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Immigration Enforcement Under Trump Neglects Rule Of Law

By **David Leopold** (May 13, 2019, 3:37 PM EDT)

On May 1, the Trump administration called on Congress to provide \$4.5 billion in emergency supplemental funding “to provide more resources to respond to the humanitarian crisis at the border.” The White House claims these additional funds are necessary for “humanitarian response and border operations” because the country is “experiencing an overwhelming surge of migrants flooding our border, many of whom are minors and families who require extensive care.” Congress must act, according to the White House, because “the surge of migrants arriving at the southern border has strained existing resources to a breaking point.”



David Leopold

America is a country that does big things. When Europe was in ruins after World War II, the United States answered with the Marshall Plan,[1] a far more ambitious project than any required to alleviate the corruption and gang violence that plagues Central America causing “minors and families” to flee north. When he took office in 2017, President Donald Trump knew that the percentage of families fleeing Central America had been steadily rising since 2010.[2] Astonishingly, rather than focus on a long-term strategy to alleviate the root causes of the migration, Trump has taken actions that have made things much worse, such as severely limiting asylum applications at U.S. ports of entry, prosecuting asylum-seekers who enter between ports of entry, and separating children and forcing families to wait in Mexico, to name a few.

The Trump administration would have Americans believe that our country is somehow threatened by hordes of mothers and children seeking to enter the United States at the southern border. The so-called “humanitarian crisis” at the border is, in reality, a Trump-exacerbated crisis, which demands real solutions, not incendiary rhetoric, cruelty and lawlessness.

The Trump administration’s emergency funding plea to Congress is the latest in a series of urgent measures taken by the president purportedly in an effort to secure the southern border from invading masses of Central American families. Late last year, the president proudly forced the longest government shutdown in U.S. history because Congress refused his demand for \$5.7 billion to build a border wall — the same one he’d repeatedly promised his supporters that he would build and Mexico would pay for. Then, shortly after the shutdown ended with Congress providing Trump \$1.375 billion, which was much less than he had originally demanded, Trump declared a national emergency as a pretext to reprogram funds Congress refused to provide him toward the building of a border wall.

It’s notable that the lion’s share of the funds requested in the emergency request are designated for U.S. Department of Homeland Security enforcement operations. Further, while the request is couched in terms of “humanitarian aid” in the nearly two and a half years since the Trump administration took office, it has closed or suspended programs that could have done much to alleviate the Trump border crisis, such as the Central American Minors Program that enabled youth to have their asylum claims heard in their home countries rather than embark on a dangerous journey north to the U.S. border. The Trump administration also stopped working with the U.N. High Commissioner for Refugees on an effort that would have led to regional refugee processing centers.

Indeed, it could be convincingly argued that far from seeking smart solutions to the increasing

migration flow, the Trump administration has embarked on an effort to exacerbate the surge at the southern border. For example, rather than marshal resources to the border to meet the demands of increasing numbers of families seeking asylum, the administration has done nothing to increase funding for immigration judges so that asylum claims can be adjudicated fairly, efficiently and in accordance with due process. Nor has the administration redirected more U.S. Citizenship and Immigration Services asylum corps officers to the border to conduct credible fear screenings.

Instead, Trump has called for \$23 million for Border Patrol agents to conduct credible fear interviews. Unlike asylum corps officers, these agents are not trained in the complexities of credible fear screenings or asylum law, which makes clear that the administration is far more interested in expedited removal of migrants than providing them with a fair assessment of whether they are entitled to a full hearing on their asylum claims before an immigration judge.

Further, the Trump administration, which instituted and then abandoned the zero-tolerance policy of prosecuting asylum-seekers who apply between ports of entry, has implemented a scheme known as "metering" at border checkpoints. Rather than meeting the demands of increased numbers of asylum applicants at ports of entry, the administration has limited the consideration of asylum applicants to a handful of people a day. Metering at the border has predictably led to increased numbers of migrants abandoning their hopes to apply at designated ports of entry and cross in between ports of entry.[3]

Recently, in *Matter of M-S-*, Attorney General William Barr ruled that asylum-seekers who apply after entering the United States between ports of entry are not eligible to request release on bond from an immigration judge and must be detained until their removal proceedings conclude, unless they are granted parole. Barr postponed the effective date of the ruling for 90 days. This, coupled with the 40 percent increase in funding for family detention suggests that the Trump administration has plans to detain more families that have credible asylum claims, rather than employ alternative forms of detentions.

In addition to all this, the Trump administration has instituted a "remain in Mexico" policy. The scheme, officially dubbed "Migrant Protection Protocols," requires that asylum-seekers and others seeking entry into the United States without advance documentation be returned to Mexico while their cases are heard by an immigration judge in the United States. Remain in Mexico is based on Immigration and Nationality Act § 235(b)(2)(C), which provides that "in the case of an alien ... who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA.

The legally dubious policy, which is currently being challenged in federal courts, has been criticized for subjecting asylum-seekers to months of waiting on the Mexican side of the border subject to squalor and crime and depriving them of meaningful access to counsel and due process.[4] Indeed, there is no explanation on how attorneys trained in U.S. immigration law will have access to clients who are stuck in Mexico with few resources. Will American lawyers have to obtain visas to visit their clients in Mexico? What is that process? Will clients be allowed to enter the United States to visit lawyers?

Nor is the Trump administration's draconian enforcement regime limited to the southern border. Within a few weeks of the president's inauguration, then-DHS Secretary John Kelly revoked the Obama era enforcement priorities, which targeted felons and security threats over undocumented immigrants with strong ties to the United States, and replaced them with two memos implementing Trump's executive orders on border security and immigration enforcement. The first memo, "Enforcement of the Immigration Laws to Serve the National Interest," all but directed U.S. Immigration and Customs Enforcement agents to round up any unauthorized immigrants they encountered and arrest them no matter how long they have been in the United States or how much value they have contributed to the economic and social fabric of their communities.

Over the next several months, ICE Enforcement and Removal Operations agents arrested scores of immigrants, many of whom had been living in the United States for years under ICE orders of supervision, and deported them, in many cases tearing their families apart. Particularly impacted were communities of color, such as the Mauritanian community of Columbus, Ohio, whose plight was detailed by journalist Franklin Foer in his gripping front page *Atlantic Monthly* expose, "How Trump Radicalized ICE." [5]

The second memo, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," which focused mostly on border security, contains a provision that foreshadows an even broader, more draconian internal roundup of immigrants. Tucked away in the middle of the missive is a section entitled, "Expanding Expedited Removal Pursuant to Section 235(b)(1)(A)(iii)(I) of the INA." That section, which went relatively unnoticed at the time the memo was issued, considers the expansion of expedited removal, the process by which inadmissible unauthorized immigrants may be removed from the United States based on the decision of a low-level immigration bureaucrat, not an immigration judge.

As the memo points out, under current practice, expedited removal has only been applied to noncitizens who are "encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea other than at a port of entry." However, media reports suggest that "The Homeland Security Department is weighing a plan to bypass immigration courts and remove undocumented immigrants who cannot prove they've been present continuously in the U.S. for two years or more." [6]

Obviously, this could lead to a massive expansion of expedited removal. Further, it would effectively deprive millions of people the opportunity to have their cases heard by an immigration judge because requiring people, especially unauthorized immigrants, to prove two years of continuous physical presence is a nearly impossible task, especially for someone in ICE detention.

Since taking office in 2017, the Trump administration has engaged in what can only be described as an outright attack on immigrants and their families. The courts have pushed back against many of the most egregious enforcement efforts including family separation, ending Deferred Action for Childhood Arrivals, temporary protected status, and Deferred Enforced Departure for the vast majority of participants, and Muslim travel bans among others. Sadly, the Trump administration seems to prioritize draconian immigration enforcement above all else, including the rule of law.

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[1] Melvyn P. Leffler, "Divide and Invest: Why the Marshall Plan Worked," Foreign Affairs, July/August 2018, <https://www.foreignaffairs.com/reviews/review-essay/2018-06-14/divide-and-invest>.

[2] Doris Meissner and Sarah Pierce, "A Wall Cannot Fix Problems at Border; Smart Solutions for Asylum Crisis Can," Migration Policy Institute, January 2019, <https://www.migrationpolicy.org/news/wall-cannot-fix-problems-border-smart-solutions-asylum-crisis-can>.

[3] U.S. Department of Homeland Security Office of Inspector General, "Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy," OIG-18-84, September 27, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

[4] Miriam Jordan, "Rain Turns Squalid Migrant Camp Near California Border Into Scene of Fetid Misery," New York Times, November 30, 2018, <https://www.nytimes.com/2018/11/30/us/migrant-camp-tijuana.html>.

[5] Franklin Foer, "How Trump Radicalized ICE," Atlantic Monthly, September 2018, <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/>.

[6] Ted Hesson, "DHS draft proposal would speed deportations," Politico, April 25, 2019, <https://www.politico.com/story/2019/04/25/deportation-undocumented-immigrants-1380380>.

