Litigation Tracker: Major Decisions Facing the Biden Administration

By Karl Mihm, Justin Cole, Iva Petkova, and Tess Bridgeman
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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) *State of Texas v. Biden*, No. 21-10806 (5th Cir. Aug 16, 2021)	
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. UPDATE: On August 13, 2021, as part of a lawsuit brought by Texas and Missouri, a Texas federal judge ordered the Biden administration to "enforce and implement MPP in good faith" until it has been lawfully rescinded and the federal government has sufficient detention capacity. DHS appealed this ruling. The Supreme Court refused an emergency stay of that ruling on August 24, meaning that the Biden administration must reinstate "Remain in Mexico" for the time being. The Fifth Circuit heard oral argument on November 2.
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.
Biden Administration posture	In February 2021, the Biden administration announced a review of the MPP program, which Biden promised to roll back as a presidential candidate, and was reported to have begun processing asylum claims of those subject to the program. The Biden administration officially rescinded the policy on June 1, 2021. In the wake of the Supreme Court's Aug. 24 ruling, which DHS noted it "regrets," the Biden administration announced in October 2021 that it tentatively plans to restart MPP in mid-November. However, DHS issued a new memorandum on Oct. 29, 2021, again terminating MPP. The memo notes that DHS will continue complying with the *Texas* injunction requiring good-faith implementation and enforcement of MPP, but that the termination of MPP will be implemented as soon as practicable after a final judicial decision to vacate the *Texas* injunction.

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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, the Biden DOJ asked the Supreme Court to take this case off of its February argument calendar, which the Court promptly did on Feb. 3. After DOD and DHS announced they were canceling all border wall construction, the USG asked the Court to vacate and remand the case to lower courts, which the Court did in July 2021. UPDATE: As of November 2021, the case is winding down. The Biden administration has stipulated that it will not proceed with any construction and the parties are moving toward officially ending the case via settlement.
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).
Biden Administration posture	The Biden administration has directly opposed the Trump administration's position and effectively ended the dispute. 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. In the court proceedings, the Biden administration has followed through on that promise, stipulating that it will not pursue construction and working instead toward settling the case.

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3. Jurisdiction Over Retired Servicemembers *Larrabee v. Braithwaite*, No. 19-cv-00654, 502 F. Supp. 3d 322 (D.D.C. Nov. 20, 2020), *appeal docketed*, No. 21-5012 (D.C. Cir. Jan. 22, 2021); *United States v. Begani*, No. 20-0217 (CAAF)	
Agency Involved	United States Marine Corps; Secretary of the Navy
Issue	The case arose when Steven Larrabee was court martialed for committing a sexual assault 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 (NMCCCA)

	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) affirmed and Larrabee then appealed to the D.C. District Court. There, the 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 court martial jurisdiction. *Begani*--a companion case to *Larrabee*--also addresses whether courts martial have jurisdiction over retired servicemembers. In that case, the defendant was a Navy veteran who was convicted of attempted sexual assault after he retired. Although the NMCCA initially vacated his conviction, the court ultimately reinstated it and CAAF then affirmed in June 2021.
Key Upcoming Filing Dates/Case Status	In *Larrabee*, the Trump administration appealed to the D.C. Circuit. The parties filed their respective briefs in April and May 2021. The D.C. Circuit heard oral argument on Oct. 22. Begani's counsel, meanwhile, filed a cert petition at the Supreme Court in August 2021. The Biden administration opposed cert on Nov. 9, 2021, arguing that CAAF was correct in upholding jurisdiction over retirees.
Trump Administration posture	The Trump administration argued that retired servicemembers are within the jurisdiction of the UCMJ because Congress has deemed them part of the land and naval forces. This argument rested on *Solorio v. United States,* a 1987 Supreme Court case holding that servicemembers can be court-martialed even for crimes that have no connection to their military service.
Biden Administration posture	The issue of jurisdiction over military retirees has been particularly salient for the Biden administration after the Jan. 6 insurrection, given 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. In both cases, the Biden administration has largely adopted the position of its predecessor. In the *Begani* oral arguments, for instance, the new administration's arguments mirrored those of the prior administration. LIkewise, in *Larrabee*, the Biden administration's appellate brief continues to maintain that retirees are part of the Armed Forces by statute (10 U.S.C. §§ 101(a)(4), 8001(a)(2)), and have been subjected to the UCMJ in historical practice.

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4. Federal Death Penalty in Boston Marathon Bombing Case *United States v. Tsarnaev,* 968 F.3d 24 (1st Cir. 2020)	
Agency Involved	Department of Justice (DOJ)
Issue	Whether the First Circuit erred in overturning a federal death penalty conviction for Dzhokhar Tsarnaev, one of the two Boston Marathon bombers. The ruling rested on two grounds, whether the trial judge should have (1) asked prospective jurors what media coverage they had seen or heard about regarding Tsarnaev's

	case; and (2) permitted Tsarnaev's lawyers to introduce evidence that his brother, Tamerlan, was involved in an unsolved triple murder that occurred two years before the Boston Marathon bombing.
Key Upcoming Filing Dates/Case Status	The Supreme Court heard oral arguments on Oct. 13, 2021, and appeared "poised" to reinstate Tsarnaev's death sentence. Ginger Anders, Tsarnaev's lawyer, devoted the majority of her time to the second issue in the First Circuit's ruling. Emphasizing that the defense's entire argument on behalf of Tsarnaev was that he was "less culpable because Tamerlan indoctrinated him," Anders asserted that evidence of Tamerlan's "commission of the murders," by showing "the key indoctrinating event by demonstrating to Dzhokhar that Tamerland had irrevocably committed himself to violent jihad," constituted evidence that was "central to the mitigation case." Several justices were openly skeptical of this argument. Chief Justice John Roberts suggested that allowing this evidence would have shifted attention towards the inherently unsolvable issue of who committed the 2011 murders given that the two possible killers, Tamerlan and his friend Ibragim Todashev, are both dead. Other justices, including Justices Amy Coney Barrett and Neil Gorsuch agreed with Roberts, and Justice Samuel Alito similarly protested that permitting the evidence would have led to a mini-trial. Justices Elena Kagan and Stephen Breyer disagreed with their colleagues and pressed Deputy Solicitor General Erin Feigin as to why the jury should not have been allowed to evaluate for itself the reliability and relevance of the evidence of Tamerlan's involvement in the murder. The justices spent comparably little time on the issue of pre-trial media coverage potentially seen or heard by members of the jury, though Justice Sonia Sotomayor did imply that the trial judge had not acted cautiously enough to ensure that jurors had not been improperly influenced as such. The Court is expected to hand down its decision in 2022.
Trump Administration posture	The Trump administration argued that the First 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	Although Biden has publicly stated that he is against the federal death penalty and Attorney General Merrick Garland has imposed a moratorium on federal executions, the Biden administration continued to pursue the appeal against Tsarnaev, urging the Supreme Court to reverse the First Circuit decision overturning Tsarnaev's death sentence. This prompted confusion from Justice Barrett during oral arguments with respect to the Biden administration's "end game," noting that a victory for the government would seemingly result in Tsarnaev being "relegated to living under the threat of a death sentence that the government doesn't plan to carry out." In response, Feigin explained that the moratorium was simply lin place to allow the DOJ to review its policies and procedures on capital punishment.

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5. 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 (UK) to the United States, 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.
Key Upcoming Filing Dates/Case Status	In January 2021, a UK judge blocked Assange's extradition, in part because Assange's "mental condition" and "risk of suicide" were so severe that he could not legally be extradited for trial. The Biden DOJ appealed that ruling to the UK High Court. In August 2021, the High Court expanded the grounds on which the U.S. could pursue its appeal. Though "very unusual," the High Court authorized the U.S. to challenge the accuracy of an expert psychiatric report that diagnosed Assange with life-threatening mental illness. UPDATE: At the appellate hearing on Oct. 27-28, 2021, Assange's lawyers argued that concerns about his mental state should bar extradition. The U.S. counsel responded that it had alleviated those concerns by promising not to subject Assange to severe forms of detention.
Trump Administration posture	The Trump administration indicted Assange in 2018 for federal crimes and sought his extradition from the UK.
Biden Administration posture	Under Biden, the U.S. has signaled that it will challenge the lower court ruling on multiple grounds. In addition to disputing the psychiatric report, the U.S. also plans to contest whether the lower court correctly applied the UK's Extradition Act, whether the court gave sufficient notice to the US of its decision, and whether the U.S. has adequately committed to detaining Assange in a way that mitigates his risk of self-harm. On that front, the U.S. has assured the UK courts that it will not subject Assange to certain harsh prison conditions, and that it would let Assange serve any custodial sentence in his home country of Australia. UPDATE: U.S. counsel tracked these same arguments during the full appellate hearing. According to reporting, the lawyers said the U.S. had assured the UK that Assange could serve any sentence in Australia, and that he would not be subjected to certain severe detention conditions, including detention at ADX (a Colorado Supermax prison) or Special Administrative Procedures (a severe detention protocol that includes solitary confinement).

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6. 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 Guantanamo. 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. Separately, 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.
Key Upcoming Filing Dates/Case Status	The Trump administration moved for Judge Watkins to reconsider his ruling on Dec. 23, 2020. On Feb. 18, 2021, Judge Watkins denied the government's request to reconsider his earlier ruling that he could grant Khan administrative credit. UPDATE: Judge Watkins issued two key rulings in late March 2021. Most notably, on Mar. 30, 2021, he issued an order postponing Khan's sentencing hearings indefinitely. Judge Watkins explained that a significant number of motions are still undecided, including crucial ones on witnesses and use of classified information. Because of the COVID-related restrictions on travel to Guantanamo, Judge Watkins concluded that all open motions must be resolved before the hearings take place. On Mar. 29, 2021, Judge Watkins denied the *New York Times*'s motion for public access on ripeness grounds. He reasoned that no party has formally tried to close the proceedings off from the public, so it would be too early to consider the motion on its merits. UPDATE: On Apr. 12, 2021, Judge Watkins also ruled on Khan's motion for public access to the pretrial proceedings scheduled for May 2021. First, Judge Watkins deferred decision on Khan's request to have those proceedings made public, explaining that he would rule on this issue once it is determined whether Khan will testify about classified matters. Second, Judge Watkins denied as moot Khan's request to have members of the media present because the government has invited the media to the hearings. UPDATE: In May 2021, Carol Rosenberg of the *New York Times* reported that Khan and the government have reached a deal: Khan will forfeit his right to question the CIA about its torture program and, in exchange, can secure his release from Guantanamo as early as 2022. Rosenberg also reports that the agreement itself remains under seal. UPDATE: At his Oct. 28-29 sentencing, Khan described the torture inflicted upon him in horrific detail, "even beyond the heinous acts detailed in the executive summary of the Senate Intelligence Committee's 2014 oversight study of the CIA

	torture program." Khan also forgave those involved in his torture and apologized to victims of the attack for which he was convicted. A panel of senior military officers sentenced Khan to 26 years, though Khan's plea agreement with the government means that he will likely be released as early as the beginning of 2022. Notably, seven of the eight panel members signed a handwritten clemency letter on his behalf, citing basic violations of due process, physical and psychological abuse, and Khan's young age at the time of his crimes. *Editor's Note:* Readers may be interested in Scott Roehm's overview of Khan's sentencing hearing and Joseph Margulies' essay on the handwritten clemency letter.
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 filed several substantive motions but most remain under seal. *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."

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7. 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. 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 commission. The government's reply is due by Dec. 7, 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."

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8. 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. On Feb. 22, 2021, the Biden administration filed an ex parte, in camera supplement to their motion for exception to disclosure. Duran responded on Apr. 9 and the government filed its reply brief on Apr. 30. The filings remain classified. As of Oct. 24, 2021, the case is still pending with no new updates publicly available.
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 as Vice President Biden 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. Update: On Apr. 4, 2021, Carol Rosenberg reported that the Biden administration has shut down Camp 7 at Guantanamo Bay as a cost cutting and troop reduction measure. The report notes that the Trump administration had also considered closing Camp 7 to consolidate detainees. 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."

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9. 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. The Biden administration opposed Ali's petition and the Supreme Court ultimately denied it on May 17, 2021. The D.C. Circuit rejected Al-Hela's due process claims in August 2020. After Al-Hela petitioned for rehearing en banc, the court vacated the panel decision and agreed to rehear the case on Sept. 30, 2021. The *Nasser* case is still pending before the U.S. District Court for the District of Columbia. UPDATE: The D.C. Circuit heard oral arguments en banc in *Al Hela* on Sept. 30, 2021. According to reporters, the court appeared "reluctant" to find that Guantanamo detainees have due process rights. Several judges did, however, question whether the US could continue to detain Al Hela even after it had withdrawn from Afghanistan--potentially ending any "conflict" with Al Qaeda. The government lawyer answered that the administration had "made clear" that the conflict continues even without a US ground presence in Afghanistan.
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 United States and that, because Guantanamo is not part of U.S. territory, detainees there do not enjoy due process rights.
Biden Administration posture	The Biden DOJ has maintained that the detainees are legally held but has adopted a more nuanced position on their due process rights. Unlike the Trump administration--which urged the courts to declare that Guantanamo detainees categorically lack due process rights--the Biden DOJ argued in *Ali* and *Al Hela* that the court should not address the due process question at all. Instead, the USG argued that all Guantanamo detainees already receive constitutionally sufficient procedural protections through habeas review, so it would make no difference if the due process clause did apply. UPDATE: During the *Al Hela* en banc argument on Sept. 30, DOJ maintained its briefing position that due process rights would make no difference because Al Hela received enough process through habeas review. At one point, the court noted that a review board had approved Al Hela for release, and asked the DOJ lawyer whether the government could continue to hold Al Hela "indefinitely." The lawyer responded that the government had "no intention" of dragging out Al Hela's release but noted that detainee transfers are a delicate process into which the court should not intrude. Editor's Note: Jonathan Hafetz, Scott Roehm, and Nina Shamsi criticize the Biden administration's legal position in *Ali*, arguing that it "returns the U.S. government to a stance of longstanding resistance to fundamental rights." Ryan Goodman argues that the Biden DOJ should have acknowledged in *Al Hela* that due process applies at Guantanamo, noting that the Biden administration's current position "undercuts [Biden's] stated goal of closing the prison" and "risks

	having Guantanamo remain a legal black hole for future presidents to transfer and indefinitely detain individuals in wartime or other situations."

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10. 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	On May 12, the parties notified the D.C. Circuit that they had reached an agreement for McGahn to testify before the Judiciary Committee. Because that mooted the need for a subpoena, the committee asked the court to dismiss the appeal and to vacate the prior decision holding that the House lacked a cause of action to enforce committee subpoenas. The D.C. Circuit granted that motion and dismissed the appeal on Aug. 2, 2021. Notably, the court also agreed to vacate its prior opinion that the House could not enforce subpoenas, meaning that ruling is no longer on the books.
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 reversed its predecessor and agreed not to assert testimonial immunity, opening the door for McGahn to testify before the committee. *Editor's Note*: Just Security's Andy Wright explored the tension between Biden's DOJ and the House of Representatives here.

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11. Social Media Registration for Visa Applicants *Doc Society v. Pompeo*, No. 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. The court then stayed the case in March 2021 after Biden revoked the executive order. Biden subsequently instructed the Department of Homeland Security to provide a report reviewing the use of social media identifiers. On May 28, 2021, the Biden administration indicated in a short filing that it did not "anticipate taking any action that would moot" the case. After the court issued multiple stays the administration indicated in an Oct. 18 court filing that it would notify the court when its review was complete.
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	Although Biden has "loudly hinted" that his administration would eliminate the registration requirement put in place under his predecessor, it has not yet done so. Biden did order the Secretary of State and the Secretary of Homeland Security, in consultation with the Director of National Intelligence, to "review . . . the current use of social media identifiers in the screening and vetting process, including an assessment of whether this use has meaningfully improved screening and vetting." This review remains ongoing.

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12. 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 denied the motion to stay on Sept. 15, 2021, meaning that the lower court proceedings can move forward during the appeal.. At the Second Circuit, the parties have completed briefing and the case is scheduled for argument on Dec. 3, 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	The Biden DOJ filed a reply brief on June 7, 2021, that backed Trump's argument that the FTCA covered his conduct. It echoed the core arguments from the Trump DOJ's opening brief that the president is an "employee" under the FTCA and that elected officials act within the scope of their employment when they respond to media inquiries.

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13. Asylum Cooperative Agreements and Safe Third Country Policy *U.T. v. Wilkinson*, Docket No. 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. Under the ACAs, the USG can deny asylum seekers' applications and remove them to a "safe third country" to seek asylum there.

	Multiple plaintiffs filed for a preliminary injunction in the D.C. District Court, 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. UPDATE: No new developments as of November 2021.
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.

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14. Bars to Asylum Eligibility Rule *Pangea Legal Services v. DHS*, No. 20-cv-09253 (N.D. Cal. Dec 21, 2020); *Immigration Equality v. DHS*, Dkt. No. 20-cv-09258 (N.D. Cal. Dec 21, 2020) *Human Rights First v. Wolf*, No. 20-cv-03764 (D.D.C. Dec 21, 2020)	
Agency Involved	Department of Homeland Security (DHS)
Issue	In November 2020, the Trump DHS promulgated an asylum rule that 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 next month, several parties challenged the rule under the Administrative Procedure Act (APA). They argue that the new rule exceeds the DHS's statutory authority and is arbitrary and capricious.
Key Upcoming Filing Dates/Case Status	After consolidating two of the cases, the Northern District of California granted a nationwide preliminary injunction on Jan. 8, 2021. On Jan. 28, 2021 the District Court stayed the case pending review of the rule. UPDATE: As of November 2021, the rule remains preliminarily enjoined, and the district court proceedings are stayed. Per several status reports, the parties continue to discuss how to finally resolve the case, including possibly a permanent injunction.

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.

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15. Unlawful Command Influence by the President *Bergdahl v. United States*, Docket No. 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). CAAF upheld the conviction in a 3-2 vote in 2020 and denied Bergdahl's 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	On Aug. 2, 2021, the USG moved to dismiss Bergdahl's suit. Bergdahl responded in October by opposing dismissal and moving for summary judgment.
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 opposed Bergdahl's suit by moving to dismiss it in August 2021. It argued that the military courts had repeatedly rejected Bergdahl's UCI claims and that the civilian district court must defer heavily to those decisions. For Bergdahl's judicial conflict claims, the administration likewise argued that the military courts had already rejected them, that Bergdahl had waived them, and that the conflict was not disqualifying on the merits because the military judge's potential employer--DOJ--was not a party to the proceedings.

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16. Third-Country Transit Ban *Biden v. CAIR Coalition*, No. 19-cv-02117 (D.D.C. June 30, 2020). *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073 (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 in August 2020. On Aug. 10, 2021, the government moved to dismiss the case and vacate the district court's decision. In a series of briefs responding to this motion, both sides have agreed that the appeal is moot and should be dismissed, but the government maintains that the district court decision must be vacated, which would remove its precedential effect. The N.D. Cal. issued a preliminary injunction of the final rule on February 16, 2021. In March, the court granted the parties' motion to stay the case pending the Biden administration's review of the rule.
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	On February 2, 2021, the Biden administration issued an Executive Order calling for a review of several Trump-era immigration policies, including the third-country transit ban.

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17. 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, 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. On Mar. 24, 2021, the Ninth Circuit denied the government's petition for rehearing en banc. Though the panel agreed that the appeal was not moot, it denied the Biden administration's request to hold the case in abeyance, and instead

	remanded the case back to the district court. The parties are waiting for DHS to decide whether to rescind the regulation. UPDATE: In an August 2021 letter, the Biden administration reaffirmed that it plans to "modify or rescind" the DHS rule but noted that its review was still "ongoing."
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 the administration has not yet formally rescinded the full rule, its most recent court filing maintains that it still plans to do so.

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18. Temporary Protected Status *Sanchez v. Mayorkas*, No. 2018 WL 6427894 (D.N.J. Dec. 7, 2018), 967 F.3d 242 (3d Cir. 2020), No. 20-315 (Supreme Court).	
Agency Involved	Department of Homeland Security (DHS)
Issue	Whether, under 8 U.S.C. § 1254a(f)(4), a grant of Temporary Protected Status (TPS) authorizes eligible noncitizens to obtain lawful-permanent-resident (LPR) status under 8 U.S.C. § 1255. TPS allows eligible people from designated countries the opportunity to live and work temporarily in the United States. As of 2020, over 400,000 people from eleven countries held TPS. *Sanchez v. Mayorkas* is the latest case in a long-running controversy over whether these individuals are eligible for LPR status under the Immigration and Nationality Act (INA). § 1255 requires that LPR applicants have been "inspected and admitted." Plaintiffs, TPS recipients from El Salvador who were denied LPR status, argue that TPS satisfies this requirement, pointing to language in § 1254a(f)(4) that states "for purposes of adjustment of status under section 1255 of this title . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant." The District Court found for the plaintiffs, but the Third Circuit reversed, finding that "admission" and "status" are distinct concepts and that TPS therefore does not count as admission for the purpose of LPR eligibility. The Third Circuit thereby deepened an existing circuit split, aligning itself with the Eleventh Circuit and against the Sixth and Ninth Circuits.
Key Upcoming Filing Dates/Case Status	UPDATE: The Supreme Court heard oral argument on Apr. 19, 2021.

	UPDATE: The Court handed down its decision on June 7, 2021. It unanimously affirmed the Third Circuit's ruling, rejecting the idea that someone who entered the United States through TPS, but bypassed inspection at the border, could meet the "inspected and admitted" requirement for LPR status. The Court focused on the distinction between "admission" and "lawful status," finding that the lawful status given to TPS holders is distinct from "admission."
Trump Administration posture	The Trump administration argued the position that the Third Circuit adopted: that an individual has not been "inspected and admitted" merely by virtue of being a TPS recipient, because "status" and "admission" are distinct concepts under immigration law.
Biden Administration posture	The Biden administration adopted the Trump administration's posture.

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19. Free Speech and Chinese Tech Platforms (WeChat) - CASE CLOSED *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	After the Biden administration rescinded E.O. 13,943, it voluntarily moved to dismiss the appeal on July 26, and the Ninth Circuit granted that motion on Aug. 9.
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	On Feb. 11, the administration requested a delay in litigation until it reviewed changes to its China policy. On June 9, Biden revoked E.O. 13,943, and the Commerce Department subsequently rescinded its list of prohibited transactions related to WeChat (as well as TikTok). The Biden administration then voluntarily moved to dismiss the appeal.

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20. Free Speech and Chinese Tech Platforms, Part Two (TikTok) - CASE CLOSED *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	After the Biden administration rescinded E.O. 13,942, it agreed along with the plaintiffs to dismiss the case on July 21, 2021.
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	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. On June 9, Biden revoked E.O. 13,942, and the Commerce Department subsequently rescinded its list of prohibited transactions related to TikTok (as well as WeChat). The Biden administration then agreed to dismiss the district court case along with the plaintiffs.

21. Immigration and Public Benefits - CASE CLOSED *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. On Feb. 22, the Supreme Court granted cert in *Department of Homeland Security v. New York* (Docket No. 20-449). UPDATE: On March 9, parties filed a Joint Stipulation to Dismiss pursuant to Rule 46.1 of the Supreme Court. Later the same day the Court dismissed the case, along with the two other public charge rule cases, *Wolf v. Cook County* and *USCIS v. City and County of San Francisco*.
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 and on March 9 joined plaintiffs in a motion to dismiss. After the Supreme Court dismissed the cases, the Biden administration filed a notice in the Federal Register formally rescinding the rule.

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22. International Criminal Court Sanctions - CASE CLOSED *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 law professor Leila Sadat 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. In *Sadat*, the plaintiffs moved for a preliminary injunction on Mar. 12, 2021. Much like the *Open Society* challengers, they allege that the executive order violates their free speech rights and conflicts with IEEPA's prohibition on regulating information. UPDATE: On Apr. 2, 2021, President Biden rescinded the executive order, which lifted the sanctions against the ICC officials. The *Sadat* plaintiffs then withdrew their motion for a preliminary injunction and noted that they were reviewing the effects of Biden's decision to revoke the executive order. UPDATE: The *Open Society* plaintiffs voluntarily dismissed their suit on Apr. 29, 2021. UPDATE: The *Sadat* plaintiffs and the Biden administration jointly asked for a dismissal of the suit on May 24, 2021. Both cases are closed following the Biden administration's rescission of the sanctions regime.
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	Shortly after President Biden formally revoked the executive order, Secretary of State Antony Blinken released a press statement on the decision. Blinken explained that, although the Biden administration disagreed with the ICC's Afghanistan investigation, the sanctions were "inappropriate and ineffective." Without endorsing the ICC specifically, Blinken noted that the United States supports the rule of law--including other international tribunals--and would continue to encourage state parties to reform the ICC to operate more effectively.

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23. Prepublication/SCI Disclosure Litigation Against John Bolton - CASE CLOSED *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 June and July 2021. UPDATE: On June 16, 2021, the Biden DOJ dropped both the lawsuit and the criminal investigation against Bolton.
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	The Biden administration dropped both the civil and criminal proceedings against Bolton, displaying a clear break from the Trump DOJ's aggressive pursuit of sanctions. Beyond a one-sentence filing to dismiss the civil suit, the Biden DOJ gave no indication why it was taking a different course.

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