DEVELOPING A RISK ASSESSMENT INSTRUMENT FOR IMMIGRATION CASES UNDER FEDERAL SUPERVISION

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Dedication

To my small, but big in heart family.

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by

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THESIS

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Introduction

The illegal immigration flow into the United States continues to be one of the most volatile subjects when it comes to border security. The southwest border which has nine sectors: Big Bend, Del Rio, El Centro, El Paso, Laredo, Rio Grande Valley, Tucson, San Diego, and Yuma, has the most registered encounters and apprehensions since the 1970's. Apprehensions in the southwest border have fluctuated throughout the years impacting the U.S. border security and other national security aspects. Since 2017 the number of encounters and apprehensions has rapidly increased, reaching a total of 851,508 apprehensions in 2019 (U.S. Customs and Border Protection, FY 1960-2020) of undocumented individuals attempting to cross into the United States.

In 2020, the number of apprehensions for illegal entry into the United States were dramatically diminished to 458, 088. In March 2020, during the initial stages of the COVID-19 pandemic, in an effort to halt the spread of the virus into the United States, the Trump Administration closed the border indefinitely by implementing Title 42 under the 1944 Public Health Service Act (Chisti, 2022). The U.S. health law Section 256 of the U.S. Code Title 42 allows the Centers for Disease Control and Prevention (CDC) director to "prohibit the introduction into the United States of individuals when there is a serious danger of the introduction of a communicable disease" (American Immigration Council, 2022). Under Title 42, any individual attempting to illegally enter or seeking asylum into the United States was to be removed to their country of origin without further prosecution in order to mitigate the transmission of COVID-19 within the United States. The deployment of this policy mandated Customs and Border Protection (CBP) to "catch and release" those individuals attempting to enter into the U.S., decreasing the number of illegal entry apprehensions.

Conversely, the number of legal admissions into the United States through a refugee program or asylum claims was severely impacted by Title 42. In 2020, President Trump set the refugee ceiling for Fiscal Year 2021 to only 15, 000 applications. In 2021, the number of affirmative asylum filings decreased by 33% compared to the 93,518 applications in 2020, and the 97,270 applications in 2019 (Office of Immigration Statistics, 2021) Affirmative asylum claims are referred to the U.S. Citizenship and Immigration Services (USCIS) and granted by the Department of Homeland Security (DHS). Defensive asylum cases were equally impacted during this period. Only a total of 85, 537 applications were received in 2021 compared to the 214, 490 applications received in 2019 (Office of Immigration Statistics, 2021) Defensive asylum claims are granted by the Department of Justice (DOJ) before an EOIR (Executive Office for Immigration Review) immigration judge.

In January 2021, the Biden Administration took office and issued Executive Order No. 13768 (2021) to postpone removals and deportations from the United States for one hundred days, in order to employ the limited resources to alleviate the impact caused by COVID-19. In his executive order, Biden acknowledged the significant operational challenges confronting the global health crisis and the need to employ resources to secure the border. The order allocated available funds to rebuild effective asylum procedures, and simultaneously prioritized the response to threats to national security, public safety, and border security (U.S. Department of Homeland Security, 2021). In addition to this order, in February 2021, President Biden issued Executive Order No. 14013 which aimed at rebuilding, expanding, and improving the U.S. Refugee Admissions Program (Office of Immigration Statistics, 2021)

Consequently, under these directives, the Department of Homeland Security (DHS) developed a removal/deportation criteria to ensure coverage in three sectors:

> *(1)* National security: Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the U.S.; (2) Border security: Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the U.S. on or after November 1, 2020, or who were not physically present in the U.S. before November 1, 2020; (3) Public safety: Individuals incarcerated within federal, state, and local prisons and of an "aggravated felony" and are determined to pose a threat to public safety (U.S. Department of Homeland Security, 2021).

The DHS prioritized those cases meeting the criteria to be removed/deported from the U.S. by the U.S. Immigration and Customs Enforcement (ICE). Cases not meeting the removal or deportation criteria were screened for asylum eligibility and referred to the USCIS for further review. Moreover, if ICE determined the case not to be a threat to public safety or to be a flight risk, the individual was released on immigration parole into the U.S. while the case was reviewed by USCIS. Subsequently, the USCIS reviewed the referred cases and, if the claim of fear of persecution or torture in the country of origin was found to be credible, then affirmative or defensive asylum (before an EOIR immigration judge) was granted, and the individual was allowed to remain in the United States.

In summary, whereas the implementation of Title 42 and the closure of the border under the Trump Administration may have temporarily mitigated the illegal entry into the United States, Biden's subsequent executive order, intended to promote legal entry into the United States, has created a plethora of issues for federal agencies outside the executive cabinet departments, such as the U.S. Courts and the U.S. Probation Office under the judicial branch.

Non-citizen individuals criminally convicted of immigration-related offenses in a U.S. Court are released within the U.S. under these directives. Whereas non-citizen individuals are allowed to file for asylum claims and released on bond if eligible, they must be supervised and report to an immigration officer while undergoing immigration proceedings. In the same manner, if a non-citizen is not removed or deported from the U.S., they must report to the U.S. Probation Office for supervision. These circumstances create an overlap in two different governmental systems, confusion amongst the non-citizen population, and a significant over-supervision and resource expenditures.

Criminal prosecution of undocumented U.S. citizens

Per the Immigration and Nationality Act (INA; 8 U.S.C. § 1101), federal courts have jurisdiction over criminal immigration offenses (Motivans, 2019). Individuals are subject to criminal prosecution if illegal entry/reentry into the U.S, failing to depart from the U.S. when ordered, overstaying with a temporary permit, bringing in or harboring undocumented non-U.S. citizens occurs.

The U.S. Probation Office manages the United States federal supervision system. Under Title 18 U.S.C. §3601 of the U.S. Federal Criminal Code and Rules, an individual who is criminally prosecuted and sentenced is to be supervised by the U.S. Probation Office. In the federal system there are two types of supervision: probation which is a period of supervision without the imposition of an incarceration term (Cohen et al., 2018), and supervised release which refers to term of supervision after a period of incarceration. Whether receiving probation or supervised release, individuals under supervision must comply with certain conditions imposed by the judge on the sentencing judgment.

The Administrative Office of the United States Courts (2018) states that the conditions of supervision set the parameters of supervision as they define how supervision is to be carried. Immigration-related offenses that are sentenced to a term of probation or supervised release typically have immigration-related special conditions included in the judgment. For example,

> If ordered deported from the United States, the defendant must remain outside the United States. If the defendant re-enters the United States, he or she must report to the nearest probation office within 72 hours of his or her return. If release from confinement or not deported, the defendant must report to the nearest probation office within 72 hours (The Administrative Office of the United States Courts, 2016)

This special condition is most commonly imposed on immigration-related cases for a specific reason. In most immigration-related offenses, an immigration detainer is lodged against the non-citizen undergoing criminal proceedings and it is honored upon completion of the custody sentence imposed. Due to the legal immigration status of these cases, it is expected that the majority are highly likely to be removed or deported from the United States to their country of origin by the Immigration and Customs Enforcement (ICE). Sentencing judgments in immigration-related cases where removal or deportation is the likely outcome are phrased with the "non-reporting" language. The term non-reporting is utilized to address the removal or deportation. If the convicted individual is indeed removed or deported from the United States, then the individual will not have to report to the U.S. Probation Office for the term of probation or supervision imposed. Even though the sentencing judgment includes the "non-reporting" language in immigration-related cases, if the individual is not removed or deported from the United States upon being released from federal custody, the individual must report to the nearest U.S. Probation Office for supervision upon