.[80]

> Go where you may, search where you will, roam through all the monarchies and despotisms of the Old World, travel through South America, search out every abuse, and when you have found the last, lay your facts by the side of the everyday practices of this nation, and you will say with me, that, for revolting barbarity and shameless hypocrisy, America reigns without a rival.[81]

As it stands, while the number of border crossings is significant,[82] efforts to stem the flow, while legitimate, have caused more harm than good.[83] At this time, the policies exacerbate the humanitarian crises and lead to increased suffering among vulnerable migrant populations. The efforts by our states to address what they have characterized as "illegal border crossings" are not only aimed at enforcement but have now also crossed into realms of inhumanity. In recent reports,[84] troubling instances have come to the forefront, revealing specific states' deliberate attempts to dehumanize individuals caught up in immigration issues.[85] These actions raise concerns about border control measures and prompt a critical examination of the broader implications on the human rights and dignity of those affected by such policies.[86] The challenge lies in finding a balance between enforcing border security and upholding basic principles of humanity and compassion.

The United States needs to take a stance. If it aspires to be a just society, then it needs to ensure fairness in its actions and treatment of those at and within its borders. Otherwise, the United States needs to openly acknowledge and take unapologetic ownership of its harsh disparate treatment of its people of color and be prepared to defend its actions in the face of global scrutiny. If this is the true nature of our country, then let's stand firmly in that position instead of one that boasts justice and liberty for all.

Although many of us may find the inhumane treatment by our government officials abhorrent, we have become numb and desensitized to the dehumanization of marginalized groups, particularly those who are Black and Brown. Before demanding reforms in the judiciary, policing, and harmful policies impacting Black and Brown communities worldwide—and in light of the appeals from twenty-first-century activists and critical race theorists to reflect on our "privilege"—we must first acknowledge our own biases.[87] These biases shape how we perceive and tolerate the mistreatment of others. Contrary to our nods of disgust, we are consenting to this behavior. We are actively watching it and are telling ourselves something different to make it legally justifiable.

As my stay on Martha's Vineyard neared its end, I returned to the porch each morning in search of perspective. Conversations with strangers and passersby became a ritual each morning before the day began and each evening as the night concluded, sharing the histories of visiting the island and reflecting on the significance of these moments of respite for their families. A palpable sense of a collective reset resonated among the people I met as they relished the opportunities to rejuvenate their minds and bodies. However, the paradox of cleansing lies in our tendency to soil ourselves once again. It mirrors a vicious cycle, reminiscent of how our country's history often repeats itself.

At the end of the day, we can do better. We should do better. We just have to decide who we want to be.

Notes

* Nicole C. Dillard, Esq., is an immigration attorney and assistant professor at Howard University in the Cathy Hughes School of Communications where she teaches pre-law students. A heartfelt thank you to Cynthia Groomes Katz, Esq., for her invaluable insights, support, and unwavering community as I've journeyed through my career in immigration law. I am also deeply grateful to my ever-reliable forever editor, former student and frequent co-author, Esperanza Sanchez, whose encouragement is a constant source of strength. Lastly, to my daughter Lena, my cherished travel companion—may you always find peace and respite in every adventure you embark upon.

1. For purposes of this essay, references to Black Americans refers to an ethnic distinction of Americans with ancestral ties to U.S. slavery. References to Black immigrants refers to people immigrating from the entire diaspora, extending to any continent in the world where there are Black people. Notably, the inhumane treatment of Black people is without regard to ethnicity and marginalization appears to be solely based on race.

2. *Immigration Attorney Demographics and Statistics in the U.S.*, Zippia.com, (updated Apr. 5, 2024), https://www.zippia.com/immigration-attorney-jobs/demographics/; *see also* American Bar Association Profile of the Legal Profession 2023, which states that 79% of all lawyers are White, 5.3% are Black (noting that that is far less than the percentage of Blacks in the U.S. population (13.6%)), 6% are Hispanic and 6% are Asian, https://www.abalegalprofile.com/demographics.html.

3. *Adoption of Diversity and Inclusion Mission Statement* (Apr. 9, 2016), AILA Governance, https://www.aila.org/library/adoption-of-diversity-inclusion-mission-statement.

4. In this essay, references to the U.S. government are inclusive of local, state, and/or federal governments.

5. Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019).

6. The Text of Frederick Douglass's Most Famous Speech, Given in 1852, "What, to a Slave, Is the Fourth of July?" DPLA (July 4, 2012), https://dp.la/primary-source-sets/frederick-douglass-and-abraham-lincoln/sources/96.

7. Lavanya Ramanathan, *How Martha's Vineyard Became a Black Summertime Sanctuary*, Vox (Aug. 24, 2021, 8:00 AM), https://www.vox.com/the-highlight/22627047/marthas-vineyard-black-tourism-oak-bluffs-inkwell.

8. The term "refuge" mentioned throughout this essay is not intended to reference the term "refugee" pursuant to the INA § 101(a)(42) except where explicitly stated.

9. Dominique Nadeau, *The Power of Place: An Overview of Black History on Martha's Vineyard*, Writers Theaters (Jan. 24, 2020), https://www.writerstheatre.org/blog/power-place-overview-black-history-marthas-vineyard/; *see also* Wampanoag History, *History of Martha's Vineyard*, Wampanoag Tribe of Gay Head (Aquinnah), https://wampanoagtribe-nsn.gov/wampanoag-history or Original Vineyards, The Island's First Settlers, N.Y. Times, https://archive.nytimes.com/www.nytimes.com/fodors/top/features/travel/destinations/unitedstates/massachusetts/marthasvineyard. The Wampanoag people were the original inhabitants of Martha's Vineyard (they called the island Noepe) until it was colonized by the British in the mid-seventeenth century. Original Vineyarders—New York Times. *See also* Nicholas Conley, *Martha's Vineyard: A Landmark of Diversity*, Eastern Bank (July 27, 2018), https://www.easternbank.com/marthas-vineyard-landmark-diversity (20% of the year-round residents are Brazilian and the island presents itself as welcoming to all people).

10. Joe Bills, *The African American Heritage Trail*, New England (May 22, 2023), https://newengland.com/today/the-african-american-heritage-trail-of-marthas-vineyard/.

11. Charlayne Hunter-Gault, *A Healing Reunion at Inkwell Beach on Martha's Vineyard*, The New Yorker (Sept. 2, 2017), https://www.newyorker.com/culture/culture-desk/a-healing-reunion-at-inkwell-beach-on-marthas-vineyard. Note that there are two possible origins of the name "the Inkwell." "[T]he first, that it was called Inkwell because it always filled with people of color; the second, that it was because many of the town's most prominent people, many of them writers, mingled there."

12. Lavanya Ramanathan, *How Martha's Vineyard Became a Black Summertime Sanctuary*, Vox (Aug. 24, 2021, 8:00 AM), https://www.vox.com/the-highlight/22627047/marthas-vineyard-black-tourism-oak-bluffs-inkwell.

13. A.R. Jefferson (Jan. 23, 2023), *The Inkwell, Martha's Vineyard (1890s-)*. The Inkwell, Martha's Vineyard (1890s-), https://www.blackpast.org/african-american-history/inkwell-martha-s-vineyard-1890s/.

14. Isabel Wilkerson, *Caste: The Origins of Our Discontents* (2020) p. 17. Isabel Wilkerson explains, "Throughout human history, three caste systems have stood out . . . Nazi Germany, India . . . and the shapeshifting, unspoken, race-based caste pyramid in the United States. Each version relied on stigmatizing those deemed inferior to justify the dehumanization necessary to keep the lowest-ranked people at the bottom and to rationale the protocols of enforcement." *See also America's Race-Based Caste Structure: Its Impact in College and Professional Sports*, 9 Tex. A&M L. Rev. 599, 603 (2022).

15. J.F. Staszak, "Other/Otherness," in A. Kobayashi (ed.), International Encyclopedia of Human Geography, 2nd ed., vol. 10 (Elsevier 2020), pp. 25-31. Stazak defines *otherness* as the result of a discursive process by which a dominant in-group ("Us")

constructs one or many dominated out-groups ("Them," or the "Other") by stigmatizing differences, real or imagined, presented as a negation of identity and thus a motive for potential discrimination. The creation of otherness (also called *othering*) consists of applying a principle that allows individuals to be classified into two hierarchical groups: "them and us." For undocumented immigrants entering the United States, this provides a way to create an "us" versus "them" approach based on how they entered the country.

16. As an African American woman, reaching, achieving and becoming an immigration attorney and professor is significant in and of itself. As Isabel Wilkerson in *Caste* suggest, "people of color with the most education, who compete in fields where they are not expected to be, continually press against the boundaries of caste.... The stigma and stereotypes they labor under expose them to higher levels of stress-inducing discrimination in spite of, or perhaps because of, their perceived educational or material advantages." "The more ambitious the marginalized person, the greater the risk of the out-of-place principle of social dominance," Isabel Wilkerson, *Caste: The Origins of Our Discontents* (2020) pp. 306-07.

17. Nicholas Conley, *Martha's Vineyard: A Landmark of Diversity*, Eastern Bank (July 27, 2018), https://www.easternbank.com/marthas-vineyard-landmark-diversity.

18. Edgar Sandoval, Miriam Jordan, Patricia Mazzei & J. David Goodman, *The Story Behind DeSantis's Migrant Flights to Martha's Vineyard*, N.Y. Times (Oct. 2, 2022), https://www.nytimes.com/2022/10/02/us/migrants-marthas-vineyard-desantis-texas.html.

19. *Id.*

20. Camilo Montoya-Galvez, *GOP Govs. Ron DeSantis, Greg Abbott Send Migrants to Martha's Vineyard and Vice President's Residence*, CBS News (Sept. 16, 2022, 6:51 PM), https://www.cbsnews.com/news/ron-de-santis-flies-texas-florida-migrants-marthas-vineyard-kamala-harris-residence/.

21. Compare the government-sponsored exiles to Martha's Vineyard with similarly sponsored bus trips sending Black Americans from the Jim Crow south to northeastern cities unaware and unprepared for the influx of their arrival, infamously referred to as "Reverse Freedom Riders." G. Emanuel (Feb. 29, 2020), *The Cruel Story Behind the "Reverse Freedom Rides,"* NPR, https://www.npr.org/sections/codeswitch/2020/02/29/809740346/the-cruel-story-behind-the-reverse-freedom-rides; Matthew Van Meter, *Racist Bussing Rides Again*. Texas Observer (Sept. 28, 2022) ("We called them refugees. They represented what we feel a refugee is. They were homeless, broke, tired, and afraid. We had to help them," Rev. Kenneth Warren, a Unitarian minister who was the chairman of the committee, said to a reporter at the time); *see also* Clive Webb, *"A Cheap Trafficking in Human Misery": The Reverse Freedom Rides of 1962*. J. Amer. Studies 38 (2004).

22. Matthew Van Meter, *Racist Bussing Rides Again*, Texas Observer (Sept. 28, 2022).

23. Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019).

24. Kelsey Smoot, *Juneteenth—Not the Fourth of July—Was the Real Independence Day*, The Guardian (July 4 2020), https://www.theguardian.com/commentisfree/2020/jul/04/juneteenth-not-the-fourth-of-july-was-the-real-independence-day.

25. Annie Karni & Luke Broadwater, *Biden Signs Law Making Juneteenth a Federal Holiday*, N.Y. Times (June 17, 2021), https://www.nytimes.com/2021/06/17/us/politics/juneteenth-holiday-biden.html.

26. Derrick Bryson Taylor, *Juneteenth: The History of a Holiday*, N.Y. Times (June 19, 2023), https://www.nytimes.com/article/juneteenth-day-celebration.html.

27. Kelsey Smoot, *Juneteenth—Not the Fourth of July—Was the Real Independence Day*, The Guardian (July 4, 2020), https://www.theguardian.com/commentisfree/2020/jul/04/juneteenth-not-the-fourth-of-july-was-the-real-independence-day; *see also* Arielle Gray, *As A Black American, I Don't Celebrate The Fourth Of July*, WBUR (July 3, 2019), https://www.wbur.org/news/2019/07/03/black-american-fourth-of-july; Emily Davies, Fredrick Kunkle, Justin Jouvenal, Marissa J. Lang & Sydney Trent, *"In an Era of Racial Unrest, Americans Converging in D.C. to Celebrate the Fourth of July Question the Meaning of Freedom,"* Wash. Post (July 4, 2020), https://www.washingtonpost.com/local/fourth-of-july-protest-celebrations/2020/07/04/aa362aa8-be01-11ea-8cf5-9c1b8d7f84c6_story.html.

28. *An Introduction to the Current Conversation on Race and Immigration*, 33rd Annual (2020) California Chapters Handbook, AILA Conference Publications citing to *Dred Scott v. Sandford*, 60 U.S. 393 (1856), (In an article exploring the relationship between racism, immigration, and policing, the authors highlight, among other things, how Black people are regarded as subordinate and inferior class. As such, the authors delve into policing in the United States and its historical connections to racism, specifically noting that the roots of policing in the United States are tied to violence toward communities of color, including immigrants of color.).

29. *1700-Present. A Brief History of African Americans on Martha's Vineyard*, Vineyard Gazette, Time Machine (Sept. 29, 1854), https://vineyardgazette.com/timemachine/collection/african-american-history; *see also* Associated Press, *Obama Adds to Vineyard's History*, NBC News (July 23, 2009, 9:38 AM), https://www.nbcnews.com/id/wbna32085934.

30. *Id.*

31. Marvel L. Faulkner, *Dear Courts: I, Too, Am a Reasonable Man*, 48 Pepp. L. Rev. 223 (2021).

32. 8 U.S.C. § 1101(a)(42). An alien qualifies as a "refugee" if he is outside the country of his nationality and is unwilling or unable to return to his country because of a well-founded fear of persecution.

33. To highlight the Cuban-friendly approach to immigrants from Cuba, see, for example, the Cuban Adjustment Act of 1966, 89 P.L. 732, 80 Stat. 1161 and later in 1995, following revisions, referred to colloquially as "Wet foot, dry foot," which grants work authorization and, later, permanent residence to any Cuban who settled in the United States for at least one year. Later, in 1980, 125,000 Cubans, known as Mariel Cubans, fled Cuba for the United States.

34. In contrast, the Court in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) held that an Executive Order directing the Coast Guard to intercept vessels transporting passengers from Haiti to the United States in international waters without determining their qualifications as a refugee and to repatriate those passengers did not violate section 243(h)(1) of the Immigration and Nationality Act of 1952 and Article 33 of the United Nations Convention Relating to the Status of Refugees. Section 243(h) of the Immigration and Nationality Act of 1952 and Article 33 of the United Nationals Protocol Relating to the status of Refugees protects individuals escaping potential prosecution from forced repatriation.

35. U.S. Department of Justice (n.d.), *Rfkhumanrights*. Request to Appear as Amicus Curiae for Amicus Invitation No. 24-28-06, https://rfkhumanrights.org/

wp-content/uploads/2024/04/2017-990-reduced.pdf, citing Black Alliance for Just Immigration & NYU School of Law Immigrant Rights Clinic, *The State of Black Immigrants* 20 (2016).

36. U.S. Department of Justice (n.d.), *Rfkhumanrights*. Request to Appear as Amicus Curiae for Amicus Invitation No. 24-28-06, https://rfkhumanrights.org/wp-content/uploads/2024/04/2017-990-reduced.pdf.

37. In order to qualify for asylum, the applicant must establish that he is a refugee, within the meaning of § 1101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant. 8. U.S.C. § 1158(b)(1)(B)(i); notably, economic hardship is not a ground for succeeding in a claim for asylum; *Ethno-Nationalism and Asylum Law*, 74 Me. L. Rev. 188, 200 (2022) ("Although Haitians clearly faced political persecution by their government, the United States has long characterized Haitian tribulations as "economic," rendering most Haitians ineligible for asylum. Notwithstanding the fact that Haitian poverty is a political condition in and of itself, the economic misfortunes of Haitians cannot preclude their right to asylum … The United States further foreclosed relief for Haitians with the implementation of the "Haitian Program" in 1978. The program has been characterized as "accelerated processing," to "expel Haitian asylum applicants as rapidly as possible." The program sought to deter Haitians from entering the United States and detained Haitian asylum seekers who were already in the United States—"basically denying them carte blanche their asylum claims and just sending them back.")

38. Philip S. Foner, *The Life and Writings of Frederick Douglass, Volume II, The Meaning of July Fourth for the Negro* (1852), https://www.pbs.org/wgbh/aia/part4/4h2927t.html:

> What, to the American slave, is your 4th of July? I answer, a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.

39. Gloria Oladipo and agencies, *Texas Trooper Says They Were Told to Push Children into Rio Grande and Deny Migrants Water*, The Guardian (July 18, 2023 8:38) (emphasis added), https://www.theguardian.com/us-news/2023/jul/18/texas-troopers-inhumane-migrants-greg-abbott-border-initiative (A trooper-medic from the Texas department of public safety expressed concern over "inhumane" actions toward migrants in an email to supervisors. In the email, the trooper requested several policy changes to prevent further injury to migrants. "The wire and barrels in the river need to be taken out as this is nothing but an inhumane trap … Due to the extreme heat, the order to not give people water needs to be immediately reversed as well.").

40. Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FiveThirtyEight (Jan. 6, 2022, 6:00 AM), https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/.

41. *Id.*

42. Richard Fausette, *Before Breonna Taylor and George Floyd, There Was Ahmaud Arbery*, N.Y. Times (Feb. 28, 2021), https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html. While George Floyd and Ahmaud Arbery were immediate precursors to the racial reckoning that captivated a national audience during the pandemic, there had been a growing movement spurred by the killing of Trayvon Martin, Eric Gardner ("I can't breathe"), and many that followed.

43. *Martha's Vineyard v. DeSantis*, https://studios.time.com/our-work/marthas-vineyard-v-desantis/. *See also* Abby Remer, *Playing Politics with People's Lives*, MVTimes .com (Sept. 6, 2023), https://www.mvtimes.com/2023/09/06/playing-politics-peoples-lives/. This article is referring to the documentary *Martha's Vineyard v. DeSantis*.

44. Paolo Gaudiano, *Two Years After George Floyd's Murder, Is Your DEI Strategy Performative or Sustainable?*, Forbes (July 27, 2022), https://www.forbes.com/sites/paologaudiano/2022/06/27/two-years-after-george-floyd-is-your-dei-strategy-performative-or-sustainable/?sh=575956ef6aaa.

45. Helen Bezenuh, *Diversity, Equity and Inclusion Initiatives Face a Sharp Decline Three Years After George Floyd*, The Afro (Dec. 10, 2023), https://afro.com/diversity-equity-and-inclusion-initiatives-face-a-sharp-decline-three-years-after-death-of-george-floyd/; *see also* Eric Shuman, Eric Knowles & Amit Goldenberg, *To Overcome Resistance to DEI, Understand What's Driving It*, Harvard Business Review (Mar. 1, 2023), https://hbr.org/2023/03/to-overcome-resistance-to-dei-understand-whats-driving-it; *see also* Leah Watson, *Anti-DEI Efforts Are the Latest Attack on Racial Equity and Free Speech*, ACLU (Feb. 14, 2024), https://www.aclu.org/news/free-speech/anti-dei-efforts-are-the-latest-attack-on-racial-equity-and-free-speech.

46. Patrik Jonsson, *After Obama's Win, White Backlash Festers in US*, The Christian Science Monitor (Nov. 17, 2008), https://www.csmonitor.com/USA/Politics/2008/1117/p03s01-uspo.html; *see also* Monika L. McDermott & Cornell Belcher, *Barack Obama and Americans' Racial Attitudes: Rallying and Polarization*, Polity Vol. 46, No. 3, Unity and Division (July 2014), 46(3), pp. 449-69, http://www.jstor.org/stable/24540221; Further, a "reckoning suggested the country was on the cusp of lasting change. But to the extent that a reckoning occurred, it was short-lived and didn't lead to fundamental changes." Hakeem Jefferson & Victor Ray, *White Backlash Is A Type Of Racial Reckoning, Too*, FiveThirtyEight (Jan. 6, 2022, 6:00 AM), https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/.

47. *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023) (holding that consideration of an applicant's race as one factor in making an admissions decision in order to realize the benefits of diversity is unconstitutional).

48. Vice President Kamala Harris's mother, an Indian national, and her father, a Jamaican national, met while they were graduate students at the University of California, Berkeley. Lindsay Lowe & Ariana Brockington, *Who Are Kamala Harris' Parents? What to Know About Shyamalya Gopolan and Donald Harris* (Aug. 23, 2024) https://www.yahoo.com/news/kamala-harris-parents-know-shyamala-033247923.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAKg70yVAkx_N29_PmKg6duajC-4A94jRlq6ynxlvsXKZeCBCOMDUnip51F0cUNXvt4yZm-zzInf3zNLH7PO7Oc9FakHBADN4E_eTkS

mYRNre-jV1KAryjxUEJwfvinXu1KOkvAwY4JBdAy-L0KdXiu2-ih5idljTkmty3x2sks6o.

49. Vice President Kamala Harris attended Howard University, one of the oldest HBCaUs, and has long held a commitment to the study of disadvantaged persons in American society and throughout the world. Howard ranks among the highest producers of the nation's Black professionals in medicine, dentistry, pharmacy, engineering, nursing, architecture, religion, law, music, social work, and education. *History*. History, Howard University (n.d.), https://howard.edu/about/history.

50. Alpha Kappa Alpha Sorority Incorporated is a sorority founded by Black women in 1908 (during a time when Black women were not permitted to join White sororities). Service through its membership extends beyond college. *Homepage*. Alpha Kappa Alpha Sorority Inc. (Aug. 19, 2022), https://aka1908.com/.

51. Chelsea Bailey, *A GOP Congressman Called Kamala Harris a "DEI Hire." Some Caution It's a Sign of What's to Come*, CNN (July 23, 2024), https://www.cnn.com/2024/07/23/politics/kamala-harris-burchett-dei-hire-backlash/index.html. "Tennessee Republican Rep. Tim Burchett suggested President Joe Biden selected Harris as his running mate solely because she is Black and has consequently turned diversity into a slur: "One hundred percent she is a DEI hire," he said, referring to diversity, equity and inclusion. "Her record is abysmal at best." … "Kamala Harris, who was a former district attorney, former attorney general, former United States senator and current vice president is a 'DEI hire' in their minds, just because she's a Black woman," he said. "I mean, you couldn't get more transparent than that."

52. In this context, "United States" refers to both the state and federal governments, as well the citizens within them. This author asserts that the U.S. government plays a role in *enabling, emboldening, and normalizing criticism and misconduct among its citizens*.

53. An Introduction to the Current Conversation on Race and Immigration, *33rd Annual (2020) California Chapters Handbook* (AILA 2020).

54. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

55. *George Floyd: 'Disgusting That Black People Still Treated Like Animals,' Says Trayvon Martin's Mother*, Sky News (June 17, 2020), https://news.sky.com/story/george-floyd-disgusting-that-black-people-still-treated-like-animals-says-trayvon-martins-mother-12008354.

56. Benjamin Wermund, *Exclusive: Texas Troopers Told to Push Children into Rio Grande, Deny Water to Migrants, Records Say*, Houston Chronicle (July 21, 2023), https://www.houstonchronicle.com/politics/texas/article/border-trooper-migrants-wire-18205076.php.

57. *Id.*

58. *Id.*

59. *Full Text: Donald Trump Announces a Presidential Bid*, Wash. Post (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

60. Gabriel J. Chin, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3686&context=nclr, page 300.

61. Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019); (It was not until the Immigration Act of 1965 that America's ethnicity-based quotas would disappear, and the United States would adopt a more ethnically neutral way of

controlling immigration. Prior to 1965, the Immigration Act of 1924 required a quota system for nationalities in which Japanese immigrants were banned and only a small number of eastern and southern European immigrants were permitted to enter, whereas Irish, German, and British immigrants were permitted to enter the United States in large numbers.).

62. During an Oval Office talk with several U.S. senators about a new immigration package designed to protect immigrants from Haiti, El Salvador, and African countries by extending their Temporary Protected Status, President Donald Trump reportedly said, "Why are we having all these people from shithole [sic] countries come here?" *See* Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, The Atlantic (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/ ("Trump had reportedly complained that Nigerian immigrants would never 'go back to their huts' and Haitians 'all have aids.' He doubled down at the Oval Office meeting. 'Why do we need more Haitians?' Trump said. 'Take them out.'").

63. As of the date of publication, Donald Trump is running for a second term after having lost the 2020 election.

64. Valerie Gonzalez & Steve Peoples, *DeSantis Unveils an Aggressive Immigration and Border Security Policy That Largely Mirrors Trump's*, AP News.com (June 26, 2023).

65. *See generally* Isabel Wilkerson, *Caste: The Origins of Our Discontents* (2020).

66. *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 Berkeley La Raza L.J. 1, 7 (2016) (It took a while, however, for each of these groups to fully integrate since race, specifically whether you were considered a part of the "White" race determined where you were considered in the superficial caste. ("the racial status of "White"—an important mediator of quality of life and opportunity—was not bestowed upon all European immigrants. Successive waves of European immigration led "only to shifts in where, not whether, racial lines [were] drawn."… German immigrants were not considered "White" until the 1840s to 1860s, Irish immigrants until the 1850s to 1880s, and eastern and southern Europeans immigrants until the 1900s to 1920s. [For] Irish immigrants, "entering the white race was a strategy to secure an advantage in a competitive society.").

67. *Id.* at 5 (2016).

68. *Id.* at 1.

69. *Id.*; *see also* Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, Wash. Post (Nov. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/.

70. Neil G. Ruiz, Carolyne Im & Ziyao Tian, *Asian Americans and "Model Minority" Stereotype*, Pew Research Center (Nov. 30, 2023), https://www.pewresearch.org/race-ethnicity/2023/11/30/asian-americans-and-the-model-minority-stereotype/. ("Amid the Civil Rights Movement in the 1960s, another narrative about Asian Americans became widespread: being characterized as a "model" minority.… The model minority stereotype has characterized the nation's Asian population as high-achieving, economically and educationally, which has been attributed to Asians being hardworking and deferential to parental and authority figures, among other factors. The stereotype generalizes Asians in the U.S. as intelligent, well off, and able to excel in fields such as math and science. Additionally, the model minority myth positions Asian Americans in comparison with other non-White groups such as Black and Hispanic Americans.").

71. One scholar notes, "The black American experience is an immigrant experience … However, the situation in which black Americans find themselves is different. The general failure of assimilation has made the black American experience unique among immigrant experiences in that it is an unremitting immigrant experience—an experience of continued exclusion. Blacks are part of a de facto permanent immigrant class." Rhonda V. Magee (2010), *Slavery as Immigration?*, University of San Francisco Law Review Vol. 44: Iss. 2, Article 4, citing to Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreigness*, 49 DePaul L. Rev. 85 (1999).

72. David Benjamin Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 Berkeley La Raza L.J. 1 (May 2016), https://lawcat.berkeley.edu/record/1127396.

73. Erin Blakemore, *The Long History of Anti-Latino Discrimination in America*, History (Aug. 4, 2023), https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america; see also Douglas S. Massey, *The New Latino Underclass*, The Standford ( ), https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/massey_new-latino-underclass.pdf; Since the Mexican-American war and the signing of the Treaty of Guadalupe-Hidalgo, in 1848, Mexicans have been victims of mob violence and massacres—some perpetrated by the Texas Rangers—to voting and employment discrimination and school and housing segregation. *History of Racism Against Mexican Americans Clouds Texas Immigration Law*.

74. *Toni Morrison Talks Love*, O, The Oprah Magazine (Nov. 2003), https://www.oprah.com/omagazine/toni-morrison-talks-love/4.

75. Isabel Wilkerson, *Caste: The Origins of Our Discontents* at p. 141 (2020).

76. Incidentally, we have a U.S. State Department annual Human Rights Reports, where various countries are evaluated based on their adherence to international human rights standards (International human rights law lays down obligations which states are bound to respect. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfill human rights.). Bureau of Democracy, Human Rights, and Labor, *2022 Country Reports on Human Rights Practices*, U.S. Department of State (Mar. 20, 2023), https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/; *see also Ten ways that Saudi Arabia violates human rights*, Amnesty International UK (Jan. 12 2024, 4:04 PM), https://www.amnesty.org.uk/saudi-arabia-human-rights-raif-badawi-king-salman. Further, in cases where other countries have punished its citizens for political participation or fair legal practices, the United States has not hesitated to express its concerns and, in some cases, impose sanctions or diplomatic measures. *Treasury Designates Perpetrators of Human Rights Abuse and Commemorates the 75th Anniversary of the Universal Declaration of Human Rights* (Dec. 8, 2023), https://home.treasury.gov/news/press-releases/jy1972; *see also* Daphne Psaledakis & Michael Martina, *US Sanctions Dozens of People Worldwide Over Human Rights Abuses*, Reuters (Dec. 8, 2023, 3:35 PM), https://www.reuters.com/world/us/us-sanctions-dozens-people-worldwide-over-human-rights-abuses-2023-12-08/#:~:text=Over%20the%20last%20year%20the,risk%20being%20hit%20with%20sanctions.

77. The Foundation of International Human Rights Law, United Nations, https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law.

78. Forrest Brown, *What Travel Warnings Do Other Nations Give Their Citizens About US Violence?*, CNN (Aug. 29, 2023), https://www.cnn.com/travel/article/travel-warnings-other-countries-us-violence/index.html; *see also* Jason Lange & Lauren Hirsch,

3 Countries Urge Caution Traveling to U.S. Amid Protests, Violence, Reuters (July 10, 2016, 3:41 PM), https://www.reuters.com/article/idUSKCN0ZQ0VS/. (In 2016, Bahamas, a Caribbean nation where most people identify as being of African heritage, on Friday warned its people to be careful when visiting U.S. cities rocked by "shootings of young black males by police officers." "In particular young males are asked to exercise extreme caution in affected cities in their interactions with the police. Do not be confrontational and cooperate," Bahamas foreign ministry said in a travel advisory.); *see also* Martie Bowser, *These Countries Have Issued Travel Advisories for Their Citizens Towards the United States*, Miami Herald (May 1, 2023, 12:15 PM), https://www.miamiherald.com/detour/article274840151.html. It is worth noting that many of the countries mentioned in the article that did not issue travel advisories are allies of the United States and its citizens are "white." *See also* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, Journal of Democracy, vol. 32, no. 4, Oct. 2021, pp. 160-76, https://www.journalofdemocracy.org/articles/the-rise-of-political-violence-in-the-united-states/ (The United States has a history of political violence. "Starting in the late 1970s, political violence shifted rightward with the rise of white supremacist, anti-abortion, and militia groups.... What is occurring today does not resemble this recent past ... political violence still comes overwhelmingly from the right, whether one looks at the Global Terrorism Database, FBI statistics, or other government or independent counts."

79. David J. Bier, *U.S. Immigration Policy Lags behind a Globalizing World*, Cato Institute (Sept. 4, 2023), https://www.cato.org/publications/us-immigration-policy-lags-behind-globalizing-world; *see also* Quoctrung Bui & Caitlin Dickerson, *What Can the U.S. Learn From How Other Countries Handle Immigration?*, N.Y. Times (Feb. 16, 2018), https://www.nytimes.com/interactive/2018/02/16/upshot/comparing-immigration-policies-across-countries.html; *see also* Meredith Deliso, *What other countries show us about America's gun violence epidemic*, ABC News (November 5, 2021, 6:01 AM), https://abcnews.go.com/US/countries-show-us-americas-gun-violence-epidemic/story?id=80495637.

80. William Jaffe, *United States' Human Rights Record Criticized by the UN*, PHR (Nov. 29, 2023), https://phr.org/our-work/resources/united-states-human-rights-record-criticized-by-international-community/. ("Immigration policies adopted under the Trump and Biden administrations violate the human right to seek asylum, according to the Committee.... [T]he "enhanced expedited removal" procedure, and the "Zero Tolerance Policy" were specifically criticized by the Committee for causing discrimination on the basis of nationality and risking the safety of asylum seekers, including their unlawful repatriation to potentially dangerous environments…The Committee also flagged that reports of the U.S. government's extensive use of solitary confinement and poor health conditions for detained asylum seekers violate international standards." Regarding policing, "racial profiling is still used by law enforcement and leads to the overrepresentation of racial minorities in the criminal legal system."). *See also* "Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention, PHR, (Feb. 6, 2024), https://phr.org/our-work/resources/endless-nightmare-solitary-confinement-in-us-immigration-detention/.

81. Frederick Douglass, What to a Slave is the Fourth of July? /https://loveman.sdsu.edu/docs/1852FrederickDouglass.pdf.

82. John Gramlich, Migrant encounters at the U.S. Mexico border hit a record high at the end of 2023, Pew Research Center (Feb. 15, 2024).

83. *Asylum in America by the Numbers*, N.Y. Times (Nov. 21, 2023); U.S. Department of Homeland Security, Fact Sheet: Presidential Proclamation to Suspend and Limit Entry and Joint HS-DOJ Interim Final Rule to Restrict Asylum During High Encounters at the Southern Border (June 4, 2024). *See also* AILA American Immigration Council, Fact Sheet: Analysis of the President's 212(f) Proclamation and Interim Final Rule Restricting Asylum (June 5, 2024), https://www.aila.org/library/policy-brief-analysis-of-proclamation-and-interim-final-rule-on-securing-the-border ("[i]t is our judgment that this new policy will effectively bar access to asylum for nearly all people seeking protection at our border. The complex and extensive restrictions imposed by this policy constitute a severe erosion of due process and the asylum protections guaranteed by U.S. law.").

84. Texas lawmakers call for an investigation into Operation Lone Star's treatment of migrants, Stephanie Whitfield & John Diaz, KHIOU*11 (July 18, 2023, 10:59 AM), https://www.khou.com/article/news/local/texas/texas-dps-inhumane-treatment-children-migrants-report/285-0f370668-84cf-4a05-9fcf-e056ccf0e94e.

85. *Governor Ron DeSantis Announces Draconian Measures to Oppress Migrants Seeking Safety in Florida*, Florida Immigrant (Feb. 23, 2023), https://floridaimmigrant.org/press_releases/governor-ron-desantis-announces-draconian-measures-to-oppress-migrants-seeking-safety-in-florida/; *see also* Stephanie Kirshwasser, *DeSantis's Actions on Migrants Are "Mini-Ethnic Cleansing," Expert Warns*, The Guardian (Sept. 19, 2022), https://www.theguardian.com/us-news/2022/sep/19/ron-desantis-migrants-mini-ethnic-cleansing.

86. *OHCHR and Migration | ohchr*. About migration and human rights (n.d.), https://www.ohchr.org/en/migration.

87. *See generally* An Introduction to the Current Conversation on Race and Immigration, *33rd Annual (2020) California Chapters Handbook* (AILA 2020).

This Makes No Sense

Craig Shagin and Maria Vejarano*

Abstract: There are numerous provisions in the immigration laws that make no sense. They add unnecessary delay, expense and backlogs in a terribly over burdened system. Here are three proposals that are intended to remove some of the cholesterol from the veins of the immigration system. Hopefully, this will inspire others to make suggestions of a similar improvements. Complicated systems can benefit by small continuous improvements. This requires constant input.

Introduction

There are numerous provisions in the immigration laws that make no sense. They create unnecessary delay and expense to resolve an issue and either serve no meaningful purpose or serve a purpose that could be addressed in a more economical manner. These issues typically are mere oversights either in the administration of the immigration laws or due to their convoluted bureaucratic administration.[1] They are not exciting topics. They are not at the forefront of some policy argument nor are they a matter of great scholarly interest. Nevertheless, taken collectively, these issues contribute to delays in processing cases, unnecessarily adding to the backlog of both removal cases and petitions before U.S. Citizenship and Immigration Services (USCIS), and the costs of administering the immigration laws. Believing that there is merit in seeking to make continuous improvements—even if small—to any complicated operation, we believe examining such flaws and offering realistic improvements will provide, over time, an improved immigration system.

Here, we note three such problems and propose easy fixes that should be both noncontroversial and improve the efficiency of administering the immigration laws. These are:

1. Requiring that immigration detention facility medical staff be USCIS-designated civil surgeons so that detained aliens do not have to leave a detention facility to get a Form I-693 Report of Immigration Medical Examination completed;
2. Mandate that the Attorney General designate a Department of Homeland Security office to review INA § 237(a)(1)(H) waiver requests when Form N-400 applications for naturalization are denied because USCIS determines that the alien was not admissible at the time of entry and does not elect to put them into removal proceedings; and

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 293–300.

ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

AILA Doc. No. 24110402. (Posted 11/4/24)

3. Permit U.S. Immigration and Customs Enforcement (ICE) legal advisors to grant parole in place to individuals who presumptively qualify for cancellation of removal but for the absence of available visas and have a path to receive an immigrant visa but for their means of entry.

Requiring All Immigration Detention Facility Medical Staff to Be USCIS-Designated Civil Surgeons

The problem: Many detained aliens seek relief through adjustment of status, which requires, among other things, a Form I-693 completed by a USCIS-designated civil surgeon.[2] These are typically private medical offices under contract with USCIS scattered about a state.[3] There do not appear to be any in a detention facility. In order to have this Form I-693 approved, arrangements must be made with the detention facility to have the alien transported to the approved civil surgeon's offices, with a security detail to prevent any escape during transportation.[4]

These procedures are not available on Pennsylvania's alien detention facilities' websites.[5] Scheduling an appointment requires communicating with someone at the detention center. All of this is done at great cost to the alien and his or her family and is an inconvenience to the immigration court, as an adjustment of status application may not be adjudicated without a completed Form I-693.[6] This delay is profitable to the private prisons now detaining aliens, as each day an alien is detained is another day of revenue.[7] Hence, the detention facilities have no incentive, outside of being directed by USCIS, to make the system more efficient.

The medical examination and vaccination requirements apply to all aliens seeking admission to the United States,[8] including those who are about to arrive in the United States for the first time, as well as those who have been here for 50 years.[9] The logic of worrying about contagion from a person who has lived in the United States for decades may escape the non-USCIS indoctrinated. However, this absurdity pales in comparison to having to remove someone from a detention center, where they have already been examined for contagion, so that a USCIS-designated civil surgeon can examine and then return them to the detention center. Because they are returning from outside the prison, they may again, depending on the prison's policies, be placed in isolation to ensure—what else—that they do not now have a contagion. This makes no sense.

Prisons, jails, or the more popularly termed detention facilities are required to safeguard their populations from contagion.[10] Providing medical care in immigration detention facilities is crucial for safeguarding the health and welfare of detainees. Whereas the standards and procedures for delivering such care can differ based on factors such as the particular facility and the supervising agencies, each detention facility with an ICE contract must comply with

one of several national detention standards: National Detention Standards (NDS),[11] Performance-Based National Detention Standards (PBNDS),[12] NDS 2019,[13] or Family Residential Standards 2020.[14]

The 2000 National Detention Standards establish guidelines and protocols for delivering medical care within immigration detention facilities. They mandate that facilities maintain accreditation from the National Commission on Correctional Health Care and strive to attain accreditation from the Joint Commission on the Accreditation of Health Care Organizations, to ensure adherence to recognized standards of care.

Detention facilities covered by this policy include Service Processing Centers, Contract Detention Facilities, and state or local government facilities used by ICE through Intergovernmental Service Agreements for detaining detainees for over 72 hours.[15]

Current policy mandates an initial medical screening, primary medical care, and emergency care for all detainees.[16] The policy requires medical facilities to have sufficient space and equipment, to keep medical records separate from detainee records, and to ensure the secure storage and administration of medication.[17] Medical screening must be conducted for all new arrivals, including mental health screening, tuberculosis screening, and evaluation for substance use or dependence.[18]

These same physicians are undoubtedly technically qualified to make the determinations required to complete Form I-693. The primary responsibility of a civil surgeon is to conduct immigration medical examinations to assess whether aliens exhibit any of the following medical conditions that could lead to their inadmissibility:

1. Communicable disease of public health significance,
2. Failure to provide evidence of required vaccinations (applicable to immigrant visa applicants and adjustment of status applicants only),
3. Physical or mental disorder with associated harmful behavior, and
4. Drug abuse or addiction.[19]

All of this is already being carried out by the detention centers under existing policies. Thus, all that is required to eliminate the need for detainees to leave the institution to complete a Form I-693 exam is to require all detention facilities to have their medical staff certified to be designated civil surgeons. The facilities already appear to meet the requirements. Existing policy requires that healthcare staff possess valid professional licensure or certification, so civil surgeons must also.[20]

This simple fix would deduct months from an adjustment of status case, eliminate the cost of having to transport an alien under guard outside the prison, reduce the detained case backlog, and reduce the government expense and the alien's loss of freedom by unnecessarily detaining an adjusting alien for longer than necessary.

The solution, moreover, is easy. It requires no new legislation or regulations. USCIS designates eligible physicians as civil surgeons to perform medical examinations for these immigration benefit applicants in the United States.[21] USCIS could designate the detention facility physicians, even keeping their archaic "civil surgeon" nomenclature, to perform this task. The applicable ICE contracts could require detention facilities to seek and obtain certification for their medical staff.

There is administrative precedent as well. A Policy Memorandum already exists: "To ease difficulties encountered by physicians and applicants in the military, USCIS [issued] a blanket civil surgeon designation to qualifying military physicians to permit them to perform the immigration medical examination and Vaccination Record, Form I-693, for eligible members and veterans of the Armed Forces and their dependents."[22] Similar action could be taken with respect to physicians serving in alien detention facilities.

Enable USCIS to Issue a 237(a)(1)(H) Waiver

Currently, there is no means for an alien to correct a technical defect in an initial entry except in removal proceedings. Although the Immigration and Nationality Act permits the Attorney General to waive the removal of an alien for fraud or misrepresentation—whether willful or innocent—there is no procedure for USCIS to grant such a waiver outside of removal proceedings.[23] This makes no sense.

The problem arises in multiple forms, typically when an alien applies for naturalization years after having entered the United States and residing here, reasonably believing they are in lawful permanent resident status. Thus, by way of illustration, a citizen of the United Kingdom receives an EB-1 visa. She, her husband, and their children have their passports stamped and receive their entry packets simultaneously on May 1. The dependent husband and children travel to the United States on May 4 to establish a residence and enroll the children in school. They are admitted and receive green cards. The wife, who is the principal applicant, arrives in the United States on August 4. She, too, is admitted and issued a green card. Subsequently, the family has traveled to and from the United States a dozen times together.

Five years later, the husband and wife apply for naturalization. USCIS denies the husband's application because a spouse or child, as defined under the Act,[24] shall "be entitled to the same status … if accompanying or following to join, the spouse or parent."[25] The Philadelphia USCIS Field Office, at least, reads this provision literally, so that if the dependents precede the principal applicant to the United States, they are not accompanying or following to join. Philadelphia USCIS may be an outlier of literal interpretation, but there are a multitude of other technical flaws that might result in a subsequent finding that an alien was not lawfully admitted for permanent residence. For example, the principal applicant may later be found to have committed fraud on entry;

there might have been a technical defect in the divorce of a prior marriage; or the lead applicant may have inadvertently or deliberately failed to disclose information that, were the true facts known, might not themselves have been grounds for inadmissibility but could have led to further inquiry and, for that reason alone, would render the individual inadmissible.

There is a cure for this problem if the alien is in removal proceedings. A waiver before an immigration judge is available for individuals who have been deemed inadmissible to the United States due to misrepresentations made during their admission process.[26] This provision applies both to those whose entry into the United States was procured through fraudulent means or willful misrepresentation of material facts as well as innocent misrepresentations that render them inadmissible.[27]

The BIA has held that the contradictory reference in INA § 237(a)(1)(H) to "aliens described in [INA §212(a)(6)(C)(i)], whether willful or innocent," should be read to include persons charged as inadmissible at the time of entry or adjustment for fraud or willful misrepresentation under INA § 212(a)(6)(C)(i), and also for lack of a valid immigrant visa under INA § 212(a)(7)(A)(i)(I) where there was a misrepresentation made at the time of admission, whether innocent or not.[28] In *Matter of Fu*, Mr. Fu was found to have implicitly misrepresented his eligibility for an immigrant visa as the son of his lawful permanent resident father, even though his father had passed away prior to the issuance of the visa.[29] Despite the potential innocence of this implicit misrepresentation and the lack of a charge relating to INA § 212(a)(6)(C)(i), he was deemed eligible for a waiver under INA § 237(a)(1)(H).[30]

The waiver involves determinations well within the capability of the USCIS to determine. To qualify for a waiver of removability, the person must be: (1) the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; (2) be in possession of an immigrant visa or equivalent document; and (3) otherwise have been admissible at the time of admission to the United States.[31] These findings are even less than those that USCIS is called on to make for a waiver of misrepresentation prior to admission.[32]

Permitting USCIS to make this determination would preclude the necessity of placing an alien in proceedings to obtain a 237(a)(1)(H) waiver, thus reducing the burden on the immigration courts. It would also prevent an otherwise worthy alien from being barred from naturalizing and becoming a citizen of the United States.

Parole in Place for Aliens Presumptively Granted Non-LPR Cancellation of Removal

Cancellation of removal and adjustment to lawful permanent residence is a relief available to aliens who: (1) have been physically present in the United

States for 10 years or more, (2) demonstrate good moral character, (3) have not been convicted of certain crimes, and (4) demonstrate that their removal would result in exceptional and extremely unusual hardship to a United States citizen or lawful permanent resident spouse, child, or parent.[33] However, only 4,000 people are permitted to be granted non-LPR cancellation of removal per year.[34] There is currently about a four-year wait for this relief to be available *after* a merits hearing has been concluded. This means that those cases remain on the immigration court's docket for several years thereafter. Although a case may be denied on the day of the individual merits hearing, it may only be granted when the allocated relief is available. Because many cases take years before they can be presented to an immigration judge, and then must wait years before relief can be granted, an applicant's U.S. citizen children may become adults in the interim.

These cases often involve U.S. citizen spouses, children, or parents who could petition for the alien but for the absence of a lawful entry. The immigration court backlog could be reduced if those aliens who have presumptively qualified for cancellation relief were given parole in place by the Department of Homeland Security to permit them to seek adjustment of status. This would follow the model proposed by President Biden for spouses of U.S. citizens. However, it would also require the presumptive approval of cancellation relief. Hence, these would necessarily be persons of good moral character, who have been in the United States for 10 or more years, who have not been convicted of disqualifying crimes, and whose departure would result in exceptional and extremely unusual hardship to their qualifying relatives.

Conclusion

There seems to be an endless number of requirements or procedures that either serve no valid substantive purpose or serve a purpose poorly. Correcting these is, in the scheme of things, not the most pressing issue either of the policy or practice of immigration lawyers. Nevertheless, their accumulation, like ohms in the flow of electricity, slows our work and burdens the system. The three mentioned here are just examples. We hope our readers will suggest more. Because seeing the absurdity of the statutes without commenting on them really just makes no sense.

Notes

* Craig Shagin (cshagin@shaginlaw.com) is the founding member of The Shagin Law Group LLC and an Adjunct Professor of Law at Widener University Commonwealth Law School. Maria F. Vejarano (mvejarano@shaginlaw.com) is an immigration attorney at The Shagin Law Group LLC. The Shagin Law Group is a full-service immigration law firm in Harrisburg, Pennsylvania.

1. Given that the laws are administered by five Departments—Homeland Security, Justice, State, Labor, and Health—the greater wonder is not the number of meaningless obstacles but their paucity. Nevertheless, there is much to be said for continuous improvement of small details in any complicated system. The purpose of this article is to highlight three. However, there is likely an unlimited supply of such topics.

2. The Immigration and Nationality Act (INA) renders any alien inadmissible to the United States if they have a communicable disease of public health significance. Regulations require that such individuals seeking to adjust status be examined by a USCIS-designated civil surgeon. 8 U.S.C. § 1182; INA § 212(a)(1). Additionally, any alien seeking admission as an immigrant or adjustment of status must present documentation of having received vaccinations for vaccine-preventable diseases.

3. USCIS does not publish the complete list on its website. Instead, it has a "find" tool. Pennsylvania has both Pike County Prison and the GEO Group's Moshannon Valley Detention Facility with no certified surgeons in the detention facilities. *See* https://www.uscis.gov/tools/find-a-civil-surgeon.

4. U.S. Immigration and Customs Enforcement, Detention Management, 2000 National Detention Standards for Non-Dedicated Facilities, https://www.ice.gov/doclib/dro/detention-standards/pdf/medical.pdf.

5. *See* BCRC, Berks County Residential Center, https://www.berkspa.gov/Dept/BCRC/Pages/default.aspx; U.S. Immigration and Customs Enforcement, Moshannon Valley Processing Center, https://www.ice.gov/detain/detention-facilities/moshannon-valley-processing-center; York County, Pennsylvania, Prison, https://yorkcountypa.gov/477/Prison.

6. 8 U.S.C. § 1182; INA § 212(a)(1).

7. The Department of Homeland Security (DHS) and the White House requested $1.84 billion for DHS Custody Operations. This funding level would amount to over $5 million per day spent on immigration detention. This funding level would put the current cost to detain an immigrant at approximately $159 per day at a capacity of 31,800. The U.S. House of Representatives would spend even more. Furthermore, many of these detention dollars flow to enormous private prison corporations that stand to reap significant profits when the number of detained immigrants increases.

8. 8 C.F.R. § 245.1; 8 C.F.R. § 245.5; INA § 212(a)(1)(A)(ii).

9. INA § 212(a)(1)(A)(i).

10. U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97 (1976). The Supreme Court held that deliberate indifference to the serious medical needs of prisoners constitutes cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. This decision establishes that prison officials have a constitutional obligation to provide adequate medical care to inmates, and failure to do so, when deliberate and leading to harm, violates the prohibition against cruel and unusual punishment; *Hutto v. Finney*, 437 U.S. 678, 686 (1978). The Supreme Court emphasized that prison conditions must meet basic human needs, including protection from serious health risks, under the Eighth Amendment's prohibition against cruel and unusual punishment.

11. U.S. Immigration and Customs Enforcement, 2000 National Detention Standards for Non-Dedicated Facilities, https://www.ice.gov/detain/detention-management/2000.

12. U.S. Immigration and Customs Enforcement, *2008 Operations Manual ICE Performance-Based National Detention Standards*, https://www.ice.gov/detain/detention-management/2008.

13. U.S. Immigration and Customs Enforcement, *2019 National Detention Standards for Non-Dedicated Facilities*, https://www.ice.gov/detain/detention-management/2008.

14. U.S. Immigration and Customs Enforcement, *Family Residential Standards*, https://www.ice.gov/detain/detention-management/family-residential.

15. Medical Care, https://www.ice.gov/doclib/dro/detention-standards/pdf/medical.pdf.

16. *Id.*

17. *Id.*

18. *Id.*

19. INA § 212(a)(1).

20. U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, at 59 (2011), https://www.ice.gov/detain/detention-management, and U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 4.3: Medical Care* 15 (2019), https://www.ice.gov/doclib/detention-standards/2019/4_3.pdf.

21. 42 C.F.R. § 34.2(o) and 22 C.F.R. § 42.66. See 9 FAM 302.2-3(E).

22. PM-602-0074 (Sept. 26, 2012).

23. INA § 237(a)(1)(H).

24. INA § 101(b)(1).

25. INA § 203(d).

26. *Id.*

27. INA § 212(a)(6)(C)(i).

28. *Matter of Fu*, 23 *I& N Dec*. 985 (BIA 2006).

29. *Id.*

30. *Id.*

31. INA §§ 237(a)(1)(H)(i)(I)-237(a)(1)(H)(i)(II).

32. INA § 212(i).

33. INA § 240A(b)(1).

34. 8 U.S.C. § 1229(e); INA § 240A(e)(1).

AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

The American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Fastcase's Full Court Press has partnered with AILA to publish this journal in furtherance of its mission.

ISSN 2642-8598 (print)
ISSN 2642-8601 (online)