Litigation Tracker: Major Decisions Facing the Biden Administration

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Just Security, last updated March 8, 2021

As with all presidential transitions, the Biden administration has inherited a docket of pending litigation related to the previous administration's policies and actions. These cases involve a range of complaints originally brought against or brought by the Trump administration on hot-button policy issues, such as asylum, the death penalty, and the use of emergency executive authorities. The Biden administration must now decide whether to change course or maintain the Trump administration's litigation posture.

In some cases, we can reasonably anticipate that the government's posture in court may change -- or at least, in order to be consistent with key Biden policy priorities, it *should* change. For instance, some of the ongoing cases rest on issues that are key policy rifts between the two administrations, such as whether the Executive had the legal authority to divert funds appropriated for other purposes for construction of the Border Wall or whether the so-called "Remain in Mexico" program (Migrant Protection Protocols) aimed at keeping asylum seekers from U.S. territory is legal. Others involve issues that may not have been heavily litigated on the campaign trail, but present moral and legal issues that are key to restoring U.S. global leadership. These cases include complaints against the government involving torture, sanctioning international prosecutors, and the use of the federal death penalty. In some of these cases, the Biden administration may face decisions regarding whether to abandon appeals, leaving decisions seen as unfavorable to the executive branch on the books.

Other cases present more complicated policy issues but also involve highly aggressive legal positions, such as using emergency authorities to implement outright bans of the TikTok and WeChat platforms. In these cases, the Biden administration may face more difficult decisions on how to construe executive authority, including whether to dial back Trump administration legal interpretations in order to preserve what deference from the courts remains after the judiciary reacted with greater-than-usual skepticism to the Trump administration's extreme claims. And yet, in other cases, the Biden administration may be swayed from its policy positions in order to defend Executive branch institutional prerogatives in court, or may simply share the Trump administration's views, such as in the case seeking the extradition of Julian Assange from the United Kingdom.

Below we have compiled key cases concerning major Trump-era national security issues and decisions. Each case chart below explains the main issue in the case, the case's procedural posture, and both the Trump and Biden administration's litigation postures (if any). These charts show what is at stake and what comes next in cases that will be early tests on key legal policy issues for the Biden administration.

If you believe we are missing a significant issue or development, send us an email message at lte@justsecurity.org.

Case Chart

1. Migrant Protection Protocols/Remain in Mexico Program *Mayorkas, Sec. Homeland Security et. al. v. Innovation Law Lab*, 140 S. Ct. 1564 (2020)	
Agency Involved	Department of Homeland Security (DHS)
Issue	In January 2019, DHS began large-scale implementation of what it terms the "Migrant Protection Protocols" (MPP), also known as the "Remain in Mexico" program, under which the United States sends non-Mexican

	asylum-seeking individuals to Mexico for the duration of the adjudication of their immigration proceedings in U.S. courts. DHS claims statutory authority to implement the program under section 235(b)(2)(C) of the Immigration and Nationality Act (INA), which authorizes DHS "to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry), pending removal proceedings" under the INA. The lawfulness of the program was challenged by Innovation Law Lab and several Central American migrants. The District Court granted and the 9th Circuit affirmed a preliminary injunction to pause the program, however the Trump administration filed a request for an administrative stay pending a petition to the Supreme Court. The 9th Circuit granted in part and denied in part the emergency stay. The 9th Circuit concluded that the MPP violated federal law, but limited the lower court's injunction on the MPP to just the 9th Circuit's geographical reach, allowing the program in New Mexico and Texas to proceed.
Key Upcoming Filing Dates/Case Status	The Acting Secretary of Homeland Security asked for the removal of the case from the Supreme Court's February argument calendar and to hold further motions in abeyance until the administration had completed its review of the MPP, The Court granted the motion on Feb. 3.
Trump Administration posture	The Trump administration argued that MPP implements precisely the "contiguous-territory-return authority" that Congress expressly established in the INA. *Contra* petitioners' argument, the INA does not create two different classes of applicants for admission, one of which is supposedly excluded from contiguous-territory-return because of the expedited removal procedure available to the government instead under the governing statute 1225(b)(1). Innovation Law Lab argued that DHS could have simply invoked expedited removal for these migrants, but the Trump administration argued that the (b)(1) and (b)(2) applicants are not distinct classes. The statute merely offers two separate removal procedures that DHS may use at its discretion. The Trump administration's brief was filed on Mar. 10, 2020.
Biden Administration posture	The Biden administration has not yet taken a position in the case, although it has announced a review of the MPP program, which Biden promised to roll back as a presidential candidate, and is reported to have begun processing asylum claims of those subject to the program.

2. The Border Wall Case *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) *Joe R. Biden, Jr. v. Sierra Club* (2021)	
Agency Involved	Department of Defense (DOD)
Issue	The petitioners questioned whether Section 8005 of the Department of Defense Appropriations Act authorized the then-Acting Secretary of Defense to divert $2.5 billion in military funds to DHS to pay for the southern border wall. In *California v. Trump*, the District Court held that the

	Acting Secretary had exceeded his statutory authorities with the funds transfer. In the separate proceeding of *Sierra Club v. Trump* (merged in the Supreme Court), the lower court enjoined DOD and DHS from using the funds to construct the border fence. The Supreme Court issued a stay of the injunction, but the 9th Circuit affirmed the lower court injunctions. The Trump administration appealed on the merits to the Supreme Court.
Key Upcoming Filing Dates/Case Status	On Feb. 1, Acting Solicitor General Elizabeth Prelogar asked the Supreme Court to take this case off of its February argument calendar, which was granted on Feb. 3.
Trump Administration posture	The government argued that the Acting Secretary of Defense has the authority to transfer funds to DHS in response to a request for counterdrug assistance at the southern border. DOD argued that it had already transferred appropriately allocated funds to DHS and responded within statutory bounds to the second request for additional counterdrug assistance. Section 8005 gives the Secretary wide latitude to act when he deems it necessary to transfer funds in the "national interest." Similarly, the DOD Appropriations Act allows DOD to support other agencies' counterdrug efforts in the form of "roads and fences." 10 U.S.C. § 284(a)(1)(A). The Trump administration's brief was filed on Dec. 8, 2020.
Biden Administration posture	On his first day in office, President Biden ended the national emergency that opened some of the funding streams for the border wall and reiterated his disagreement with the border wall policy. This was followed by a formal request to remove the case from the Supreme Court's argument calendar, which the Court granted. The Biden administration has not yet taken any position in the litigation, which will be an early test of how it construes the scope of executive authority in a case in which the Biden policy position is at odds with that of his predecessor.

3. Free Speech and Chinese Tech Platforms (WeChat) *United States WeChat Users All. v. Trump*, No. 20-16908, 2020 U.S. App. LEXIS 33700 (9th Cir. Oct. 26, 2020)	
Agency Involved	President and the Department of Commerce
Issue	President Trump issued Executive Order 13,943, which stated that mobile apps developed in China and used widely in the U.S. pose a national security threat to the country. E.O. 13,943 singled out WeChat as a platform of concern (mirroring an earlier executive order regarding TikTok and ByteDance) and banned transactions related to WeChat. WeChat Users Alliance and a number of WeChat users sued, claiming the order is not constitutional because it violates their freedom of speech under the First Amendment. Two days later, the Department of Commerce issued a regulation based on E.O. 13,943 that made it illegal for U.S. app stores to allow users to download or update WeChat. A magistrate judge issued an emergency injunction of the WeChat ban, finding serious First Amendment

	concerns even after receiving a classified briefing from the government on the threats posed by WeChat and its owner Tencent. A 9th Circuit panel agreed with the magistrate judge and declined to issue a stay of the injunction for the government.
Key Upcoming Filing Dates/Case Status	Arguments in the 9th Circuit occurred on Jan. 14, 2021 and parties are awaiting the 9th Circuit's decision.
Trump Administration posture	The administration argued that E.O. 13,943 was lawful because under 50 U.S.C. § 1702(b)(1), the International Economic Emergency Powers Act (IEEPA), the President can limit transactions in the interest of national security. President Trump declared a national emergency with regards to threats made by foreign adversaries in cyberspace through his executive orders and IEEPA emergency powers allowed the President and the Department of Commerce to ban WeChat. The underlying premise of the argument was that the Chinese government would continue to use WeChat to surveil and collect massive amounts of data on the American people, which posed national security risks.
Biden Administration posture	Press Secretary Jen Psaki indicated that the administration will review changes to the China policy set by former President Trump. On Feb. 11, the administration made a request to the 9th Circuit requesting a delay in litigation until it reviewed changes to China policy, confirming a probable shift away from the Trump Administration's stance towards China. The court granted the motion to stay proceedings but required that within 60 days, and every 60 days after, the U.S. must provide a report detailing its progress in reviewing the Department of Commerce vis-a-vis this case.

4. Free Speech and Chinese Tech Platforms, Part Two (TikTok) *TikTok Inc. v. Trump*, Civil Action No. 20-cv-02658, 2020 U.S. Dist. LEXIS 232977 (D.D.C. Dec. 7, 2020)	
Agency Involved	President and the Department of Commerce
Issue	Similar to the WeChat case, President Trump issued Executive Order 13,873 pursuant to his powers under the International Emergency Economic Powers Act (IEEPA), which noted national security threats posed to downstream U.S. technology companies owned by Chinese companies. Trump subsequently issued E.O. 13,942, which singled out TikTok and authorized the Secretary of Commerce to prohibit transactions related to TikTok and its Chinese parent company, ByteDance, because the platform could be used to gather information for the Chinese government about Americans or spread Chinese propaganda. The President also directed the Committee on Foreign Investment in the United States (CFIUS) to ensure that any TikTok operations in the U.S. are divested from ByteDance. TIkTok and ByteDance challenged the actions claiming that they violated the First Amendment and the President's IEEPA authority. A separate action brought by TikTok users resulted in a preliminary injunction of the government's proposed ban. *Marland v. Trump*, 2020 U.S. Dist. LEXIS 202572, 2020 WL 6381397, (E.D. Pa. Oct. 30, 2020). The D.C. District Court determined in its Dec. 7, 2020 opinion that the Trump administration

	was indirectly regulating personal communications, and that the Secretary of Commerce was arbitrary and capricious in promulgating the rules on TikTok transactions. Following the D.C. court decision, the Trump Administration stated that it would vigorously defend its actions against TikTok.
Key Upcoming Filing Dates/Case Status	The Biden administration's formal response as part of the appellate procedure is due to the court on Feb. 18, although it is unclear if the request for a delay by the Biden administration will affect this date.
Trump Administration posture	The Trump administration argued that the national security and cybersecurity implications of allowing ByteDance to operate TikTok within the U.S. is pressing enough that the President's use of IEEPA powers is warranted.
Biden Administration posture	Press Secretary Jen Psaki indicated that the administration will review changes to the China policy set by former President Trump, although no changes in litigation posture have been noted yet. On Feb. 10, the Biden administration formally requested a delay in its appeal to the district court, citing a desire to review agency actions that are at issue in the case.

5. Jurisdiction Over Retired Servicemembers *Larrabee v. Braithwaite*, No. 19-654, 2020 U.S. Dist. LEXIS 219457 (D.D.C. Nov. 20, 2020); *United States v. Begani*, No. 20-0217 (CAAF)	
Agency Involved	United States Marine Corps; Secretary of the Navy
Issue	The case arose when Larrabee, a retired servicemember, was court martialed for sexual assault committed after he retired from the Marine Corps and was serving as a member of the Fleet Marine Corps Reserve. Larrabee challenged the action, asserting that trying retired service members under the Uniform Code of Military Justice (UCMJ) for offenses committed while retired violates 10 U.S.C. § 802(a)(6). The U.S. Navy-Marine Corp Criminal Court of Appeals affirmed Larrabee's sentence on the basis that a retired servicemember can reasonably be recalled to active duty service at any time. The Court of Appeals for the Armed Forces (CAAF) summarily affirmed the Court of Appeals decision. Larrabee appealed to the D.C. District Court. *Begani* is a companion case to *Larrabee*, above, pending in front of the Court of Appeals for the Armed Forces (CAAF). The arguments are similar– the court will decide whether or not retirees from the military are members of the "land and naval forces" under the Uniform Code of Military Justice (UCMJ) and can be subjected to a court martial.
Key Upcoming Filing Dates/Case Status	In *Larrabee*, the D.C. District Court ruled against the government and held that a retiree cannot be court martialed for offenses committed after they retire. The Court determined that the possibility of being recalled for service is not enough for a court martial jurisdiction. The Trump administration formally filed a notice of appeal to the Court of Appeals for the District of

	Columbia on Jan. 19, 2021. As for *Begani*, on Dec. 8, 2020, CAAF approved reconsideration on the topic of retiree jurisdiction under the UCMJ. On Feb. 8th, 2021, Begani's lawyers submitted their reply brief to CAAF.
Trump Administration posture	The Trump administration argued that yes, servicemembers are within the jurisdiction of the UCMJ because Congress has deemed them part of the land and naval forces. The argument rested on *Solorio v. United States,* 483 U.S. 435 (1987), which stated this proposition as well.
Biden Administration posture	The Biden administration has not yet taken a position in either case. The issue of jurisdiction over military retirees, however, is now particularly salient after the Jan. 6, 2021 insurrection, given the reports that current and retired members of the military may have participated in the events at the U.S. Capitol. The outcomes of *Larrabee* and *Begani* could have implications for charges stemming from Jan. 6.

6. Citizenship Status of US-Born ISIS Member *Muthana v. Pompeo,* No. 19-5362, 2021 U.S. App. LEXIS 1332 (D.C. Cir. Jan. 19, 2021)	
Agency Involved	Department of State
Issue	The court addressed whether Hoda Muthana, born in the United States to foreign diplomats, can be repatriated after leaving the United States to be an "ISIS bride." The suit was brought on behalf of Muthana by her father.
Key Upcoming Filing Dates/Case Status	The D.C. Circuit ruled in favor of the government and decided the case on Jan. 19, 2021.
Trump Administration posture	The State Department asserted that Muthana was never a U.S. citizen by birth and therefore cannot be given back a passport because the Department cannot confer citizenship to someone who never had it.
Biden Administration posture	It remains unclear whether Muthana's father will petition on her behalf for rehearing en banc. The Biden administration has not yet taken a position in the case, but the previous administration's position regarding the status of children born to diplomats in the United States is consistent with long-standing U.S. government legal views.

7. Federal Death Penalty in Boston Marathon Bombing Case *United States v. Tsarnaev,* 968 F.3d 24, 34 (1st Cir. 2020)	
Agency Involved	Department of Justice (DOJ)
Issue	Whether First Circuit erred in overturning federal death penalty conviction for Dzhokhar Tsarnaev, one of the two Boston Marathon bombers.
Key Upcoming Filing Dates/Case Status	Pending petition No. 20-443 for writ of certiorari before the Supreme Court as of October 6, 2020. Response was filed on Dec. 17, 2020. As of Jan. 19,

	2021 the case was circulated for Conference.
Trump Administration posture	The Trump administration argued that theFirst Circuit improperly vacated the capital sentences recommended by the jury and imposed by the district court, claiming that the Supreme Court should reverse and reinstate the capital sentence for Tsarnaev. (See Letta Taylor's analysis on this issue for *Just Security* here.)
Biden Administration posture	Biden has publicly stated that he is against the federal death penalty, although his administration has announced no changes yet to DOJ's policy towards the death penalty or taken any other actions to end its use. This case will be an early test of Biden's anti-death penalty commitment as the administration decides whether to continue the appeal.

8. Immigration and Public Benefits *Department of Homeland Security v. New York,* 974 F.3d 210, 214 (2d Cir. 2020) Related cases: Wolf v. Cook County, 962 F.3d 208 (7th Cir. 2020)	
Agency Involved	Department of Homeland Security (DHS)
Issue	Under the Immigration and Nationality Act (INA), an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). Following notice-and-comment rulemaking, DHS promulgated a final rule interpreting the statutory term "public charge." The Rule defines "public charge" to mean "an alien who receives one or more public benefits . . . . for more than 12 months in the aggregate within any 36-month period." Previously, "public charge" was defined as anyone who "is or is likely to become primarily dependent on the government for subsistence." The issue is whether the final rule is likely contrary to law or arbitrary and capricious. The District Court granted a preliminary injunction, preventing the rule change from going into effect, which the Second Circuit Court of Appeals affirmed as applied to New York, Connecticut, and Vermont. Note: Preliminary injunctions were granted in a number of other districts where similar suits were brought; some of those were stayed, some were reversed, and some were affirmed.
Key Upcoming Filing Dates/Case Status	Petition to Supreme Court Docket No. 20-450 (Cook County). The case was distributed for conference on Jan. 22, 2021. UPDATE: On Feb. 22, the Supreme Court granted cert in Department of Homeland Security v. New York (Docket No. 20-449).
Trump Administration posture	The Trump administration argued that the Supreme Court should reverse the Second Circuit injunction and allow the new rule defining public charge to go into effect. The Trump Administration argued that the rule is a plainly permissible exercise of Executive Branch authority and is not arbitrary and capricious.

Biden Administration posture	Biden ordered a review of the public charge rule on Feb. 2 but has taken no position in the case.

9. Assange Extradition from the UK *The Government of the United States of America v. Julian Paul Assange*, [2020] WMC 1.	
Agency Involved	Department of Justice (DOJ)
Issue	The case turns on whether Julian Assange, founder of Wikileaks, can be extradited from the United Kingdom to the U.S., where he faces numerous federal charges including Conspiracy to Commit Computer Intrusion, Conspiracy to Receive National Defense Information, Obtaining National Defense Information, and Disclosure of National Defense Information. A judge in the UK blocked Assange's extradition, noting that his "mental condition" would make it unwise to allow him to be extradited to the U.S. for trial.
Key Upcoming Filing Dates/Case Status	The UK judge set Friday, Feb. 12th, 2021 as the deadline for the U.S. to file its notice of appeal. A Biden DOJ spokesperson confirmed the U.S. has filed the notice to appeal.
Trump Administration posture	The Trump administration indicted Assange in 2018 for federal crimes and sought his extradition from the UK.
Biden Administration posture	A spokesperson for Biden's DOJ said the administration will continue to push for extradition of Assange and challenge the UK ruling.

10. Torture and Guantanamo Military Commissions *United States v. Majid Khan,* AE033O (Mil. Comm'n Feb. 18, 2021)	
Agency Involved	Office of Military Commissions
Issue	This case addresses whether military commission judges have authority to award administrative credit to inmates as a remedy for government torture. The defendant, Majid Khan, was tortured at both CIA black sites and Gauntanamo. He pled guilty to military commission charges in 2012 but has not been sentenced. In May 2019, he petitioned the military commission to grant him administrative credit for the time periods during which the government tortured him. Judge Col. Douglas Watkins granted the motion in part, ruling that he had authority to award administrative credit for the illegal torture but would hold off on calcluating the exact amount of credit until he officially sentences Khan (scheduled for May 2021). In justifying that ruling, Judge Watkins reasoned that the government violated both treaty and jus cogens norms against torture, which entitled him to grant Khan a remedy.
Key Upcoming Filing Dates/Case Status	The Trump administration moved for Judge Watkins to reconsider his ruling on Dec. 23, 2020. Khan's sentencing is scheduled for May 2021. UPDATE: On Feb. 18, 2021, Judge Watkins denied the government's

	request to reconsider his earlier ruling that he could grant Khan administrative credit. Separately front, the parties are also contesting public access to Khan's proceedings. Both Khan and the *New York Times* filed motions asking the court to make Khan's testimony available to the public, and a group of third-party detainees has likewise requested access. Before Trump's term ended, his administration formally opposed the *New York Times*'s motion. The Biden administration also responded to the Khan and third-party detainee motions, but those filings are not yet publicly available.
Trump Administration posture	In its motion for reconsideration, the Trump administration argued that no international law--treaty or customary--grants military commission judges the authority to award administrative credit, even as a remedy for torture. It maintained that international law cannot bind US courts unless there is implementing legislation and no domestic law addresses the same issue. Here, the administration argued that (i) neither of the applicable torture-related treaties (the Convention Against Torture and the 1949 Geneva Conventions) were self-executing, nor had Congress enacted them with implementing statutes, and (ii) the political branches displaced any application of international law in this arena when they created the Military Commission system. So, per the government, nothing granted Khan a judicially enforceable right to remedy torture, and likewise nothing granted Judge Watkins the authority to award relief for the same.
Biden Administration posture	The Biden administration has not yet taken a position in this particular case, but the administration has confirmed that they will begin a review process in the hopes of closing the prison at Guantanamo. This could have direct repercussions for the military commissions. Editor's Note: Hina Shamsi and Scott Roehm argue that the Biden administration should immediately withdraw the government's motion for reconsideration: "If Judge Watkins rules on the motion before it does so, the Biden administration should inform the court through an appropriate filing that it does not agree with, and will not rely upon, the arguments made in the Trump administration's motion, which if allowed to stand as official government positions would have far reaching legal and policy consequences."

11. Medical Commissions for Guantanamo Detainees *Al-Qahtani v. Trump,* 443 F. Supp. 3d 116 (D.D.C. 2020)	
Agency Involved	Department of Justice (DOJ); Secretary of the Army
Issue	This case concerns whether the Secretary of the Army can issue a last-minute exception to exclude Guantanamo detainees from the scope of an Army regulation that opens the door for prisoners to be medically repatriated. Petitioner Mohammed al-Qahtani has been held at Guantanamo for nearly two decades. During that time, he was tortured by military interrogators and developed severe mental illness. After a decade-plus of habeas proceedings, al-Qahtani filed a motion in 2017 to request a Mixed Medical Commission under Army Regulation 190-8. That regulation

	authorizes a panel of doctors to examine military prisoners to determine if they should be repatriated for medical reasons. Agreeing that Al-Qahtani qualified, the federal court granted his request and ordered the government to establish the medical commission. But rather than comply, the Secretary of the Army issued a memorandum in January 2021 that explicitly *excluded* Guantanamo detainees from AR 190-8's scope. Citing that memorandum, the Trump administration then urged the district court to revoke its order because AR 190-8 no longer applied to al-Qahtani.
Key Upcoming Filing Dates/Case Status	The Trump administration moved for reconsideration of the district court's order on Jan. 15, 2021. UPDATE: On Feb. 26, 2021, Al-Qahtani filed a brief opposing the government's motion. He argues that the Army Secretary lacked authority to create the Guantanamo exception to AR 190-8 and urges the district court to order the government to proceed with the medical commision. The government's reply is due by Mar. 26, 2021.
Trump Administration posture	In its motion for reconsideration, the Trump administration first argued that the memorandum has binding force--and would exclude Al-Qahtani--because AR 190-8 expressly authorizes the Secretary to "approve exceptions" to its scope. The government also pointed to several "practical concerns" against such medical commissions, including the possibility that detainees could exploit the Commission structure to both secure repatriation and avoid justice.
Biden Administration posture	The Biden administration has not yet taken a position in the case. Editor's Note: Hina Shamsi and Scott Roehm argue that the Biden administration should "rescind the Army Secretary's Jan. 11 memorandum, withdraw its motion for reconsideration, and immediately repatriate Mr. al-Qahtani to Saudi Arabia, which has confirmed its willingness to accept him. If the administration refuses to do so, it must promptly establish a Mixed Medical Commission to evaluate Mr. al-Qahtani and do the same for any other detainee who requests one consistent with AR 190-8."

12. Torture and Guantanamo Habeas Cases *Duran v. Trump,* No. 16-cv-02358 (D.D.C. Feb 4, 2021)	
Agency Involved	Department of Justice (DOJ)
Issue	This case addresses whether a Guantanamo detainee can compel the government to produce records detailing his torture at the hands of the CIA. In 2004, habeas plaintiff Guled Duran was captured in Djibouti. The CIA interrogated, threatened, and tortured Duran before transferring him to Guantanamo two years later. After a decade in custody, Duran filed a habeas petition in 2016 to challenge his detention. Alleging that the government tortured him to obtain its key evidence, Duran moved for discovery in 2019, seeking records that detailed the CIA's abuse. Though the government partially complied, it continues to withhold critical documents. Chief among them is the nearly 7000-page Senate Select Committee on Intelligence report on torture, which Duran believes will shed

	light on how the CIA tortured him.
Key Upcoming Filing Dates/Case Status	The parties have filed a series of classified briefs on the discovery dispute, two of which were recently released in redacted form. In October 2020, the court ordered the government to explain why it has failed to disclose certain documents. The Trump administration responded with a classified filing on Dec. 18, and the Biden administration informed the court that it will supplement that filing by Feb. 19, 2021. UPDATE: On Feb. 22, 2021, the Biden administration filed an ex parte, in camera supplement to their motion for exception to disclosure. It has not been released to the public.
Trump Administration posture	Given the heavily classified docket, it's unclear what the Trump administration's final posture was. It had previously argued--back in 2019--that a variety of reasons prevented it from producing the documents that Duran sought. For many of those records, the government claimed they could not be located or were immaterial or redundant. As for the Senate report itself, the government argued it is a congressional record under exclusive Congressional control, and that producing it would be unduly burdensome.
Biden Administration posture	The Biden administration has not yet taken a position in the case, but Vice President Biden has said that making the SCCI torture report public and "exposing" our "mistakes" would strengthen America's position worldwide. Biden also announced that he would begin a review of Guantanamo, with the ultimate goal of closing it. Editor's Note: Hina Shamsi and Scott Roehm argue that the Biden administration should "immediately conduct a thorough review of Mr. Duran's case to ensure that no torture or CIDT-derived evidence has been or will be used, and establish unambiguous safeguards against its use in other cases. The administration should also provide Mr. Duran's counsel immediate access to the full torture report and to any other related exculpatory evidence. The government cannot torture a man, claim authority to hold him indefinitely – including on the basis of information connected to that torture – then refuse to disclose to him the details of the crimes to which it subjected him."

13. Due Process at Guantanamo *Ali v. Trump*, 959 F.3d 64 (D.C. Cir. 2020), reh'g denied (July 29, 2020), petition for cert. filed (U.S. Dec. 28, 2020) (No. 20-888); *Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020), petition for reh'g en banc filed (Dec. 7, 2020); *Nasser v. Trump*, No. 04-cv-01194 (D.D.C. Aug. 14, 2020)	
Agency Involved	Department of Justice (DOJ), Office of the Solicitor General (OSG)

Issue	Ali, Al Hela, and Nasser have all been held at Guantanamo since the early 2000s. Each of their cases presents the same question: does the Due Process clause apply at Guantanamo?
Key Upcoming Filing Dates/Case Status	In *Ali v. Trump*, the D.C. Circuit rejected Ali's due process claims on May 15, 2020. Ali filed a cert petition with the Supreme Court on Dec. 28, 2020. UPDATE: The Biden administration's response to Ali's cert petition is due by Apr. 5, 2021. The D.C. Circuit likewise rejected Al Hela's due process claims on Aug. 28, 2020. Al Hela petitioned for rehearing en banc in December 2020. The Trump administration responded but the D.C. Circuit has not yet issued a ruling. The *Nasser* case is still pending before the U.S. District Court for the District of Columbia. A status report is due Mar. 30, 2021.
Trump Administration posture	The Trump administration argued that Guantanamo detainees have no due process rights at all, no matter how long they have been held there. At bottom, it contended that due process extends only to aliens with presence or property in the US and that, because Guantanamo is not part of US territory, its detainees do not enjoy due process rights.
Biden Administration posture	The Biden administration has not commented directly. But the Trump administration's arguments conflict with three important Biden statements: (1) that "internationally recognized human rights and fundamental freedoms are each – equally – the entitlement of all;" (2) that his administration would prioritize "universal rights and strengthening democracy;" and (3) that he will seek to close Guantanamo. Editor's Note: Hina Shamsi and Scott Roehm argue that the Biden administration "needs to distance itself, across the board, from the categorical position that due process does not apply at Guantanamo. It should do so before the Supreme Court in its response, due on February 3, to Abdul Razak Ali's request for the Court to review the merits of his case. It should do so in the Al-Hela case through immediate notice to the en banc D.C. Circuit Court of Appeals — under President Obama, the Justice Department similarly rejected erroneous interpretations of international law before the en banc D.C. Circuit in the Al-Bihani case in May 2010. In the Nasser case, the Biden administration should inform the D.C. District Court of the same change in position in a status report due on March 30. In that report to the court, the government should also commit to swiftly transferring Mr. Nasser from Guantanamo, consistent with a 2016 Periodic Review Board decision approving him for transfer."

14. International Criminal Court Sanctions *Open Society Justice Initiative v. Trump*, No. 20-cv-08121 (S.D.N.Y. Jan. 4, 2021); *Sadat v. Trump*, No. 21-cv-00416 (N.D. Cal. filed Jan. 29, 2021)	
Agency Involved	Department of Justice (DOJ); US Attorney's Office for the Southern District of New York (SDNY)

Issue	These cases concern the Trump administration's sanctions against the International Criminal Court (ICC). In June 2020, then-President Trump issued an executive order authorizing sanctions against ICC officials and those who support its activities. The order claimed to be a response to the ICC's "illegitimate assertions" of jurisdiction over US personnel, and specifically cited the ICC's investigation into US military misconduct in Afghanistan. Then, in September, the Trump administration formally imposed sanctions on the ICC's Chief Prosecutor, Fatou Bensouda, and a top official, Phakiso Mochochoko. In response, the Open Society Justice Initiative and the ACLU filed separate lawsuits challenging the sanctions on First Amendment and statutory IEEPA grounds. For the constitutional challenge, the plaintiffs argued that the sanctions violate the free speech rights of those seeking to communicate with ICC personnel. On the statutory front, they argued that Trump's executive order is an *ultra vires* violation of IEEPA's bar on "regulat[ing] or prohibit[ing]" the import and export of "information."
Key Upcoming Filing Dates/Case Status	In *Open Society*, the district court granted a preliminary injunction on Jan. 4, 2021, holding that the plaintiffs were likely to succeed on their First Amendment claims but that their IEEPA challenge was not ripe. UPDATE: In *Open Society*, the Biden administration received an extension and its reply is now due Apr. 5, 2021. The *Sadat* case has been assigned to a judge but has not progressed beyond that.
Trump Administration posture	In justifying the executive order, Trump asserted that the ICC's investigation threatened US sovereignty and national security. After the *Open Society* plaintiffs moved for a preliminary injunction, the administration responded by arguing that the executive order withstood First Amendment scrutiny and did not regulate the type of "information" transmission that IEEPA expressly protected.
Biden Administration posture	The Biden administration has not yet taken a position in the case but has said it will thoroughly review the ICC sanctions. UPDATE: In early March, ICC Chief Prosecutor Fatou Bensouda urged the Biden administration to lift its sanctions. In response, a State Department spokesperson reaffirmed that it was still reviewing the sanctions but offered no further comment. In that same statement, the Biden spokesperson also criticized the ICC for opening an investigation into Israel's mistreatment of Palestinians. Editor's Note: Hina Shamsi and Scott Roehm argue that the Biden administration should "rescind the ICC E.O. prior to the March 5 deadline in *Open Society Justice Initiative* and deadlines that will come up in the *Sadat* case. If the administration has not done so by then, the Justice Department should at a minimum inform the court that it intends to rescind the E.O. and will not enforce it or contest the injunction or otherwise defend the sanctions in the interim."

15. Prepublication/SCI Disclosure Litigation Against John Bolton *United States v. Bolton*, No. 20-cv-1580, 2020 WL 131445 (D.D.C. Jan. 14, 2021)	
Agency Involved	Department of Justice (DOJ)
Issue	As widely publicized last year, the government is suing John Bolton for breaching NDAs when he published a memoir about his time as Trump's National Security Adviser. As a condition of taking that role, Bolton signed several NDAs that required him to refrain from disclosing classified information and to obtain prepublication approval for any writings about his tenure. Shortly after leaving the White House, Bolton began writing his manuscript. As required by his NDA, he also sought prepublication review from NSC officials. But after several months of heavy editing, the NSC informed Bolton that they needed to start a second review, with no end date in sight. Undeterred, Bolton pushed ahead with his publisher's release schedule, despite not receiving permission to do so. Then, just one week before the book's release, the Trump DOJ sued Bolton to enjoin him from publishing, setting off a flurry of last-minute briefing and hearings. Though the court conceded that Bolton would likely violate his NDA obligations, it denied the government's request for an injunction, holding that it would amount to an unjustified prior restraint. Bolton's memoir was released in June 2020. The Trump administration pressed forward with its lawsuit, seeking to recover monetary damages for breach of contract. Bolton moved to dismiss, but the district court refused to do so, explaining that the government had plausibly alleged that Bolton's conduct violated the NDAs' prepublication and disclosure clauses. Having failed to win an early dismissal, Bolton then moved to begin discovery. He seeks to prove that the Trump administration acted in bad faith and alleges that it dragged out the manuscript review in a pretextual bid to suppress his book's embarrassing claims about the White House.
Key Upcoming Filing Dates/Case Status	The court granted Bolton's discovery request but limited its scope to his allegations that the Trump administration acted in bad faith. It also granted the Biden administration's request to extend discovery deadlines given the change in administration. The parties are scheduled to develop a discovery plan over the course of Apr. and May 2021.
Trump Administration posture	The Trump administration maintained that Bolton breached the NDA's clear terms by proceeding with publication without first getting formal permission to do so. It also argued that the second round of NSC review was a legitimate attempt to screen out classified information and not a pretextual maneuver to halt publication. Apart from this civil suit, the Trump DOJ also opened a criminal investigation into Bolton's conduct. No charges have been filed.
Biden Administration posture	Then-nominee Biden commented on Bolton's book shortly after its release, though that statement focused on the book's content and not Bolton's NDAs. The new administration has yet to take a formal position.

16. Former Executive Officials' Testimony to Congress *Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020)*	
Agency Involved	Department of Justice (DOJ)
Issue	In the aftermath of the Mueller Investigation and report, the House Judiciary Committee issued a subpoena to Donald McGahn, former White House Counsel for the Trump Administration and a witness to multiple events detailed in the Mueller report. Upon McGahn's noncompliance, the House brought suit to enforce the subpoena. While the D.C. Circuit en banc found that the House had Article III standing to bring the suit and that the suit did not violate constitutional separation of powers principles, on remand a panel denied that the House had a cause of action and dismissed the case. The court then agreed to review the case en banc for a second time in 2021, with parties addressing previous questions of standing and cause of action, as well as whether or not the case would be mooted upon the end of the 116th Congress, and the constitutionality of compelling testimony from a close presidential advisor.
Key Upcoming Filing Dates/Case Status	In light of the delay granted to the DOJ (serving as counsel for McGahn), oral arguments are now scheduled for Apr. 27, and the DOJ must provide a status report to the court by Mar. 25.
Trump Administration posture	President Trump directed McGahn not to comply with the House subpoena to testify. The Trump Administration's Office of Legal Counsel (OLC) issued an opinion concluding that McGahn was absolutely immune from testifying, even as a former official. McGahn also argued that the judicial branch could not wade into this interbranch dispute without violating separation of powers principles.
Biden Administration posture	The Biden administration requested a delay in oral arguments, which had been scheduled for Feb. 23. The motion was granted on Feb. 18. *Editor's Note*: Just Security's Andy Wright explored the tension between Biden's DOJ and the House of Representatives here.

17. Social Media Registration for Visa Applicants ***Doc Society v. Pompeo*, No. 1:19-cv-03632 (D.D.C. 2020)**	
Agency Involved	Department of State
Issue	Whether the State Department's rule requiring visa applicants to register their social media handles: (1) exceeds the Secretary's statutory authority and is arbitrary and capricious under the Administrative Procedure Act; and (2) violates the First Amendment.

Key Upcoming Filing Dates/Case Status	The Trump Administration filed a Motion to Dismiss in April 2020. Reply briefing has concluded, and the case is pending decision before the district court.
Trump Administration posture	The Trump Administration argued that the rule was lawful within the statutory framework, which delegates authority to the Secretary of State to make rules "necessary" to identify visa applicants, determine eligibility, and enforce immigration and nationality laws. Furthermore, the Trump Administration argued the rulemaking reflected sound decision-making.
Biden Administration posture	Advocacy groups have called on the Biden Administration to reverse the rule. Biden revoked the executive order that gave rise to the policy and called for review of the effectiveness of social media identifiers in the visa screening process, signaling openness to reconsider the rule.

18. E. Jean Carroll FTCA Litigation *Carroll v. Trump*, No. 20-cv-07311, 2020 WL 6277814 (S.D.N.Y. Oct. 27, 2020), *appeal docketed*, No. 20-03978 (2d Cir. Nov. 25, 2020)	
Agency Involved	Department of Justice (DOJ)
Issue	In 2019, Carroll publicly accused then-President Trump of sexually assaulting her in a New York City department store in the 1990s. A few hours later, Trump denied Carroll's allegation and accused her of fabricating the story to drum up publicity for her upcoming book. Caroll then sued Trump for defamation in New York state court, alleging that Trump defamed her when he publicly accused her of falsifying the assault story. After nearly a year of state court proceedings--and with Carroll's counsel arguing for the need to sample Trump's DNA--DOJ moved to intervene on Trump's behalf under the Federal Tort Claims Act (FTCA), which threatened to quash the suit. In effect, the FTCA (as amended by the Westfall Act) provides blanket immunity to federal employees who commit certain torts--including defamation--arising out of their official duties. According to DOJ, the president's official duties include speaking to the press about public matters, which would mean that Trump had immunity for any defamatory statements he made about Carroll. DOJ's intervention derailed the state court proceedings because FTCA claims *must* be litigated in federal court. Thus, Carroll's suit was automatically removed to the Southern District of New York (SDNY). In federal court, Carroll argued that Trump's statements were not protected by the FTCA. In short, Carroll contended that (i) Trump was not covered by the FTCA because the president is not an "employee;" and (ii) Trump's statements about Carroll fell outside of his official presidential duties. On both counts, the court agreed. Though removal was irreversible, the court held that the FTCA did not cover Trump's actions, so Carroll's defamation suit could proceed against Trump in his personal capacity. Acting separately, the DOJ and Trump both appealed. Trump also requested the court stay the district court proceedings until that appeal is resolved.

Key Upcoming Filing Dates/Case Status	In the SDNY proceedings, the parties filed opposing memoranda on Trump's motion to stay in December 2020. Judge Kaplan has not yet ruled on that issue. If he denies the motion, Carroll's defamation claim could proceed at the same time as the Second Circuit hears Trump's appeal on FTCA immunity. At the Second Circuit, DOJ and Trump filed separate opening briefs on Jan. 15, 2021. Carroll's reply brief is due on April 16, 2021.
Trump Administration posture	In its Second Circuit brief, the Trump DOJ argued that the President is an "employee" under the FTCA and that Trump was acting within the scope of his official duties when he made his comments about Carroll.
Biden Administration posture	Notably, Carroll explicitly selected April 16 as the due date for the reply brief so that Biden's new DOJ could reassess its predecessor's position that Trump's statements were covered by the FTCA. The Biden administration has not yet indicated whether it will change its posture.

19. Asylum Cooperative Agreements and Safe Third Country Policy *U.T. v. Wilkinson, Docket No. 1:20-cv-00116 (D.D.C. Jan. 15, 2020)*	
Agency Involved	Department of Homeland Security (DHS), Department of Justice (DOJ)
Issue	In 2019, the United States signed new Asylum Cooperative Agreements (ACAs) with Guatemala, Honduras, and El Salvador, labeling them officially as "safe third countries." The ACAs entered into force on Dec. 29, 2020. The implementation of the ACAs allows the United States to deny asylum seekers' application for asylum and instead remove them to a "safe third country" to seek asylum there. Multiple plaintiffs filed in the D.C. District Court for a preliminary injunction, stating that their removal to the countries above would subject them to persecution or danger. The complaint asserted that the three countries are actually dangerous to asylum seekers, as opposed to the only other designated safe third country, Canada, and as such, the DHS rule allowing the ACAs to come into effect violates the Immigration and Nationality Act's (INA) safe third country provision. Codified at 8 U.S.C. §1158(a)(2)(A), the provision requires an individualized determination of the likelihood of persecution prior to the removal to a third country.
Key Upcoming Filing Dates/Case Status	On Feb. 23, 2021, Judge Sullivan granted a motion to hold the case while the Biden Administration determines what it will do with the ACA rule.
Trump Administration posture	The Trump administration argued that the ACAs were valid. DOJ and DHS argued that they were within the bounds of their authorities to determine that the ACA countries were in fact safe for asylum seekers and that there is no statutory requirement to review each asylum seeker's case individually.
Biden Administration posture	On Feb. 6, 2021, Biden's Secretary of State Antony Blinken stated that the United States has suspended and begun the process to terminate the ACAs with Guatemala, Honduras, and El Salvador.

20. Bars to Asylum Eligibility Rule *Pangea Legal Services v. DHS, Dkt. No. 3:20-cv-09253 (N.D. Cal. Dec 21, 2020); Immigration Equality v. DHS, Dkt. No. 3:20-cv-09258 (N.D. Cal. Dec 21, 2020)* *Human Rights First v. Wolf, Docket No. 1:20-cv-03764 (D.D.C. Dec 21, 2020)*	
Agency Involved	Department of Homeland Security (DHS)
Issue	The Asylum and Bars to Asylum Eligibility Rule creates new categorical restrictions on asylum eligibility, including barring those with convictions for certain criminal offenses, and allows adjudicators to reject applicants when they have reason to believe the applicant has a history of domestic violence. The issue is whether the new rule is contrary to the statutory authority and intent of Congress or arbitrary and capricious under the Administrative Procedure Act because of insufficient explanation for the rule and inadequate notice to the public.
Key Upcoming Filing Dates/Case Status	The District Court granted a nationwide preliminary injunction on Jan. 8, 2021. On Jan. 28, 2021 the District Court stayed the case pending review of the rule. The parties are scheduled to submit a status report on Apr. 19, 2021.
Trump Administration posture	The Trump administration argued that the rule is a "critical reform" that provides "much needed guidance on how to interpret undefined and ambiguous terms in the Immigration and Nationality Act (INA)."
Biden Administration posture	On Feb. 2, 2021, Biden ordered a review of rules relating to asylum eligibility and adjudication.

21. Unlawful Command Influence by the President *Bergdahl v. United States, Docket No. 1:21-cv-00418 (D.D.C. Feb. 17, 2021)*	
Agency Involved	President as Commander in Chief; Department of the Army
Issue	In 2018, Bowe Bergdahl was convicted by a general court martial for desertion and misbehavior in front of the enemy. He appealed his conviction to the Court of Appeals for the Armed Forces (CAAF), arguing that the conviction should be overruled because then President Trump and Senator John McCain unlawfully influenced the proceedings. A provision of the Uniform Code of Military Justice (UCMJ) bars unlawful command influence (UCI). The CAAF upheld the conviction in a 3-2 vote in 2020 and denied the motion for reconsideration. Bergdahl appealed to the D.C. District Court for collateral review of his conviction on Feb. 17, 2021. Bergdahl again raised issues of UCI and additionally raised concerns that the military judge in his trial was unlawfully influenced because he had applied for (and not disclosed in court proceedings) a job as a federal immigration lawyer. Following the affirmed conviction, Bergdahl also applied for *corum nobis* review by the CAAF, which was ultimately denied.

Key Upcoming Filing Dates/Case Status	No dates or filing deadlines have been published in the collateral review request at this time; the case is assigned to Judge Walton.
Trump Administration posture	The Department of the Army argued in the CAAF proceedings that Bergdah's UCI claims were invalid because a President cannot commit UCI as the UCMJ defines it. The Court denied this claim, noting that a President is able to commit UCI, but in this case, President Trump did not intolerably strain the military justice system with his comments about Bergdahl to the press. The government also expressed concern that Bergdahl had not raised issues about his trial judge until after a verdict was handed down, despite multiple months elapsing between the judge announcing his new position and the verdict for Bergdahl.
Biden Administration posture	The Biden administration has not offered a position yet; the Department of the Army declined to comment on the collateral review filing.

22. Third-Country Transit Ban *Biden v. CAIR Coalition*, No. 19-2117 (D.D.C., June 30, 2020). *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073-JST (N.D. Cal. Feb. 16, 2021).	
Agency Involved	Department of Homeland Security (DHS) Department of Justice (DOJ)
Issue	The Trump administration implemented an interim rule in July 2019 barring asylum for individuals who travel through a third country en route to the Southern border, without requesting asylum in that third country, effectively precluding asylum eligibility for non-Mexican nationals arriving at our Southern border. The District of D.C. granted summary judgment vacating the interim rule nationwide in June 2020, finding that the Trump administration violated the Administrative Procedures Act by issuing the rule on an interim basis without a valid exception. In July 2020, the Ninth Circuit upheld a separate four-state injunction against the interim rule by the Northern District of California, on the grounds that it was inconsistent with existing asylum law and therefore in violation of the Administrative Procedures Act. In December 2020, the Trump administration issued a final version of the rule, which was virtually identical to the interim rule.
Key Upcoming Filing Dates/Case Status	The Trump administration appealed the D.D.C. judgment enjoining the interim rule, but the D.C. Circuit has not issued a briefing schedule. The N.D. Cal. issued a preliminary injunction of the final rule on February 16, 2021.
Trump Administration posture	The Trump administration claimed the authority to issue the rule on an interim basis rather than through notice-and-comment rulemaking. It argued that the good cause exemption applied because the 30-day gap between publication and implementation would cause a surge of asylum seekers. It also pointed to the foreign affairs exemption, on the basis that notice-and-comment rulemaking would negatively affect immigration negotiations with

	several Central American governments. In *East Bay*, the administration conceded that its final rule was "almost verbatim the interim final rule."
Biden Administration posture	The Biden administration has not offered a formal position yet.

23. President's Blocking of Users on Social Media *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).	
Agency Involved	President
Issue	The lawsuit challenges the President's ability to block users on social media. The Knight First Amendment institute argued that the President's Twitter account was a "public forum," an extension of the President's office, and therefore must be open to all viewpoints. The President thus violated the First Amendment by blocking or ejecting users based on their viewpoints. The Second Circuit held that the President's practice of blocking critics violated the First Amendment.
Key Upcoming Filing Dates/Case Status	A petition for certiorari is pending review before the Supreme Court (Dkt. No. 20-197).
Trump Administration posture	Trump argued that his use of @realDonaldTrump constituted government speech, and therefore was immune from First Amendment enforcement. Furthermore, the Trump administration asserted that a ruling against Trump would disincentivize the use of social media by government officials. In supplemental briefing, the Trump administration argued that the case is now moot, because it solely involved the @realDonaldTrump twitter account, which would no longer be used for official purposes. The Knight First Amendment Institute argued that it was only moot because Twitter had suspended Trump's account, and that the Court should still uphold the lower court decision.
Biden Administration posture	The Biden administration has not taken a position on the issue.

24. Asylum Ban at the Southern Border *O.A. v. Trump*, No. 18-cv-02718, 2018 WL 112409801 (D.D.C. Aug. 2, 2019), held in abeyance by *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Feb. 24, 2021) *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810 (N.D. Cal. Dec. 19, 2018), aff'd, 950 F.3d 1242 (9th Cir. 2020), petition for reh'g en banc filed (June 29, 2020)	
Agency Involved	Attorney General (AG), Department of Homeland Security (DHS), President
Issue	On Nov. 9, 2018, the Trump administration issued a regulation that barred asylum for any asylum seeker who crossed the US-Mexico border outside of an official port of entry. That same day, a group of immigration nonprofits challenged the rule in California federal court. On Dec. 19, 2018, the district court granted those plaintiffs a preliminary injunction, finding that the rule conflicted with the Immigration and Nationality Act (INA). The Trump administration appealed, but the Ninth Circuit affirmed the injunction on Feb. 28, 2020. The panel reasoned that the INA allows migrants to apply for asylum no matter where they enter the United States and concluded that the new rule ran afoul of that standard. The government requested rehearing en banc in June 2020, but the Ninth Circuit has not yet ruled on that request. As a result, the nationwide injunction remains in place today. Separately, another group of plaintiffs--this time a collective of asylum seekers and pro-immigrant organizations--challenged the rule in DC federal court on Nov. 20, 2018. Much like the Ninth Circuit, the DC district judge found that the rule was inconsistent with the INA. But rather than grant a mere injunction, the district court struck down the rule in its entirety. The Trump administration appealed that decision to the DC Circuit. The panel heard oral argument on Dec. 8, 2020. Yet before the panel issued a decision, President Biden signed an executive order on Feb. 2, 2021, that largely undid the Trump administration's asylum ban. Technically, however, part of the rule is still on the books, and DHS has not yet formally revoked that remaining portion.
Key Upcoming Filing Dates/Case Status	On Feb. 3, 2021, the DC Circuit ordered the parties to address whether Biden's executive order mooted the case. Both parties then filed briefs asking the panel to hold off on deciding the appeal until DHS can decide whether to revoke the rule in its entirety. The DC Circuit granted that request on Feb. 24, 2021. The parties are now waiting for DHS to complete its review. Similarly, the Ninth Circuit--which is still considering the government's June 2020 petition for rehearing en banc--likewise directed the parties to file briefs on the mootness issue. The plaintiffs urged the court to deny the en banc petition outright, while the Biden administration asked the court to hold off until DHS makes a decision.
Trump Administration posture	When it appealed *O.A.* to the DC Circuit, the Trump administration made two arguments. First, it argued that the district court lacked jurisdiction to decide the case, primarily asserting that the organizations lacked standing

	to sue on behalf of the individual asylum seekers. Second, the government contended that the INA gave it the power to adopt categorical bars on asylum eligibility, which would make the rule valid on its face.
Biden Administration posture	The Biden administration took a key step toward rescinding the Trump rule by executive order on Feb. 2. Though Biden also directed DHS to "review and determine whether to rescind" the remaining part of the regulation, DHS has not yet reversed the rule. Even so, Biden has signaled that he will reverse many of Trump's immigration policies, and DHS may yet decide to set this one aside as well.