A Land of Wolves: The Rise of Legal Anomie in Administering Expedited Removals of Illegal Aliens in the United States

Islam Rachi

Abstract

In this article examines the new spatialities of border control in the United States and their effects on 'illegal aliens' through a legal-historical approach. To highlight the increasingly expeditious nature of border control, I focus on so-called expedited removal procedures which leave captured individuals without the time or means for lawsuits against such actions. This description is then put into perspective through debates that accompanied the emergence of the administrative state at the beginning of the 20th century.

Keywords: Immigration, Law, Border, Bureaucracy, Deportation

1. Introduction

Homo homini lupus est. This proverb borrowed by Hobbes (1642/2010, 23) could have served as the epigraph to *Sicario* (2015), a film that chronicles the day-to-day life of HRT (Hostage Rescue Team), the FBI's militarized unit, in its law enforcement missions involving drugs and human trafficking on the United States/Mexico border. In one particularly disturbing scene, Alejandro, an agent hardened by tragic events, instructs his colleague to sign a document forbidding her to divulge the unit's secrets. Coerced at gunpoint, she complies. He then utters, "You should move to a small town, where the rule of law still exists. You will not survive here. You are not a wolf, and this is the land of wolves now."

The scene depicts the taboo realities of Western democracies in the exercise of missions to secure the state borders from undocumented immigration by highlighting the illuminating relations between two border dimensions: the territorial, in the form of the borderland, and the legal and social, referring to the (missing) rule of law within this space. As becomes clear in this scene, the borderland is a place of various law violations which are becoming a normality due to a lack of control over state actors, and can therefore create new social facts.

This scene invites one to question the relationship between law and certain spaces of control within national territories: the borderland and

the control of so-called illegal aliens—an area in which legal normativity can be assumed to be applied at its best, and where judicial control of governmental action is at its zenith. Instead, however, I want to refer to the concept of a legal 'black hole' to underscore weaknesses in judicial oversight of executive actions which is key to understanding the stakes involved in state agents' discretion in their implementation of repressive laws applied to certain categories of people, such as illegal aliens.

More specifically, I want to refer to the so-called expedited removal procedure—an accelerated administrative practice of deportation, which has become widespread. By the end of Donald Trump's term as U.S. president in 2021, nearly half of the illegals deported from the country were removed in an administrative manner without due legal process. To the general public, the term 'deportation' relates to forcible state actions consisting of expelling an alien to their country of origin. However, 'removal' is the preferred legal term as it refers to various procedures that lead to this end. According to U.S. law, deportation is the formal removal procedure viewed as the usual way of expelling aliens. Based on the concept of territory, the procedure of formal removal grants illegal immigrants various constitutional rights, allowing them to defend themselves against the authorities in the judicial forum. Despite placing a heavy burden on defendants, these rights remain preferable to an expedited removal, which is still seen as an exceptional procedure in the United States, although its use has risen dramatically in recent years.

Between 2011 and 2019, approximately 364,000 individuals were expelled annually by the U.S. Department of Homeland Security (Guo 2020, 10). During this period, the proportion of deportations made through expedited removal increased from 32% to 47%; in 2019, it remained stable at 46% (2020). As the name suggests, this is an accelerated procedure of repatriation practiced by federal law-enforcement agencies, which have, by virtue of law, large discretionary power in certain geographical areas—especially in the U.S. borderlands, but as we will see, also in the inner territory of the United States. Insofar as these removals are not based on the concept of territorial presence, due process rights are greatly diminished and even annihilated, which brings into question the coherence of the American legal order. From that perspective, the practices of immigration and border control are testing the concept of the United States as a modern bureaucratic state, in which the rule of law is the basis of social order and ought to be regularly applied to all residents of the United States, regardless of nationality or origin.

By examining the evolution of expedited removal, I propose the exploration of the American state order in both its formal aspects, i.e., its rules and principles, and in its practical aspect, i.e., how it affects illegal aliens, and what kind of new parallel administrative order is evolving in the shadow of the rule of law. The aim is to apply both a textually oriented and theoretical open legal approach in order to understand the application of these procedures under a conservative, law-and-order-style government such as former President Trump's.

In the following, I will give some general remarks about the legal and administrative order and its links to territoriality before turning to a description of the removal regime and its territorial links. This shall be contextualized within debates that accompanied the emergence of the administrative state at the beginning of the last century. In this way, we will be able to examine how a conservative legal doctrine, historically hostile to unelected authorities, has conceded regarding national territory, a security exception that contrasts with its discourse on individual liberties and the rule of law. Instead, the new emerging administrative order creates a widening legal black hole, which applies not only to the margins of the state—the geographic borderlands—but which stretches throughout all U.S. territory.

2. Legal Order, the Administrative Order and the Links to Territoriality

Whether conceived in terms of conciliation or dialectic, the relationship between freedom and security is a recurrent problem in the social sciences. The law expressly arbitrates it by instituting an order. In Weberian thought, the order is defined as a system of "determinate maxims or rules" (Weber, cited in Spencer 1970, 123). It is also, according to Kelsen ([1958] 1982, 1), an "aggregate or a plurality of general and individual norms that govern human behavior, that prescribe, in other words, how one ought to behave". Hence, from a juridical point of view, order is based on the written law, that founds the legitimacy of bureaucratic domination. By naming and classifying facts, by assigning them a set of rules, the state portrays itself as the sole arbiter of human interactions—regardless of whether the state is a democracy or a dictatorship. This monopoly of apprehending reality is maintained by a legitimate violence, which sanctions the violations to varying degrees, according to the infringements of the order.

Insofar as it claims to govern behavior, the legal order—which legitimizes rational legal domination—must preserve an intrinsic coherence to be predictable and therefore acceptable. Indeed, the order is only considered such if its norms "constitute a unity, and they constitute a unity if they have the same basis of validity" ([1958] 1982, 64)—a constitution, procedures for enactment of norms, and consistent enforcement, for example. Despite its hegemony, it is not the only normative order, since it coexists with other systems of representation that it usually dominates whether legal (the family) or illegal (crime syndicate). Accordingly, it is the result of a set of beliefs and doctrines that influence each other through the competition of its legitimate actors in the field of power (Bourdieu 1989). If there is competition, then the unitary character of the legal order itself can only be fragmented, relative, and evolving.

Thus, the legal order is not, contrary to commonplaces, a set of written rules preestablished by actors—legislators, judges, administrators—always concerned with satisfying the requirement of formal rationality necessary to system equilibrium. The unfinished quest for pure and perfect coherence raises the question of the stability of the entire order—or at least part of it—the functioning of which can be revealed through the degree of disjunction between the text and the realities it covers. It is assumed that a threshold of coherence is always necessary to maintain the legitimacy of laws and the situations they apprehend; beyond this threshold, history has shown that these situations can become disordered, leading to the evolution of the legal order: that is, reform or revolution.

The state border as an abstract, named, and concrete geographical reality linking different jurisdictions and societies illustrates, in my view, the plural logics of order and disorder. Indeed, reflections on post-Westphalian borders tend to minimize the territorial dimension of control, as one observes in a country like the United States. Bordered to the south by a continent plagued by political instability, the erection of physical barriers attests to this traditional control function of borders. The border wall that separates the United States from Mexico fuels and arouses the fantasies of its promoters. In the words of former President Trump, it is an "impenetrable, physical, tall, powerful, beautiful southern border wall" (Shachar 2019, 95) against an existential danger coming from elsewhere.

The wall illustrates an old-fashioned way of regulating human movement. As a physical entity in an era of increasing digital surveillance, it brings the bodies of both the authorities and the people examined closer together. However, due to the relocation of the border, control is shifting

from the 'Trump Wall' to the heart of the country. There too, border police agents and undocumented residents are interacting with one another.

The rise of post-war constitutionalism gradually detached the law from essentialism in favor of a statutory prism that, in formal terms, ignores the intrinsic qualities of individuals, such as race and class, especially in matters of immigration. This was not without contradictions in an America that is at once welcoming and freedom loving but imperialist and segregated. The law that sanctions these plural cultural and political realities is the product of both compromises and contradictions in many areas. However, the designation/stigmatization of specific ethnic, cultural, or economic groups is becoming less taboo within the legal material such as opinions and executive orders.

3. The Shifting Role of Territoriality for Exclusion, Deportation and Expedited Removal

Public international law recognizes a state reality when three elements are present: a political authority, a population, and a territory (Ragazzi 1992). These territorial and social criteria are interdependent. Indeed, the state is an administrative organization that exercises sovereignty over a population within a geographical area it defines, and which is generally recognized by other states.[1] The control of its territory and the power to include or exclude individuals through "legitimate" violence are at the heart of sovereignty missions.[2] The understanding of space is complex in U.S. law, since entry and exit policies are at the interface of a highly operative normative distinction between domestic and foreign policy law.

In theory, the first is more concerned with individual liberties insofar as the constitution, on this issue, benefits any "person" established in the territory;[3] its application in this terrain is absolute and socially controlled by forces in civil society or its remnants (Audier 2006), culturally vigilant

1 It is also defined as "The area geographically within defined territorial boundaries with a set of political institutions and rules by a government through conformance laws." (Black's Law Dictionary 1910, state entry).

2 Weber says: "we have to say that a state is that human community which (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory" (Lassman 2000, 90).

3 The 14th amendment provides: "No State shall […] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The decision *Plyler v. Doe* (1982) prohibits discriminatory

and hostile to the concentration of power (Tocqueville 1893, 44). The second is exactly the opposite: traditionally the realm of the sovereign and more specifically of the president, this law is part of a state-of-nature vision of international relations where the category of illegal alien distinguishes undesirable people from the polity (Martinez 2000).

Historically, U.S. law established a strong relationship between presence on its territory and the enjoyment of certain constitutional rights (Smith 2019). The entry fiction doctrine constituted an exception in that an individual arrested at the border or at a point of entry, although geographically present on the territory, was deemed to be outside it (*Shaughnessy v. United States ex rel. Mezei*, the Supreme Court 1954). Thus, aliens denied entry at an airport or checkpoint were excluded, while those apprehended within the territory were deported. As mentioned previously, deportation is a formal procedure in which illegal aliens who are present in the territory are granted certain rights. Although the procedures of exclusion and deportation were different, both included a counsel and a hearing (Smith 2019, 6–7).

Typically, when an alien is arrested on immigration-violation charges, they are detained while waiting for an immigration judge to take over the case. According to the law, an individual is entitled to know the reason for their arrest, the authorities involved, and their rights. In the first hearing, an alien can ask for more time to find a lawyer and prepare their defense. At a second hearing, verification is carried out to confirm the information filed by law-enforcement agents in the notice to appear.[4] The defendant then can testify, gather evidence, bring witnesses to corroborate their claims, and contest removal. It is possible to apply for an 'adjustment and status process', through which an alien can obtain asylum or a green card through the support of a third party via sponsorship or petitioning, depending to their situation (family ties, employment, 8 U.S. C. § 1255). If deportation is ordered by the judge, a defendant can appeal the decision to the Department of Justice's Bureau of Immigration Appeals, the highest administrative immigration court, which, in the event that relief is denied, would transfer the case for further review to either the United States Court of Appeals or the United States Supreme Court. The process creates a

measures against children whose parents are undocumented because they fell into the category of "person".

4 It is also known as Form I-862, a document issued by the U.S. Department of Homeland Security.

respite during which a defendant can prepare their defense or, in the case of a dismissal, arrange for an organized return to the country of origin.

Aliens arrested at entry points such as airports were targeted by legislators more frequently than those found within U.S. territory. Legislators argued efficiency-cost imperatives in accelerating these aliens' fates because, in reality, they had very little chance of remaining in the country since they had no constitutional rights, even before a judge (the entry fiction doctrine). However, regardless of their social or geographic situation, virtually all illegal aliens were impacted by later reforms.

In 1996, the geography of immigration law was transformed by embracing the security paradigm of that era. The 1995 Oklahoma City bombing by right-wing extremists led to major legal innovations. Congress passed an old Clinton administration bill that led to the *Antiterrorism and Effective Death Penalty Act* in 1996.[5] Among other provisions, the act broadened the list of offenses that could allow for the deportation of a legal alien and eliminated the defendant's ability to challenge final deportation orders before a judge. In the same year, the *Illegal Immigration Reform and Immigrant Responsibility Act* boasted of wishing to better manage alien entries by allocating judicial efforts to legal immigration (Androphy 2021, § 42:4). To do so, it instituted expedited removal, which was intended to relieve the courts of deportation cases. The procedure reflects the abandonment of the concept of territory that was at the core of the exclusion/deportation distinction in border control. Instead, it introduces the concept of admission (Kanstroom 2018, 1332), taking the legal abstraction to a higher level.

Basically, it reinforces the entry fiction doctrine, which assumes that an individual is not in the territory even at an airport, checkpoint, or some distance past the border. This is an abstract construction aimed to achieve a result—an expulsion—without recognizing a violation since, according to the U.S. Constitution, anybody within the United States is entitled to some degree of protection regardless of their status. Thus, only individuals who have already been legally admitted can avail themselves of basic rights (Bosniak 2007). In some cases, being admitted encompasses aliens who have never held legal status but have been present for a sufficient length

5 The political climate was a particular one in which partisan labels partially disappeared in favor of an ideological cleavage between the proponents of centralization and of pro-federalism. Thus, an unexpected alliance was formed between conservative and progressive jurists. Indeed, the Act has taken jurisdiction of ordinary offenses that used to be under state jurisdiction.

of time and can be considered to reside within the territory, therefore benefiting from the formal removal process, that is, deportation.

These innovations have changed the spatial and temporal framework of border control. The fiction of non-presence—the assumption that an individual is not in the country despite their physical presence—has become stronger as the procedure is increasingly applied within the territory. While it was originally applied at the point of entry or near the border, it gradually evolved in response to the context.

In 2001, expedited removal procedures concerned individuals present in detention centers well within the inner territory of the United States. In 2004, the application of this procedure was territorially widened and took a step forward by covering a zone of 160 km^2 (100 miles, 69 FR 48877), which has been active from all land and sea borders since 2006. An individual arrested in this area, which included two thirds of the U.S. population (Garza 2019), had to prove they had been present for at least 14 days in order to benefit from territorial-based deportation procedures.[6]

The Trump administration pursued this policy by tightening enforcement. Since 2019, expedited removal officially covers the entire territory and requires proof of two years of continued presence in order to benefit from the said rights, replacing the previous 14-day requirement (84 FR 35409). Thus, an individual who has been in the country for one year and 364 days is still to be regarded as an arriving alien subject to entry fiction doctrine, which conditions due process rights to a (valid) territorial presence. The change in the geographical and temporal criteria nearly eliminates the territorial protection that some undocumented persons used to enjoy, almost making an alien's presence on American soil a "constitutional irrelevancy."[7] The Washington Court of Appeals affirmed in September 2020 that both the designation of new classes subject to the procedure and its expansion are within the government's "sole and unreviewable

6 It is now being applied within the full extent of the law: "An alien described in this clause is an alien who [...] has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph" (8 U.S.C. § 1225(b)(1)(A)(iii)).

7 The Supreme Court stated in 1982: "Undocumented aliens cannot be treated as suspect class for purposes of equal protection clause because their presence in this country in violation of federal law is not 'constitutional irrelevancy'" (*Plyler v. Doe* 1982).

discretion" under the terms of the law (8 U.S.C. § 1225(b)(1)(A)(iii)(I)).[8] This gradual expansion has benefitted the procedure, whose constitutional foundations were not to be overly questioned in the courts.[9] September 11, the Iraq war, Obama's controversial deportation policy,[10] and the rise in populist rhetoric have profoundly reshaped immigration law practice, which is now inextricably linked to the security issue.

This last stage originated in the Kelly Memorandum, named after the Secretary of Homeland Security,[11] which was later translated into *Executive Order 13768* in 2017. At the outset, upon reading it, the White House makes a connection between immigration and national security: "Many aliens who illegally enter the United States [...] present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct" (82 FR 8799). This quote is striking in both its generality and peremptoriness; the number behind the word 'many', the link between legal status and crime, and the nature of the latter (Kanstroom 2018, 1343) are all elements that attest to the securitization of borders, as understood by the Copenhagen School (Buzan et al. 1998). The supposed well-being of a national community is called into question by an external enemy: the migrant who has now entered, or is about to do so. This discourse, which constructs a security problem allegedly legitimate, essentializes individuals through distinctive social or racial traits.

The Presidential Order, unlike the memorandum, has legal value and may therefore appear surprising because of its lack of restraint; contemporary laws frequently aim to be more polished, breaking with older ones that explicitly banished certain origins in favor of others.[12] However, it should

8 The Court decided: "We hold that the district court properly exercised jurisdiction over the Associations' case. But because Congress committed the judgment whether to expand expedited removal to the Secretary's 'sole and unreviewable discretion,' [...] the Secretary's decision is not subject to review under the APA's standards for agency decisionmaking. Nor is it subject to the APA's notice-and-comment rulemaking requirements" (*Make The Road New York et al. v. Mcaleenan et al.* 2019).

9 Legislators created a period of 60 days to challenge the constitutionality of expedited removal (8 U.S.C. § 1252(e)(3)(A)-(B); Obaro 2017).

10 Under Obama's administration deportation removals increased 53,7% (from 2,012,539 to 3,094,208). The numbers taken from Chishti et al. (2017) are roughly the same (Guo 2020, 10; Baker 2017, 8; Simanski/Sapp 2012, 5).

11 Kelly was the only military man to hold this position since Haig under Nixon.

12 The first Act on Immigration (1790) opened the country to "free white person". The *Chinese Exclusion Act* of 1882 prohibited Chinese laborers from entering the country for ten years. In 1952, the *Immigration and Nationality Act* prohibited people coming

be remembered that not long ago, such criteria justified some distance from the principle of the equal protection, notably when the Burger Court declared "Mexican appearance" as a "relevant factor" in immigration control (*United States v. Brignoni-Ponce* 1975; Khilji 2019, 203–204). The legal field is not hermetic to politics or social pressures. Immigration has long been a prime target of public policies that aim to be tough on crime. As part of the 'law and order' discourse formulated in the 1960s, in a context of upheaval linked to the civil rights and anti-war movements, voices were raised in the legal community calling for the repression of these mobilizations through unconventional means. In doing so, they contradicted themselves with long-cherished principles such as the prohibition of military intervention in a 'sacred interior'.[13] However, sacrificing coherent texts was necessary to preserve what they called 'the fabric of society,' that is, an unequal social and political order protecting white people against black people, owners against the 'mob,' and America against 'communism'.[14]

4. The Legal Regime of Expedited Removal

Expedited removal is carried out by agents of the executive branch, who have been massively recruited since 2001 to arrest aliens, order their deten-

from the Asia-Pacific. Later amendments in 1965 abandoned these sorts of references. The Supreme Court was also intervened in this area. In *Chan Ping v. United States* (1889) it founds Congress to be within its rights when it considered "the presence of foreigner of a different race in this country, who will not assimilate with us to be dangerous to its peace and security" (Kanstroom 2018, 818). The *Korematsu* case can also be added, it validated the internment of individuals of Japanese descent in the United States during World War II (*Korematsu v. United States* 1944).

13 The *Posse Comitatus Act* (1878) prohibits employing the army as police force: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both" (18 U.S.C. § 1385).

14 See for example military justice expert Frederick Bernays Wiener (1969) writing for the *American Bar Association Journal*: "The Riot Commission also attributed the principal cause of the 1967 riots to white racism. But within a month after the publication of its report, there came the widespread and indeed nation-wide rioting of April, 1968, that followed the murder of Dr. Martin Luther King, Jr. This was rioting that all too clearly reflected *black racism*." (1969, 729, own emphasis). He then stated: "Therefore, it is vital that those in executive office reverse the prevailing trend of permissiveness and leniency, now so widespread that it threatens to rend the very fabric of society" (1969, 729). Sending soldiers onto the streets was thus the solution.

tion, and finally exclude them, all without any real judicial control (8 U.S. Code § 1225 [b][1][a][i]). Indeed, most of them do not have the right to a lawyer and cannot contact their families, given the expeditiousness of the procedure (Garza 2019, 893). The determination of the merits of their situation is at the discretion of the agents. From this point of view, the Trump administration made the possibilities to legalize the stay of undocumented migrants more cumbersome by requiring two years of continued presence, even though the context makes it difficult to gather suitable documentation, let alone the fact that there is no guarantee that the officer will accept them.

Although expedited removal purports not to apply to individuals seeking asylum (8 U.S.C. § 1225[b][1][B][ii]), federal officials actually decide whether the alien "demonstrate[s] a substantial and realistic possibility of succeeding" (Lafferty 2014) in their future application; in other words, the subject must prove they have a credible fear of persecution based on one of five causes: race, religion, nationality, membership in a specific social group, or political opinion (*INS v. Cardoza-Fonseca,* the Supreme Court 1987). Although it seems broad, an alien must demonstrate the veracity of their fear ("a significant possibility," as specified by the law [Marguiles 2020, 419]), which is not an easy task given judicial deadlines and, more generally, a situation of extreme deprivation.

In the instances where the alien cannot demonstrate this claim, the individual is deported within a few days. An initial determination in the individual's favor leads them to undergo a second examination under the aegis of another administrative service.[15] At this stage, if the refusal can theoretically lead to an appeal, the judge—to whom the foreigner finally has access—validates the decision in 80% of cases (Weissert/Schmall 2018). There are therefore several barriers to legal entry, the theoretical passage of which is constrained by the unchecked realities on the ground (e.g., situation and rights not exposed, lack of translation, incompetent agents), making the entire process unreliable.

Despite falling into a category of people protected by national and international texts, most individuals are quickly expelled. The law defines a multitude of temporalities to render justice. Acceleration of legal time breaks with the ordinary justice at work in other fields. Under the guise of efficiency, such procedures are de facto decisions without examination. Investigation and judgment merge in a temporality of the moment completely controlled by the state. This real-time treatment expresses an institutional

15 The USCIS (United States Citizenship and Immigration Services).

confusion between police and justice authorities (Chainais 2014, 112) and creates a fiction in which the guilty parties are identified in advance.

Throughout the process, foreigners are detained for between 48 hours and two years, depending on their situation. Although in principle any individual,[16] can challenge the conditions of the detention by *habeas corpus*, regardless of their status (*INS v. St. Cyr*, the Supreme Court 2001), the 1996 law prevents the federal judge from examining the request.[17] However, this remedy is guaranteed by Article 1 of the Constitution, which states that *habeas corpus* cannot be suspended except in cases of rebellion or invasion.[18] One can wonder whether crossing the border illegally is, in fact, akin to exceptionally grave offenses such as these. The recourse is also an element of the separation of powers [19], especially in the case that an executive agency first triggers the detention, due to the lack of disinterestedness that characterizes criminal proceedings (Schusterman 2020, 664). The purpose of this procedural guarantee is basically substantive; the Founding Fathers believed that individual liberty could only be guaranteed if the powers were both divided and keeping each other in check.

Expedited removal thus appears unconstitutional, fueling an unclear body of case law that would tend to temper its use in the future. For example, the Third Circuit in *Osorio-Martinez* held that the petitioners, children and their mothers, were not subject to expedited removal because the special status attached to these minors and their "substantial connections with country"[20] made them more like permanent residents as opposed to

16 The Supreme Court stated: "Given that United States Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in United States courts can seek to enforce separation-of-powers principles" (*Boumediene v. Bush* 2008).

17 The law restricted the benefit to certain situations that did not concern asylum seekers. *Habeas corpus* then becomes the exception, since it only concerns errors regarding the categories targeted by expedited removal (8 U.S.C. § 1252(e)(2)).

18 Article 1 of the Constitution states: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (U.S. Const., art., 1, sec., 9, cl., 2).

19 According to *Boumediene v. Bush* (2008): "Suspension Clause ensures that, except during periods of formal suspension of writ of *habeas corpus*, the judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty".

20 The Court stated: "(2) Congress accorded these children a range of statutory and procedural protections that establish a substantial legal relationship with the United States; (3) with their eligibility for application for permanent residence assured and

"recent surreptitious entrants" quoting *Castro v. Department of Homeland Security*, Third Circuit (2016). Thus, they were entitled to constitutional rights, including the right to challenge detention. In this case, the family was subject to expedited removal after being caught by U.S. border police four miles beyond the border in U.S. territory. The administration then determined that the family—who had escaped extreme violence perpetrated by gangs in Honduras and El Salvador—was not entitled to asylum, a decision that was challenged. The litigation lasted two years, during which time the initial situation changed. Even though the court did confirm that "an alien seeking initial admission [...] has no constitutional rights" (quoting the Supreme Court in *Landon v. Plasencia* 1982), the question was whether the family was truly (at the time of the appeal) seeking initial admission or if they were already in the country. The judges decided the latter.

The entry fiction doctrine—here assuming an individual is not in the United States despite their physical presence—is narrowly applied, tempered by the court to individuals apprehended only a few days or hours after their entry, thus reconfirming it as an exceptional rule. Although one could argue this was the case of the family, the difference lay in the overall situation of the group that created ties with the country, due to the special status of the minors. Indeed, during the detention the children were granted a Special Immigrant Juvenile Status (SIJS), a classification protecting vulnerable undocumented minors. Thus, the social-temporal element prevailed over the extended spatiotemporal one, as previously held by the lower court. From a historical legal point of view, this reduction of time and space was more in the spirit of the original entry fiction doctrine before the legislative evolution of border control.

Recently, in *U.S. Department of Homeland Security v. Thuraissigiam* (2020), the U.S. Supreme Court made the enjoyment of constitutional rights regarding deportation conditional on a presence in the territory based on community ties, but without defining their nature—noting only that the defendant, an asylum seeker, was captured within 25 yards of the border, the distance being an indication supporting the lack of "ties" to the country (Smith 2020, 5). Justice Alito, writing for the majority, asserted that

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their applications awaiting only the availability of visas (a development that is imminent by the Government's calculation) and the approval of the Attorney General, these children have more than "beg[un] to develop the ties that go with permanent residence," [...] and; (4) in contrast with the circumstances in *Castro*, recognition of SIJ designees' connection to the United States is consistent with the exercise of Congress's plenary power" (*Osorio-Martinez v. AG United States* 2018).

the provision restricting the benefit of *habeas corpus* was constitutional, and that the entrant subject to expedited removal could not challenge the administrative determination denying him asylum. Moreover, *habeas corpus* does not purport to serve as a vehicle for coming into the country. This link with the community attests to the discriminating aspect of the law, specific to a society, in a Hobbesian vision of the world in which foreign individuals are presumed to be hostile to a population of reference.

Since laws and elections are sometimes connected, one can imagine partisan considerations leading to a relaxation of the current regime. Using the same political theories of law, one can also argue that the Supreme Court is governed by a conservative bloc in the way of reforms—again, assuming that a liberal border policy is more flexible, which recent history does not show (Baker 2017).[21] The fact remains that political changes can somehow affect the enforcement of procedures. For example, it has been observed that since former President Trump took office in 2017, the likelihood of a refugee passing the credibility fear test has dropped, which shows normativity outside the courts, in the meanders of bureaucracy.[22] It should be noted that even under the previous regime, the vast majority of deportations at the southern border did not meet the legal standard.

5. The Bureaucratic Order and the Creation of Legal Black Holes

Expedited removal is implemented by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two federal law enforcement agencies under the control of the Department of Homeland Security, both created in 2003. The latter is an administrative mastodon with an annual budget of $17.7 billion (2021), making it one of the largest police forces in the country (American Immigration Council 2021). Its prerogatives cover immigration, anti-drug, and terrorism issues. In 2019, more than 68% of all removals were initiated by arrests of this agency (Guo 2020, 20). There have been a string of documented cases of violence, corruption, and racial profiling, which are becoming more numerous and visible as its jurisdiction expands inland (Heyman 2017). The structural problems of the

21 The procedure is used more and more in recent years. The Obama administration pursued a long-standing border policy, which Biden very recently recognized as a "big mistake" (Barrow 2020).

22 Before Trump's arrival, 80% of migrants used to pass the credible fear interview before asylum officers (Schusterman 2020, 661–662).

CBP are not new; they are inherent to repressive administrative authorities acting without judicial control.

This issue can be highlighted by the concept of a legal black hole (Koh 2018) which designates those areas, geographical or abstract, characterized by the maximization of executive powers. They can be provided for by law, which seems contradictory from a formalist or Kelsenian point of view, that assumes both legal hierarchy and clear rules, or can exist as a social fact. Expedited removal exemplifies this concept insofar as the judiciary cannot, under law, control the exercise of administrative discretion. Although it was formally located at the edges of the geographic state, the black hole has grown to cover the entire state territory.

This legal black hole can be seen as a growing area ruled by administrative reflexes or informal practices that stretch the boundaries of the permissible or simply go beyond them (Kent 2015, 1032). It is a normative space on its own, yet it is defined by the legal order inasmuch as its existence is tolerable; this is why some would refer to is as a "gray hole" (2015, note 23). Whatever the terminology, bureaucratic actions within this hole create normative tensions within the larger, more typical law-based space. Courtrooms give us a forum to distinguish between these intertwined spaces, both of which are based upon a type of legal legitimacy. One can see two ideologies confronting judges: one claims the rule of law as a non-negotiable value; the other invokes the argument of exception under the rule of emergency. Assuming such a simplistic, schematic view of the forces within the legal field, one can say that somewhere between legality and illegality, a black hole expansion in immigration law—typical of national security affairs—is absorbing the substance of rule of law, taking human rights, normative predictability, and government restraint along with it.

This is reminiscent of the 'political questions' (*Marbury v. Madison*, the Supreme Court 1803), a judicial doctrine that impedes the intervention of the judge in sensitive matters and was thought to have disappeared domestically. While the syntagm may come as a surprise because the term 'doctrine' implies a predictability which contrasts with changing politics (Nagel 1989, 643), it has long been used—and still is—to justify the discretionary or illegal doings of government, particularly in the field of national security. Even if not directly invoked, expedited removal has the same effect, since weak judicial regulation equates an absent one: judges cannot, for explicit jurisdictional bars, review questions of fact or law regarding agent determinations. Like the doctrine of political questions, this executive deference reveals the limits of both judicial control and even the law as a

non-arbitrary system, thus creating a legal black hole where unrestrained subaltern agents may act as wolves through the ambiguities of the law.

It is true that the power to include or exclude an individual historically resides in the executive branch.[23] However, one can see that the geographical expansion of this control accompanies an extension of executive power to other spheres. Yet one can think that these phenomena were not desired or foreseeable. In fact, a hundred years ago, conservative jurists were concerned about the growth of the administrative state and its impact on liberties, particularly in the interior. Indeed, since 1920, the doctrine had been divided between realists, who saw the law as an instrument for implementing policies (those of the New Deal), and formalists who continued the tradition of an ideal conception of the law based on legal principles.

James Landis, in *The Administrative Process* (1938), argued for the growth of administrative agencies based on a tradition of political progressiveness and legal realism. The advent of the administrative state was intended to respond to the incompetence of judges in the face of the realities of industrialized and atomized societies, as highlighted by the social sciences (Horwitz 1992, 214–215). Reticent to the contributions of empirical analysis, politically conservative judges favored a common law system, which only allowed for a slow adaptation of the law to these realities. Thus, two opposing theories faced each other: an expert theory, which advocated for a strong delegation of power to administrative agencies, and a delegation theory, where Congress strictly defined their margin of maneuver (1992, 216–217).

Roscoe Pound, who preceded Landis as dean of Harvard Law School, proved to be his biggest opponent. A former adherent to the realist theses, Pound's optimism gave way to a virulent criticism of the legal developments to which he had greatly contributed. The legal historian Morton Horwitz suggests that Pound made himself—perhaps indirectly—the spokesman of a silent minority, eminent people who had been adversely affected by left-wing policies reinforced by realism (Horwitz 1992, 219–220). What Pound criticized was the ability of unelected authorities to set general rules that would impact society without the deliberation and reason that characterize the legislative process. Executive justice too was thought to be unpredictable—"arbitrary," "biased," "extra-legal," and reflective of a "mob mind" (McLean 1979, 79). He likened the administrative process to Soviet

23 The plenary power doctrine justifies this executive supremacy (Martinez 2010, 818).

bureaucratization, which would lead to the end of the rule of law. The experts, accredited for their knowledge, presented themselves as the guarantors of a rational administration concerned with the common good. Yet the formalist vision came back in force in the 1940s and shook some of the achievements of realism (Horwitz 1992, 231–233). Conservatives thus developed an acceptance of the evolution they sought to contain in a general way but fully adopted in a particular field. What one would call the conservative exception in terms of regulation is reflected by the freedom given to agencies carrying out national security tasks on both sides of the border. Thus, atypical positions arose: conservatives favored administrative control to monitor associations, individuals, and foreigners, while liberals who had called for greater autonomy for the expert agencies did an about-face when they witnessed the excesses of McCarthyism.[24]

The study of this security exception reveals a legal pragmatism, an instrumental conception of law at the service of any politics. The exception is especially interesting when put into perspective with certain major objectives on the right, notably that of a weak executive on the domestic front to prevent calling economic privilege into question in the event of a political alternation. In retrospect, therefore, one might think the conservative hostility *vis-à-vis* 'big government' was a matter of economic thinking: only the infringement of property rights, freedom of contract and *laissez-faire* bothered them. Thus, it was appropriate to claim formalism (the strict reading of texts) and later to abandon it when this interpretative methodology no longer guaranteed the politically desired results. Some observers will note that the territorial argument denying constitutional rights to new entrants is based on a methodology historically affiliated with conservatism, versus the liberal functionalist interpretation at work in the *Boumediene* (2008) and *St. Cyr* (2001) cases which both extend *habeas corpus*, even though the defendants were not seeking entry.[25] This is not contradictory if one leaves the legal doctrine *stricto sensu* to understand that substantive motives,

24 According to Walter Gelhorn: "During the period in which these and other new powers have been granted or old ones fortified, the former friends and the former detractors of administrative process have been circumnavigating the globe of government, traveling in opposite directions. The friends, starting from a point on the globe that might be labeled extreme support, have now traveled all the way to the station of extreme fear. The detractors, starting from extreme fear, have seemingly reached the point from which the friends had so recently departed" (Gelhorn cited in Horwitz 1992, 240–241).

25 In the *Boumediene* case, the benefit of the suspension clause depended on statutory, territorial and procedural factors. The defendant was entitled to the clause despite

political or value related, often govern judges' reasoning, a phenomenon commonly designated as the "politicization of the law" (West 1990).

Fundamentally, the expedited removal procedure remains inspired by instrumental considerations, since it seeks to deal efficiently with entries, despite sacrificing certain procedural guarantees associated with the idea of justice. It essentially posits an old idea of realism that justice is to be found outside the law. The last century's structural changes and political turmoil have incrementally reinforced executive dominance. Let us remember that during the Korean War, the Supreme Court struck down former President Harry Truman's seizure of steel mills, under the threat of strikes. Judge Jackson, in his famous concurrence, then wrote, "the accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority" (*Youngstown Sheet & Tube Co. v. Sawyer* 1952). The case is one of the most famous in constitutional law. Not only does it reassert that even in times of war— under national emergency— the president cannot usurp Congress's power, it also underlies the idea that government cannot act unrestrainedly in the domestic area. Today, this concentration has almost been achieved, and its outcome plainly felt by individuals in what have formally become constitution-free zones in the interior.

6. Conclusion

Past fears of an unbridled government resurface at a time when the administrative state is an immutable reality. The mobilization of a thick police apparatus in the implementation of a repressive ideology undermines the coherence of the legal order. The point of tension between individual rights and security can no longer be arbitrated by legal norms. The case of expedited removals reveals a dual state order, of which one is a bureaucratic order free from control and the other a formal legal order. The latter, which claims to regulate the territory, maintains an ambiguous relationship with the actors: field agents, powerful agencies, and illegal aliens. The adverbs

the fact that even though he was not a citizen and was detained outside the territory. The Supreme Court thus dissociated the territorial presence from the benefit of constitutional rights (*Boumediene v. Bush* 2008). In *INS. v. St. Cyr* (2001), the judges stated that Congress needed to be clear if it wished to suspend the use of *habeas corpus* relief.

'now' and 'here' used by Alejandro in *Sicario* to justify his wrongdoings (formally through a legal non-disclosure agreement) do suggest the existence of an unwritten order, the real one, past the illusions of words and principles. It still attempts to formalize or minimize disturbing realities by confining them into the realm of extraordinary.

As seen above, legislations and jurisprudence have laid the foundations for a new principle in which every non-admitted alien is deprived of basic rights. Yet this inversion reveals the nature of the doctrine of entry fiction in the first place. Indeed, the exception that would confirm the liberal rule is essentially the origin of the political and moral problem inherent to the free movement of people. This conceptualization conceals the unsolved question of political communities. The exceptional situation of the foreign human in distress (the rich can always circulate) justifies an ordinary and essentially tolerable violence, as long as it remains circumscribed in an inconspicuous area that would not call into question the rational action of the state.

The legal doctrine is not the only forum where such problematic arguments are made. So are the economic justifications of immigration, which feeds a utilitarian prism of human beings where migrants must be workers to enter the territory (Samers 2003, 212–213). By stressing the numerical weakness of the arrivals, the demographic explanations also reassure a majority cultural group prey to its obsessions (2003). These scientific arguments, which are meant to be pro-freedom, sometimes feed a nationalistic pro-market vision of communities where individuals poorly endowed in capitals (Bourdieu 1979) are foreign elements with rights necessarily diminished. Would thinking of the matter in terms of exceptionalness have the effect of perpetuating the system by affirming either the necessity of a rule or the contingency of dramatic events? Would the violations in the land be the very characteristic of the established order in a vision where the distinction—assuming its relevance—between normality and emergency, between rule and exception, would be in constant redefinition (Gross/Ní Aoláin 2006, 175)?

Juridical concepts, such as those of sovereignty or jurisdiction, can be subject to as yet unimagined flexibility. However, legal contradictions in ordering structural realities present a limit, a threshold of social and political acceptability—which, if crossed, causes the law to lose its legitimacy. The existing order then adapts to remain relevant, and in the case of expedited removal, such change could prove to be too difficult for courts alone. The legalized anomie, the black hole, has thus deepened, creating

a zone where norms both contradict each other and decompose. One can think the expansion of this *Wild West* would make visible all this misery, would touch populations until now spared, perhaps forcing those who have created, hidden or ignored the problem to change the laws.

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Author information

Islam Rachi is a PhD candidate in law and society at the Georg Simmel Center (EHESS/CNRS). His research focuses on the structural and substantive aspects of militarization in the United States between 1970 and 2001. He is also a teaching assistant in political science and sociology (ATER) for undergraduate students.