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To the Subcommittee on National Security, the Border, and Foreign Affairs of the  
Committee on Oversight and Accountability  
and the  
Subcommittee on Crime and Federal Government Surveillance of the  
Committee on the Judiciary  
United States House of Representatives

For A Hearing Titled:

“Biden’s Border Crisis and its Effect on American Communities”

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Chairman Grothman, Ranking Member Garcia, Chairman Biggs, Ranking Member Jackson-Lee, and members of the subcommittees, thank you for inviting me here today to discuss our nation’s ongoing border crisis and its impacts on America’s communities.

### Congress’ Plenary Authority Over Immigration

Key to understanding how border security is supposed to work is appreciating where the immigration authority in this country rests.

Article I, sec. 8 of the U.S. Constitution<sup>1</sup> states, in pertinent part: “The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”.

“Naturalization”<sup>2</sup> is the process by which a foreign national in the United States—defined as an “alien” in section 101(a)(3) of the INA<sup>3</sup> — becomes a “citizen” (as defined by reference therein and in section 101(a)(22) of the INA<sup>4</sup>). Inherent in and essential to Congress’ constitutional authority “to establish a uniform Rule of Naturalization”, therefore, is its power to regulate immigration.

As the Congressional Research Service (CRS)<sup>5</sup> explains: “Long-standing Supreme Court precedent recognizes Congress as having plenary power<sup>6</sup> over immigration, *giving it almost complete authority to decide whether foreign nationals* (aliens, under governing statutes and case law) *may enter or remain in the United States*” (emphasis added). Two brief Supreme Court holdings illustrate the point.

In its 1954 opinion in *Galvan v. Press*<sup>7</sup>, the Court explained:

*Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies*

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<sup>1</sup> U.S. CONST. art. 1, § 8. Source: <https://uscode.house.gov/static/constitution.pdf>.

<sup>2</sup> *Citizenship and Naturalization*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Jul. 5, 2020). Source: [https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization#:~:text=Naturalization%20is%20the%20process%20by,and%20Nationality%20Act%20\(INA\)](https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization#:~:text=Naturalization%20is%20the%20process%20by,and%20Nationality%20Act%20(INA)).

<sup>3</sup> See sec. 101(a)(3) of the INA (2023) (“The term ‘alien’ means any person not a citizen or national of the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

<sup>4</sup> See section 101(a)(22) of the INA (2023) (“The term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

<sup>5</sup> *Constitution Annotated, Artl.58.C18.8.1 Overview of Congress’s Immigration Powers*. CONGRESSIONAL RESEARCH SERV. (undated). Source: [https://constitution.congress.gov/browse/essay/artl-58-C18-8-1/ALDE\\_00001255/](https://constitution.congress.gov/browse/essay/artl-58-C18-8-1/ALDE_00001255/).

<sup>6</sup> See “*plenary power*”. Legal Information Institute (undated) (“Complete power over a particular area with no limitations.”). Source: [https://www.law.cornell.edu/wex/plenary\\_power](https://www.law.cornell.edu/wex/plenary_power). See generally, Feere, Jon. *Plenary Power: Should Judges Control U.S. Immigration Policy?* CENTER FOR IMMIGRATION STUDIES (Feb. 25, 2009). Source: <https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy>.

<sup>7</sup> *Galvan v. Press*, 347 U.S. 522, 532. (1954). Source: <https://supreme.justia.com/cases/federal/us/347/522/>.

*is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. [Emphasis added.]*

Similarly, the Court noted in its 1972 opinion in *Kleindienst v. Mandel*<sup>8</sup> that, “The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” (Emphasis added.).

That’s a long way of saying that when it comes to allowing aliens to enter and remain in the United States, Congress makes the rules and the executive is supposed to carry them out.

Section 212(a) of the INA<sup>9</sup> delineates the various categories of aliens whom Congress has determined should be barred from admission to the United States (known collectively as the “grounds of inadmissibility”).

The most basic of those grounds, and the one that allows Congress to control the flow of immigrants to the United States, is section 212(a)(7)(A)(i) of the INA<sup>10</sup>, which bars the admission of any alien “who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document”.

Congress’ Inspection Protocol for “Applicants for Admission” in Section 235 of the INA

To ensure the executive complies with its “policies pertaining to the entry of aliens”, Congress has created a protocol in section 235 of the INA<sup>11</sup> that CBP must follow when considering whether to admit “applicants for admission”<sup>12</sup>. That statutory term, “applicant for admission”, includes both aliens seeking entry at the ports of entry and migrants who are apprehended crossing the land and coastal borders between those ports<sup>13</sup>-- a fact that is essential to understanding what is occurring at the Southwest border now.

Some historical background puts that process into focus and explains why Congress meant for the current iteration of the inspection protocol in section 235 of the INA to apply equally to inadmissible aliens at the ports of entry and illegal entrants apprehended between them.

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<sup>8</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Source: <https://supreme.justia.com/cases/federal/us/408/753/>.

<sup>9</sup> Sec. 212 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>10</sup> *Id.* at cl. (a)(7)(A)(i).

<sup>11</sup> Sec. 235 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>12</sup> *See id.* at para. (a)(1) (“An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”).

<sup>13</sup> *See id.*

Section 302 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)<sup>14</sup>, the source of the current language in section 235 of the INA, eliminated prior legal precedents that had treated aliens entering illegally *between the ports* differently from those seeking admission *at the ports*.

Prior to that amendment, officers at the then-Immigration and Naturalization Service (INS)<sup>15</sup> — the precursor to CBP and ICE in immigration enforcement — were required to apply a factual and legal analysis known as the “entry doctrine”<sup>16</sup> when its officers and agents apprehended aliens at the borders and the ports.

As its name suggests, the focus of the entry doctrine was on whether an alien had physically “entered” the United States<sup>17</sup>, and the circumstances surrounding that entry.

Under that doctrine, aliens who had not made an entry into the United States were placed into exclusion proceedings under section 236 of the INA<sup>18</sup> and received few constitutional protections.<sup>19</sup> Aliens who had deliberately entered the country — even illegally — and who did so “free from actual and constructive restraint”<sup>20</sup> were placed into deportation proceedings under then-section 242 of the INA<sup>21</sup>, in which they were accorded greater rights and procedural benefits.

Application of the entry doctrine was straightforward in the case of an alien who was stopped at a port seeking admission, because ports were treated as the de facto “doorstep” of the United States, and while aliens were in the ports, they had not entered and could be excluded.<sup>22</sup>

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<sup>14</sup> Tit. III, sec. 302 of the Illegal Immigration Reform and Immigrant Responsibility Act, Div. C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 (1996), 110 Stat. 3009–579 to 584. Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

<sup>15</sup> See *Overview of INS History*. USCIS HISTORY OFFICE AND LIBRARY (undated) (“The Homeland Security Act of 2002 disbanded INS on March 1, 2003. Its constituent parts contributed to 3 new federal agencies serving under the newly []formed Department of Homeland Security (DHS): 1. Customs and Border Protection (CBP), 2. Immigration and Customs Enforcement (ICE), and 3. U.S. Citizenship and Immigration Services (USCIS).”). Source: <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf>.

<sup>16</sup> Wiegand III, Charles A. *Fundamentals of Immigration Law*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (revised Oct. 2011). Source: [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals\\_of\\_Immigration\\_Law.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf).

<sup>17</sup> *Id.* at 1.

<sup>18</sup> See sec. 236 of the INA (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>19</sup> See generally *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”) (citations omitted). Source: <https://supreme.justia.com/cases/federal/us/345/206/>.

<sup>20</sup> *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973). Source: [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals\\_of\\_Immigration\\_Law.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf).

<sup>21</sup> See sec. 242 of the INA (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>22</sup> See fn. 32 (Shaughnessy).

Applying the entry doctrine was challenging, however, in cases involving aliens who had entered illegally.<sup>23</sup> Did the alien “actually and intentionally evade inspection”? Was the alien “free from official restraint”?<sup>24</sup> Application of the entry doctrine was more art than science, requiring a resource-intensive analysis of often disputed facts.

In its IIRIRA amendments to section 235 of the INA, Congress cut this Gordian knot by treating all “arriving aliens” — those at the ports and those apprehended entering illegally between them — as applicants for admission<sup>25</sup>, subject to what was now post-IIRIRA called “inadmissibility” under section 212 of the INA.

In place of exclusion and deportation proceedings, Congress created a single proceeding at which an alien’s inadmissibility or deportability were determined and eligibility for relief assessed, known as “removal proceedings”.<sup>26</sup>

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA<sup>27</sup>, which mandates that all applicants for admission be “inspected by immigration officers” to

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<sup>23</sup> See *Matter of G-*, 20 I&N Dec. 764 (BIA 1993) (“The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States. In the case of the *Golden Venture*, an alien will be found to have been ‘free from official restraint’ if he establishes that he was among the first of the ship’s occupants to reach the shore, that he landed on a deserted beach, or that he managed to flee into a neighboring community. In contrast, an alien who was escorted off the *Golden Venture*, pulled from the water by rescue personnel, or who landed in the cordoned-off area of the beach after it was secured will not be found to have been ‘free from official restraint,’ as his movements were restricted to the immediate vicinity of the beach that was cordoned-off and controlled by the enforcement officers of the various governmental organizations present at the site to prevent the ship’s occupants from absconding. In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. Where there is no evidence that an alien, who arrives at other than the nearest inspection point, deliberately surrenders himself to the authorities for immigration processing, or that, once ashore, he seeks them out, voluntarily awaits their arrival, or otherwise acts consistently with a desire to submit himself for immigration inspection, actual and intentional evasion of inspection at the nearest inspection point may be found.”). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3215.pdf>.

<sup>24</sup> See *id.*

<sup>25</sup> See Sec. 235(a)(1) of the INA (2023) (“Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>26</sup> See Sec. 240(a)(1) of the INA (2023) (Removal proceedings. (a) Proceeding (1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>. See also *Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011) (“IIRIRA eliminated the bright-line distinction between exclusion and deportation, merging the two into proceedings for ‘removal’ and replacing the definition of ‘entry’ with that for ‘admission’ . . . After IIRIRA, both aliens arriving at the border and aliens already present in the United States without inspection are deemed ‘applicants for admission,’ . . . who must ‘be inspected by immigration officers’ to determine their admissibility . . . If, upon such inspection, an alien is not ‘clearly and beyond a doubt’ admissible, he must be placed in removal proceedings.”) (citations omitted). Source: <https://casetext.com/case/cruz-miguel-v-holder>.

<sup>27</sup> Sec. 235(a)(3) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

determine whether they're inadmissible under any of the grounds of inadmissibility in section 212(a) of the INA.

Consequently (and critically), under the inspection protocol in section 235 of the INA, the term “immigration officer” applies to both Border Patrol agents and CBP officers within the agency’s Office of Field Operations (OFO)<sup>28</sup>, which has jurisdiction over the ports of entry.

Thus, and regardless of whether those “immigration officers” are Border Patrol agents or OFO CBP officers, their job is the same — to keep inadmissible aliens from entering the United States.

If, following that inspection mandated by Congress in section 235(a)(3) of the INA, an immigration officer determines that an applicant for admission is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA<sup>29</sup>, that officer has a choice.

Section 235(b)(1)(A)(i) of the INA<sup>30</sup> allows that officer to “order the alien removed from the United States without further hearing or review”-- and without obtaining a removal order from an immigration judge-- “unless the alien indicates either an intention to apply for asylum ... or a fear of persecution”. This process is known as "expedited removal".

If an alien subject to expedited removal specifically asks for asylum or claims a fear of return, the immigration officer must “refer the alien for an interview by an asylum officer” from U.S. Citizenship and Immigration Services (USCIS), pursuant to section 235(b)(1)(A)(ii) of the INA<sup>31</sup>, to determine whether that alien has a “credible fear of persecution”.

The term “credible fear of persecution” is defined in section 235(b)(1)(B)(v) of the INA<sup>32</sup> as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under” section 208 of the INA. Thus, it is a screening standard, to determine whether the alien *may* be eligible for asylum.

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<sup>28</sup> See *Office of Field Operations, What We Do*. U.S. CUSTOMS AND BORDER SECURITY (undated) (“U.S. Customs and Border Protection Officers are responsible for America's border security at ports of entry, safeguarding our country and communities from terrorism, illegal activity, narcotics and human trafficking.”). Source: <https://www.cbp.gov/careers/fof/what-we-do>.

<sup>29</sup> See Sec. 212(a)(6)(C)(i) of the INA (2023) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible”); *id.* at subcl. (ii)(I) (“In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>30</sup> Sec. 235(b)(1)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>31</sup> *Id.* at cl. (ii).

<sup>32</sup> Sec. 235(b)(1)(B)(v) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA<sup>33</sup>, that aliens “*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed”, and is equally clear in section 235(b)(1)(B)(ii) of the INA<sup>34</sup> that if an asylum officer “determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*” (emphasis added).

The detention of aliens subject to expedited removal is critical to the credibility of this process because the credible fear standard is extremely low and because, as I will explain below, asylum is particularly susceptible to fraud. The release of aliens who pass credible fear incentivizes other alien applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief.

With only extremely limited exceptions<sup>35</sup>, the “consideration of the application for asylum” in that context is performed by an immigration judge in removal proceedings under section 240 of the INA<sup>36</sup>.

The other choice that the immigration officer during the inspection protocol under section 235 of the INA — again, OFO CBP officer at the ports or Border Patrol agent between them— has in the case of an “applicant for admission” who is inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat them like any other alien inadmissible under section 212(a)(2) of the INA, and to place the alien directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA<sup>37</sup>.

#### “Parole”

Although section 235(b) of the INA requires DHS to detain inadmissible applicants for admission, Congress in section 212(d)(5)(A) of the INA<sup>38</sup> has given DHS extremely limited authority to “parole” individual aliens into the United States in exceptional or emergent circumstances.

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<sup>33</sup> Sec. 235(b)(1)(B)(iii)(V) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>34</sup> Sec. 235(b)(1)(B)(ii) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>35</sup> Arthur, Andrew. *Biden Administration to ‘Pause’ Radical Asylum Officer Rule*. CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2023). Source: <https://cis.org/Arthur/Biden-Administration-Pause-Radical-Asylum-Officer-Rule>.

<sup>36</sup> See sec. 240 of the INA (2023) (“Removal proceedings”); see also *id.* at para. (a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *id.* at para. (c)(4) (“Applications for relief from removal”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>; *id.* at para. (c)(4) (“.

<sup>37</sup> See section 235(b)(2)(A) of the INA (2023) (“in the case of an alien who is an applicant for admission, if the examining immigration officer *determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted*, the alien shall be detained for a” removal proceeding under section 240 of the INA) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>38</sup> Sec. 212(d)(5)(A)(1) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

That provision<sup>39</sup> states, in pertinent part, that the DHS secretary:

*[M]ay, in his discretion parole into the United States temporarily under such conditions as he may prescribe **only on a case-by-case basis for urgent humanitarian reasons or significant public benefit** any alien applying for admission to the United States, but **such parole of such alien shall not be regarded as an admission of the alien** and when the purposes of such parole shall, in the opinion of the [DHS secretary], **have been served** the alien shall **forthwith return or be returned to the custody** from which he was paroled and thereafter **his case shall continue to be dealt with in the same manner** as that of any other applicant for admission to the United States. [Emphasis added.]*

The congressional limitations on DHS's authority are apparent from the highlighted portions of the language of the statute.

First, parole may only be granted “on a case-by-case basis”<sup>40</sup>, and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens, or programmatically.

Second, DHS may only grant parole for either “urgent humanitarian reasons” or for “significant public benefit”<sup>41</sup>. Granting parole for any other purpose is thus *ultra vires*<sup>42</sup>, as it exceeds the statutory parole authority.

Third, an alien who is granted parole is not “admitted” to the United States, and therefore—as a legal matter—remains locked in the same immigration status that the alien held when that parole was granted.

Consequently, an alien who has been apprehended entering illegally without proper documents (as nearly all are; if they had proper admission documents, they wouldn't have to enter illegally) or who has been deemed inadmissible at a port of entry under section 212(a)(7)(A)(i) of the INA, and who has been paroled, remains amenable to expedited removal once “the purposes of such parole . . . have been served” and parole is revoked.

Congress first provided the executive branch with that parole authority when it initially enacted the INA in 1952<sup>43</sup>, at which point the parole statute read as follows:

*The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe **for emergent reasons or for reasons deemed strictly in the public interest** any alien applying for admission to the United States, but such parole of such alien shall not be*

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *ultra vires*. Legal Information Institute (undated) (“Latin, meaning “beyond the powers.” Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.”). Source: [https://www.law.cornell.edu/wex/ultra\\_vires](https://www.law.cornell.edu/wex/ultra_vires).

<sup>43</sup> Sec. 212(d)(5) of the Immigration and Nationality Act of 1952, Pub. L. 88-414, 66 Stat. 188 (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.



*regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. [Emphasis added.]*

The secretary of Homeland Security, both *de facto* and *de jure*, succeeded the attorney general as the officer given the statutory authority to grant parole under the Homeland Security Act of 2002<sup>44</sup> (although the current text continues to show the attorney general in possession of that authority), but most importantly the highlighted text reveals the tighter restrictions Congress has placed on the DHS secretary in granting parole in the intervening seven decades.

As my colleague, George Fishman, has explained<sup>45</sup>, Congress has more rigidly cabined the parole authority since 1952 because various administrations have abused parole to ignore Congress' plenary power over immigration and exceed the limits it has set on the annual admission of immigrants.

You don't have to trust Fishman about Congress' intentions, however. The current language of the parole statute was included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>46</sup>, under the title "Limitation on the Use of Parole"<sup>47</sup>.

In its 2011 opinion in *Cruz-Miguel v. Holder*<sup>48</sup>, the Second Circuit described how IIRIRA amended the parole statute and explained why Congress had constrained the executive's parole power therein:

*IIRIRA struck from [section 212(d)(5)(A) of the INA] the phrase "for emergent reasons or for reasons deemed strictly in the public interest" as grounds for granting parole into the United States and inserted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." . . . The legislative history indicates that this change was animated by concern that parole under [section 212(d)(5)(A) of the INA] was being used by the executive to circumvent congressionally established immigration policy. [Citations omitted.]*

That raises the question, however, what Congress intended by its use of the terms "urgent humanitarian reasons" and "significant public benefit" in the parole statute.

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<sup>44</sup> Homeland Security Act of 2002, Pub. L. 107-206 (2002). Source: <https://www.congress.gov/bill/107th-congress/house-bill/5005/text>; see also *id.* at sec. 471(a) ("Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.").

<sup>45</sup> Fishman, George. *The Pernicious Perversion of Parole, A 70-year battle between Congress and the president*. CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2022). Source: <https://cis.org/Report/Pernicious-Perversion-Parole>.

<sup>46</sup> Tit. VI, sec. 602 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009–689 (1996). Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011). Source:

Fortunately, the then-INS explained in detail what their predecessor phrases-- “emergent reasons” and “reasons deemed strictly in the public interest”-- meant when it was promulgating<sup>49</sup> its then-parole regulation in 1982:

*The legislative history of the parole provision shows a Congressional intent that parole be used in a restrictive manner. The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. . . . In 1965, a Congressional committee stated that the parole provisions “were designed to allow the Attorney General to act only in emergent, individual, and isolated situations, such as in the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.”*

Thus, even prior to Congress further tightening of the executive’s authority to parole aliens into the country in IIRIRA, the phrase “emergent reasons” was interpreted to apply only to aliens requiring “immediate medical attention”, and “reasons deemed strictly in the public interest” to apply to aliens being brought into the United States to participate in criminal proceedings here.

Plainly, as the Second Circuit explained, the IIRIRA amendments limited the circumstances in which parole may be granted—it did not in any way expand them.

I note, however, that the current iteration of the parole regulation, 8 CFR § 212.5<sup>50</sup>, states:

*(b) Parole from custody. The parole of aliens within the following groups who have been or are detained . . . would generally be justified only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit,” provided the aliens present neither a security risk nor a risk of absconding: . . .*

*(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section. [Emphasis added.]*

That seemingly broad regulatory catch-all parole authority, however, actually derives from the aforementioned 1982 regulatory amendment, when that provision<sup>51</sup> read as follows:

*The parole of aliens within the following groups would generally come within the category of aliens for whom the granting of the parole exception would be “strictly in the public interest”, provided that the aliens present neither a security risk nor a risk of absconding:*

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<sup>49</sup> *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul. 9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

<sup>50</sup> 8 CFR § 212.5 (2023). Source: <https://www.law.cornell.edu/cfr/text/8/212.5>.

<sup>51</sup> See 8 CFR § 212.5(2) (1982) as amended by *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul. 9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

*(v) Aliens whose continued detention is not in the public interest as determined by the district director. [Emphasis added.]*

Accordingly, that current regulatory authority is not the “catch-all” it appears to be at all, but simply a reiteration of the existing bases for granting parole, that is, for emergency medical treatment or appearance at U.S. criminal proceedings, or for some analogous purpose. To the degree that it is treated as a catch-all release authority, however, it is also *ultra vires*.

### Border Security Before Biden

When President Biden took office, he inherited what his first Border Patrol chief, Rodney Scott, described in a September 2021 letter to Senate leadership as “arguably the most effective border security in” U.S. history.<sup>52</sup> The new administration, Chief Scott complained, quickly allowed that security to “disintegrate” as “inexperienced political appointees” ignored “common sense border security recommendations from experienced career professionals.”<sup>53</sup>

The security Chief Scott described was the direct result of a series of border-related policies that had been implemented by the Trump administration.

### *Remain in Mexico*

The most notable Trump border security program — and arguably the most effective — was the Migrant Protection Protocols (MPP)<sup>54</sup>, better known as “Remain in Mexico”.

MPP was first implemented by then-DHS Secretary Kirstjen Nielsen in January 2019<sup>55</sup>, and it allowed DHS to return “other than Mexican” (OTM) migrants caught entering illegally or without proper documentation at the Southwest border back to Mexico to await removal hearings.<sup>56</sup>

Remain in Mexico was premised on DHS’s authority in section 235(b)(2)(C) of the INA<sup>57</sup> to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings. Aliens subject to MPP were paroled into the United States to apply for

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<sup>52</sup> Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019). Source: [https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20\(MPP,of%20their%20immigration%20proceedings%2C%20where](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20(MPP,of%20their%20immigration%20proceedings%2C%20where).

<sup>55</sup> *Id.*

<sup>56</sup> Arthur, Andrew. *Why Trump’s Border Security Didn’t Last, Part 3*. CENTER FOR IMMIGRATION STUDIES (Jul. 17, 2023). Source: <https://cis.org/Arthur/Why-Trumps-Border-Security-Didnt-Last-Part-3>.

<sup>57</sup> See section 235(b)(2)(C) of the INA (“Treatment of aliens arriving from contiguous territory. In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section” 240 of the INA. Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

asylum at port courts<sup>58</sup>, while the Mexican government agreed to provide them with protection for the duration of their stays in that country.

The program was expanded from a pilot site in San Ysidro, Calif.<sup>59</sup> in late January 2019, to Calexico, Calif.<sup>60</sup>, and El Paso, Tex.<sup>61</sup> in March of that year, and then in July 2019<sup>62</sup> to Laredo and Brownsville (both in Texas) before finally it was expanded to the Arizona border town of Nogales<sup>63</sup> in the late fall.

When it was fully implemented, nearly 70,000 migrants<sup>64</sup> were sent back across the Southwest border to await their removal hearings under MPP.

In its October 2019 assessment<sup>65</sup> of the program, DHS found that MPP was “an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system”, particularly as related to alien families. Asylum cases were expedited under the program, and MPP removed incentives for aliens to make weak or bogus claims when apprehended.<sup>66</sup>

That’s because many if not most of those aliens requesting asylum at the border aren’t seeking protection so much as they are coming to live and work here for the time (usually years<sup>67</sup>) that it takes for their claims to be heard. Remain in Mexico denied them the ability to do so.

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<sup>58</sup> Arthur, Andrew. *Tent Courts Aren't Tents — and Provide Due Process. Inside the Laredo MPP hearing facility, and then the view from the other side.* CENTER FOR IMMIGRATION STUDIES (Feb. 4, 2020). Source: <https://cis.org/Arthur/Tent-Courts-Arent-Tents-and-Provide-Due-Process>.

<sup>59</sup> Averbuch, Maya and Sieff, Kevin. *Asylum seeker is sent back to Mexico as Trump administration rolls out new policy.* WASHINGTON POST (Jan. 29, 2019). Source: [https://www.washingtonpost.com/world/the\\_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084\\_story.html](https://www.washingtonpost.com/world/the_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084_story.html).

<sup>60</sup> Rose, Joel. *'Remain In Mexico' Immigration Policy Expands, But Slowly.* NPR (Mar. 12, 2019). Source: <https://www.npr.org/2019/03/12/702597006/-remain-in-mexico-immigration-policy-expands-but-slowly>.

<sup>61</sup> Montes, Aaron. *El Paso begins Trump policy that sends migrant asylum seekers back to Mexico.* EL PASO TIMES (Mar. 16, 2019). Source: <https://www.elpasotimes.com/story/news/immigration/2019/03/16/trump-immigration-metering-policy-migrant-protection-protocols-implemented-el-paso-juarez/3177682002/>.

<sup>62</sup> Roldan, Riane. *Asylum seekers will appear before judges via teleconferencing in tents as "Remain in Mexico" program expands to Laredo.* TEXAS TRIBUNE (Jul. 9, 2019). Source: <https://www.texastribune.org/2019/07/09/remain-mexico-program-expands-laredo-texas/>.

<sup>63</sup> Prendergast, Curt. *'Remain in Mexico' program begins in Nogales* (Dec. 17, 2019). Source: [https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article\\_95f757ac-1851-11ea-b29e-47f1d679e3d8.html](https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article_95f757ac-1851-11ea-b29e-47f1d679e3d8.html).

<sup>64</sup> *Fact Sheet: The “Migrant Protection Protocols”.* AMERICAN IMMIGRATION COUNCIL (Jan. 7, 2022). Source: <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

<sup>65</sup> *Assessment of the Migrant Protection Protocols (MPP).* U.S. DEP’T OF HOMELAND SECURITY (October 28, 2019). Source: [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf).

<sup>66</sup> *See id.*

<sup>67</sup> *See Immigration Court Asylum Backlog.* TRAC IMMIGRATION (undated) (average days pending nationwide from court filing to asylum hearing is 1,477 days—just over four years-- through the end of June 2023). Source: <https://trac.syr.edu/phptools/immigration/asylumb/l/>.

Returning those migrants to Mexico also enabled the Trump administration to comply with Congress' directives<sup>68</sup> in section 235(b) of the INA<sup>69</sup> that DHS not release inadmissible aliens stopped at the border and ports into the United States until they receive asylum or are removed, as described above

DHS's assessment of the program aside, the impact of Remain in Mexico is clear from CBP's own statistics. In May 2019<sup>70</sup>, before MPP was fully implemented, agents at the Southwest border apprehended nearly 133,000 illegal entrants, 63.6 percent of whom (nearly 84,500) were adult aliens travelling with children in family units<sup>71</sup> (FMUs).

Four months later, in September, apprehensions dropped to fewer than 41,000, fewer than 40 percent (15,824) of them in FMUs<sup>72</sup>. That's a four-month overall decline of just less than 70 percent, and an 81 percent decline in family apprehensions over that period.

Deterring adult migrants from bringing children with them when entering the United States not only advances border security, but it also protects the migrants themselves, and in particular the children in those family units.

As a bipartisan federal panel<sup>73</sup> tasked with examining a then-massive surge in family entries in FY 2018 and FY 2019<sup>74</sup> determined in an April 2019 report<sup>75</sup>:

*Migrant children are traumatized during their journey to and into the U.S. The journey from Central America through Mexico to remote regions of the U.S.*

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<sup>68</sup> Arthur, Andrew. *DHS Can't Just Release Illegal Migrants at the Border*. CENTER FOR IMMIGRATION STUDIES (Oct. 22, 2021). Source: <https://cis.org/Arthur/DHS-Cant-Just-Release-Illegal-Migrants-Border>.

<sup>69</sup> See secs. 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV), and 235(b)(2)(A) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>70</sup> *Southwest Border Migration FY 2019*. U.S. Customs and Border Protection (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Arthur, Andrew. *2019 Bipartisan Border Plan Would Solve Today's Migrant Crisis, Tell Biden, Mayorkas, and Congress: 'Read the damn report!'*. CENTER FOR IMMIGRATION STUDIES (Mar. 16, 2021) ("Karen Tandy, the chairwoman, was originally appointed to that position by Jeh Johnson, the last DHS secretary under the Obama/Biden administration. Jim Jones, chairman of Monarch Global Strategies, was initially appointed to the panel by the first Obama/Biden DHS Secretary Janet Napolitano. And Leon Fresco was a principal advisor to Sen. Chuck Schumer (D-N.Y.) when Schumer was chairman of the Senate Judiciary Subcommittee on Immigration. After that, he was deputy assistant attorney general for the Office of Immigration Litigation. In that role, he was the Obama/Biden administration's immigration lawyer at the Justice Department."). Source: <https://cis.org/Arthur/2019-Bipartisan-Border-Plan-Would-Solve-Todays-Migrant-Crisis>.

<sup>74</sup> See *Total Family Unit Apprehensions By Month - FY 2018* and *Total Family Unit Apprehensions By Month - FY 2019*. U.S. Border Patrol (undated) (107,212 FMU Border Patrol Southwest border apprehensions in FY 2018 and 473,682 FMU Border Patrol Southwest border apprehensions in FY 2019). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%208FY%202013%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%208FY%202013%20-%20FY%202019%29_1.pdf).

<sup>75</sup> *Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019), at 6. Source: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

*border is a dangerous one for the children involved, as well as for their parent. There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money.*

. . . .

*Criminal migrant smuggling organizations are preying upon these desperate populations, encouraging their migration to the border despite the dangers, especially in remote places designed to overwhelm existing [U.S. Border Patrol] infrastructure, and extorting migrants along the way, thereby reaping millions of dollars for themselves and the drug cartels who also charge money to cross the border.*

With respect to the kids, the panel report explained: “In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States. . . .”<sup>76</sup>

The numbers kept falling thereafter even prior to the implementation of Title 42 in March 2020<sup>77</sup>, to fewer than 30,000 in January 2020<sup>78</sup> (fewer than 5,200 in family units, 17.6 percent of the total), before rising slightly to just over 30,000 the next month (just 15.3 percent in FMUs).

#### *PACR and HARP*

To speed the review of credible fear claims by illegal entrants, the Trump administration implemented two separate border programs<sup>79</sup>: Prompt Asylum Case Review (PACR<sup>80</sup>), for aliens from Central America; and Humanitarian Asylum Review Program (HARP), for Mexican nationals. Under PACR and HARP, credible fear claims were conducted while illegal entrants were in CBP custody.

The Government Accountability Office (GAO) reported<sup>81</sup> that PACR was launched as a pilot program in El Paso in October 2019, with Border Patrol leadership expanding it to the component’s Rio Grande Valley (Texas) sector in December 2019 and Yuma (Ariz.) sector in

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<sup>76</sup> *Id.* at 1.

<sup>77</sup> Arthur, Andrew. *SCOTUS Keeps Title 42 Going — For Now*. CENTER FOR IMMIGRATION STUDIES (Dec. 28, 2022). Source: <https://cis.org/Arthur/SCOTUS-Keeps-Title-42-Going-Now>.

<sup>78</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>79</sup> Misra, Tanvi and DeChalus, Camila. *DHS expands programs that fast-track asylum process*. THE HILL (Feb. 26, 2020). Source: <https://rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>.

<sup>80</sup> Montoya-Galvez, Camilo. *Program to expedite deportations of asylum-seekers at border expands*. CBS NEWS (Dec. 31, 2019). Source: <https://www.cbsnews.com/news/immigration-program-expediting-deportations-of-asylum-seekers-at-border-expands/>.

<sup>81</sup> *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry*. GOV’T ACCOUNTABILITY OFF. (Jan. 2021). Source: <https://www.gao.gov/assets/720/711974.pdf>.

January 2020.<sup>82</sup> Those sectors were chosen because they had temporary structures at which aliens subject to that process could be housed.

HARP, on the other hand, started out<sup>83</sup> under the auspices of OFO at the border ports in October 2019, before being expanded to Border Patrol in January 2020.<sup>84</sup> At that point, inadmissible aliens encountered by OFO were sent to Border Patrol for HARP processing.<sup>85</sup>

All told, according to GAO, nearly 5,300 aliens<sup>86</sup> encountered by CBP at the Southwest border were subject to PACR and HARP through September 2020. Of that total, 1,210 received positive credible fear determinations and were sent to immigration court, while more than 3,700 were removed.<sup>87</sup>

While those numbers are relatively small, by ensuring that inadmissible applicants for removal would have their credible fear claims decided quickly while they were in custody, PACR and HARP preserved ICE detention resources while allowing CBP to employ Congress' expedited removal process<sup>88</sup>. And because many of those aliens were removed before ICE had to release them, it lessened the likelihood that inadmissible aliens without asylum claims could exploit the system.

### *Asylum Reforms*

Asylum is the most significant statutory exception to the limitations<sup>89</sup> Congress has placed in the INA on immigration to the United States. And it is likely the most abused.

As the Supreme Court has held, “Many ask for asylum, claiming that they would be persecuted if returned to their home countries. ... Most asylum claims, however, ultimately fail, and some are fraudulent.”<sup>90</sup>

According to the Department of Justice (DOJ)<sup>91</sup>, of the aliens who were subject to expedited removal between FY 2008 and FY 2019 and who claimed a fear of harm or requested asylum,

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* (“DHS data indicate that CBP identified approximately 5,290 individuals who were eligible for screening under the pilot programs.”)

<sup>87</sup> *Id.*

<sup>88</sup> *See* sec. 235(b)(1) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. *See also infra.*

<sup>89</sup> *See Tit. II, chap. 1 of the INA, sections 201 through 210.* Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGl0bGU4LXNlY3Rpb24xMjMx%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>.

<sup>90</sup> *DHS v. Thuraissigiam*, 591 U.S. \_\_\_, slip op. at 1 (2020). Source: [https://www.supremecourt.gov/opinions/19pdf/19-161\\_g314.pdf](https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf).

<sup>91</sup> *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019.* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

USCIS immigration officers found that 81 percent had a credible fear of persecution or torture<sup>92</sup>, and 2 percent were determined to have a credible fear by immigration judges on review<sup>93</sup>-- 83 percent in total.

Of those aliens subject to expedited removal who were determined to have a credible fear of persecution or torture, fewer than 17 percent<sup>94</sup> (14 percent of the total of aliens who had requested asylum or claimed a fear of harm) were ultimately granted asylum. By contrast, 32.5 percent of the aliens found to have a credible fear were ordered removed *in absentia* when they failed to appear in court<sup>95</sup>.

With respect to fraud, evidence presented at a 2014 congressional hearing<sup>96</sup> revealed that U.S. USCIS had determined “only 30 percent of asylum cases from a random sample were confirmed to be fraud-free”.<sup>97</sup>

One of the reasons why asylum is so susceptible to fraud is clear from the terms of the asylum statute itself, section 208 of the INA<sup>98</sup>. Clause (b)(1)(B)(ii)<sup>99</sup> therein, which governs the alien’s burden for obtaining that protection, states that:

*The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.*

Thus, and logically (persecutors are unlikely to provide corroborating evidence), no extrinsic or documentary evidence is necessarily required for an asylum applicant to establish his or her claim.

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<sup>92</sup> See sec. 235(b)(1)(B)(v) of the INA (2023) (defining “credible fear of persecution”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>93</sup> See sec. 235(b)(1)(B)(iii)(III) of the INA (2023) (“Review of determination. The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>94</sup> *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

<sup>95</sup> *Id.*

<sup>96</sup> See Vaughan, Jessica. *House Hearing on Asylum Reveals Rampant Fraud, More Abuse of Executive Discretion*. CENTER FOR IMMIGRATION STUDIES (Feb. 11, 2014). Source: <https://cis.org/Vaughan/House-Hearing-Asylum-Reveals-Rampant-Fraud-More-Abuse-Executive-Discretion>.

<sup>97</sup> *Id.* at cl. (b)(1)(B)(ii).

<sup>98</sup> Sec. 208 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

<sup>99</sup> *Id.* at cl. (b)(1)(B)(ii).



That doesn't mean that the presentation of extrinsic evidence in this context is optional, though, because that clause<sup>100</sup> also state makes clear that: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

There are few restrictions<sup>101</sup> barring aliens in the United States from seeking asylum. Notably, section 208(a)(1) of the INA<sup>102</sup> states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival...), irrespective of such alien's status, may apply for asylum."

Any administration can implement immigration policy changes either through procedural rulemaking (by publishing new regulations) or binding precedential decisions<sup>103</sup> issued by the attorney general, whose determinations, under the INA, control "all questions of law"<sup>104</sup>. With respect to asylum, the Trump administration used both.

Of course, regardless of which path an administration takes, the resulting policy is subject to judicial review. If either a precedent decision or a regulation is blocked by a district court (through injunction, vacatur, restraining order, or in the case of precedent, reversal), it can take

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<sup>100</sup> *Id.*

<sup>101</sup> See section 208(a)(2) of the INA (2023) ("Exceptions. (A) Safe third country. Paragraph [208(a)(1) of the INA] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States. (B) Time limit. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. (C) Previous asylum applications. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien if the alien has previously applied for asylum and had such application denied. (D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph [208(a)(2)(B) of the INA] . . ."). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

<sup>102</sup> Sec. 208(a)(1) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>. *But see* fn. 98.

<sup>103</sup> Arthur, Andrew. *AG Certification Explained*. Center for Immigration Studies (Nov. 5, 2019). Source: <https://cis.org/Arthur/AG-Certification-Explained>.

<sup>104</sup> See sec. 103(a)(1) of the INA ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling."). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim>.

years — absent a stay — for a final ruling to be issued by either a circuit court or the Supreme Court, during which the policy languishes.

In his June 2018 decision in *Matter of A-B*<sup>105</sup>, then-Attorney General Sessions provided bright-line rules for adjudicators (including immigration judges and asylum officers) to follow when considering asylum claims by aliens who assert they fear “persecution” at the hands of non-state criminal actors — usually gangs or spousal abusers. Those are the most common border claims.

That December, however, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia permanently enjoined<sup>106</sup> that decision as it related to credible fear claims.

By statute<sup>107</sup>, reviews of expedited removal procedures are within the sole jurisdiction of that court, but notably, Attorney General Sessions’ decision in *Matter of A-B* did not directly involve an asylum claim by a border alien. The judge concluded, however, that his limited review authority gave him sufficient license. The D.C. Circuit concurred, largely affirming that order in a July 2020 opinion.<sup>108</sup>

In July 2019, the Trump administration published a “safe-third country” rule<sup>109</sup> that would have required illegal entrants and other aliens without proper documents at the Southwest border to apply for asylum in a third country through which those aliens passed before seeking that protection in the United States.

Given that every country in the Western Hemisphere — save Cuba (an island) and Guyana (an isolated and largely coastal enclave) — grants some form of asylum protection<sup>110</sup>, it is not unreasonable to require foreign nationals to seek humanitarian protection in any of them that they pass through before they are allowed to apply for asylum in the United States.

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<sup>105</sup> *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018). Source: <https://www.justice.gov/eoir/page/file/1070866/download>. Vacated, *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

<sup>106</sup> See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). Source: <https://casetext.com/case/grace-v-whitaker>.

<sup>107</sup> Sec. 242(e)(3)(A) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

<sup>108</sup> *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). Source: <https://casetext.com/case/grace-v-barr>.

<sup>109</sup> *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (Jul. 16, 2019). Source: <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

<sup>110</sup> *World: State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol - As of September 2012*. United Nations Office for the Coordination of Humanitarian Affairs (Sep. 11, 2012). Source: <https://reliefweb.int/map/world/world-state-parties-1951-convention-relating-status-refugees-and-or-its-1967-protocol>.

Nonetheless, a U.S. district court judge in Oakland, Calif., quickly enjoined<sup>111</sup> that rule. That wasn't much of a surprise, however, because a few months earlier the same judge had blocked<sup>112</sup> a different Trump rule<sup>113</sup> that rendered illegal entrants ineligible for asylum.

In any event, the Ninth Circuit affirmed the district court injunction of Trump's safe-third country rule in July 2020.<sup>114</sup>

Finally, in December 2020 — the month after Trump lost reelection — the administration published a regulation<sup>115</sup> that would have (among other things) raised the burden of proof for credible fear claims. It was enjoined<sup>116</sup> less than a month later by a different district court judge, this one across the bay in San Francisco.

### *Diplomatic Efforts*

No single other factor — including seasonal fluctuations — did more to improve border security and limit illegal entries than Remain in Mexico. That said, it wasn't the only executive authority the Trump administration brought to bear at the Southwest border.

Using his foreign policy power, Trump negotiated safe third country “Asylum Cooperative Agreements” (ACAs or “safe-third country agreements”) with El Salvador, Guatemala, and Honduras<sup>117</sup>.

Those agreements would have enabled the United States to share its migrant burden with its regional partners by allowing DHS to send third-national asylum seekers to those countries to apply for protection.

While the ACAs with El Salvador and Honduras weren't implemented before the Covid-19 pandemic was announced in March 2020 (they came into force in December<sup>118</sup> of that year), the

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<sup>111</sup> *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. 2019). Source: [https://scholar.google.com/scholar\\_case?case=15492460766902773338&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=15492460766902773338&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>112</sup> *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST (N.D. Cal. Nov. 19, 2018). Source: [https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/east-bay-sanctuary-v-trump-jst/C18-6810-JST\\_Order-Granting-TRO.pdf](https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/east-bay-sanctuary-v-trump-jst/C18-6810-JST_Order-Granting-TRO.pdf).

<sup>113</sup> *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*. 83 Fed. Reg. 55934 (Nov. 9, 2018). Source: <https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf>.

<sup>114</sup> *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). Source: [https://scholar.google.com/scholar\\_case?case=717263077632091124&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=717263077632091124&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>115</sup> *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*. 85 Fed. Reg. 80274 (Dec. 11, 2020). Source: <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

<sup>116</sup> *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). Source: <https://casetext.com/case/pangea-legal-servs-v-us-dept-of-homeland-sec-1>.

<sup>117</sup> *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*. U.S. Dep't of Homeland Security (undated). Source: [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).

<sup>118</sup> *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, U.S. Dep't of Homeland Security (Dec. 29, 2020). Source: <https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation>.

United States was able to send more than 900 third-country nationals to Guatemala<sup>119</sup> prior to the pandemic, most of them from El Salvador and Honduras.

That not only demonstrated that so-called “asylum seekers” could apply for protection closer to home, but it also signaled to would-be migrants that simply making it illegally to the United States was not a guarantee they would be able to remain.

As important, if not more so, was the diplomatic pressure that Trump brought to bear to force the Mexican government to secure its own southern border to transit by illegal OTM migrants.

As AP explained in December 2019<sup>120</sup>, Trump “threatened crippling tariffs on all Mexican goods unless Mexico stepped up efforts to curb the flow of migrants. Mexico responded by deploying thousands of members of its newly formed National Guard along migration routes.” Illegal migrants can’t cross the Southwest border if they can’t get there, and due to the pressure that the Mexican government imposed, many couldn’t.

### Biden’s Quick Reversals of Trump Border Policies

Although, as noted above, Chief Scott blamed the rapid decline in border security under the Biden administration on “inexperienced political employees” who “ignored and stymied” what he referred to as “[c]ommon sense border security recommendations from experienced career professionals”<sup>121</sup>, they were plainly taking their lead if not directions from the White House.

As an aside, while Biden had campaigned on reversing the Trump border policies (including and especially MPP), as president-elect he explained that he would have to end those policies “at a slower pace than he initially promised, to avoid winding up with '2 million people on our border”, and only after “‘setting up the guardrails’ to find a solution to the immigration issue”.<sup>122</sup>

Despite that promise, once in the Oval Office, Biden quickly ended nearly all of the Trump policy initiatives that had created the border security that Chief Scott described in the first place: PACR and HARP were ended by executive order on February 2, 2021<sup>123</sup>; Secretary of State

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<sup>119</sup> Sieff, Kevin and Sheridan, Mary Beth. *The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says*, WASHINGTON POST (Jan. 16, 2021). Source: [https://www.washingtonpost.com/world/the\\_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/world/the_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html).

<sup>120</sup> *What crackdown? Migrant smuggling business adapts, thrives*. ASSOCIATED PRESS (Dec. 19, 2019). Source: <https://apnews.com/article/us-news-ap-top-news-international-news-az-state-wire-immigration-202a751ac3873a802b5da8c04c69f2fd>.

<sup>121</sup> Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>122</sup> Miroff, Nick, Sacchetti, Maria. *Biden says he’ll reverse Trump immigration policies but wants ‘guardrails’ first*. WASHINGTON POST, Dec. 22, 2020. Source: [https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16\\_story.html](https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html). Accessed on 1 Mar. 2023.

<sup>123</sup> *Executive Order 14010, “Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”*, 86 Fed. Reg. 8267 (Feb. 2, 2021). Source: <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

Anthony Blinken announced<sup>124</sup> — “In line with the President’s vision” — the administration was suspending and terminating the ACAs four days later; Attorney General Merrick Garland vacated Sessions’ order in *Matter of A-B-* in June 2021<sup>125</sup>; and DHS suspended new enrollments in MPP hours after the inauguration<sup>126</sup>.

That suspension of MPP spurred the states of Texas and Missouri to file suit in U.S. district court in Texas in April 2021<sup>127</sup> to force the Biden administration to reimplement Remain in Mexico, in *Texas v. Biden*.

For 10 months between the late fall of 2021 and summer of 2022, an injunction<sup>128</sup> in that matter forced the Biden administration to return a limited number of illegal border crossers back to Mexico to await their removal proceedings.<sup>129</sup> While the Supreme Court has reversed and remanded that injunction<sup>130</sup>, *Texas* remains pending in district court.

President Biden has not simply reversed Trump-era border security policies, however. In a significant—if not tectonic-- break from every one of its predecessors, the Biden administration has also rejected any action that would deter illegal entrants as a border policy.

Nowhere is this shift better demonstrated than in an exchange between DHS Secretary Alejandro Mayorkas and Bret Baier, on the May 1, 2022, edition of “Fox News Sunday”.<sup>131</sup> Baier asked Mayorkas: “Is it the objective of the Biden administration to reduce, sharply reduce, the total number of illegal immigrants coming across the southern border? Is that the objective?”<sup>132</sup>

To which Mayorkas replied: “It is the objective of the Biden administration to make sure that we have safe, legal, and legal pathways to individuals to be able to access our legal system.”<sup>133</sup>

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<sup>124</sup> Blinken, Anthony J. *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras*. U.S. DEP’T OF STATE (Feb. 6, 2021). Source: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.

<sup>125</sup> *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021). Source:

<https://www.justice.gov/eoir/page/file/1404796/download>.

<sup>126</sup> *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*. U.S. Dep’t of Homeland Security (Jan. 20, 2021). Source: <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

<sup>127</sup> *Texas v. Biden*, No. 2:21-cv-00067-Z, Complaint (N.D. Tex. Apr. 13, 2021). Source:

[https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.1.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.1.0_1.pdf).

<sup>128</sup> *Texas v. Biden*, No. 2:21-cv-00067-Z, Memorandum Opinion and Order (N.D. Tex. Aug. 13, 2021). Source:

[https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.94.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.94.0_1.pdf).

<sup>129</sup> *See Custody and Transfer Statistics FY2022*. U.S. Customs and Border Protection (modified Nov. 14, 2022) (4,740 aliens subject to MPP between November 2021 and August 2022). Source:

<https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>.

<sup>130</sup> *Biden v. Texas*, \_\_\_ U.S. \_\_\_, No. 21–954, *slip op.* (Jun. 30, 2022). Source:

[https://www.supremecourt.gov/opinions/21pdf/21-954\\_7148.pdf](https://www.supremecourt.gov/opinions/21pdf/21-954_7148.pdf).

<sup>131</sup> *Sec. Mayorkas: 'I'm looking forward to testifying before the US Senate'*. FOX NEWS (May 1, 2022). Source:

<https://www.foxnews.com/video/6305481541112>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

By “access our legal system”, Mayorkas means to “apply for asylum”, and in fact the Biden administration has treated all illegal entrants as “asylum seekers”, regardless of the strength of their claims or even whether they come seeking asylum at all.<sup>134</sup>

In line with the administration’s shift away from any policy that would reduce the number of illegal immigrants coming across the border to one providing all migrants with “safe, legal, and legal pathways . . . to access our legal system”, the president has also largely refused to use the primary tools Congress has given the executive branch to deter illegal entrants—detention and prosecution.

Illegal entry is both a civil violation (subjecting the offender to removal) and a criminal offense, punishable as a misdemeanor carrying a sentence of up to six-months and a fine for the first offense and a felony subject to up to two years’ imprisonment and a fine for subsequent offenses under section 275 of the INA.<sup>135</sup>

Criminal prosecutions under this provision peaked in 2018 and 2019 under Trump and then plummeted with the onset of the Covid-19 pandemic, which reduced detention space.<sup>136</sup> Even as illegal entries surged under the Biden administration and pandemic-related restrictions on detention have eased, however, the number of prosecutions for improper entry have remained low.<sup>137</sup>

The same is true of the Biden administration’s refusal to detain inadmissible alien applicants for admission—including, again, illegal entrants-- at the Southwest border.

#### Southwest Border Releases Under the Biden Administration

Since Joe Biden took office, Border Patrol agents at the Southwest border have set new yearly records for migrant apprehensions, first in FY 2021, as agents apprehended nearly 1.6 million illegal migrants<sup>138</sup>, and again in FY 2022, as apprehensions exceeded 2.2 million.<sup>139</sup>

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<sup>134</sup> Arthur, Andrew. *Biden’s Plan to Enable Everyone in the World to Apply for Asylum in the U.S.* CENTER FOR IMMIGRATION STUDIES (May 11, 2022). Source: <https://cis.org/Arthur/Bidens-Plan-Enable-Everyone-World-Apply-Asylum-US>.

<sup>135</sup> Sec. 275(a) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1325&num=0&edition=prelim#:~:text=Any%20individual%20who%20knowingly%20establishes,%2C%20C2%A7275%2C%2066%20Stat>. Accessed on 1 Mar. 2023.

<sup>136</sup> *Major Swings in Immigration Criminal Prosecutions during Trump Administration.* TRAC IMMIGRATION (Dec. 18, 2020). Source: <https://trac.syr.edu/immigration/reports/633/>.

<sup>137</sup> *Criminal Immigration Referrals Up from the Border Patrol.* TRAC IMMIGRATION (Jul. 7, 2022). Source: <https://trac.syr.edu/immigration/reports/688/>.

<sup>138</sup> Arthur, Andrew. *All-Time Record for Southwest Border Apprehensions in FY 2021.* CENTER FOR IMMIGRATION STUDIES (Oct. 22, 2021). Source: <https://cis.org/Arthur/AllTime-Record-Southwest-Border-Apprehensions-FY-2021>.

<sup>139</sup> ARTHUR, Andrew. *Late Night CBP ‘News Dump’ Reveals the Border’s in Freefall.* CENTER FOR IMMIGRATION STUDIES (Oct. 24, 2022). Source: <https://cis.org/Arthur/Late-Night-CBP-News-Dump-Reveals-Borders-Freefall>.

Despite that historically unprecedented surge in illegal migrants, however, the administration has asked Congress to cut the number of beds DHS has available for immigration detainees, from 34,000 per day to 25,000 (a 26.5 percent reduction), in its FY 2024 budget request.<sup>140</sup>

Instead of detaining those illegal “applicants for admission”—again, as Congress mandated—Biden has almost categorically released the ones who have not been expelled under Title 42.

By my calculations, which are based on published statistics<sup>141</sup> from U.S. Customs and Border Protection (CBP) and court-ordered Department of Homeland Security (DHS) disclosures in the aforementioned *Texas v. Biden*<sup>142</sup>, at least 2.2 million aliens<sup>143</sup> encountered by Border Patrol agents and CBP officers at the Southwest border have been released into the United States under the Biden administration. That is more people than live in New Mexico, the 36<sup>th</sup> largest state<sup>144</sup> by population.

It should be noted that this figure includes nearly 311,000 unaccompanied alien children (UACs) from “non-contiguous countries” (that is, every foreign country other than Mexico and Canada) who were encountered by CBP at the Southwest border since February 2021.<sup>145</sup>

Under section 235 of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>146</sup>, DHS is required to transfer UACs from non-contiguous countries to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) within 72 hours of encountering them, for placement with “sponsors” in the United States.

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<sup>140</sup> See *U.S. Immigration and Customs Enforcement, Budget Overview*. U.S. Dep’t of Homeland Security (Mar. 2023), at 18 (“This program change reduces average daily population (ADP) by 9,000, from an ADP of 34,000 in the FY 2023 Enacted to an ADP of 25,000 (including 1,000 beds funded via fees).”). Source: [https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT_Remediated.pdf).

<sup>141</sup> *Custody and Transfer Statistics FY 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2023). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021>. *Custody and Transfer Statistics FY 2022*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2022). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>. *Custody and Transfer Statistics FY 2023*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>142</sup> See *State of Texas v. Joseph R Biden*, 2:21-cv-00067 (N.D. Texas Jul. 28, 2023). Source: <https://www.courtlistener.com/docket/59815977/state-of-texas-v-joseph-r-biden/>.

<sup>143</sup> Arthur, Andrew. *Decoding CBP’s Southwest Border Statistics for May. Not what they appear to be — they’re much, much worse*. Center for Immigration Studies (Jun. 26, 2023). Source: <https://cis.org/Arthur/Decoding-CBPs-Southwest-Border-Statistics-May>; see also *Custody and Transfer Statistics FY2023*. U.S. Customs and Border Protection (Jul. 18, 2023) (Border Patrol agents at the Southwest border released 35,796 illegal entrants at the Southwest border in June). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>144</sup> *US States - Ranked by Population 2023*. WORLD POPULATION REVIEW (undated). Source: <https://worldpopulationreview.com/states>.

<sup>145</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>146</sup> Sec. 235, Pub. L. 110-457 (2008). Source: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text>.

If those children were all in the same school district, it would be the sixth largest in the United States<sup>147</sup>, trailing only the Clark County (Nev.) school district--which has just short of 327,000 students-- in terms of enrollment. And that figure does not include children who entered in family units.

I add the modifier “at least” above because DHS under the Biden administration has failed to provide—except under court order—statistics on the number of aliens deemed inadmissible at ports of entry along the Southwest border by OFO CBP officers who those officers subsequently released into the United States, or on the number of aliens encountered by Border Patrol and OFO at the Southwest border who were transferred to the custody of U.S. Immigration and Customs Enforcement (ICE) and who were subsequently released by ICE.

In its June 30, 2022, decision in *Texas*<sup>148</sup>, the Supreme Court reversed and remanded a district court order<sup>149</sup> that had required DHS to provide that release information to the district court. Consequently, the last DHS disclosures on OFO and ICE Southwest-border releases was submitted to the court on July 15, 2022<sup>150</sup>, covering releases in the month of June 2022.

Since then, no subsequent statistics on OFO and ICE Southwest border releases have been forthcoming from DHS.

#### Border Releases with Notices to Report, and on NTA/OR and Parole

Initially, Border Patrol under the Biden administration released many of the aliens who were not expelled under Title 42 with “Notices to Report” (NTRs), documents directing those migrants to appear at an ICE office near their intended destinations in the United States within 60 days, at which time they would be served with a “Notice to Appear” (NTA), the charging document in removal proceedings.<sup>151</sup>

Not only were releases of illegal entrants without an NTA and a hearing date “unprecedented”<sup>152</sup>, releasing aliens on NTRs isn’t statutorily authorized under the INA. Not surprisingly, many of those migrants released with NTRs failed to later appear.<sup>153</sup> By October 2021, DHS had phased

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<sup>147</sup> *Top 10 Largest School Districts by Enrollment and Per Pupil Current Spending*. U.S. CENSUS BUREAU (revised Oct. 28, 2021). Source: <https://www.census.gov/library/visualizations/2019/comm/largest-school-districts.html>.

<sup>148</sup> *Biden v. Texas*, \_\_\_ U.S. \_\_\_, No. 21–954, *slip op.* (Jun. 30, 2022). Source: [https://www.supremecourt.gov/opinions/21pdf/21-954\\_7148.pdf](https://www.supremecourt.gov/opinions/21pdf/21-954_7148.pdf).

<sup>149</sup> *Texas v. Biden*, 554 F. Supp. 3d 818, 857-58 (N.D. Tex. 2021). Source: <https://casetext.com/case/state-v-biden>.

<sup>150</sup> *See Texas v. Biden*, Defendant’s Monthly Report for June 2022, No. 2:21-cv-00067-Z (N.D. Tex. Jul. 15, 2022). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.143.0.pdf>.

<sup>151</sup> Kight, Stef. *Scoop: 50,000 migrants released; few report to ICE*. AXIOS (Jul. 27, 2021). Source: <https://www.axios.com/2021/07/27/migrant-release-no-court-date-ice-dhs-immigration>.

<sup>152</sup> *Id.*

<sup>153</sup> Arthur, Andrew. *Sen. Ron Johnson Releases Explosive Information on Migrant No-Shows*. CENTER FOR IMMIGRATION STUDIES (Jan. 12, 2022). Source: <https://cis.org/Arthur/Sen-Ron-Johnson-Releases-Explosive-Information-Migrant-NoShows>.



out NTR releases<sup>154</sup>, by which point<sup>155</sup> it had released 95,598 border migrants with Notices to Report.

But that did not mean Border Patrol agents and OFO officers at the Southwest border stopped releasing inadmissible applicants for admission in contravention of section 235(b) of the INA.

Since October 2021, the administration has been releasing border migrants encountered by CBP either on their own recognizance under section 236(a) of the INA<sup>156</sup> with “Notices to Appear”<sup>157</sup> (“NTAs”, the DHS charging documents placing aliens into removal proceedings)— a policy referred to as “NTA/OR” -- or on parole.

Agents began releasing illegal entrants at the Southwest border on NTA/OR on President Biden’s first day in office (January 20, 2021), and by the end of FY 2021, had released more than 154,000 of them in this manner.<sup>158</sup>

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<sup>154</sup> Alvarez, Priscilla. *DHS stops releasing some migrants without providing immigration court dates*. CNN (Nov. 16, 2021). Source: <https://www.cnn.com/2021/11/16/politics/dhs-migrants-paperwork-ice-notice-to-appear/index.html>.

<sup>155</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>156</sup> See sec. 236(a) of the INA (2023) (“Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General-(1) may continue to detain the arrested alien; and (2) may release the alien on- (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole; but (3) may not provide the alien with work authorization (including an ‘employment authorized’ endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.”). Source:

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>157</sup> See sec. 239(a)(1) of the INA (2023) (“Initiation of removal proceedings. (a) Notice to appear. (1) In general. In removal proceedings under [section 240 of the INA], written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated. (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection [239(b)(2) of the INA]. (F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under [section 240 of the INA]. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien’s address or telephone number. (iii) The consequences under [section 240(b)(5) of the INA] of failure to provide address and telephone information pursuant to this subparagraph. (G)(i) The time and place at which the proceedings will be held. (ii) The consequences under [section 240(b)(5) of the INA] of the failure, except under exceptional circumstances, to appear at such proceedings.”). Source:

[https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1229%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1229%20edition:prelim)).

<sup>158</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

Border Patrol agents at the Southwest border only started releasing illegal entrants on parole in August 2021<sup>159</sup>, and had granted parole to more than 25,000 apprehended migrants there by the end of FY 2021.

In FY 2022, more than 378,000 illegal migrants apprehended by Border Patrol at the Southwest border were paroled into the United States, while nearly 311,000 others were released on NTA/OR.<sup>160</sup>

That trend has continued. In the first nine months of FY 2023, Border Patrol agents have paroled more than 304,000 illegal migrants they apprehended at the Southwest border into the United States, while more than 276,000 others were released on their own recognizance with NTAs.<sup>161</sup>

As noted, statistics on OFO Southwest border releases are only available between January 2021 and June 2022, but during that period<sup>162</sup>, CBP officers at the Southwest border ports paroled more than 147,000 inadmissible aliens into the United States.

Similarly, statistics on ICE releases of aliens encountered by CBP at the Southwest border who had been transferred to ICE are only available for the period between January 20, 2021, and the end of June 2022<sup>163</sup>. During that period, however, ICE released nearly 221,000 Southwest border applicants for admission.

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<sup>159</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>160</sup> CBP NEWSROOM (2022). "Custody and Transfer Statistics FY2022, USBP Monthly Southwest Border Encounters by Processing Disposition." U.S. CUSTOMS AND BORDER PROTECTION, 14 Nov. 2022. Source:

<https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>. Accessed on 3 Mar. 2022.

<sup>161</sup> CBP NEWSROOM (2023). "Custody and Transfer Statistics FY2023, USBP Monthly Southwest Border Encounters by Processing Disposition." U.S. Customs and Border Protection, 10 Feb. 2023. Source:

<https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>. Accessed on 3 Mar. 2023.

<sup>162</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for December 2021, Exhibit A; (N.D. Tex. Jan. 14, 2022) *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for January 2022, Exhibit A (N.D. Tex. Feb. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for February 2022, Exhibit A (N.D. Tex. Mar. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for March 2022 (N.D. Tex. Apr. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for April 2022 (N.D. Tex. May 16, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for May 2022, Exhibit A (N.D. Tex. Jun. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for June 2022, Exhibit A (N.D. Tex. Jul. 15, 2022). Source:

<https://www.courtlistener.com/docket/59815977/state-of-texas-v-joseph-r-biden/>.

<sup>163</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit B (N.D. Tex. Dec. 15, 2021); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for December 2021, Exhibit B; (N.D. Tex. Jan. 14, 2022) *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for January 2022, Exhibit B (N.D. Tex. Feb. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for February 2022, Exhibit B (N.D. Tex. Mar. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for March 2022, Exhibit B (N.D. Tex. Apr. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for April 2022, Exhibit B (N.D. Tex. May 16, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for May 2022, Exhibit B (N.D. Tex. Jun. 15, 2022); *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants' Monthly Report for June 2022, Exhibit B (N.D. Tex. Jul. 15, 2022). Source:

<https://www.courtlistener.com/docket/59815977/state-of-texas-v-joseph-r-biden/>.

## No Authority for NTA/OR Releases of Border Migrants

Although CBP under President Biden has released hundreds of thousands of inadmissible applicants for admission under section 236(a) of the INA<sup>164</sup>, that provision provides CBP no authority to release border migrants.

By its express terms, that section of the INA gives DHS officers authority to arrest aliens on warrants.<sup>165</sup> After arrest, pursuant to that statute, DHS can continue to detain such aliens, or to release them on bond or conditional parole.<sup>166</sup>

The problem is that few if any illegal migrants apprehended at the Southwest border are arrested on warrant, for a simple reason: Border Patrol agents can't and don't seek warrants to arrest migrants they see or know to have entered illegally at the border, because that would allow those aliens to abscond.

Congress gave Border Patrol agents the authority to make such warrantless arrests in section 287(a)(2) of the INA<sup>167</sup>. It states, in pertinent part:

*Any officer or employee of the Service ... shall have power without warrant- to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation ... or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.*

As a formality, agents and officers may subsequently issue a “Warrant for Arrest” for such aliens, but that does not convert a warrantless arrest into an arrest on warrant that would allow for release under section 236(a) of the INA. Or, as one district court judge held<sup>168</sup> in March: “This sleight of hand — using an ‘arrest’ warrant as de facto ‘release’ warrant — is administrative sophistry at its worst.”

## Biden Administration’s Parole Releases

Nor is there any authority for CBP to release hundreds of thousands of border migrants on parole<sup>169</sup>, either.

By way of background, the Biden administration has implemented two separate formal programs under which Border Patrol agents were directed to release illegal entrants on parole:

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<sup>164</sup> Sec. 236(a) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Sec. 287(a)(2) of the INA (2023). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1357%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1357%20edition:prelim)).

<sup>168</sup> *Florida v. U.S.*, 3:21-cv-01066-TKW-ZCB, Opinion and Order, at 84 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>169</sup> *See infra*.

“Parole+ATD” (parole under section 212(d)(5)(A)(1) of the INA plus so-called “alternatives to detention”<sup>170</sup>) and “Parole with Conditions” (PWC).

Parole+ATD came to light because of a suit<sup>171</sup> filed by the state of Florida in September 2021 captioned “*Florida v. U.S.*” (*Florida I*). The state alleged<sup>172</sup> that the administration was deliberately “ignoring” the congressional detention mandate in section 235(b) of the INA by releasing migrants apprehended at the border, directly resulting in fiscal harm to the state.

More than a year of discovery followed, which uncovered a November 2, 2021, memo<sup>173</sup> from Border Patrol Chief Raul Ortiz formally adopting Parole+ATD releases (although, as the court eventually found, the record established that Border Patrol “started using ‘parole’ as a means of improving ‘processing efficiencies’” that July)<sup>174</sup>.

That November memo applied this parole policy only to aliens in family units and justified its use on a “need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities”<sup>175</sup>. Parole+ATD then also only applied in the Border Patrol’s Rio Grande Valley and Del Rio sectors, but the memo noted it could be extended to reduce crowding in CBP facilities elsewhere.

The court explained that the November Memo “concluded by stating that ‘when COVID-19 conditions eventually improve, it is expected that there will no longer be a need for this alternative pathway’”<sup>176</sup>.

Even though the administration announced in April 2022<sup>177</sup> that it would be ending the Covid-19-related Title 42 in late May, the Parole+ATD “pathway” remained.<sup>178</sup> In fact, the

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<sup>170</sup> See *Alternatives to Detention*. U.S. Immigration and Customs Enforcement (updated Jul. 6, 2023) (“ICE’s Alternatives to Detention (ATD) programs exist to ensure compliance with release conditions and provide important case management services for non-detained noncitizens. ATD consists of multiple distinct subprograms such as the Intensive Supervision Appearance Program (ISAP), Young Adult Case Management Program (YACMP), and the new Case Management Pilot Program (CMPP) in partnership with DHS’s Office for Civil Rights and Civil Liberties (CRCL). Each ATD program utilizes certain tools like technology and case management to support noncitizens compliance with release conditions while on ICE’s non-detained docket. ATD also increases court appearance rates. ATD enables noncitizens to remain in their communities — contributing to their families and community organizations and, as appropriate, concluding their affairs in the U.S. — as they move through immigration proceedings or prepare for departure.”). Source: <https://www.ice.gov/features/atd>.

<sup>171</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Complaint for Declaratory and Injunctive Relief (N.D. Fla. Sep. 28, 2021). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.1.0.pdf>.

<sup>172</sup> See *id.* at 2.

<sup>173</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 25-26 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 28-29.

<sup>176</sup> *Id.*

<sup>177</sup> See Arthur, Andrew. *Title 42 Reportedly to End May 23*. Center for Immigration Studies (Mar. 31, 2022). Source: <https://cis.org/Arthur/Title-42-Reportedly-End-May-23>.

<sup>178</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 29-30 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

Parole+ATD policy “was effectively reauthorized in a July 18, 2022, memorandum jointly issued by CBP and ICE titled ‘Policy on the Use of Parole Plus Alternatives to Detention to Decompress Border Locations’”<sup>179</sup>.

There were any number of problems with Parole+ATD, not the least of which was that it created a massive backlog for ICE in finding and issuing NTAs to aliens released under that program and with NTRs, which would take years and millions of dollars for ICE to clear even if the program were shut down<sup>180</sup>.

As NBC News reported in February<sup>181</sup>:

*Between late March 2021 and late January 2023, more than 800,000 migrants were released on Notices to Report or Parole Plus ATD. About 214,000 of them were eventually issued charging documents with court dates, according to data obtained by NBC News, meaning that roughly 588,000 did not know when or where to report for their asylum hearings.*

How long would migrants have to wait for their NTAs? According to the New York Post<sup>182</sup>, by the middle of March, the New York City ICE office was “fully booked” for migrant call-in appointments through October 2032.

U.S. district court Judge T. Kent Wetherell II, who was assigned to hear the state’s claims in *Florida I*, concluded in his March 8, 2023, order<sup>183</sup> vacating Parole+ATD that this policy was “contrary to law in three ways”:

*(1) it does not contemplate a return to custody once the purposes of parole have been served; (2) it does not comply with the case-by-case requirement; and (3) it does not limit parole to urgent humanitarian reasons or significant public benefit.*

I will analyze the court’s findings with respect to each of these three issues in turn.

*No Return to Custody*

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<sup>179</sup> *Id.* at 30.

<sup>180</sup> *See id.* at 34 (“ICE officials estimated that it would take nearly 3 years (and \$25 million) to clear the ‘backlog’ and issue NTAs to these 110,000 aliens if the Parole+ATD policy was stopped at that point. For every 30 days that the policy continued in place, approximately an additional year and \$8 million were added to the time and cost of clearing the backlog.”).

<sup>181</sup> Ainsley, Julia. *Nearly 600,000 migrants who crossed the border since March 2021 were released in the U.S. with no immigration court dates.* NBC NEWS (Feb. 3, 2023). Source: <https://www.nbcnews.com/politics/immigration/nearly-600000-migrants-crossed-border-released-inside-us-rcna68687>.

<sup>182</sup> Nelson, Steven. NYC ICE office ‘fully booked’ for migrant appointments through late 2032: document. New York Post (Mar. 13, 2023). Source: <https://nypost.com/2023/03/13/nyc-ice-office-fully-booked-for-migrant-appointments-through-late-2032/>.

<sup>183</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 88 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

As noted *infra*, the parole statute<sup>184</sup> requires that a parolee “be returned to the custody from which he was paroled” after the purpose of the parole has been satisfied.

During oral argument<sup>185</sup>, the government admitted that “the ‘purpose’ of parole” in this context was to move “aliens out of CBP facilities faster than would occur if the alien were processed consistent with the requirements of” section 235 of the INA.

Referencing that admission at oral argument, the court held<sup>186</sup>:

*That being the case, the purpose of the parole is served when the alien has his first encounter with ICE. However, nothing in the July Memo or the supplemental administrative record contemplates a return to custody at that time or any time thereafter — indeed, the supplemental administrative record shows that aliens are all-but-guaranteed that they “will not be taken into custody” when they report to ICE for issuance of an NTA. [Emphasis added.]*

That shows that the administration is expressly violating the parole statute; this isn’t “parole”, it’s “release”, unmoored from any statutory authority.

The parole statute also contemplates that the alien return to his or her “case” once the purpose of parole is completed<sup>187</sup>. As the judge noted<sup>188</sup>, however, “the entire purpose of the Parole+ATD policy is to expedite the processing of aliens at CBP facilities without initiating an immigration proceeding against them”, and therefore the alien has no removal “case” to return to.

#### *“Case-by-Case” Requirement for Parole*

Judge Wetherell further held<sup>189</sup> that the Parole+ATD policy violates DHS’s duty under the parole statute<sup>190</sup> to assess the circumstances in individual parole cases on a “case-by-case” basis, in several different ways.

First, although the July memo “pays lip service to assessments of individual aliens, it’s largely focused on DHS’s operational circumstances [its detention capacity] rather than an individual alien’s circumstances”.<sup>191</sup>

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<sup>184</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>185</sup> See *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 89 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>186</sup> *Id.* at 90.

<sup>187</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>188</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 90 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>189</sup> *Id.* at 91.

<sup>190</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>191</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 91 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

Second, the sole focus of the case-by-case assessment under DHS’s Parole+ATD policy is “whether the alien is a public safety risk or flight risk, not on whether the alien meets the exceedingly high parole standard”.<sup>192</sup>

Third, that memo “turns the parole standard on its head by providing ineligibility criteria rather than eligibility criteria. In other words, the July Memo essentially establishes a presumption of parole when the relevant ‘triggers’ are met”.<sup>193</sup>

The court also noted that Border Patrol’s time estimate for completing the Parole+ATD process is “15 to 30 minutes”, concluding that it would be “implausible” for agents to “meaningfully assess an alien’s individual circumstances” in that brief period.<sup>194</sup>

#### *Urgent Humanitarian Reasons or Significant Public Benefit Requirement*

Finally, the judge held<sup>195</sup> that Parole+ATD policy violates the statutory requirement that parole be granted only “for urgent humanitarian reasons or significant public benefit”<sup>196</sup>.

He concluded<sup>197</sup>:

*The primary “public benefit” that the Parole+ATD policy sought to achieve was speeding up the inspection mandated by [section 235 of the INA] to “decompress” overcrowded CBP facilities. However, even if there may be circumstances where an individual alien might be eligible for parole based on overcrowding and health and safety concerns, creating an entirely new “processing pathway” to avoid the process mandated by [section 235] is inconsistent with the narrow language in [the parole statute].*

#### *Florida II*

On these and other bases, Judge Wetherell vacated the Parole+ATD policy.<sup>198</sup>

Judge Wetherell’s order did briefly stop Border Patrol from releasing migrants on parole, but only until May 10, the day before Title 42 ended.

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<sup>192</sup> *Id.* at 92.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 93.

<sup>196</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>197</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 93-94 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>198</sup> *Id.* at 108-109. See also Arthur, Andrew. *Federal Judge Vacates Biden’s ‘Parole+ATD’ Border Release Policy*. CENTER FOR IMMIGRATION STUDIES (Mar. 10, 2023). Source: <https://cis.org/Arthur/Federal-Judge-Vacates-Bidens-ParoleATD-Border-Release-Policy>.

On that day, then-Border Patrol Chief Raul Ortiz issued a memo<sup>199</sup> directing his agents to implement a new policy called “Parole with Conditions” (PWC), purportedly to reduce overcrowding at Border Patrol processing facilities.

Under PWC, Border Patrol was again directed to release aliens in its custody on parole without issuing them NTAs and court dates, or as that memo put it “in advance of the issuance of an NTA”.<sup>200</sup>

That memo sent the state of Florida back to court on May 10 to halt PWC parole releases, in a new case captioned *Florida v. Mayorkas*<sup>201</sup> (*Florida II*).

Based on what little information it had about that policy (the memo hadn’t been released yet), Florida argued in its complaint<sup>202</sup> that the latest policy “may violate” the court’s March 8 vacatur of Parole+ATD in *Florida I*.

The state continued<sup>203</sup>, however, noting: “But it is unquestionably cynical, in bad faith, and contrary to both the [INA] and the [Administrative Procedure Act, ‘APA’]. It is also, unfortunately, consistent with the game of whack-a-mole DHS has been playing with Florida and this court for almost two years.”

On these grounds, the state asked the district court for a temporary restraining order (TRO) stopping PWC releases.<sup>204</sup>

*Florida II* was also assigned to Judge Wetherell, who concluded on May 11 that a TRO was in order<sup>205</sup> given:

*the challenged policy appears to be materially indistinguishable from the Parole+ATD policy vacated in [Florida I] — both in its purpose (reducing overcrowding at border patrol facilities) and manner of operation (releasing aliens into the country without first issuing a charging document placing them in immigration proceedings and simply directing the aliens to report to ICE within a specified period for further processing).*

“It Has Come to the Court’s Attention . . .”

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<sup>199</sup> Taer, Jennie. *EXCLUSIVE: Here Are The Docs Instructing Border Patrol To Release Waves Of Migrants Into The Country*. Daily Caller (May 11, 2023). Source: <https://dailycaller.com/2023/05/11/border-patrol-docs-migrants-title-42/>.

<sup>200</sup> *Id.*

<sup>201</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Relief (N.D. Fla. May 10, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.1.0.pdf>.

<sup>202</sup> *Id.* at 1.

<sup>203</sup> *Id.* at 1-2.

<sup>204</sup> *Id.* at 7-8.

<sup>205</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Temporary Restraining Order, at 8 (N.D. Fla. May 10, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0_2.pdf)



The aftermath of Judge Wetherell’s TRO in *Florida II* is as enlightening on the administration’s release policies as the facts revealed in the *Florida I* and *Florida II* decisions.

On May 14, the Washington Times<sup>206</sup> reported DHS had paroled “roughly 2,500 border migrants” on May 12, the day after Judge Wetherell issued his order in *Florida II*.

In response to that article, Judge Wetherell issued an Order to Show Cause<sup>207</sup> on May 15, which began “[i]t has come to the Court’s attention” — words to chill any lawyer. He asked DHS whether the Times’ reporting was correct, and if so, how those releases occurred and why DHS should not be held in contempt.

In the response<sup>208</sup> DOJ filed that same day, it explained that while DHS and CBP “take very seriously their obligation to comply with court orders”, DHS had concluded the judge’s TRO still allowed it to release 2,576 aliens on parole whose processing was “fully complete” prior to the issuance of that order, but who had not yet been set free.

No one was held in contempt, but Judge Wetherell wasn’t happy with that explanation, either, noting in his May 16 order<sup>209</sup> discharging the Order to Show Cause: “Ideally, DHS would have sought clarification from the Court before making a unilateral decision to release aliens under the authority of the Parole with Conditions policy after the TRO took effect.”

He did, however, direct<sup>210</sup> DHS to “file periodic reports on the status of those [2,576] aliens”, identifying “the number of aliens who have reported to ICE and been issued NTAs”, indicating “when, where (city and state), and how (in person or online) these aliens reported to ICE and were issued NTAs”, and explaining “what steps DHS is taking to track down the aliens who did not report as required and whether those efforts have been successful”.

The court’s interest in those specific aliens aside, the 2,576 are a microcosm of the two million-plus border migrants DHS has released under the Biden administration. Thus, the government’s response to the May 16 order was bound to provide a rare glimpse into Biden’s otherwise secretive handling of the illegal migrant population post-release.

DHS’s first report was due 60 days after the issuance of Judge Wetherell’s May 16 order, coinciding with the 60-day period the May 10 PWC memo gave paroled aliens to report to ICE for service of their NTAs.

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<sup>206</sup> Dinan, Stephen. *Feds granted thousands parole after court’s hold; border numbers drop with Title 42 expiration*. WASHINGTON TIMES (May 14, 2023). Source: <https://www.washingtontimes.com/news/2023/may/14/border-patrol-paroled-2500-migrants-after-judges-r/>.

<sup>207</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Order to Show Cause, at 1 (N.D. Fla. May 15, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.17.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.17.0_1.pdf).

<sup>208</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Response to Order to Show Cause (N.D. Fla. May 15, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.26.0.pdf>.

<sup>209</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Order, at 2 (N.D. Fla. May 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.31.0.pdf>.

<sup>210</sup> *Id.* at 4.

The government's response to that order was filed on July 17<sup>211</sup>. Attached was a declaration filed by Daniel Bible, deputy executive associate director at ICE's Enforcement and Operations (ERO) component, which provided answers to Judge Wetherell's questions.

Bible explained that of those 2,572 PWC aliens, 1,507 had checked in with ICE (only 464 of whom were served NTAs), and 1,065 were no-shows.<sup>212</sup>

That's a 58.6 percent appearance rate, but more critically a 41.6 percent nonappearance rate. Worse, Bible failed to explain why fewer than one-third of the late-released PWC aliens who *did* report to ICE were served with NTAs and placed into proceedings.

Again: (1) in *Florida I*, Judge Wetherell found the Biden administration was flouting Congress's directives with respect to the detention and processing of illegal migrants in March; (2) in *Florida II*, he concluded DHS was contravening his *Florida I* order by reissuing what was essentially the same border parole release policy he had already vacated; and (3) he concluded on May 16 that while DHS's late PWC releases of aliens didn't meet the contempt standard, the department wasn't taking his orders as seriously as it should.

Which brings me to (4), the court's reaction in its July 18 order<sup>213</sup> to the Bible declaration.

The judge noted the government's response confirmed his conclusions in *Florida I* about "the inefficacy of using 'parole' as a processing pathway" for apprehended illegal entrants, and — more biting — held that DHS's actions were "akin to what Florida described in its original complaint in *Florida I* as 'immigration enforcement by the honor system'"<sup>214</sup>.

The court then turned<sup>215</sup> to DHS's less-than-effective response to the aliens who failed to report to ICE:

*Notably, [Bible] did not say that enforcement action will be taken against the aliens who violated the conditions of their parole under the PWC policy if DHS is able to find them. Rather, he only said that "ICE may take enforcement action against those [aliens]," ... and that one potential enforcement action might be "initiation of removal proceedings," .... Given that the initiation of removal proceedings is what was supposed to happen if the alien had checked in as directed, it is hard to understand why DHS thinks that aliens will take any of its directives seriously if their "punishment" for not doing so ends up being the*

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<sup>211</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Defendants' Response to Court's May 16 and 22 Orders (N.D. Fla. Jul. 17, 2023). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.53.0.pdf>.

<sup>212</sup> Arthur, Andrew. *Federal Judge Unloads on Do-Nothing ICE in Screwed-Up Border Fiasco*. 'It is hard to understand why DHS thinks that aliens will take any of its directives seriously'. Center for Immigration Studies (Jul. 24, 2023). Source: <https://cis.org/Arthur/Federal-Judge-Unloads-DoNothing-ICE-ScrewedUp-Border-Fiasco>.

<sup>213</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Order Requiring Periodic Reports (N.D. Fla. May 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.54.0.pdf>.

<sup>214</sup> *Id.* at 1-2.

<sup>215</sup> *Id.* at 3.

*same thing that would have happened if they complied. [Emphasis added; internal citations omitted].*

You can sense the court’s frustration. But the worst part was — as the judge held<sup>216</sup> — there’s nothing he can do about it, admitting that he has no “authority to order DHS to track down and take into custody the aliens who should not have been released under the enjoined PWC policy and who are in violation of their ‘parole’ and unlawfully in the country”.

### Largest Influx of Irregular Migrants in History

The Southwest border has experienced the largest influx of irregular migration in the nation’s history since President Biden took office.<sup>217</sup> Since February 2021, Border Patrol agents at the Southwest border have apprehended more than 5.6 million illegal entrants.<sup>218</sup>

More than 2.515 million of those apprehensions resulted in expulsion<sup>219</sup> under orders<sup>220</sup> issued by the Centers for Disease Control (CDC) pursuant to Title 42 of the U.S. Code<sup>221</sup> in response to the Covid-19 pandemic.

Conversely, more that 3.154 million of the migrants apprehended illegally at the Southwest border during that period have been processed under the INA, or as the Biden White House refers to it --in an apparent attempt to make it sound as effective as Title 42 (it’s not)-- “Title 8”<sup>222</sup>.

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<sup>216</sup> *Id.* at 4.

<sup>217</sup> *Compare Southwest Border Sectors, Total Encounters By Fiscal Year.* U.S. Border Patrol (undated) (covering FY 1960 to FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF>. *with Nationwide Encounters.* U.S. CUSTOMS AND BORDER PROTECTION (Jul. 18, 2023) (covering FY 2020 to present). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>218</sup> *Nationwide Encounters.* U.S. CUSTOMS AND BORDER PROTECTION (Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>219</sup> *Id.*

<sup>220</sup> *See, e.g., Order Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists.* U.S. DEP’T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 20, 2020). Source: [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).

<sup>221</sup> *See id.*; 42 U.S.C. § 265 (2023) (“Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”). Source: [https://uscode.house.gov/view.xhtml?req=\(title:42%20section:265%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:42%20section:265%20edition:prelim)).

<sup>222</sup> *See, e.g., FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* White House (Jan. 5, 2023) (“To facilitate a return to the processing of all noncitizens under Title 8 authorities when Title 42 eventually lifts . . .”). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

Not surprisingly, that massive surge in illegal migrants has severely taxed Border Patrol’s limited resources. At the end of FY 2020 (the last year for which staffing statistics<sup>223</sup> are available), there were fewer than 17,000 Border Patrol agents stationed along the 1,954-mile<sup>224</sup> Southwest border.

On paper, that equals out to roughly 8.64 agents per mile, but in reality, agents work shifts of approximately 50 hours per week. That means fewer than 30 percent of those agents are on the line at any given time, reducing staffing down to about 2.57 agents per mile.

Even that figure, however, does not adequately represent the actual number of agents who are “on the line”—that is, actively preventing the illicit entry of drug mules and human traffickers and smugglers-- at the border at any given time. That’s because of the demographics of those millions of illegal migrants and the manner in which they entered.

In the past 30 months, migrants have crossed the border illegally in groups consisting of hundreds of individuals<sup>225</sup>, an uncommon phenomenon in the past. Many if not most are so-called “give ups” (to contrast them with “got aways”<sup>226</sup>), that is aliens who enter illegally and wait for agents to arrive in the (legitimate) hope that they will be processed and released.

While agents don’t have to expend resources to pursue such give ups, tens of them must be dispatched at a time to report to those crossing scenes and more to then transport, process, and care for migrant groups of that size, pulling them off the line for indeterminate periods.

That is especially true in the case of large numbers of aliens travelling in “family units” and where apprehensions involved unaccompanied alien children.

FMUs and UACs are the most vulnerable migrants in the best of circumstances, and given the fact that most Border Patrol processing centers were built in the late 1990s and early 2000s, when nearly all illegal entrants were single adult males from Mexico (and thus are unsuitable for housing children and families for any extended period), agents must use special care to house and process them, and to segregate them from other migrants with potential criminal and predatory intent.

In FY 2021, Border Patrol agents set a record for UAC apprehensions at the Southwest border, encountering nearly 145,000 alien children<sup>227</sup> who were travelling alone. That was nearly twice

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<sup>223</sup> See *Border Patrol Agent Nationwide Staffing by Fiscal Year*. U.S. Border Patrol (undated) (16,878 agents on the Southwest border in FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf>.

<sup>224</sup> *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (undated). Source: <https://www.cbp.gov/node/293681/printable/print>.

<sup>225</sup> See, e.g., Caralle, Katelyn. “The ticking border time bomb: 1,000 migrants in the largest caravan in HISTORY crosses the Rio Grande into El Paso - with huge numbers being released onto the streets and just nine days until Title 42 ends”. DAILY MAIL (Dec. 12, 2022). Source: <https://www.dailymail.co.uk/news/article-11529519/Largest-migrant-caravan-HISTORY-illegally-crosses-Rio-Grande-El-Paso.html>.

<sup>226</sup> See *infra*.

<sup>227</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

as many UACs as in FY 2019<sup>228</sup>, when agents apprehended just over 76,000 unaccompanied children at the Southwest border—a then record.

That FY 2021 record was quickly broken, as agents caught an additional 149,000-plus UACs<sup>229</sup> at the Southwest border in FY 2022.

As for family units, agents apprehended more than 451,000 adults and children travelling in FMUs in FY 2021<sup>230</sup>. While that represented fewer aliens in FMUs than the nearly 473,700 apprehended at the Southwest border in FY 2019<sup>231</sup> (a year in which more than 55 percent of Southwest border apprehensions involved aliens in FMUs), it was a 764 percent increase over FY 2021<sup>232</sup> (when just over 52,200 illegal entrants in FMUs were apprehended there).

The illicit crossing of large groups of migrants together—and in particular groups including significant numbers of aliens in family units and/or unaccompanied alien children—isn't simple happenstance, as Chief Scott explained<sup>233</sup>:

*[I]llegal entries are being scripted and controlled by Plaza Bosses that work directly for the transnational criminal organizations (TCO) to create controllable gaps in border security. These gaps are then exploited to easily smuggle contraband, criminals, or even potential terrorists into the U.S. at will. Even when [Border Patrol] detects the illegal entry, agents are spread so thin that they often lack the capability to make a timely interdiction.*

“Got Aways”

As that excerpt from Chief Scott indicates, not all illegal entrants at the Southwest border want to be or are caught.

Increasingly under the Biden administration, hundreds to thousands of illegal entrants per day have evaded apprehension by overwhelmed Border Patrol agents and made their way successfully into the interior of the United States. Those aliens are defined in statute as “got aways”<sup>234</sup>.

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<sup>228</sup> *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month - FY 2019*. U.S. BORDER PATROL (undated). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf).

<sup>229</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>230</sup> *Id.*

<sup>231</sup> *Southwest Border Migration FY 2019*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>232</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>233</sup> *Letter from Rodney Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman* (Sept. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>234</sup> See 6 U.S.C. § 223(a)(3) (2023) (“Got away. The term ‘got away’ means an unlawful border crosser who- (A) is directly or indirectly observed making an unlawful entry into the United States; (B) is not apprehended; and (C) is

That definition was added to the U.S. Code by section 1092 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017)<sup>235</sup>, under the header “Border Security Metrics”, which is now codified at 6 U.S.C. §223<sup>236</sup>.

Section 1092 of NDAA 2017<sup>237</sup> requires the DHS secretary to “develop metrics, informed by situational awareness, to measure the effectiveness of security between ports of entry”, and to provide an annual report on the results to the GAO and to the Senate Homeland Security and Governmental Affairs and House Homeland Security Committees.

The last such report, for FY 2021<sup>238</sup>, was filed with GAO and the committees in May 2022, but it only includes “got-away” statistics from FY 2010 through the end of FY 2020.<sup>239</sup>

It reveals that during that 11-year period, got-ways at the Southwest border peaked in FY 2013 (171,051), and remained roughly static just north of 101,000 between FY 2015 and FY 2017 before jumping again in FY 2018 (127,944) and FY 2019 (150,090), then dipping again in FY 2020 (135,593), roughly coinciding with the implementation of MPP and Title 42.

Again, those are the last published got-away numbers, but DHS Secretary Alejandro Mayorkas told the House Judiciary Committee in April 2022<sup>240</sup> that there were 389,515 got aways in FY 2021, while Fox News reported in October that there were 599,000 got aways in FY 2022<sup>241</sup>.

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not a turn back.”). Source:

<https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxIOjYgc2VjdGlvbjoyMjMgZWRRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>235</sup> Sec. 1092 of National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source:

<https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>236</sup> See 6 U.S.C. § 223(a)(3) (2023) (“Got away. The term ‘got away’ means an unlawful border crosser who- (A) is directly or indirectly observed making an unlawful entry into the United States; (B) is not apprehended; and (C) is not a turn back.”). Source:

<https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxIOjYgc2VjdGlvbjoyMjMgZWRRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>237</sup> Sec. 1092 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source:

<https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>238</sup> *Department of Homeland Security Border Security Metrics Report: 2021*. U.S. DEP’T OF HOMELAND SECURITY (Apr. 27, 2022). Source: [https://www.dhs.gov/sites/default/files/2022-06/2022\\_0427\\_plcy\\_border\\_security\\_metrics\\_report\\_FY2021\\_%282020\\_data%29.pdf](https://www.dhs.gov/sites/default/files/2022-06/2022_0427_plcy_border_security_metrics_report_FY2021_%282020_data%29.pdf).

<sup>239</sup> See *id.* at 16.

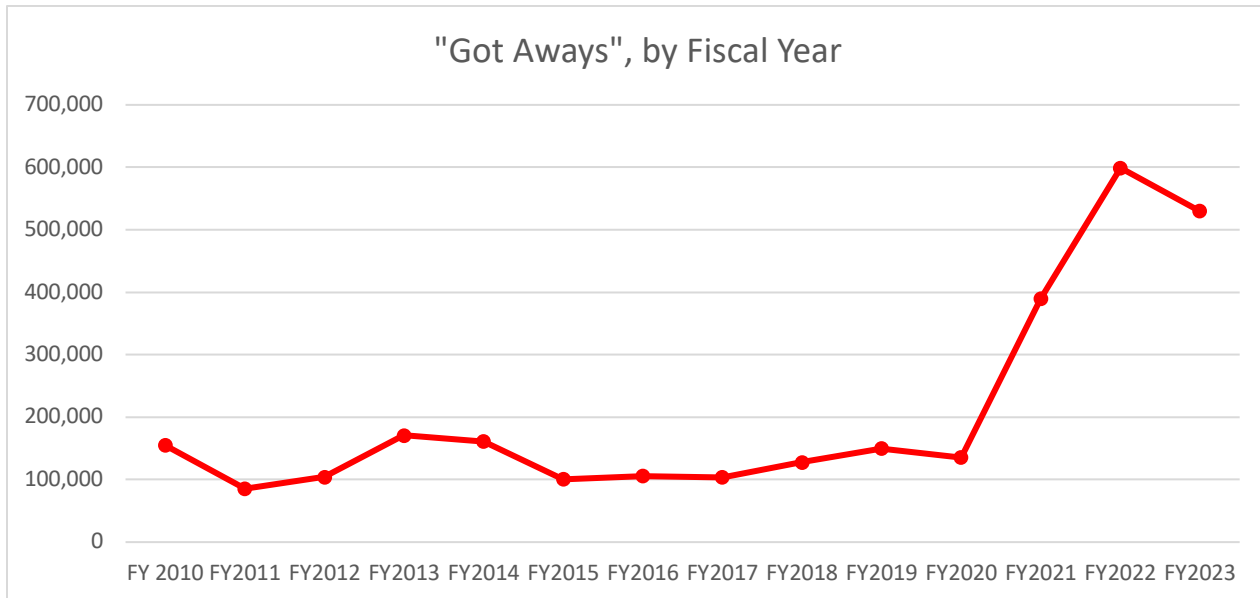
<sup>240</sup> Betz, Bradford. *Mayorkas testifies more than 389,000 migrant ‘gotaways’ at border*. Fox News (Apr. 28, 2022). Source: <https://www.foxnews.com/politics/mayorkas-389-thousand-migrant-got-aways-at-border>.

<sup>241</sup> Melugin, Bill and Blitzer, Ronn. *Border officials count 599,000 ‘gotaway’ migrants in Fiscal Year 2022: source*. Fox News (Oct. 2, 2022). Source: <https://www.foxnews.com/politics/border-officials-count-599000-gotaway-migrants-fiscal-year-2022-source>.

At an early May White House press conference<sup>242</sup>, Mayorkas was asked about reports that there had already been more than 530,000 gotaways in FY 2023 (“roughly the size of the population of the city of Baltimore”), which he did not deny.

That’s more than 1.5 million aliens who have entered illegally since President Biden took office and who are now living in the United States, largely if not completely free from any official constraint — “roughly the size of the population of Philadelphia”<sup>243</sup>, America’s sixth-largest city.

Here's how the got-away statistics look, when graphed:



Sources: Department of Homeland Security Border Security Metrics Report: 2021; Fox News; White House

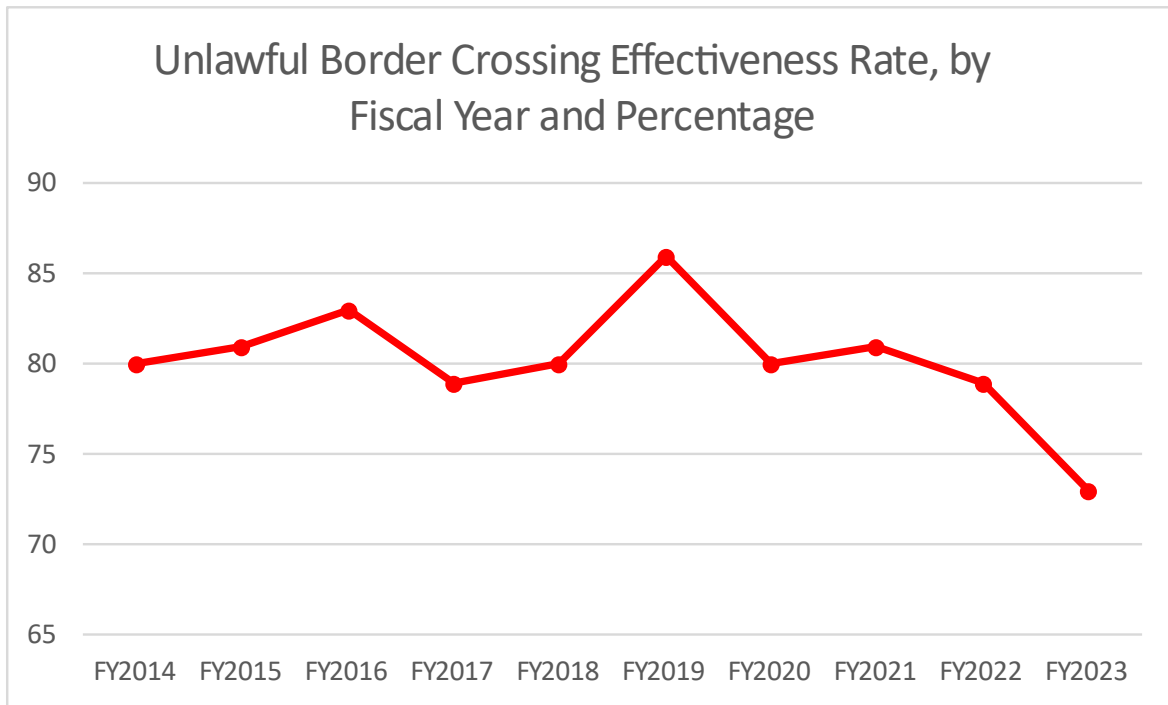
That one chart reveals, better than any other, how drastically DHS’s ability to secure the Southwest border has declined under the Biden administration, and significantly, it comes with Congress’ imprimatur.

<sup>242</sup> See *Press Briefing by Press Secretary Karine Jean-Pierre and Secretary of Homeland Security Alejandro Mayorkas*. White House (May 11, 2023) (Q: Republicans have challenged you on this point on Capitol Hill, and I wanted to give you an opportunity to respond. You know, they point to Border Patrol’s own numbers, which show that, going back to October of last year, there were more than a million apprehensions, but then there were also more than 530,000 ‘got-aways.’ That’s roughly the size of the population of the city of Baltimore. How can you say that the border is not open? SECRETARY MAYORKAS: So, we removed, returned, and expelled 1.4 million people last year. Ask those 1.4 million people if — if they think the border is open. Our apprehension rate at the border is consistent with the apprehension rate in prior years —). Source: <https://www.whitehouse.gov/briefing-room/press-briefings/2023/05/11/press-briefing-by-press-secretary-karine-jean-pierre-and-secretary-of-homeland-security-alejandro-mayorkas/>.

<sup>243</sup> *QuickFacts. Philadelphia city, Pennsylvania; United States*. U.S. CENSUS BUREAU (undated, retrieved Jul. 30, 2023). Source: <https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania,US/BZA210221>.

Section 1092(b)(1)(C) of NDAA 2017<sup>244</sup> also directs DHS to create a calculus for the “unlawful border crossing effectiveness rate”, that is, the total of apprehensions, turn-backs, and Title 42 expulsions divided by that same figure plus got-aways — essentially a metric that measures the effectiveness of CBP’s apprehension and deterrence efforts and administration policies.

Again, the most recent report only includes data through the end of FY 2020, so I must omit the turn-back numbers for FY 2021 through FY 2023. That should make minimal difference in the result, however, as the number of turn-backs would be reflected in both the numerator and the denominator. Here’s what DHS’s unlawful border-crossing effectiveness rate looks like, when graphed:



Sources: Department of Homeland Security Border Security Metrics Report: 2021; Fox News; White House

### Why Are So Many Inadmissible Alien Applicants for Admission Coming to the Southwest Border Now?

It is apparent that a massive surge of inadmissible alien applicants for admission (including illegal entrants) has arrived at the Southwest border since Joe Biden became president in January 2021, and that this migrant wave is severely impacting CBP’s ability to secure the Southwest border against potential terrorists, human traffickers, drug smugglers, and “got aways”.

That raises the question, however: Why are so many illegal migrants showing up at the U.S.-Mexico line now?

<sup>244</sup> Sec. 1092(b)(1)(C) of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.



Here is how Blas Nuñez-Neto, DHS's current Assistant Secretary for Border and Immigration Policy<sup>245</sup> has explained it in a recent declaration, under the header "Hemispheric conditions are driving encounter levels that strain DHS resources":

*Violence, food insecurity, severe poverty, corruption, climate change, the continuing effects of the COVID-19 pandemic, and dire economic conditions have all contributed to a significant increase in irregular migration around the globe, fueling the highest levels of irregular migration since World War II. ... In the Western Hemisphere, failing authoritarian regimes in Venezuela, Cuba, and Nicaragua, along with an ongoing humanitarian crisis in Haiti, have driven millions of people from those countries to leave their homes. Additionally, violence, corruption, and the lack of economic opportunity — challenges that are endemic throughout the region — are driving noncitizens from countries such as Brazil, Colombia, Ecuador, and Peru to make the dangerous journey to the U.S. border. This is in addition to the continuing economic headwinds and rule of law concerns in traditional sending countries, such as Guatemala, Honduras, and El Salvador.*

It is notable that most of the issues the assistant secretary lists are, indeed, endemic ("violence, food insecurity, severe poverty, corruption"), some aren't quantifiable ("climate change", the "continuing effects of the COVID-19 pandemic"), and others are purely a matter of historical perspective (the current political and economic situations in Venezuela, Cuba, Nicaragua, Haiti, Brazil, Colombia, Ecuador, and Peru).

As I explained in response:

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<sup>245</sup> *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST, Declaration of Blas Nuñez-Neto (N.D. Cal. Jun. 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.176.2.pdf>.

*Perhaps Nunez-Neto has forgotten . . . the past reigns of terror of the Sendero Luminoso<sup>246</sup> in Peru, the FARC<sup>247</sup> in Colombia, and the Tonton Macoutes<sup>248</sup> in Haiti, or the civil wars in Guatemala<sup>249</sup> and El Salvador<sup>250</sup> (each of which ended in the 1990s).*

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<sup>246</sup> See *Shining Path*. BRITANNICA (undated) (“The Shining Path was founded in 1970 in a multiple split in the Communist Party of Peru. . . . Envisioning revolution as a long military offensive, the Shining Path relied primarily on the peasantry and made ruthless use of terror and violence. . . . Guzmán, whose organizational and tactical abilities underlay the Shining Path’s success, was captured in a police raid in Lima on September 12, 1992, and in October he was sentenced to life imprisonment on terrorism charges. Despite his conviction, the organization continued to clash with the government throughout the 1990s. In July 1999 its new leader, Oscar Ramirez Durand (alias Comrade Feliciano), was captured and, like Guzmán, sentenced to life imprisonment. In 2003 Peru’s Truth and Reconciliation Committee issued a report stating that 37,800 of the estimated 70,000 deaths in Peru’s 20-year insurgency conflict were caused by Shining Path guerrillas led by Guzmán. The Shining Path’s terrorist activities also seriously disrupted the country’s economy.”). Source: <https://www.britannica.com/topic/Shining-Path>.

<sup>247</sup> See *FARC*. BRITANNICA (updated Jul. 28, 2023) (“The FARC has carried out bombings, assassinations, hijackings, and other armed attacks against various political and economic targets in the country; it has also kidnapped foreigners for ransom, executing many of its captives. The FARC’s links to drug trafficking have brought hundreds of millions of dollars annually into the organization from taxes it imposes. . . . Nonetheless, the process by which the FARC guerrillas were to relinquish their weapons was largely peacefully under way at the beginning of 2017. On August 15, 2017, the FARC turned over the last of its accessible weapons to UN representatives (some 900 weapons remained in caches in remote areas), bringing the total of decommissioned weapons to more than 8,100 guns and about 1.3 million cartridges. With this action the Colombian government declared an official end to its conflict with the FARC. The FARC began its transition into a political party that was guaranteed 10 unelected seats in the Colombian legislature (five in the House of Representatives and five in the Senate).” Source: <https://www.britannica.com/topic/FARC>.

<sup>248</sup> See *The Tonton Macoutes: The Central Nervous System of Haiti’s Reign of Terror*. COUNCIL ON HEMISPHERIC AFFAIRS (Mar. 11, 2010) (“Few countries in the hemisphere have suffered through such an extensive run of unqualified repressive regimes and military dictatorships as Haiti. The nearly thirty years of harsh rule under François “Papa Doc” Duvalier, and his son, Jean-Claude “Baby Doc” Duvalier that ended in 1986, are likely the most infamous epoch in the painful history of this small French-Creole nation that occupies the western third of the Caribbean island of La Hispaniola.”). Source: <https://coha.org/tonton-macoutes/>.

<sup>249</sup> *Timeline: Guatemala’s Brutal Civil War*. PBS NEWS HOUR (Mar. 7, 2011) (“More than 200,000 people were killed over the course of the 36-year-long civil war that began in 1960 and ended with peace accords in 1996. About 83 percent of those killed were Mayan, according to a 1999 report written by the U.N.-backed Commission for Historical Clarification titled ‘Guatemala: Memory of Silence.’ The report also concluded that the vast majority, 93 percent, of human rights violations perpetrated during the conflict were carried out by state forces and military groups.”). Source: [https://www.pbs.org/newshour/health/latin\\_america-jan-june11-timeline\\_03-07](https://www.pbs.org/newshour/health/latin_america-jan-june11-timeline_03-07).

<sup>250</sup> *Salvadoran Civil War (1979-1992)*. AMERICAN ARCHIVE OF PUBLIC BROADCASTING (undated). Source: <https://americanarchive.org/exhibits/newshour-cold-war/el-salvador>.

*He should also take a look at the 2015 Department of State country reports for Cuba<sup>251</sup>, Nicaragua<sup>252</sup>, and Venezuela<sup>253</sup>. That year<sup>254</sup>, 1,015 Nicaraguans, 106 Cubans, and 23 Venezuelans were apprehended at the Southwest border. Through May<sup>255</sup>, nearly 114,000 Cubans, more than 95,000 Nicaraguans, and 97,250 Venezuelans have been stopped there by agents this fiscal year.*

That, therefore, calls into question whether so-called “hemispheric conditions” are driving CBP’s Southwest border encounter levels at all. That question was answered in Judge Wetherell’s March 8 opinion in *Florida I*.

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<sup>251</sup> See *Cuba 2015 Human Rights Report*. U.S. DEP’T OF STATE (undated) (“Cuba is an authoritarian state led by Raul Castro, who is president of the Council of State and Council of Ministers, Communist Party (CP) first secretary, and commander in chief of security forces. . . . The principal human rights abuses included the abridgement of the ability of citizens to choose their government; the use of government threats, physical assault, intimidation, and violent government-organized counterprotests against peaceful dissent; and harassment and detentions to prevent free expression and peaceful assembly. The following additional abuses continued: harsh prison conditions; arbitrary, short-term, politically motivated detentions and arrests; selective prosecution; denial of fair trial; and travel restrictions.”). Source: <https://2009-2017.state.gov/documents/organization/253217.pdf>.

<sup>252</sup> See *Nicaragua 2015 Human Rights Report*. U.S. DEP’T OF STATE (undated) (“The principal human rights abuses were restrictions on citizens’ right to vote; obstacles to freedom of speech and press, including government intimidation and harassment of journalists and independent media, as well as increased restriction of access to public information, including national statistics from public offices; and increased government harassment and intimidation of nongovernmental organizations (NGOs) and civil society organizations. Additional significant human rights abuses included considerably biased policies to promote single-party dominance; arbitrary police arrest and detention of suspects, including abuse during detention; harsh and life-threatening prison conditions with arbitrary and lengthy pretrial detention; discrimination against ethnic minorities and indigenous persons and communities. There was also widespread corruption, including in the police, CSE, Supreme Court of Justice (CSJ), and other government organs; societal violence, particularly against women and lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons; trafficking in persons; societal discrimination against persons with disabilities; discrimination against persons with HIV/AIDS; and violations of trade union rights.”). Source: <https://2009-2017.state.gov/documents/organization/253241.pdf>.

<sup>253</sup> See *Venezuela 2015 Human Rights Report*. U.S. DEP’T OF STATE (undated) (“Venezuela is formally a multiparty, constitutional republic, but for more than a decade, political power has been concentrated in a single party with an increasingly authoritarian executive exercising significant control over the legislative, judicial, citizen, and electoral branches of government. . . . Principal human rights abuses reported during the year included use of the judiciary to intimidate and selectively prosecute government critics; indiscriminate police action against civilians leading to widespread arbitrary detentions and unlawful deprivation of life; and government actions to impede freedom of expression and restrict freedom of the press. The government arrested and imprisoned opposition figures and did not respect judicial independence or permit judges to act according to the law without fear of retaliation. The government blocked media outlets, and harassed and intimidated privately owned television stations, other media outlets, and journalists throughout the year using threats, fines, property seizures, arrests, criminal investigations, and prosecutions.”). Source: <https://2009-2017.state.gov/documents/organization/253261.pdf>.

<sup>254</sup> *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector in FY2015*. U.S. BORDER PATROL (undated). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF>.

<sup>255</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2022). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

Again, *Florida I* was a suit filed by the state of Florida in September 2021<sup>256</sup>, alleging that the Biden administration was “ignoring” the congressional detention mandates in section 235(b) INA by refusing to detain illegal border migrants.

In his opinion, Judge Wetherell found that:

*[T]he evidence establishes that [the federal government has] effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing “alternatives to detention” over actual detention and by releasing more than a million aliens into the country—on “parole” or pursuant to the exercise of “prosecutorial discretion” under a wholly inapplicable statute—without even initiating removal proceedings.*<sup>257</sup>

The court continued:

*There were undoubtedly geopolitical and other factors that contributed to the surge of aliens at the Southwest Border, but [the administration’s] **position that the crisis at the border is not largely of their own making because of their more lenient detention policies is divorced from reality and belied by the evidence. Indeed, the more persuasive evidence establishes that [the administration] effectively incentivized what they call “irregular migration” that has been ongoing since early 2021 by establishing policies and practices that all-but-guaranteed that the vast majority of aliens arriving at the Southwest Border who were not excluded under the Title 42 Order would not be detained and would instead be quickly released into the country where they would be allowed to stay (often for five years or more) while their asylum claims were processed or their removal proceedings ran their course—assuming, of course, that the aliens do not simply abscond before even being placed in removal proceedings, as many thousands have done.***

*It is particularly noteworthy that [Border Patrol Chief Raul] Ortiz testified that the current surge differs from prior surges that he seen over his lengthy career in that most of the aliens now being encountered at the Southwest Border are turning themselves in to [Border Patrol] officers rather than trying to escape the officers. It is reasonable to infer (and just plain common sense) that aliens are doing this because they are aware that they will be expeditiously processed and released into the country. Indeed, on this point, Chief Ortiz credibly opined based on his experience that the aliens are likely “turning themselves in because they think they’re going to be released.” [Emphasis added.]*<sup>258</sup>

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<sup>256</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Complaint for Declaratory and Injunctive Relief (N.D. Fla. Sep. 28, 2021). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.1.0.pdf>.

<sup>257</sup> *Id.* at pp. 4-5.

<sup>258</sup> *Id.* at 21-22.

In other words, while so-called “hemispheric factors” are likely providing some impetus for foreign nationals to consider leaving their homes (so-called “push factors”), the main reason they’re coming to the Southwest border now is that they understand that they are likely to be released into the United States, where they will be able to live and work indefinitely (the ultimate “pull factor”).

#### “New Border Enforcement Actions”

Nonetheless, the Biden administration continues to argue that it’s those hemispheric conditions and not its release policies that are driving the record surge in illegal migration at the Southwest border, suggesting that there is a discrete group of foreign nationals who will attempt to come to the United States regardless of what deterrence measures DHS puts into place.

To that end, it is actively expanding programs to allow inadmissible applicants for admission to enter illegally through the ports of entry in lieu of entering illegally between the ports of entry, summarized in a January 5 White House “fact sheet”<sup>259</sup> captioned “Biden-Harris Administration Announces New Border Enforcement Actions”.

#### The “CBP One App Port Interview Scheme”

According to that fact sheet:

*When Title 42 eventually lifts, noncitizens located in Central and Northern Mexico seeking to enter the United States lawfully through a U.S. port of entry have access to the CBP One mobile application for scheduling an appointment to present themselves for inspection and to initiate a protection claim instead of coming directly to a port of entry to wait. This new feature will significantly reduce wait times and crowds at U.S. ports of entry and allow for safe, orderly, and humane processing.*

For simplicity’s sake, I refer to this program as the “CBP One app port interview scheme”, and there are many misstatements of fact and law in that paragraph, though two in particular stick out.

First, as I explained above, aliens who show up at the ports of entry without proper admission documents are inadmissible to the United States under section 212(a)(7)(A)(i) of the INA and thus aren’t “seeking to enter the United States lawfully”.

Second, the CBP One app port interview scheme didn’t start “when Title 42 eventually lifted” (on May 11<sup>260</sup>); it was rolled out a week after that announcement on January 12, as CBP has subsequently admitted<sup>261</sup>.

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<sup>260</sup> Krikorian, Mark and Bensman, Todd. *5/11: The End of Title 42*. Center for Immigration Studies (May 11, 2023). Source: <https://cis.org/Parsing-Immigration-Policy/511-End-Title-42>.

<sup>261</sup> See *CBP Releases May 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) (“From January 12, when the scheduling function was introduced, until May 31, 2023, more than 106,000 individuals used the CBP One mobile application to schedule an appointment to present at a southwest border

In any event, here's how it works: Any foreign national (either a Mexican national or "other than Mexican" national or "OTM") can now download and access the CBP One mobile app<sup>262</sup>, which, as DHS explains it, "serves as a single portal to a variety of CBP services"<sup>263</sup>.

Foreign nationals in central and northern Mexico can then use the app to schedule an "appointment" to present themselves for inspection under section 235 of the INA (or, as the CBP update describes it, "to be processed under Title 8"<sup>264</sup>; as noted, "Title 8" is the administration's preferred nomenclature for the INA) at a Southwest border port.

When this scheme was first introduced, appointments were for a time certain, like 10:45 AM on March 30. Apparently, migrants had difficulty complying with that schedule, however, so CBP now allows them to show up instead at any point during a 23-hour timeframe.<sup>265</sup>

That's not the only recent expansion to the scheme. By May, DHS made 1,000 CBP One app port appointment slots available daily, but on June 1<sup>266</sup>, the agency expanded that to 1,250 daily appointment slots — all, as noted, to appear at any time during a 23-hour timeframe. Later that month<sup>267</sup>, the number of CBP One port interview slots was expanded further, to 1,450 per day— or 529,000-plus per year.

While (*see infra*) the administration has refused to publish any statistics on the number of inadmissible alien applicants for admission at the ports who have been paroled or otherwise released into the United States by OFO since June 2022, one report from April<sup>268</sup> revealed that more than 99 percent of all would-be illegal migrants who scheduled appointments at ports of entry for exemptions to expulsion under Title 42 using the CBP One app received them.

That is consistent with a more recent article from CBS News in mid-July<sup>269</sup>, which reported that some 130,000 aliens who used what it termed the "CBP One app process" had been paroled into the United States as of June 30.

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port of entry for inspection."'). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

<sup>262</sup> *CBP One™ Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 21, 2023). Source: <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

<sup>263</sup> *Id.*

<sup>264</sup> *CBP Releases May 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *CBP One™ Appointments Increased to 1,450 Per Day*. U.S. Customs and Border Protection (Jun. 30, 2023). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>.

<sup>268</sup> Shaw, Adam. *Over 99% of migrants who have sought Title 42 exception via CBP One app were approved*. FOX NEWS (Apr. 14, 2023). Source: <https://www.foxnews.com/politics/99-percent-migrants-sought-title-42-exception-cbp-one-app-approved>.

<sup>269</sup> Montoya-Galvez, Camilo. *U.S. has welcomed more than 500,000 migrants as part of historic expansion of legal immigration under Biden*. CBS NEWS (Jul. 18, 2023). Source: <https://www.cbsnews.com/news/immigration-parole-migrants-us-expansion-biden/>.

If these reports are correct, the Biden administration is essentially—and illegally-- funneling would-be illegal migrants through the ports into the United States.

The illegality of the CBP One app port interview scheme and the inadmissibility of the aliens who utilize it aside, the scheme suffers from three other major flaws, two related to migrant safety and the third to U.S. border security.

First, and despite CBP's contentions<sup>270</sup> that this scheme “offers a safe, orderly, and humane lawful process for” would-be illegal migrants to come to the border, and that it “reduces the potential for smugglers or others to exploit migrants”, both contentions are patently fallacious.

Again, in order to even utilize the CBP One app to make an appointment under this scheme, the alien must be in central or northern Mexico, and in order to appear at the appointment, the alien must be at a port of entry. That will require any OTM applicants to hire smugglers for both the journey to and through Mexico and possibly the journey to the port, as well.

Further, as I explained<sup>271</sup> shortly after that scheme was announced in January, “it will actually endanger even greater numbers of foreign nationals by encouraging them in greater numbers to travel illegally to the other side of the Southwest border”.

That poses unconscionable risks to the migrants lured north by this scheme, particularly given that more than two-thirds of those who make the trip to Mexico are physically assaulted, and nearly a third of the female migrants are sexually assaulted.<sup>272</sup> In reality, the only dangers that this scheme spares those migrants are the ones associated with the physical trip across the border from Mexico to the United States.

Second, aliens must wait in Mexico for their scheduled appointments, and to explain why that's an issue, I refer back to the Biden administration's reasons for terminating Remain in Mexico.

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<sup>270</sup> *CBP One™ Appointments Increased to 1,450 Per Day*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 30, 2023).

Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>.

<sup>271</sup> Arthur, Andrew. *'CBP One' App Will Have Real Blood on Its Metaphorical Hands*. CENTER FOR IMMIGRATION STUDIES (Jan. 26, 2023). Source: <https://cis.org/Arthur/CBP-One-App-Will-Have-Real-Blood-Its-Metaphorical-Hands>.

<sup>272</sup> See *Forced to Flee Central America's Northern Triangle. A Neglected Humanitarian Crisis*. DOCTORS WITHOUT BORDERS (May 2017) (“Violence on the Journey: — 68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States. — Nearly one-third of the women surveyed had been sexually abused during their journey. — MSF patients reported that the perpetrators of violence included members of gangs and other criminal organizations, as well as members of the Mexican security forces responsible for their protection.”). Source: [https://web.archive.org/web/20230522110109/https://www.doctorswithoutborders.ca/sites/default/files/msf\\_forced-to-flee-central-americas-northern-triangle\\_0.pdf](https://web.archive.org/web/20230522110109/https://www.doctorswithoutborders.ca/sites/default/files/msf_forced-to-flee-central-americas-northern-triangle_0.pdf).

In his second memo (of two<sup>273</sup>) terminating MPP, issued in October 2021<sup>274</sup>, Secretary Mayorkas explained:

*Significant evidence indicates that individuals awaiting their court hearings in Mexico under MPP were subject to **extreme violence and insecurity at the hands of transnational criminal organizations that profited by exploiting migrants' vulnerabilities**. It is possible that such humanitarian challenges could be lessened through the expenditure of significant government resources currently allocated to other purposes. **Ultimately, however, the United States has limited ability to ensure the safety and security of those returned to Mexico.** [Emphasis added.]*

With due respect to the secretary and to those individuals who made such claims, the Mexican government did assure<sup>275</sup> that it would provide security for migrants who were returned to that country under MPP. For purposes of this analysis, however, I will take those claims at face value.

In its February “Operational Update”<sup>276</sup>, CBP revealed that aliens in Mexico were “commonly wait[ing]” in Mexican shelters for three months for their CBP one app appointments. Given that migrants subject to MPP waited on average two to four months<sup>277</sup> for their initial immigration court hearings at port courts, that three-month delay for a CBP One app interview raises the

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<sup>273</sup> See Arthur, Andrew. *Federal Judge Stays DHS's Latest Termination of 'Remain in Mexico'*. CENTER FOR IMMIGRATION STUDIES (Dec. 23, 2022) (“That prompted the states of Texas and Missouri to file suit in federal court in Texas in April 2021 to force reinstatement of Remain in Mexico in April, where it was assigned to Judge Kacsmaryk. Despite the pendency of that suit, DHS Secretary Alejandro Mayorkas terminated MPP on June 1, 2021. Judge Kacsmaryk enjoined that termination of MPP in August 2021. The administration quickly sought a stay of that injunction, first from the Fifth Circuit and then the Supreme Court. Both courts rejected the government’s respective stay applications. The government then went back and appealed Judge Kacsmaryk’s injunction to the Fifth Circuit. While that appeal was pending (and just days before oral argument), Mayorkas issued a second memo terminating MPP on October 29.”). Source: <https://cis.org/Arthur/Federal-Judge-Stays-DHSS-Latest-Termination-Remain-Mexico>.

<sup>274</sup> *Explanation of the Decision to Terminate the Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Oct. 29, 2021), at 2. Source: [https://www.dhs.gov/sites/default/files/2022-01/21\\_1029\\_mpp-termination-justification-memo-508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf).

<sup>275</sup> See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019) (“The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, **where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.**” Emphasis added). Source: <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

<sup>276</sup> *CBP Releases February 2023 Monthly Operational Update*, U.S. Customs and Border Protection (Mar. 15, 2023). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-february-2023-monthly-operational-update>.

<sup>277</sup> See *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP’T OF HOMELAND SECURITY (Oct. 28, 2019) (“Individuals processed in MPP receive initial court hearings within two to four months, and—as of October 21, 2019—almost 13,000 cases had been completed at the immigration court level.”). Source: [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf)





In June, CBP officers at the Southwestern border ports of entry encountered more than 45,000 inadmissible aliens<sup>284</sup>, a 27-plus percent increase over May, but more importantly the highest recorded number there ever and nearly three times as many as in June 2022. The major driver of that increase is the tens of thousands of aliens per month who are taking advantage of the CBP One app port interview scheme.

And, if most of the aliens who take advantage of that scheme are allowed to enter the United States, “the number of unlawful entries at” the Southwestern ports of entry will skyrocket, and by Congress’ own metrics, the border will be less secure.

Even putting aside Congress’ border security metrics, however, there’s no way CBP officers at the ports have the resources to reasonably evaluate protection claims made by 1,450 CBP One app interviewees per day, and especially no way they can do so for aliens who appear at 11:00 at night. And there’s really, really no way they can vet more than 99 percent of those 1,450 aliens per day for criminal histories or terrorist intent in any meaningful way before releasing them into the United States.

Despite that fact, the administration is forcing OFO to try to vet and process those aliens, which means that there will be fewer CBP officers available to screen vehicles for drugs and other contraband, and for smuggled and trafficked migrants. Even absent the port security metrics in section 1092 of NDAA 2017, the toll this scheme will impose on border security is patent and significant.

The state of Texas filed suit on May 23 in *Texas v. Mayorkas*<sup>285</sup> to shut down the CBP One app port interview scheme. The state’s complaint asserts:

*The Biden Administration is inviting tens of thousands of aliens into Texas, releasing them into the country, and inflicting serious costs on the State of Texas. The Biden Administration’s attempt to manage the southern border by app does not meet even the lowest expectation of competency and runs afoul of the laws Congress passed to regulate immigration.*<sup>286</sup>

Among other contentions in that suit, the state argues that “The CBP One app does not ask migrants whether they intend to seek asylum”, and in fact it contends CBP officers at the ports (erroneously identified in the complaint as “Border Patrol agents”) don’t “ask whether the migrants intend to seek asylum”, either.<sup>287</sup>

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<sup>284</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (revised Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>285</sup> *Texas v. Mayorkas*, No. 2:23-cv-00024, State of Texas’s Original Complaint (W.D. Tex. May 23, 2023). Source: [https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

If true, that contradicts the administration’s assertion in the January 5 White House fact sheet<sup>288</sup> that illegal migrants will “have access to the CBP One mobile application ... to initiate a protection claim”.

Thus, the state of Texas asserts, the Biden administration is “encouraging aliens to illegally cross the border without establishing that they meet some exception from removal or have a legal basis to remain in the country”.<sup>289</sup>

Texas likely has a good chance of obtaining an injunction of the CBP One app port interview scheme, at least at the district court level. As explained above, Congress has placed extremely tight restrictions on DHS’s parole authority under section 212(d)(5)(A)(i) of the INA<sup>290</sup>, none of which the scheme respects in its implementation.

Moreover, as also set forth above, the whole purpose of the inspection protocol in section 235 of the INA<sup>291</sup>, and CBP’s primary role in that process (both between the ports and at them), is to ensure that inadmissible aliens can’t enter the United States unlawfully. The administration’s CBP One app port interview scheme turns that process on its head by using the inspection protocol at the ports as a conduit by which inadmissible applicants for admission *can* enter illegally.

#### The “Circumvention of Lawful Pathways” Rule

The offer of quick releases via the CBP One app port interview scheme is the carrot in the administration’s plans to hide the number of illegal entrants flowing into the United States at the Southwest border. The stick is a series of asylum restrictions for those who bypass the ports and enter illegally.

Those restrictions were included in a joint DOJ and DHS rule published on May 16<sup>292</sup>, captioned “Circumvention of Lawful Pathways”, or the “CLAP rule”.

In contrast to aliens who preschedule their illegal entries at the ports via the CBP One app interview scheme, whose fear claims will be processed under extremely loose, pre-existing asylum and credible fear standards, the CLAP rule imposes a rebuttable presumption that illegal crossers between the ports who failed to seek asylum on the way to the United States aren’t eligible for such protection.<sup>293</sup>

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<sup>288</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>289</sup> *Texas v. Mayorkas*, No. 2:23-cv-00024, State of Texas’s Original Complaint (W.D. Tex. May 23, 2023). Source: [https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.texasattorneygeneral.gov/sites/default/files/images/press/Original%20Complaint.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

<sup>290</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>. See also *infra*.

<sup>291</sup> Sec. 235 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. See also *infra*.

<sup>292</sup> *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023).

<sup>293</sup> See *id.*

That “rebuttable presumption” is not absolute, however. There are three exceptions<sup>294</sup> to that rule, one for aliens who scheduled port appointments using the CBP one app, a second for those who applied for asylum elsewhere unsuccessfully, and a third for those who tried and failed to use the app.

In addition, under the rule, migrants can rebut that presumption by showing they have an acute medical emergency, “faced an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture, or murder”, or were a victim of trafficking.<sup>295</sup>

DHS subjected just 8,195 aliens to expedited removal processing under those CLAP rule standards between May 12 and June 13<sup>296</sup>. Of those, 3 percent established they were subject to an exception, 8 percent rebutted the presumption, and 88 percent (7,243 aliens) were subject to the presumption.<sup>297</sup>

Some 72 percent of those who qualified for an exception to the CLAP rule asylum restrictions cleared the credible fear bar, as did 77 percent of those who rebutted the presumption that they weren’t eligible for asylum.<sup>298</sup> Among those who were subject to the presumption, just 42 percent were found to have a credible fear under the heightened standards in the CLAP rule.<sup>299</sup>

These statistics demonstrate two things. First, how few illegal migrants are offering fear claims that can hold up to any kind of serious scrutiny, and second, how rarely Biden’s DHS is subjecting illegal entrants to expedited removal notwithstanding the administration’s promises to the contrary.

In that vein, in its January 5 fact sheet<sup>300</sup>, the White House asserted:

*Effective immediately, individuals who attempt to enter the United States without permission, do not have a legal basis to remain, and cannot be expelled pursuant to Title 42 will be increasingly subject to expedited removal to their country of origin and subject to a five-year ban on reentry.*

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<sup>294</sup> See *Fact Sheet: Circumvention of Lawful Pathways Final Rule*. U.S. Dep’t of Homeland Security (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule>.

<sup>295</sup> *Id.*

<sup>296</sup> Arthur, Andrew. *Border Fear Claim Denials Spike Under New Border Rules — Kind Of*. Center for Immigration Studies (Jul. 10, 2023). Source: <https://cis.org/Arthur/Border-Fear-Claim-Denials-Spike-Under-New-Border-Rules-Kind>.

<sup>297</sup> *Id.*

<sup>298</sup> See *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST, Declaration of Blas Nuñez-Neto (N.D. Cal. Jun. 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.176.2.pdf>.

<sup>299</sup> *Id.*

<sup>300</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

Secretary Mayorkas later doubled down on that expedited removal claim, vowing in a May 11 White House press conference<sup>301</sup> announcing his department’s post-Title 42 plans that: “The vast majority of individuals will indeed be placed in expedited removal, and if they do not qualify, will be removed in a matter of days, if not weeks, from the United States.”

More than 99,000 illegal entrants were apprehended at the Southwest border in June<sup>302</sup>, but CBP statistics reveal that fewer than 17,000 of them<sup>303</sup> -- 17 percent of the total-- were subject to expedited removal under section 235(b)(1) of the INA. That’s far from the “vast majority” Secretary Mayorkas promised. By contrast, agents released nearly 36,000 illegal entrants on NTA/OR<sup>304</sup>.

In any event, a federal judge vacated the asylum restrictions in the CLAP rule on July 25.<sup>305</sup> While he stayed that order for 14 days to give DOJ an opportunity to appeal that order to the Ninth Circuit (DOJ filed an appeal the next day<sup>306</sup>), the prospects for the government’s success in the matter are unclear, but doubtful.

#### “VNHC Parole Program”

Yet another purported border initiative that the administration announced on January 5<sup>307</sup> was a plan to extend an October parole program for Venezuelan nationals<sup>308</sup> to apply to Nicaraguan, Haitian, and Cuban nationals, as well. For simplicity’s sake, I refer to that as the “VNHC Parole Program”.

As the White House explained:

*Today, the Biden Administration is announcing it will extend the successful Venezuela parole process and expand it to nationals of Nicaragua, Haiti, and Cuba. Up to 30,000 individuals per month from these four countries, who have an*

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<sup>301</sup> Secretary Mayorkas Remarks at a White House Press Briefing Ahead of the Lifting of the Title 42 Public Health Order. U.S. DEP’T OF HOMELAND SECURITY (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/secretary-mayorkas-remarks-white-house-press-briefing-ahead-lifting-title-42-public>.

<sup>302</sup> Custody and Transfer Statistics FY2023, U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 18, 2023). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST, Order Granting Plaintiffs’ Motion for Summary Judgment and Denying Defendants’ Motion for Summary Judgment (N.D. Cal. Jul. 25, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0\\_3.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf).

<sup>306</sup> See *East Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9<sup>th</sup> Cir. Jul 26, 2023). Source: <https://www.courtlistener.com/docket/67637949/east-bay-sanctuary-covenant-v-joseph-biden/>.

<sup>307</sup> FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions. WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>308</sup> See *DHS Announces New Migration Enforcement Process for Venezuelans*. U.S. DEP’T OF HOMELAND SECURITY (Oct. 12, 2022) (“Our comprehensive effort to reduce the irregular migration of Venezuelans also includes a new process to lawfully and safely bring up to 24,000 qualifying Venezuelans into the United States”). Source: <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

*eligible sponsor and pass vetting and background checks, can come to the United States for a period of two years and receive work authorization. Individuals who irregularly cross the Panama, Mexico, or U.S. border after the date of this announcement will be ineligible for the parole process and will be subject to expulsion to Mexico, which will accept returns of 30,000 individuals per month from these four countries who fail to use these new pathways.*

As that excerpt reveals, there are both carrots (the promise of at least two years to work and live in the United States) and sticks (potential removal to Mexico) for nationals of those four countries in that proposal, but a lot more of the former than the latter, especially now that Title 42 has expired.

That's even more true given that on January 9, the administration published separate notices in the Federal Register on its implementation of this parole program for nationals of Venezuela<sup>309</sup>, Nicaragua<sup>310</sup>, Haiti<sup>311</sup>, and Cuba<sup>312</sup>, which permit those who bypass the parole program and enter illegally "a one-time option to voluntarily depart or voluntarily withdraw their application for admission to maintain eligibility to participate in this parole process".

That negates any border deterrence value that the VNHC parole program had entirely, because if nationals of those countries enter illegally and don't get caught by Border Patrol agents, they can likely remain indefinitely, but if they are apprehended, all that they need to do is withdraw their applications for admission and get in line for the CBP One app port interview scheme or apply for parole under the VNHC parole program.

Again, there is no authority whatsoever for these programmatic parole programs in section 212(d)(5)(A)(i) of the INA<sup>313</sup>, and not surprisingly, a 20-state coalition has filed suit<sup>314</sup> to block the VNHC parole program.

The state plaintiffs admit that while the administration has published notifications in the Federal Register that it would be implementing this parole program, it "did not provide an opportunity for public comment" and failed to "undertake a formal notice-and-comment rulemaking

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<sup>309</sup> *Implementation of Changes to the Parole Process for Venezuelans*, 88 Fed. Reg. 1279 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00253/implementation-of-changes-to-the-parole-process-for-venezuelans>.

<sup>310</sup> *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. 1255 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans>.

<sup>311</sup> *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1243 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians>.

<sup>312</sup> *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. 1266 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans>.

<sup>313</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>. See also *infra*.

<sup>314</sup> *Texas v. DHS*, 6:23-cv-00007, Complaint (S.D. Tex. Jan. 24, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.1.0.pdf>.

process”<sup>315</sup>. Nor, they contend, did the departments ask the states their opinions about the plan before proceeding.<sup>316</sup>

Moreover, the states assert, the administration failed to “explain or analyze” how it “would remove from the United States aliens paroled through the program after the end of any period of authorized parole, despite admitting general difficulty removing such aliens to their home countries presently”.

That is particularly salient given the requirement in the parole statute<sup>317</sup> that, at the end of an alien’s period of authorized parole, the alien “be returned to the custody from which he was paroled”. It would cost hundreds of millions to detain the 360,000 nationals of those four countries who are allowed to enter on parole annually at the end of their two-year periods.

Finally, they argue that the parole program violates the Administrative Procedure Act (APA)<sup>318</sup> in that it exceeds DHS’s parole authority under section 212(d)(5)(A) of the INA and should have been subject to “notice and comment rulemaking” but wasn’t.

All are good points.

#### Decline in Support for Legal Immigration

The ongoing disaster involving illegal migrants at the Southwest border appears to be souring the American people on *legal* immigration.

On July 13, Gallup released its annual survey<sup>319</sup> of public attitudes about immigration: whether it should be increased, decreased, or remain the same; whether it is good or bad for the country; and whether it makes aspects of our culture better and specific societal ills worse.

That poll was conducted between June 1 and 22<sup>320</sup>, or about three to five weeks after Title 42 expired on May 11.

The Gallup data provided responses to the question: “In your view, should immigration be kept at its present level, increased or decreased?” A plurality, 41 percent, stated that immigration

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>318</sup> See *Administrative Procedure Act*. LEGAL INFORMATION INSTITUTE (undated) (“The Administrative Procedure Act (APA) is a federal act that governs the procedures of administrative law. The APA is codified in 5 U.S.C. §§ 551–559. The core pieces of the act establish how federal administrative agencies make rules and how they adjudicate administrative litigation. 5 U.S.C. § 551(5)–(7) clarifies that rulemaking is the “agency process for formulating, amending, and repealing a rule,” and adjudication is the final disposition of an agency matter other than rulemaking. That is, rulemaking goes beyond resolution of specific controversies between parties and includes management and administrative functions. Rulemaking and adjudication can be formal or informal, which in turn determines which APA procedural requirements apply.”). Source: [https://www.law.cornell.edu/wex/administrative\\_procedure\\_act](https://www.law.cornell.edu/wex/administrative_procedure_act).

<sup>319</sup> Saad, Lydia. *Americans Still Value Immigration, but Have Concerns*. GALLUP (Jul. 13, 2023). Source: <https://news.gallup.com/poll/508520/americans-value-immigration-concerns.aspx>.

<sup>320</sup> *Id.*

should be decreased, 31 percent stated that it should remain at its current level, and 26 percent believed it should be increased.<sup>321</sup>

That is the largest percentage of respondents in that poll who wanted to see a decrease in legal immigration since June 2014, when again, 41 percent wanted a decrease in immigration. By way of comparison, in May 2020, just 28 percent of those polled wanted immigration to be decreased and 34 percent wanted an increase in immigration.<sup>322</sup>

In her September 1994 testimony<sup>323</sup> before the House Judiciary Committee’s Subcommittee on International Law, Immigration and Refugees, Barbara Jordan<sup>324</sup>—civil rights icon, former congresswoman from Texas, and then-chairman of President Clinton’s U.S. Commission on Immigration Reform, explained:

*If we cannot control illegal immigration, we cannot sustain our national interest in legal immigration. Those who come here illegally, and those who hire them, will destroy the credibility of our immigration policies and their implementation. In the course of that, I fear, they will destroy our commitment to immigration itself.*

There may be any number of reasons why the percentage of Americans who want immigration to be reduced has increased by 13 points in just over three years, and why there has been an 8-point decline in the percentage of Americans who want an increase in immigration over that period.

The logical conclusion, however, is that Chairman Jordan was correct nearly 29 years ago when she warned that a failure to control illegal immigration would lead to a decline in Americans’ interest in legal immigration. Only it’s not those who are hiring those migrants who are turning public attitudes—it is the administration itself, and its border release policies.

### Conclusion

In its final report, the 9/11 Commission noted, ruefully:

*In the decade before September 11, 2001, border security — encompassing travel, entry, and immigration — was not seen as a national security matter. Public figures voiced concern about the “war on drugs,” the right level and kind of immigration, problems along the southwest border, migration crises originating in the Caribbean and elsewhere, or the growing criminal traffic in humans. The immigration system as a whole was widely viewed as increasingly dysfunctional and badly in need of reform. In national security circles, however, only smuggling*

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> U.S. House of Reps., Comm. on the Judiciary, Subcomm. on International Law, Immigration and Refugees, Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform (Sep. 28, 1994). Source: [https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan\\_1994\\_Sept.%2029.pdf](https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1994_Sept.%2029.pdf).

<sup>324</sup> Alexander, Kerri Lee. *Barbara Jordan*. NAT’L WOMEN’S HISTORY MUSEUM (undated). Source: <https://www.womenshistory.org/education-resources/biographies/barbara-jordan>.



*of weapons of mass destruction carried weight, not the entry of terrorists who might use such weapons or the presence of associated foreign-born terrorists.*<sup>325</sup>

That lesson has ostensibly been lost on this administration. In my more than three decades of involvement in immigration and border security—both before and after September 11<sup>th</sup>-- our borders have never been less secure.

Again, thank you for the invitation to appear today, and I look forward to your questions.

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<sup>325</sup> *The 9/11 Commission Report*. NAT'L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES (Aug. 21, 2004) at 383-84.  
Source: <https://9-11commission.gov/report/>.