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"Presidential Power to Secure the Border"

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Chairman McClintock, Ranking Member Jayapal, and members of the subcommittee, thank you for inviting me here today to discuss the powers available to the president to secure the border.

Congress' Plenary Authority Over Immigration

Key to understanding the president's authority to secure the border is appreciating where the immigration authority is placed under our nation's constitutional order.

Article I, sec. 8 of the U.S. Constitution[1] 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"[2] is the process by which a foreign national in the United States—defined as an "alien" in section 101(a)(3) of the Immigration and Nationality Act (INA)[3] — becomes a "citizen" (as defined by reference therein and in section 101(a)(22) of the INA[4]). Inherent in and essential to Congress' constitutional authority "to establish a uniform Rule of Naturalization", therefore, is its ability and power to regulate immigration.

As the Congressional Research Service (CRS)[5] has explained: "Long-standing Supreme Court precedent recognizes Congress as having plenary power[6] 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*[7], 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 is entrusted exclusively to Congress has become about as firmly imbedded in the***

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[1] U.S. CONST. art. 1, § 8. Source: https://uscode.house.gov/static/constitution.pdf.

[2] *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).

[3] *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.

[4] *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.

[5] *Constitution Annotated, ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers*. CONGRESSIONAL RESEARCH SERV. (undated). Source: https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ALDE_00001255/.

[6] *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 . *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.

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

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*[8] 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).

In other words, when it comes to allowing aliens to enter, remain in, and become citizens of the United States, Congress makes the rules, and the executive must carry them out using the tools Congress has given it.

Section 212(a) of the INA[9] lists the various categories of aliens whom Congress has determined the executive should bar from admission to the United States (known collectively as the "grounds of inadmissibility").

The most fundamental of those grounds, and the one that Congress uses to control the flow of new immigrants into the United States, is section 212(a)(7)(A)(i) of the INA[10], 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's Inspection Protocol for "Applicants for Admission" in Section 235 of the INA

To guide the executive in implementing its "policies pertaining to the entry of aliens", Congress has created a protocol in section 235 of the INA[11] for U.S. Customs and Border Protection (CBP) to follow in considering whether to admit alien "applicants for admission"[12].

That statutory term, "applicant for admission", applies to both aliens seeking admission at the ports of entry and migrants apprehended crossing the land and coastal borders between those ports[13]-- a fact that is essential to understanding what is occurring at the Southwest border now.

Some historical background puts that process and the points below 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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[8] *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Source: https://supreme.justia.com/cases/federal/us/408/753/.
[9] Sec. 212 of the INA (2023). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[10] *Id*. at cl. (a)(7)(A)(i).
[11] Sec. 235 of the INA (2023). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[12] *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.").
[13] *See id*.

Section 302 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)[14], the primary source of the current statutory inspection protocol 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 in the then-Immigration and Naturalization Service (INS)[15] — the precursor to CBP and U.S. Immigration and Customs Enforcement (ICE) in immigration enforcement — were required to apply a factual and legal analysis known as the "entry doctrine"[16] when they encountered 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[17], 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 then-section 236 of the INA[18] and afforded few constitutional protections.[19] Aliens who had deliberately entered the country — even illegally — "free from actual and constructive restraint"[20] were placed into deportation proceedings under then-section 242 of the INA[21], in which they received greater rights and procedural benefits.

Application of the entry doctrine was straightforward in the case of an alien stopped at a port seeking admission, because ports were treated as the de facto "doorstep" of the United States, and thus while aliens were there, they had not entered and could be excluded.[22]

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[14] 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.

[15] *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.

[16] 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.

[17] *Id*. at 1.

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

[19] *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/.

[20] *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.

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

[22] *See* fn. 19 (*Shaughnessy*).

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

In its IIRIRA amendments to section 235 of the INA, Congress dispensed with this confusion by treating all "arriving aliens" — those at the ports and those apprehended entering illegally between them — as applicants for admission[25], subject to what is now post-IIRIRA called "inadmissibility" under section 212 of the INA.

Congress also replaced exclusion and deportation proceedings with a single proceeding at which an alien's inadmissibility or deportability was determined and eligibility for relief could be assessed, known as "removal proceedings" under section 240 of the INA.[26]

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[23] *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.

[24] *See id*.

[25] *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.

[26] *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.

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA[27], which mandates that all applicants for admission be "inspected by immigration officers" to determine whether they're inadmissible under any of the grounds 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 equally to both agents in the U.S. Border Patrol ("USBP", a CBP component) and CBP officers in the agency's Office of Field Operations (OFO)[28], the latter of which has authority over the ports of entry.

Therefore, and regardless of whether the "immigration officers" performing inspections 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 lacks proper entry documents and is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via misrepresentation or fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA[29], that officer has a choice.

Section 235(b)(1)(A)(i) of the INA[30] allows the 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, which is the general rule in cases involving removable aliens[31]-- "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 requests asylum or claims a fear of harm if returned, the CBP immigration officer must "refer the alien for an interview by an asylum officer" from U.S.

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[27] 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.

[28] *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/ofo/what-we-do.

[29] *See* Sec. 212(a)(6)(C)(i) of the INA (2024) ("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.

[30] Sec. 235(b)(1)(A)(i) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[31] *See* section 240(a)(3) of the INA (2024) ("Removal proceedings. . .. Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

Citizenship and Immigration Services (USCIS), pursuant to section 235(b)(1)(A)(ii) of the INA[32], 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[33] 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.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA[34], 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[35] 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 process is simply intended to screen asylum claims—not resolve them--and, as I will explain below, asylum is particularly susceptible to fraud.

Releasing aliens who receive positive credible fear determinations prior to a decision on their applications for protection incentivizes other would-be inadmissible applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief under U.S. law.

With only extremely limited exceptions[36], the "consideration of the application for asylum" made by an alien who had been subject to expedited removal under section 235(b)(1) of the INA is performed by an immigration judge in removal proceedings under section 240 of the INA[37].

The other choice that the immigration officer during the inspection protocol in section 235 of the INA —again, either an OFO CBP officer at the ports or a 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 that applicant like any other inadmissible

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[32] Sec. 235(b)(1)(A)(ii) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[33] 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.

[34] 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.

[35] 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.

[36] 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.

[37] *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) (".

alien, 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[38].

Parole

Although section 235(b) of the INA requires DHS to detain inadmissible applicants for admission, Congress has given DHS extremely limited authority in section 212(d)(5)(A) of the INA[39] to "parole" individual aliens into the United States in exceptional or emergent circumstances.

That provision[40] 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 parole authority are apparent from the statutory language highlighted above, but they bear analysis, nonetheless.

First, parole may only be granted "on a case-by-case basis"[41], and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens *en masse*, or programmatically to parole a class of aliens.

Second, DHS may only grant parole for either "urgent humanitarian reasons" or for "significant public benefit"[42]. Granting parole for any other purpose is thus *ultra vires*[43], as it exceeds the statutory parole authority.

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

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[38] *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.

[39] 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.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *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.

Consequently, an alien apprehended entering illegally without proper documents (as nearly all are, because 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 provided the executive branch with parole authority when it initially enacted the INA in 1952[44], with the original language in the parole statute reading 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 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 executive-branch officer given the statutory authority to grant parole under the Homeland Security Act of 2002 (HSA)[45], even though the current text continues to grant that authority to the attorney general.

Most importantly, however, the highlighted text in the current parole provision reveals the tighter limits Congress has placed on the DHS secretary in granting parole in the intervening seven decades.

As my colleague, George Fishman, has explained[46], 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.

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[44] 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.

[45] 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.").

[46] 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.

You don't have to trust Mr. Fishman about Congress' intentions, however. The current language of the parole statute was included in IIRIRA[47], under the title "Limitation on the Use of Parole"[48].

In its 2011 opinion in *Cruz-Miguel v. Holder*[49], the Second Circuit described how Congress in IIRIRA had amended the parole statute and explained why it 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, about what Congress intended by its use of the terms "urgent humanitarian reasons" and "significant public benefit" in the parole statute.

Fortunately, the then-INS explained in detail what their predecessor phrases-- "emergent reasons" and "reasons deemed strictly in the public interest" -- meant in promulgating[50] the first 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 tightening the executive's authority to parole aliens into the United States 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.

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[47] 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.

[48] *Id*.

[49] *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011). Source: https://casetext.com/case/cruz-miguel-v-holder

[50] *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.

Plainly, as the Second Circuit explained, the IIRIRA amendments were intended to restrict the use of parole-- not in any way expand it.

I note, however, that the current iteration of the parole regulation, 8 CFR § 212.5[51], 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[52] 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: . . .*
>
> *(v) **Aliens whose continued detention is not in the public interest** as determined by the district director. [Emphasis added.]*

As I have explained elsewhere[53] that 1982 regulation was rushed through in a two-week period to comply with a district-court order in *Louis v. Nelson*.[54] Even when the predecessor provision to 8 CFR § 212.5(b)(5) was published, it failed to track the then-extant limitations on parole in section 212(d)(5)(A) of the INA (1982).

The Clinton administration did not correct that regulatory language following the IIRIRA amendments and it has actually been expanded by the Biden administration.

The only reading of that language that would not render it *ultra vires* would be as 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. If it were expanded beyond such an

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[51] 8 CFR § 212.5 (2023). Source: https://www.law.cornell.edu/cfr/text/8/212.5.

[52] *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.

[53] Arthur, Andrew. *The Slapdash, Court-Ordered 1982 Regulation that Drives Biden's Parole Policies And why that regulation hasn't been valid since April 1, 1997*. CENTER FOR IMMIGRATION STUDIES (Dec. 15, 2023). Source: https://cis.org/Arthur/Slapdash-CourtOrdered-1982-Regulation-Drives-Bidens-Parole-Policies.

[54] *See Louis v. Nelson*, 544 F. Supp. 973, 1003-04 (S.D. Fla. 1982) ("Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons notice and an opportunity to comment on the new detention policy and thereafter to promulgate that policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void."). Source: https://law.justia.com/cases/federal/district-courts/FSupp/544/973/1686455/.

interpretation, or worse, treated as a catch-all release authority, however, it would plainly be *ultra vires*.

Border Security Prior to the Biden Administration, and President Authorities

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.[55] 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."[56]

The security Chief Scott described was the direct result of a series of border-related policies implemented by the Obama and Trump administrations.

Detention

With the exception of cross-border returns pending removal proceedings under section 235(b)(2)(C)[57], DHS is required by statute[58] to detain inadmissible applicants for admission.

The administration contends[59] that various "push factors"—external issues abroad that drive migrants from their homes like "corruption, violence, trafficking, and poverty"—exacerbated by the "COVID-19 pandemic and extreme weather conditions" are to blame for the current migrant surge.

In his March 8, 2023, opinion[60] in *Florida v. U.S.*-- a challenge to the administration's border-release policies—Judge T. Kent Wetherell II of the of the U.S. District Court for the Northern District of Florida concluded, however that while:

> *There were undoubtedly geopolitical and other factors that contributed to the surge of aliens at the Southwest Border, but [DHS'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 [DHS] 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*

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[55] 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%20Secuirty%20Concerns%20-%20Rodney%20Scott.pdf.

[56] *Id*.

[57] Section 235(b)(2)(C) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim; *see also* pp. 24-25 *infra*.

[58] *See* pp. 7-8, *supra*.

[59] *U.S. Strategy for Addressing the Root Causes of Migration in Central America*. NAT'L SECURITY COUNCIL (Jul. 2021), at 1. Source: https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.

[60] *Florida v. U.S.*, No. 3:21-cv-1066-TKW-ZCB, Opinion and Order (N.D. Fla. Mar. 8, 2023). Source: https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf.

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.[61]

While at times President Biden's predecessors struggled to comply with the statutory detention mandate, they generally succeeded in doing so.

The Department of Justice (DOJ) submitted the following chart to the Supreme Court in *Biden v. Texas*[62] on June 6, 2022[63], as an appendix to a letter from the solicitor general to the clerk of the court. DOJ filed that letter to correct factual errors the department had inadvertently included in prior filings:

- **Appendix 1: Encounters by Detention, Fiscal Years 2013-2021 (revised)**

Fiscal Year	Total Encounters	Continuous Detention		Booked out prior to final outcome		Never Detained	
2013	448,433	365,717	82%	42,499	9%	40,217	9%
2014	497,292	346,916	70%	83,739	17%	66,637	13%
2015	400,731	266,451	66%	77,868	19%	56,412	14%
2016	492,626	281,108	57%	125,229	25%	86,289	18%
2017	366,581	205,624	56%	86,143	23%	74,814	20%
2018	460,388	247,219	54%	132,317	29%	80,852	18%
2019	851,368	282,514	33%	225,062	26%	343,792	40%
2020	210,623	138,542	66%	27,363	13%	44,718	21%
2021	525,193	52,340	10%	138,208	26%	334,645	64%
2013-2019	3,517,419	1,995,549	57%	772,857	22%	749,013	21%
2013-2021	4,253,235	2,186,431	51%	938,428	22%	1,128,376	27%
Non-MPP Cases	875,331	355,294	41%	183,186	21%	336,851	38%

Notes: Table includes single adults and individuals in family units encountered at the southwest border, excluding noncitizens enrolled in MPP and those expelled under Title 42 authority. Non-MPP cases cover the period between Jan. 25, 2019, and Jan. 20, 2021.

The term "encounter" as used in this chart refers to aliens apprehended by Border Patrol agents at the Southwest border after entering illegally as well as to aliens deemed inadmissible by CBP officers at the Southwest border ports of entry.

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[61] *Id*. at 21-22.

[62] *See Biden v. Texas*, 142 S.Ct. 2528 (2022). Source: https://scholar.google.com/scholar_case?case=2898456342403839778hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[63] Letter from Petitioner to Clerk of the Court, *Biden v. Texas* (Jun. 6, 2022) (No. 21-954). Source: https://www.supremecourt.gov/DocketPDF/21/21-954/227228/20220606154050875_Letter%2021-954%20%206-6-2022.pdf.

Excluded from the encounter figures during the fiscal years above are unaccompanied alien children (UACs) encountered by CBP at the Southwest border, who by law[64] are not subject to DHS detention.

The chart includes statistics on the number of aliens encountered at the Southwest border by fiscal year between FY 2013 (the fourth full year of the Obama administration) and FY 2021 (the first partial year of the Biden administration).

As you can see, prior to FY 2021, DHS detained—in whole or in part—more than half the aliens CBP encountered at the Southwest border, and in fact detained more than half of all aliens encountered at the Southwest border throughout the removal process between FY 2013 and FY 2018, and again in FY 2021.

Three legal impediments prevented both the Obama and the Trump administrations from fully complying with the detention mandates in section 235(b) of the INA.

Two of those impediments relate to court decisions premised on flawed interpretations of the detention mandates in section 235(b), one by the Board of Immigration Appeals (BIA) and the other by the Court of Appeals for the Ninth Circuit.

In its 2013 opinion in *Rodriguez v. Robbins*[65] and its progeny[66], the Ninth Circuit affirmed a district court order finding that aliens subject to mandatory detention under section 235(b) of the INA were entitled to periodic bond redetermination hearings at which they would be considered for release.

In its February 2018 opinion in *Jennings v. Rodriguez*[67], however, the Supreme Court reversed the circuit court, holding that sections 235(b)(1) and 235(b)(2) of the INA "mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin".

Similarly, in its 2005 decision in *Matter of X-K-*[68], the BIA held that aliens who had been subject to expedited removal and who were placed into removal proceedings after receiving positive credible fear determinations were eligible to seek bond from immigration judges, with certain exceptions.

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[64] *See* 6 U.S.C. § 279(a) (2024) ("Children's Affairs. There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before [March 1, 2003].". Source: https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim.

[65] *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). Source: https://casetext.com/case/rodriguez-v-robbins.

[66] *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). Source: https://casetext.com/case/rodriguez-v-robbins-8.

[67] *Jennings v. Rodriguez*, 583 U.S. ___ (2018). Source: https://supreme.justia.com/cases/federal/us/583/15-1204/#tab-opinion-3858465.

[68] *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3510.pdf.

In April 2019, after the Supreme Court issued its opinion in *Rodriguez*, then-Attorney General William Barr issued a precedent decision in *Matter of M-S-*[69], reversing the BIA's erroneous reading of the mandatory detention provisions in *Matter of X-K-*.

It's unclear—and likely unknowable—how many aliens encountered at the Southwest border between FY 2013 and April 2019 who were booked out prior to final outcomes in their cases benefitted from those erroneous Ninth Circuit and BIA decisions, but many if not most likely were, particularly under the BIA's precedent in *Matter of X-K-*.

"*Flores Fix*"

Unlike the Ninth Circuit's opinion in *Rodriguez* and the BIA's decision in *Matter of X-K-*, however, the third legal impediment to compliance with the mandatory detention provisions in section 235(b) of the INA remains unresolved—though the executive branch could "fix" it (in the words of a bipartisan panel[70]) through regulation.

That impediment is the result of an August 2015 district court order in *Flores v. Lynch*[71], which directed DHS to release within 20 days of encounter alien children and adults who entered in "family units" (FMUs). Some background and history behind that decision is in order.

In 1985, organizations sued[72] the former INS on behalf of alien children being detained by the agency. The suit was brought to challenge INS's procedures regarding the detention, treatment, and release of such children.

That case went through a number of levels of judicial review[73], including by the Supreme Court (in March 1993)[74] on the question of whether a regulation[75] limiting the release of UACs violated the Due Process Clause.

That regulation provided for the release of UACs only to their parents, close relatives, or legal guardians, with limited exceptions. If UACs were not released under this provision, an INS official — the "Juvenile Coordinator" — was required to find "suitable placement . . . in a facility designated for the occupancy of juveniles."

Justice Scalia, writing for the majority, found that the regulation was not unconstitutional. He noted:

> *The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been*

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[69] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). Source: https://www.justice.gov/eoir/file/1154747/download.
[70] *See* fn. 104 *infra*.
[71] *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). Source: https://cite.case.law/f-supp-3d/212/907/.
[72] *See Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991). Source: https://casetext.com/case/flores-by-galvez-maldonado-v-meese-3.
[73] *See id*.
[74] *Reno v. Flores*, 507 U.S. 292 (1993). Source: https://supreme.justia.com/cases/federal/us/507/292/.
[75] *See* 8 CFR § 242.24 (1996). Source: https://www.govinfo.gov/content/pkg/CFR-1997-title8-vol1/pdf/CFR-1997-title8-vol1-sec242-24.pdf.

detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, i. e., unaccompanied by a parent, guardian, or other related adult.[76]

The matter was remanded to the U.S. District Court for the Central District of California, where, in January 1997, the Clinton DOJ and the *Flores* plaintiffs entered into a stipulated settlement agreement[77] known as "the *Flores* settlement agreement", or "FSA".

In its 1993 opinion, the Supreme Court concluded that the entry of 8,500 minors in 1990 — 70 percent of them UACs (the rest logically in FMUs) — was a "serious" problem.[78]

By FY 2014, however, CBP was experiencing a much larger surge in UACs and FMUs at the Southwest border. That fiscal year, Border Patrol apprehended more than 68,500 UACs[79] and an additional 68,445 aliens in FMUs[80]— a 77 percent increase in UACs and a 360 percent rise in FMUs from the year before.

The Obama administration responded[81] to that 2014 surge by opening shelters known as "Family Residential Centers" (FRCs) in Karnes City and Dilley, Tex., and Artesia, N.M., to detain FMUs (Artesia was closed shortly thereafter).

As detention rose, the number of UAC[82] and FMU[83] apprehensions at the Southwest border each dropped to just below 40,000, respectively, in FY 2015.

Regardless, those Obama-era FMU detentions prompted the *Flores* plaintiffs to turn to Judge Dolly Gee of the U.S. District Court for the Central District of California, who was overseeing the FSA.

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[76] *Flores*, 507 U.S. at 295.

[77] *Flores v. Reno*, No. No. 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (Stipulated Settlement Agreement). Source: https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf .

[78] *Flores*, 507 U.S. at 295.

[79] *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*, 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

[80] *Total Family Unit Apprehensions By Month*, U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

[81] Arthur, Andrew. *Ninth Circuit Flores Decision Puts Biden in a Fix, The more that come, the more that will come*. CENTER FOR IMMIGRATION STUDIES (Jan. 11, 2021). Source: https://cis.org/Arthur/Ninth-Circuit-Flores-Decision-Puts-Biden-Fix.

[82] *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*. 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

[83] *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

They alleged that the FSA applied to both accompanied aliens encountered with adults as well as to UACs, and further argued that the Obama administration had implemented policies under which FMUs would not be released, but instead would be detained in unlicensed facilities. That, they claimed, violated the FSA.

Note that there would have been no way for the Obama administration to hold FMUs in federally licensed facilities because there is no federal licensure scheme for family detention.

On August 21, 2015, Judge Gee issued an order requiring DHS to release aliens in FMUs within 20 days of encounter. The Obama administration appealed that decision to the Ninth Circuit, which issued an order[84] in July 2016, largely affirming the district court but holding that DHS could detain adults in FMUs—but not children.

To avoid family separation, however, the Obama administration opted to release both the adults and the children in FMUs. Likely consequently, by the end of FY 2016[85], Border Patrol apprehensions of families at the Southwest border swelled again, exceeding 77,000.

Overall Southwest border apprehensions cratered in FY 2017[86], the first partial fiscal year of the Trump administration, but FMU apprehensions continued apace, with more than 75,000 aliens[87] in family units being apprehended after entering illegally—nearly a quarter of all apprehensions that year.

Smugglers and would-be migrant adults understood that aliens entering illegally with children—even children who weren't their own-- were more likely to be released, as the *New York Times* explained in April 2018:

> *Some migrants have admitted they brought their children not only to remove them from danger in such places as Central America and Africa, but because they believed it would cause the authorities to release them from custody sooner.*
>
> *Others have admitted to posing falsely with children who are not their own, and Border Patrol officials say that such instances of fraud are increasing.*[88]

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[84] *Flores v. Lynch*, 828 F.3d 898 (2016). Source: https://scholar.google.com/scholar_case?case=12780774456837741811&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[85] *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

[86] *See Total Encounters By Fiscal Year.* U.S. BORDER PATROL (undated) (303,916 Southwest border apprehensions in FY 2017, down from 408,870 in FY 2016). Source: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF.

[87] *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

[88] Caitlin Dickerson. *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*. NEW YORK TIMES (Apr. 20, 2018). Source: https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html.

That FMU surge continued into FY 2018, as agents at the Southwest border apprehended more than 107,000[89] aliens in family units—27 percent of that year's total of alien apprehensions.

In response to this burgeoning population of FMU migrants, Attorney General Jeff Sessions in April 2018[90] called for "zero tolerance" with respect to prosecutions of illicit entrants— illegal entry being both a civil offense[91] rendering the offender removable and also a federal crime[92], punishable as a misdemeanor for a first offense and a felony for repeated offenses.[93]

That policy applied to all adults, including adults in FMUs, and in practice it meant those adults had to be sent for at least brief periods to U.S. Marshals Service custody, leaving some of their children — under DHS's interpretation of the law[94] — "unaccompanied".

By statute[95], DHS was therefore required to send those children to shelters run by the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) for placement with "sponsors" in the United States.

Logically, following the brief period that those FMU adults were in Marshals Service custody for prosecution, they would have been quickly reunited with their children, but according to the HHS[96], DHS[97], and DOJ[98] inspectors general, that did not happen, almost solely due to poor planning and incompetence.

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[89] *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

[90] *Memorandum for Federal Prosecutors Along the Southwest Border*. U.S. DEP'T OF JUSTICE (Apr. 6, 2018). Source:

[91] Section 212(a)(6)(A)(i) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[92] Section 275(a) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1325&num=0&edition=prelim.

[93] *See id*.

[94] *But see* 6 U.S.C. § 279(g)(2) (2024) ("(2) the term "unaccompanied alien child" means a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) **there is no parent or legal guardian in the United States**; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.) (emphasis added.). Source: https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim.

[95] 6 U.S.C. § 279 (2024). Source: https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim.

[96] *Separated Children Placed in Office of Refugee Resettlement Care*. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GEN. (Jan. 2019). Source: https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf.

[97] *CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and for Reasons Other Than Those Outlined in Public Statements*. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL (May 29, 2020). Source: https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-35-May20.pdf.

[98] *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL (revised Jan. 2021). Source: https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf.

The policy spurred a media backlash[99], and in response, on June 20, 2018, President Trump issued Executive Order (EO) 13841[100], directing an end to family separations. EO 13841 also ordered Attorney General Sessions to seek to modify the FSA to permit the department to detain FMUs through criminal and immigration proceedings.

Apprehensions of FMUs at the Southwest border rose sharply thereafter, exceeding 473,000 in FY 2019.[101] That fiscal year[102], nearly 56 percent of all aliens apprehended at the Southwest border after entering illegally were in family units.

That was the biggest reason why just 33 percent of the aliens encountered by CBP at the Southwest border in FY 2019 were detained throughout the removal process, and why 40 percent of those migrants were never detained.

Security at the Southwest border degraded to such an extent that then-DHS Secretary Kirstjen Nielsen was forced to declare a "border emergency" in March 2019.[103]

As she explained at the time:

> *Today I report to the American people that we face a cascading crisis at our southern border.* ***The system is in freefall****. DHS is doing everything possible to respond to a growing humanitarian catastrophe while also securing our borders, but we have reached peak capacity and are now forced to pull from other missions to respond to the emergency.*
>
> *Let me be clear: the volume of 'vulnerable populations' arriving is without precedent. This makes it far more difficult to care for them and to prioritize individuals legitimately fleeing persecution. In the past, the majority of migration flows were single adults who could move through our immigration system quickly and be returned to their home countries if they had no legal right to stay.* ***Now we are seeing a flood of families and unaccompanied children, who—because of outdated laws and misguided court decisions—cannot receive efficient adjudication and, in most cases, will never be removed from the United States even if they are here unlawfully. The result is a massive 'pull factor' to our country****.*

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[99] *See* Domonoske, Camila and Gonzales, Richard. *What We Know: Family Separation And 'Zero Tolerance' At The Border*. NPR (Jun. 19, 2018). Source: https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border.

[100] *Executive Order 13841 of June 20, 2018, Affording Congress an Opportunity To Address Family Separation*. EXEC. OFFICE OF THE PRESIDENT (Jun. 20, 2018). Source: https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation.

[101] *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf.

[102] *See Total Encounters By Fiscal Year*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF.

[103] *Secretary Kirstjen Nielsen Statement on Border Emergency*. U.S. DEP'T OF HOMELAND SECURITY (Mar. 29, 2019). Source: https://www.dhs.gov/news/2019/03/29/secretary-kirstjen-nielsen-statement-border-emergency.

> ***My gravest concern is for children***. *They are arriving sicker than ever before and are exploited along the treacherous trek. Smugglers and traffickers know that our laws make it easier to enter and stay if you show up as a family. So they are using children as a 'free ticket' into America, and* ***have in some cases even used kids multiple times—recycling them****—to help more aliens get into the United States. Our border stations were not designed to hold young people for extended periods, yet this influx has forced thousands of them into facilities that are getting crowded and overwhelmed.* ***This goes well beyond politics. We must come together to find a way to tackle the crisis and reduce the flows so children are not put at risk.*** *Any system that encourages a parent to send their child alone on this terrible journey—****where they are exploited, pawned, and recycled****—is completely broken.*[104] *[Emphasis added.]*

Secertary Nielsen's concerns were echoed in a report[105] issued a month later by a bipartisan federal panel[106] tasked with examining the surge in family entries in FY 2018 and FY 2019[107]. The panelists found:

> ***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. 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*

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[104] *Id*.

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

[106] *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.

[107] *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.

> *dollars for themselves and the drug cartels who also charge money to cross the border. [Emphasis added.]*

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. . . ."[108]

According to the panel:

> *By far, the major "pull factor" [drawing family units to the United States] is the current practice of releasing with a [Notice to Appear— "NTA"—the charging document in removal proceedings] most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 [sic] federal court order in Flores v. DHS expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to unaccompanied children (UAC). After being given NTAs, we estimate that 15% or less of FMU will likely be granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals.*[109]

That report called on DHS to:

> *Establish and staff 3 to 4 Regional Processing Centers (RPCs) along the border, scalable and with sufficient capacity to shelter all FMUs apprehended at the border and, among other things, provide safe and sanitary shelter, to include medical screening and care, credible fear examinations, vetting for identity and familial relationship, and evaluations for public health and safety, national security and flight risk.*
>
> *Resource and require transport from USBP stations and POEs of all FMUs to an RPC, within 24 hours or less of apprehension.*[110]

The panel elaborated on that RPC proposal later in their report:

> *The requirement is that that these RPCs have sufficient bed, quarantine infirmary space to detain all FMUs apprehended at or near the SWB for a minimum of 20 days. All locations are to be sited within approximately 250-300 miles at their furthest from any spot on the SWB. Possible locations include Rio Grande Valley, El Paso, Yuma and immediately available current and excess military bases. Establishment of the first RPC should begin immediately, within 30 days.*[111]

In addition, the panel called on Congress to "enact emergency legislation" that included:

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[108] *Id*. at 1.
[109] *Id*. at 2.
[110] *Id*. at 2.
[111] *Id*. at 10.

> *[A] "Flores Fix" -- Roll back the Flores Decision by exempting children accompanied by a parent or relative, who is acting as the guardian of the child. DHS also should be given discretion to detain a close relative with a non-parent family member when this is in the best interest of the child.*
>
> *Amend[ments to the asylum provision in] Section 208 of the Immigration Nationality Acts (INA) to require that border crossers make asylum claims at POEs. . . .*
>
> *Amend[ments to] the Trafficking Victims Protection Reauthorization Act (TVPRA) to permit repatriation of any child when the custodial parent residing in the country of origin requests reunification and return of the child. Currently, this is not permitted by the statute.*[112]

Congress failed to act, however, and none of these recommendations was ever implemented.

Finally, the panel also recommended that, pending a congressional *Flores* fix, "DHS should act promptly to limit it by emergency regulation".[113]

As CRS has noted, "the parties [in *Flores*] stipulated that the agreement would terminate 45 days after the government publishes final regulations implementing the terms of the agreement" in a 2001 amendment to the FSA.[114]

In response, on August 23, 2019, DHS and HHS issued a final rule[115], captioned "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children", that promulgated regulations implementing the FSA, as well as other provisions that related to UACs, in the TVPRA[116] and the HSA[117].

As Acting DHS Secretary Kevin McAleenan explained at a press conference in advance of the issuance of those regulations:

> ***First and foremost**, the new rule permanently establishes standards of care in custody for children and families. These standards are high. In doing so, the rule fulfills one of the central, original purposes of the 1997 Flores court settlement to ensure appropriate care for all children.*

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[112] *Id*. at 2-3.
[113] *Id*. at 3.
[114] *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*. CONG. RESEARCH SERV. (updated Sept. 17, 2018), at 7 n. 52. Source: https://sgp.fas.org/crs/homesec/R45297.pdf.
[115] *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (Aug. 23, 2019). Source: https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.
[116] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (2008). Source: https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf.
[117] Homeland Security Act of 2002, Pub. L. 107–296 (2002). Source: https://www.congress.gov/107/plaws/publ296/PLAW-107publ296.pdf.

A national standard of care ensures that care in custody of children and families is not a policy decision, and should not be subject to the ebbs and flows of state and local politics. Instead, all children in the Government's care will be universally treated with dignity, respect, and special concern, in concert with American values and faithful to the intent of the settlement.

. . . .

***Second**, the new rule closes the legal loophole that arose from the reinterpretation of Flores–which Congress has refused to do—allowing the federal government to house alien families together in appropriate facilities during fair and expeditious proceedings, as was done by the previous Administration in 2014 and 2015.*

Prior to the 2015 court ruling that restricted our use of the FRCs, immigration proceedings averaged less than 50 days, granting those with meritorious claims prompt relief and permission to stay in the U.S., while swiftly repatriating those meritless claims—who have comprised a substantial majority of the families being processed.

. . . .

***Third** – by closing the key loophole in Flores – the new rule will restore integrity to our immigration system and eliminate the major pull factor fueling the current crisis.*

. . . .

***And fourth**, the new rule will protect children by reducing incentives for adults, including human smugglers, to exploit minors in the dangerous journey to our border, using them to exploit the system and be released into the United States.*[118]

Those regulations were to take effect on October 22, 2019, but three days after the final rule was published, the attorney general of California along with other state attorneys general filed suit[119] to block their implementation.

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[118] *Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement*. U.S. DEP'T OF HOMELAND SECURITY (Aug. 21, 2019). Source: https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

[119] *See Press Release: Attorney General Becerra Leads Multistate Lawsuit Opposing the Trump Administration's Rule Allowing Prolonged Detention of Children*. CAL. DEP'T OF JUSTICE (Aug. 26, 2019) ("California Attorney General Xavier Becerra and Massachusetts Attorney General Maura Healey today announced that they are leading a coalition of attorneys general in filing a lawsuit opposing the Trump Administration's new rule circumventing the Flores Settlement Agreement, which has governed the treatment of children in immigration custody since 1997. In the complaint before the U.S. District Court for the Central District of California, the coalition argues that the rule eliminates several critical protections guaranteed by the Flores Settlement Agreement. In particular, the prolonged detention risked by the rule would cause irreparable harm to children, their families, and the California communities that accept them upon their release from federal custody."). Source: https://oag.ca.gov/news/press-releases/attorney-general-becerra-leads-multistate-lawsuit-opposing-trump-administration.

On September 27, 2019, Judge Gee issued an order[120] blocking the termination of the FSA and enjoining the new regulations, finding that they were inconsistent with the *Flores* settlement agreement.

The government appealed that order to the Ninth Circuit, and on December 20, 2020, the circuit court issued an opinion[121] largely affirming the regulations in the final rules issued by HHS and reversing the district court's injunction with respect to them.

The court concluded that "the DHS regulations applicable to the care and custody of accompanied minors, by design, depart significantly from the" FSA[122], and that the FSA "flatly precludes" DHS's preferred option of detaining accompanied minors with their parents or guardians[123].

Given this, with two extremely limited exceptions, the circuit court affirmed Judge Gee's injunction of the DHS regulations in the final rule. By that point, however, it was too late for the outgoing Trump administration to seek Supreme Court review of the Ninth Circuit's opinion, and the incoming Biden administration failed to do so.

Instead, in December 2021, the Biden administration stopped detaining FMUs entirely.[124]

Likely not coincidentally, Border Patrol Southwest border apprehensions of FMUs rose from just over 451,000 in FY 2021 to nearly 483,000, and then to more than 621,000 in FY 2023.[125] In the first four months of FY 2024 alone, Border Patrol apprehensions of FMUs exceeded 308,000 at the U.S.-Mexico line.

The current administration could address the pull factor that the FSA and *Flores* have created by implementing regulations along the lines of the August 2019 rule captioned "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" [126], that addressed the concerns of the district and the circuit court.

It would be incumbent on the administration, however, to vigorously litigate challenges to that rule once implemented.

Section 235(b)(2)(C) of the INA and "Remain in Mexico"

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[120] *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019). Source: https://casetext.com/case/flores-v-barr-12.
[121] *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=15013088245236846968&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[122] *Id*. at 730.
[123] *Id*. at 742.
[124] Kight, Stef W. *Scoop: Biden to stop holding undocumented families in detention centers*. AXIOS (Dec. 15, 2021). Source: https://www.axios.com/2021/12/16/biden-ends-migrant-family-detention-border-immigration.
[125] *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 13, 2024). Source: https://www.cbp.gov/newsroom/stats/nationwide-encounters.
[126] *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (Aug. 23, 2019). Source: https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.

Prevented from detaining FMUs for more than 20 days by the 2015 *Flores* order, and otherwise unable to deter alien adults from bringing children with them when they entered the country illegally, the Trump administration looked to the inherent authority given it in the INA to produce a solution to its then-border emergency.

The most notable Trump border security policy— and arguably the most effective — was the Migrant Protection Protocols (MPP)[127], better known as "Remain in Mexico".

Then-DHS Secretary Nielsen first implemented MPP in January 2019[128], and it allowed DHS to return certain "other than Mexican" (OTM) migrants caught entering illegally or without proper documentation at the Southwest border back to Mexico to await removal hearings.[129]

Remain in Mexico was premised on DHS's authority in section 235(b)(2)(C) of the INA[130] to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings.

Aliens subject to MPP were paroled in custody into the United States to apply for asylum at port courts[131], while the Mexican government had agreed to provide them with protection for the duration of their stays in that country.[132]

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[127] *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.

[128] *Id*.

[129] 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.

[130] *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.

[131] 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.

[132] *See Migrant Protection Protocols*. U.S. DEP'T OF HOMELAND SECURITY (Jan. 24, 2019) ("While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them."). 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

The program was expanded from a pilot site in San Ysidro, Calif.[133] in late January 2019, to Calexico, Calif.[134], and El Paso, Tex.[135] in March of that year, and then in July 2019[136] to Laredo and Brownsville (both in Texas) before finally being expanded to the Arizona border town of Nogales[137] in the late fall.

When it was fully implemented, fewer than 70,000 migrants[138] were returned to Mexico to await their removal hearings under MPP. As I have explained elsewhere[139], however:

> *It didn't take many MPP returns to drive the encounter numbers back down. [The DHS Office of Homeland Security Statistics] reports that fewer than 31,250 aliens encountered at the Southwest border were sent back across the border under MPP between June and September 2019 — 84 percent of them aliens in FMUs.*
>
> *In May of that year, CBP encountered about 144,000 aliens at the Southwest border, 65 percent of whom (nearly 88,600) were in FMUs — at the time, monthly records in both categories.*
>
> *As MPP got revved up and news of returns to Mexico spread, that figure dropped to fewer than 52,500 CBP Southwest border encounters in September — some 22,000 of whom (less than 42 percent) were in FMUs.*
>
> *By February 2020, the month before Title 42 was implemented and once MPP was in full swing, CBP Southwest border encounters dropped to fewer than 37,000, and just over 7,100 of those aliens (19.3 percent) were in FMUs.*

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[133] 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.

[134] 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.

[135] 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/.

[136] 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/.

[137] Prendergast, Curt. *'Remain in Mexico' program begins in Nogales.* ARIZONA DAILY STAR (Dec. 17, 2019). Source: https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article_95f757ac-1851-11ea-b29e-47f1d679e3d8.html.

[138] *Fact Sheet: The "Migrant Protection Protocols"*. AMERICAN IMMIGRATION COUNCIL (Jan. 7, 2022). Source: https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols.

[139] Arthur, Andrew. *Congressional Budget Office Estimates 860K 'Got-Aways' in FY 2023, The effects of 'family units' on border security, and the drug and terrorist threats posed by aliens who enter 'without encountering a CBP official'*. CENTER FOR IMMIGRATION STUDIES (Jan. 22, 2024). Source: https://cis.org/Arthur/Congressional-Budget-Office-Estimates-860K-GotAways-FY-2023.

In its October 2019 assessment[140] 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.[141]

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[142]) that it takes for their claims to be heard. Remain in Mexico denied them the opportunity to do so.

Or, as DHS then[143] put it:

> *MPP returnees who do not qualify for relief or protection are being quickly removed from the United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home.*

Returning those migrants to Mexico also enabled the Trump administration to comply with Congress' detention directives in section 235(b) of the INA[144].

Deterring adult migrants from bringing children with them when entering the United States illegally not only advances border security, but it also protects the migrants themselves, as the excerpts from the Homeland Security Advisory Council's CBP Families and Children Care Panel's April 2019 report[145] I referenced above reveal.

The Biden administration could reimplement this program at any time. I will note that advocates sued in the U.S. District Court for the Northern District of California to block this program, and on April 19, 2019, U.S. district court Judge Richard Seeborg issued an order granting a preliminary injunction in that case.[146]

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[140] *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 .

[141] *See id*.

[142] *See Immigration Court Asylum Backlog*. TRAC IMMIGRATION (undated) ("average days pending since court filing to asylum hearing" in immigration court was 1,424 days as of the end of December). Source: https://trac.syr.edu/phptools/immigration/asylumbl/.

[143] *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP'T OF HOMELAND SECURITY (October 28, 2019), at 3. Source: https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf .

[144] *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.

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

[146] *Innovation Law Lab. v. Nielsen*, 366 F.Supp.3d 1110 (2019). Source: https://scholar.google.com/scholar_case?case=3275760696436107849&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

The Trump DOJ filed an emergency motion[147] with the Ninth Circuit to stay that order pending appeal, which a three-judge circuit panel granted on May 7, 2019.[148]

A separate three-judge Ninth Circuit panel considering the government's appeal from the district court's decision affirmed[149] the injunction of MPP in late February 2020, but stayed that injunction temporarily for aliens apprehended outside of California and Arizona, to allow the government to seek Supreme Court review.

Shortly thereafter, in early March 2020, the Supreme Court stayed that injunction[150] pending the government's filing of, and the Court's ruling on, a petition for certiorari on the injunction.

Thereafter, in June 2021, the now-Biden administration moved to vacate the judgment of the Ninth Circuit as moot, given the fact that it had terminated MPP.[151] On June 21, 2021, the Supreme Court vacated the circuit court judgment, "with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction."[152]

Thus, neither the district court order nor the Ninth Circuit's opinion would be an impediment to reimplementation of a program similar to Remain in Mexico.

I have explained elsewhere[153] in-depth why I have concluded that the circuit court's analysis is in error, but briefly, two provisions in the inspection protocol in section 235 of the INA[154] were key to the court's analysis.

First is the expedited provision at section 235(b)(1) of the INA[155], which applies solely[156] to two classes of aliens.

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[147] *Innovation Law Lab v. Nielsen*, No. 19-15716, Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal (9th Cir. Apr. 11, 2019). Source: https://cdn.ca9.uscourts.gov/datastore/general/2019/04/13/Emergency%20Motion.pdf.

[148] *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). Source: https://casetext.com/case/innovation-law-lab-v-mcaleenan.

[149] *Innovation Law Lab v. Wolf*, 951 F. 3d 1073 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=12716474571221783570&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[150] *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). Source: https://www.supremecourt.gov/orders/courtorders/031120zr_19m2.pdf.

[151] *See Mayorkas v. Innovation Law Lab*, No. 19-1212, Petitioners Suggestion of Mootness and Motion to Vacate the Judgment of the Court of Appeals (Jun. 1, 2021). Source: https://www.supremecourt.gov/DocketPDF/19/19-1212/180713/20210601211037408_Innovation%20Law%20Lab%20-%20Suggestion%20of%20Mootness%20-%20final.pdf.

[152] *Mayorkas v. Innovation Law Lab*, No. 19-1212, Docket (Jun. 21, 2021). Source: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1212.html.

[153] Arthur, Andrew. *Ninth Circuit Blocks 'Remain in Mexico' — Sort Of, Misinterpreting the INA and ignoring contrary evidence, while the clock is ticking*. CENTER FOR IMMIGRATION STUDIES (Mar. 2, 2020). Source: https://cis.org/Arthur/Ninth-Circuit-Blocks-Remain-Mexico-Sort.

[154] Section 235 of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[155] *Id*. at para. (b)(1).

[156] *See id*. at cl. (A)(1) ("If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section [212(a)(6)(C) or 212(a)(7) of the INA], the officer shall order the alien removed from the United States without further hearing or review. . . ").

The first class consists of aliens seeking admission deemed inadmissible under section 212(a)(6)(C) of the INA[157] because they "by fraud or willfully misrepresenting a material fact, seek[] . . . admission into the United States or other benefit provided under" the INA.

The second class consists of aliens seeking admission under section 212(a)(7) of the INA[158] who lack proper admission documents.

As noted, section 235(b)(2)(C)[159] of the INA (also known as the "return clause") is the statutory basis for Remain in Mexico, but that clause only applies to aliens processed under paragraph (2) of 235(b) of the INA, not to aliens subject to expedited removal and processed under paragraph (1) of that provision.

The Ninth Circuit, in essence, determined[160] that MPP does not apply to those aliens removable under the grounds of inadmissibility listed in the expedited removal provision, because the return clause does not allow the return of aliens to whom expedited removal applies. There are two flaws in this logic.

First, DHS has the discretion to place aliens who would otherwise be subject to expedited removal directly into removal proceedings under section 240 of the INA, as the BIA held in its 2011 decision in *Matter of E-R-M- and L-R-M*.[161] Those aliens would, therefore, be subject to return under the return clause in section 235(b)(2)(C) of the INA.

In fact, as I explain *infra*, the Biden administration has bypassed expedited removal for the vast majority of aliens who have entered illegally without proper documents, all of whom would be inadmissible under section 212(a)(7) of the INA.

Second, and more saliently, the circuit court entirely ignored section 212(a)(6)(A)(i) of the INA[162], which states: "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

Aliens entering illegally are inadmissible under both section 212(a)(6)(A)(i) (for illegal entry) and section 212(a)(7) (for lacking proper documents to enter). The vast majority of the aliens subject to MPP entered illegally, not through fraud or misrepresentation.

DHS can charge illegal entrants under either (or both) of those provisions, but aliens charged under section 212(a)(6)(A)(i) of the INA are not subject to expedited removal under section

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[157] Section 212(a)(6)(C) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[158] Section 212(a)(7) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[159] *See* section 235(b)(2)(C) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[160] *See Innovation Law Lab*, 951 F. 3d at 1083-87.
[161] *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3716.pdf.
[162] Section 212(a)(6)(A)(i) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

235(b)(1)(A)(1) of the INA. That means they plainly fall under section 235(b)(2) of the INA and are therefore subject to the return clause in section 235(b)(2)(C) of the INA.

That opinion notwithstanding, I also note than in an October 29, 2021, memo[163] explaining why the Biden administration had decided to terminate Remain in Mexico, DHS cited the dangers migrants face on the other side of the border as a key reason for ending the program.

That memo immediately continued, however: "It is possible that some of these humanitarian challenges could be lessened through the expenditure of significant government resources currently allocated to other purposes."[164]

Respectfully, the current migrant surge at the border and throughout the United States is already resulting in "the expenditure of significant government resources", not only at the federal level (where those costs should be borne), but also at the state[165] and local[166] levels.

In April 2022[167], I suggested the administration could enter into an agreement with the Mexican government to allow returned migrants to be sent to a place on the other side of the border like Monterrey, Nuevo Leon, Mexico's 11th largest city. I explained that the city:

> *is relatively safe, safer than my erstwhile hometown of Baltimore, and such migrant destinations as Los Angeles, Houston, and Chicago.*
>
> *And while there is some level of violent crime in parts of the city, providing the necessary security required to address any concerns is simply a matter of money.*

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[163] *See Explanation of the Decision to Terminate the Migrant Protection Protocols*, at 2. U.S. DEP'T OF HOMELAND SECURITY (Oct. 29, 2021) ("Significant evidence indicates that individuals were subject to extreme violence and insecurity at the hands of transnational criminal organizations that profited from putting migrants in harms' way while awaiting their court hearings in Mexico."). Source: https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf.

[164] *Id*.

[165] *See* Dorgan, Michael. *Illinois pumping $250M more in taxpayer funds to help illegal migrants in Chicago*. FOX NEWS (Feb. 16, 2024) Source: https://www.foxnews.com/us/illinois-pumping-250m-taxpayer-funds-help-illegal-migrants-chicago; *Governor Hochul Extends Executive Order Declaring State of Emergency for Asylum Seeker Crisis*. OFF. OF THE GOVERNOR OF NEW YORK (Oct. 23, 2023). Source: https://www.governor.ny.gov/news/governor-hochul-extends-executive-order-declaring-state-emergency-asylum-seeker-crisis-0.

[166] *See* Franza, Sabrina. *City of Chicago has spent $156.2 million on vendors in migrant crisis, data show*. CBS CHICAGO (Jan. 10, 2024). Source: https://www.cbsnews.com/chicago/news/city-of-chicago-spending-vendors-migrant-crisis/; Newman, Andy and Rubinstein, Dana. *Chaos, Fury, Mistakes: 600 Days Inside New York's Migrant Crisis*. NEW YORK TIMES (Dec. 26, 2023) ("But the dimensions of the problem — the $2.4 billion cost so far, the harsh conditions, the number of migrants stuck in shelters — can also be traced to actions taken, and not taken, by the Adams administration, The New York Times found in dozens of interviews with officials, advocates and migrants. . .. City Hall has argued that it was only after the mayor ramped up his rhetoric that the federal government began paying attention and sending aid. But even that was scant — $156 million for a problem that the mayor said will cost $12 billion over three years."). Source: https://www.nytimes.com/2023/12/26/nyregion/migrant-crisis-mayor-eric-adams.html.

[167] Arthur, Andrew. *A Modest Proposal for 'Remain in Mexico' that Even Biden Would Like, Set up protected housing for illegal migrants awaiting hearings; it could happen in Monterrey*. CENTER FOR IMMIGRATION STUDIES (Apr. 25, 2022). Source: https://cis.org/Arthur/Modest-Proposal-Remain-Mexico-Even-Biden-Would.

> *Taking into account the needs of aliens' lawyers and U.S. government officials, Monterrey benefits from proximity to the U.S. border. It is a three-hour drive to Hidalgo, Texas, in the heart of the Rio Grande Valley (RGV), and two hours and 45 minutes to Laredo, Texas, where DHS under Trump erected a port court. And a roundtrip bus ticket from McAllen, Texas, to Monterrey is $43.*
>
> *Plus, two airports service the city, one of which — Monterrey International Airport — is the nation's fourth busiest and the busiest in northern Mexico.*
>
> *The governor of Nuevo Leon, Samuel Alejandro Garcia Sepulveda, has already shown a willingness to work with his Texas counterpart, Governor Greg Abbott (R) on cross-border issues. . . and Sepulveda would also definitely welcome the sort of money that would flow to his state if DHS were to erect and run migrant housing there.*[168]

Plainly, there are other options, but if the sole impediment to reimplementing MPP is money, the costs of the current migrant crisis are already incalculable and rising. Note that, as with Remain in Mexico, the Biden administration currently requires foreign nationals to wait in Mexico pending the port interviews they schedule using the CBP One app.[169]

PACR and HARP

To speed the review of credible fear claims by illegal entrants, the Trump administration implemented two separate border programs[170]: Prompt Asylum Case Review (PACR[171]), 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) has explained[172] 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 (Tex.) sector in December 2019 and its Yuma (Ariz.) sector in January 2020.[173] Those sectors were chosen because they had temporary structures at which aliens subject to that process could be housed.

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[168] *Id*.
[169] *See* p. 40 *infra*.
[170] 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/.
[171] 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/.
[172] *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry*. GOV'T ACCOUNTABILITY OFFICE (Jan. 2021). Source: https://www.gao.gov/assets/720/711974.pdf.
[173] *Id*.

HARP, on the other hand, started out[174] under the auspices of OFO at the border ports in October 2019, before being expanded to Border Patrol in January 2020.[175] At that point, inadmissible aliens encountered by OFO were sent to Border Patrol for HARP processing.[176]

All told, according to GAO, nearly 5,300 aliens[177] 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.[178]

While those numbers are relatively small, by ensuring inadmissible applicants for admission could 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[179]

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.

The Biden administration ended PACR and HARP by executive order on February 2, 2021[180], but the administration could always reimplement a version of those programs to speed review of asylum claims for these classes of inadmissible aliens.

Regulatory Asylum Reforms

Asylum is the biggest statutory exception in the INA to the strict limitations[181] Congress has placed on immigration to the United States. And it is likely the most abused.

As the Supreme Court has held:

> *Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming*

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[174] *Id*.
[175] *Id*.
[176] *Id*.
[177] *See id*. ("DHS data indicate that CBP identified approximately 5,290 individuals who were eligible for screening under the pilot programs.")
[178] *Id*.
[179] *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 supra*.
[180] *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-regionalframework-to-address-the-causes-of-migration-to-manage-migration.
[181] *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=%7CZ3JhbnVsZWlkOlVTQy1wcmVsaW0tdGl0bGU4LXNlY3Rpb24xMjMx%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim.

> *that they would be persecuted if returned to their home countries. . .. Most asylum claims, however, ultimately fail, and some are fraudulent.*[182]

According to DOJ statistics[183], USCIS asylum officers found that 81 percent of the aliens subject to expedited removal between FY 2008 and Q4 of FY 2019 who claimed a fear of harm or requested asylum had a credible fear of persecution or torture,[184], and 2 additional percent were determined to have a credible fear by immigration judges on review[185]-- 83 percent in total.

Of those aliens subject to expedited removal who received positive credible fear determinations during that period, fewer than 17 percent[186] (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 who received positive credible fear determinations from asylum officers were ordered removed *in absentia* when they failed to appear in court[187].

With respect to fraud, evidence presented at a 2014 congressional hearing[188] revealed that USCIS had determined that "only 30 percent of asylum cases from a random sample were confirmed to be fraud-free".[189]

One of the reasons why asylum is susceptible to fraud relates directly to the terms of the asylum statute itself, section 208 of the INA[190]. Clause (b)(1)(B)(ii)[191] therein, which governs the alien's burden in proving eligibility for 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*

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[182] *DHS v. Thuraissigiam*, 591 U.S. ___, slip op. at 1 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.
[183] *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.
[184] *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.
[185] *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.
[186] *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.
[187] *Id*.
[188] *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.
[189] *Id*. at cl. (b)(1)(B)(ii).
[190] Sec. 208 of the INA (2023). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.
[191] *Id*. at cl. (b)(1)(B)(ii).

applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.

Thus, and logically (because 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.

That doesn't mean that the presentation of extrinsic evidence in this context is optional, though, because that clause[192] also 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[193] barring aliens in the United States from applying for asylum. Notably, section 208(a)(1) of the INA[194] 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."

The executive can implement immigration policy changes either through procedural rulemaking or by through binding precedential decisions[195] issued by the attorney general, whose determinations, under the INA, control "all questions of law"[196]. With respect to asylum, the Trump administration used both policy pathways.

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[192] *Id*.

[193] *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.

[194] 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.

[195] Arthur, Andrew. *AG Certification Explained*. CENTER FOR IMMIGRATION STUDIES (Nov. 5, 2019). Source: https://cis.org/Arthur/AG-Certification-Explained.

[196] *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,

Of course, regardless of which path the executive takes, the resulting policy is subject to judicial review. If a precedent decision is overturned on circuit court review or a regulation is blocked by a district court (through injunction, vacatur, or restraining order), it can take years — absent a stay — for a final ruling to be issued, during period which the policy languishes.

In his June 2018 decision in *Matter of A-B-*[197], 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 —in most cases, gangs, or spousal abusers.

That December, however, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia permanently enjoined[198] Sessions' decision in *Matter of A-B-* as it applied to credible fear claims.

By statute[199], reviews of expedited removal procedures are within the sole jurisdiction of that court, but notably, Sessions' decision in *Matter of A-B-* did not directly involve an asylum claim by a border alien.

The judge concluded, nonetheless, that his limited review powers gave him sufficient authority to reverse *Matter of A-B-* in the expedited-removal context. The U.S. Court of Appeals for the District of Columbia Circuit concurred, largely affirming that order in a July 2020 opinion.[200]

Thereafter, current Attorney General Merrick Garland vacated Attorney General Session's opinion in *Matter of A-B-* in its entirety on June 16, 2021.[201]

As for regulations, on November 9, 2018, President Trump issued Presidential Proclamation (PP) 9822, "Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States".[202]

That PP suspended and limited entry into the United States by aliens who came after that date illegally, between the ports of entry. Notably exempted from the scope of PP 9822 were aliens

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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.

[197] *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.

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

[199] 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.

[200] *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). Source: https://casetext.com/case/grace-v-barr.

[201] *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021). Source: https://www.justice.gov/eoir/page/file/1404796/download.

[202] *Proclamation 9822 of November 9, 2018, Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018). Source: https://www.federalregister.gov/documents/2018/11/15/2018-25117/addressing-mass-migration-through-the-southern-border-of-the-united-states.

who entered the United States at ports of entry and who properly presented themselves for inspection, as well as lawful permanent residents of the United States.

That same day, Trump's DOJ and DHS published an interim final rule in the Federal Register captioned "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" (also referred to as the "entry ban", "Proclamation IFR", or "Port of Entry rule").[203]

In conjunction with PP 9822, that interim final rule would have prevented aliens who entered illegally between the ports of entry from receiving asylum in the United States. As it explained:

> *The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed in a controlled, orderly, and lawful manner.*[204]

The same day that interim final rule and PP were issued, a nonprofit organization filed a complaint[205] in the U.S. District Court for the Northern District of California, a case entitled *East Bay Sanctuary Covenant v. Trump*.

The complaint alleged, *inter alia*, that the interim final rule violated the INA, and on November 19, 2018, the judge assigned to *East Bay*, Judge Jon S. Tigar, agreed, issuing a nationwide temporary restraining order[206] (TRO) of that rule.

The Trump administration sought a stay of that TRO, which was denied by a divided panel of the Ninth Circuit in December 2018.[207] The third judge on that panel, Judge Edward Leavey, explained: "I dissent from the denial of the motion to stay because the President, Attorney General, and Secretary of Homeland Security have adopted legal methods to cope with the current problems rampant at the southern border."[208]

Twelve days later, Judge Tigar granted a preliminary injunction[209] in *East Bay*, blocking the administration from implementing the Port of Entry rule.

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[203] *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.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection.

[204] *Id*.

[205] *East Bay Sanctuary Covenant v. Trump*, *Complaint for Declaratory and Injunctive Relief*, No. 3:18-cv-06810-JST (N.D. Cal. Nov. 9, 2018). Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.1.0.pdf.

[206] *East Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST, Order Granting Temporary Restraining Order; Order to Show Cause Re Preliminary Injunction (N.D. Cal. Nov. 19, 2018). Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.43.0.pdf.

[207] *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018). Source: https://casetext.com/case/covenant-v-trump-1.

[208] *Id*. at 780.

[209] *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018). Source: https://casetext.com/case/covenant-v-trump-2.

The Trump administration appealed that decision, and in a February 2020 opinion[210], a three-judge panel of the Ninth Circuit affirmed Judge Tigar's orders. I will delve more deeply into that decision in discussing the president's authority under section 212(f), below.

The administration sought *en banc* review of that circuit-court decision, but it wasn't until March 2021—after Trump had left office-- that the circuit court issued an amended version of its February 2020 opinion and an order [211]denying rehearing *en banc*.

In a strongly worded dissent from the denial of rehearing *en banc*, circuit Judge Patrick Bumatay, writing for himself and five other circuit judges, explained:

> *We are not "Platonic Guardians" of our nation's public policies. . .. As judges, we have no business standing athwart the choices of the political branches no matter how misguided we believe them to be. That fundamental limitation on our role is even more pronounced in the immigration context, where it is long settled that "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." . . . The Supreme Court has repeatedly warned us we overstepped our bounds when we tried to curtail immigration policies in the recent past. . .. Unfortunately, we have not learned from our mistakes. Today, we once again second-guess the Executive's immigration policies.*
>
> *This time, we enjoin an immigration regulation temporarily limiting asylum eligibility to those who enter the country at a port of entry, deeming the policy "absurd." . . . To get there, we disregard two central precepts of the judicial role. First, we ignore constitutional limits on our jurisdiction by stretching organizational standing doctrine beyond Article III's reach. Second, we re-write the asylum statute to add a prohibition on the Executive's authority not found anywhere in the legislative text.[212] [Citations omitted.]*

I will further discuss the latter point in that dissent below, as well.

The Biden administration didn't seek review of that decision from the Supreme Court, but in EO 14010[213], the president called upon the attorney general and the DHS secretary to "promptly review and determine whether to rescind" the Proclamation IFR.

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[210] *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=14752063426311246949&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[211] *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 654 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=5291205268804698 74&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[212] *Id*. at 687-688.
[213] *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. 5, 2021). Source: https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.

In any event, in July 2019, the Trump administration published a "safe-third country" rule[214] (also referred to as the "third-country transit rule" or "TCT") 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[215], it is not unreasonable to conclude that foreign nationals should seek humanitarian protection in any of the ones they pass through before they are allowed to apply for asylum in the United States.

Nonetheless, Judge Tigar quickly enjoined[216]the TCT, as well, in a separate case captioned *East Bay Sanctuary Covenant v. Barr*. The Trump administration sought a stay of that order from the Ninth Circuit, which denied[217] the request on August 16, 2019.

Trump's DOJ then sought a stay of Judge Tigar's order from the Supreme Court, which granted that request on September 11, 2019[218] "pending disposition of the Government's appeal in the" Ninth Circuit "and disposition of the Government's petition for a writ of certiorari, if such writ is sought". Justice Ginsburg joined Justice Sotomayor in opposing that stay.

Thereafter, in July 2020, the Ninth Circuit affirmed the district court injunction of Trump's safe-third country rule.[219]

Trump's DOJ sought rehearing *en banc* of that decision in October 2020, but it wasn't ruled on by the Ninth Circuit in April 2021 (the request was denied).[220] Again, the Biden administration never sought final review on certiorari of that decision from the Supreme Court.

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[214] *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.

[215] *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-andor-its-1967-protocol.

[216] *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=scholarr.

[217] *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019). Source: https://scholar.google.com/scholar_case?case=16336190408097552256&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[218] *Barr v. East Bay Sanctuary Covenant*, 588 U. S. ____ (2019). Source: https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf.

[219] *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=scholarr.

[220] *East Bay Sanctuary Covenant v. Garland* (9th Cir. 2021) (Nos. 19-16487 and 19-16773) (slip op. at 12). Source: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf.

On December 11, 2020 —after Trump had lost reelection — the administration published a final rule[221] captioned "Asylum Eligibility and Procedural Modifications" that would have raised the burden of proof for credible fear claims. It was enjoined[222] less than a month later by a different judge in the U.S. District Court for the Northern District of California.

Finally, on December 17, 2020, DHS and DOJ published a final rule[223] (the "TCT Bar Final Rule" or "entry bar") responding to litigation surrounding and comments received concerning the TCT, also captioned "Asylum Eligibility and Procedural Modifications".

On February 16, 2021, Judge Tigar granted a preliminary injunction[224], blocking the departments from implementing that rule, as well.

In EO 14010[225], President Biden also called on the attorney general and the DHS to "promptly review and determine whether to rescind" that rule.

All the while, the *East Bay* litigation remained pending. In June 2022, for example, the parties jointly filed a case management statement[226] in both *East Bay Sanctuary Covenant v. Trump* and *East Bay Sanctuary Covenant v. Barr*, which stated:

> *The government presently continues to pursue rulemaking with respect to the two rules at issue in these cases, an interim final rule, "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims," 83 Fed. Reg. 55,934 (November 9, 2018) ("entry" rule), and the final rule titled "Asylum Eligibility and Procedural Modifications," 85 Fed. Reg. 82,260 (December 17, 2020) ("transit" rule) . . ..*
>
> *Given this ongoing review of the entry and transit rules and the likelihood those rules will be modified or rescinded in the future, the parties respectfully request that the Court continue to hold these cases in abeyance pending the conclusion of the Departments' review of the rules.*

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[221] *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.

[222] *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.

[223] *Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82260 (Dec. 17, 2020). Source: https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications.

[224] *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073-JST, Order Granting Preliminary Injunction, slip op. at 8 (N.D. Cal. Feb. 16, 2021). Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.344869/gov.uscourts.cand.344869.138.0.pdf.

[225] *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. 5, 2021). Source: https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.

[226] *East Bay Sanctuary Covenant v. Trump* and *East Bay Sanctuary Covenant v. Barr*, Nos. 4:18-cv-06810-JST and 4:19-cv-04073-JST, Joint Case Management Statement, at 1-2, (N.D. Cal. Jun. 21, 2022) (). Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.140.0.pdf.

The Biden administration finally began to act on those rules with the expiration of Title 42 imminent, when, in a January 5, 2023, fact sheet[227], the White House announced:

> *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.*

I have referred[228] to that port processing plan as the "CBP One app interview scheme" and will note that although the White House claimed illegal aliens would be using the CBP One app to make appointments "to initiate a protection claim", CBP was quick to note it "does not adjudicate asylum claims"[229].

Already, by the end of April 2023, CBP reported that more than 79,000 inadmissible aliens had used CBP One to schedule interviews at the Southwest border ports.[230] Just over two weeks later, the CBP One app interview scheme was officially implemented and expanded in a final rule[231] formally captioned "Circumvention of Lawful Pathways" (the "Pathways rule").

The CBP One app interview scheme was just one part of that rule. As a DHS fact sheet[232] for the Pathways rule explains, pursuant to that rule:

> *Noncitizens who cross the southwest land border or adjacent coastal borders of the United States without authorization after traveling through a third country will be presumed ineligible for asylum unless they, or a member of their family with whom they are traveling, meet one of three exceptions:*

- *They were provided authorization to travel to the United States pursuant to a DHS-approved parole process;*

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[227] *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. THE 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/.

[228] *See* Arthur, Andrew. *What's Biden Doing with Migrants at the Ports of Entry? Regardless, his mass-release scheme isn't legal*. Center for Immigration Studies (May 30, 2023). Source: https://cis.org/Arthur/Whats-Biden-Doing-Migrants-Ports-Entry.

[229] *CBP One™ Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 28, 2024). Source: https://www.cbp.gov/about/mobile-apps-directory/cbpone.

[230] *CBP Releases April 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 5, 2024). Source: https://www.cbp.gov/newsroom/national-media-release/cbp-releases-april-2023-monthly-operational-update.

[231] *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2024). Source: https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.

[232] *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.

- *They used the CBP One app to schedule a time and place to present at a port of entry, or they presented at a port of entry without using the CBP One app and established that it was not possible to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or*

- *They applied for and were denied asylum in a third country en route to the United States.*

Migrants entering illegally can rebut the presumption of ineligibility in the Pathways rule 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 victims of severe forms of trafficking.[233]

On June 23, 2023, a group of migrants and advocates filed suit[234] in the U.S. District Court for the District of Columbia, challenging implementation of the Pathways rule as it related to those who, in lieu of using the CBP One app to schedule interview appointments at the ports, entered illegally.

That case is *M.A. v. Mayorkas*, and here's how the National Immigrant Justice Center ("NIJC", which joined the ACLU and other groups in the matter) describes that litigation: "This lawsuit challenges the Biden administration's sweeping asylum ban and several new expedited removal policies that dramatically alter the screening interview process for asylum seekers and wrongfully return many back to persecution and grave danger."[235]

In September, the plaintiffs in *M.A.* filed a motion for summary judgment[236], and Biden's DOJ followed up with its own cross motion for summary judgment[237] in October.

But then, on February 5, both parties — the *M.A.* plaintiffs and DOJ — filed a "Joint Stipulation to Hold Case in Abeyance"[238]. That motion asked the court to not take any action on the matter for 60 days, explaining in pertinent part:

> *The parties are engaged in discussions regarding implementation of the challenged rule and related policies and whether a settlement could eliminate the*

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[233] *See id*.
[234] *M.A. v. Mayorkas*, *Complaint for Declaratory and Injunctive Relief*, No. 1:23-cv-01843 (D.D.C. Jun. 23, 2023). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.1.0.pdf.
[235] *MA v. Mayorkas.* National Immigrant Justice Center (Sept. 20, 2023). Source: https://immigrantjustice.org/court_cases/ma-v-mayorkas.
[236] *M.A. v. Mayorkas*, *Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support* (D.D.C. Sept. 28, 2023) (No. 1:23-cv-01843). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.37.0.pdf.
[237] *M.A. v. Mayorkas*, No. 1:23-cv-01843, Cross Motion for Summary Judgment and Opposition to Motion for Summary Judgment (D.D.C. Oct. 27, 2023). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.53.0.pdf.
[238] *M.A. v. Mayorkas*. Joint Motion to Hold Case in Abeyance (D.D.C. Feb. 5, 2024) (No. 1:23-cv-01843). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.66.0.pdf.

> *need for further litigation, and the parties believe an abeyance will facilitate such discussions. . .. Finally, the government has agreed not to remove any of the noncitizen plaintiffs currently present in the United States pending resolution of their claims.*

M.A. was not the only suit opposing the Pathways rule, however, as it was also challenged in the still-pending *East Bay* litigation.

On May 8, 2023, the parties in *East Bay Sanctuary Covenant v. Trump* filed an amended complaint[239] in that matter, by now captioned *East Bay Sanctuary Covenant v. Biden*.

Judge Tigar issued an order[240] on July 25, 2023, vacating and remanding the Pathways rule, but staying that order for two weeks to allow the Biden administration to seek further review from the Ninth Circuit.

In an order[241] issued on August 3, 2023, the Ninth Circuit agreed to stay the judge's order and expedite its consideration of the case, but its decision was not unanimous.

Judge Lawrence VanDyke, who had also dissented from the denial of *en banc* review in the case in March 2021, dissented again, crying foul:

> *My colleagues in today's majority grant a stay pending appeal of a district judge's order vacating a recently promulgated immigration rule.* ***Only a few years ago, these same colleagues affirmed the same district judge enjoining the Trump administration's rule restricting asylum eligibility for immigrants who entered the United States outside a designated port of entry (the Port of Entry Rule). They did so in a published, precedential opinion, undeterred by a chorus of dissenting colleagues****. . .. Quickly thereafter, one of my colleagues in today's majority penned another published, precedential decision again affirming a Judge Tigar decision striking the Trump administration's rule restricting asylum eligibility for aliens who passed through another country on the way to the United States without seeking asylum in that country (the Transit Rule) . . ..* ***The panel there did so notwithstanding the Supreme Court's earlier decision in that very case staying Judge Tigar's rulings pending appeal . . . evincing that the government had made the requisite "strong showing" that it was likely to succeed in its defense of the rule*** *. . ..*
>
> *Indeed, one or both of my colleagues in today's majority were directly involved in eliminating at least four different Trump administration immigration rules. . ..* ***It's***

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[239] *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, Amended and Supplemental Complaint for Declaratory and Injunctive Relief (N.D. Cal. May 18, 2023). Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.164.0.pdf.

[240] *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, slip op. at 35 (N.D. Cal. Jul. 25, 2023) Source: https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

[241] *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, slip op. at 1 (9th Cir. Aug. 3, 2023) Source: https://assets.law360news.com/1707000/1707605/9th.pdf.

> ***not an exaggeration to say that, whenever the Trump administration sought to make any meaningful adjustment to our nation's immigration rules, the Northern District of California—and ultimately our court—systematically killed each of those changes****.*
>
> *The Biden administration's "Pathways Rule" before us in this appeal is not meaningfully different from the prior administration's rules that were backhanded by my two colleagues.* ***This new rule looks like the Trump administration's Port of Entry Rule and Transit Rule got together, had a baby, and then dolled it up in a stylish modern outfit, complete with a phone app****.*[242] *[Citations omitted; emphasis added.]*

Notwithstanding this apparent victory in the circuit court, however, DOJ also joined the plaintiffs in *East Bay* in filing a motion to hold the government's appeal in abeyance pending settlement negotiations in that case and *M.A.*, which the same Ninth Circuit panel — again on a divided two to one vote — granted on February 21.[243]

The dissent was again authored by Judge VanDyke, and this time he made some very pointed accusations about the administration's intentions:

> *After the plaintiffs brought this case to enjoin and vacate the rule, the federal government spent the better part of a year vigorously defending the rule's critical necessity before the district court and in this court — all because, in the government's words, "any interruption in the rule's implementation will result in another surge in migration that will significantly disrupt and tax DHS operations."*
>
> *....*
>
> *Taking the government at its word about the pressing need for this crucial rule to remain in effect and be enforced, our court granted a stay of the district court's decision enjoining the government's rule. We heard oral argument and are now poised to render our decision.* ***Then suddenly, out of the blue, the parties come to us hand-in-hand, jointly asking us to hold off making a decision while they "engage in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation.****" For months, the rule was so important that "any interruption" in its implementation, even for a short period of time, would incapacitate the executive's border response. This panel made decisions based on those representations. Now, the government implies the rule isn't so important after all. Indeed, the government is now "engaged in discussions" that could result in the rule going away. What?*

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[242] *Id*. at 2-3.

[243] *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, slip op. at 5 (9th Cir. Feb. 21, 2024) Source: https://cdn.ca9.uscourts.gov/datastore/opinions/2024/02/21/23-16032.pdf.

> ***The administration's abrupt about-face makes no sense as a legal matter. Either it previously lied to this court by exaggerating the threat posed by vacating the rule, or it is now hiding the real reason it wants to hold this case in abeyance****. Given its success thus far in defending a rule it has consistently characterized as critical to its control of the border, and the fact that it has to realize its odds of success in this case* ***can only improve as it works its way vertically through the federal court system****, the government's sudden and severe change in position looks a lot like a purely politically motivated attempt to throw the game at the last minute. At the very least it looks like the administration and its frenemies on the other side of this case are colluding to avoid playing their politically fraught game during an election year****. [Cleaned up, emphasis added.]*[244]

Judge VanDyke continued:

> ***the executive may once again be trying to insulate bad Ninth Circuit caselaw from Supreme Court review****. As I and others have previously written, our East Bay precedents are clearly wrong. ...* ***Yet they aided the Democratic cause by invalidating Trump-era immigration rules. If this case gets before the Supreme Court, the safe bet is that it would overrule those erroneous precedents****. This* ***settlement tactic is therefore a powerful tool for the administration: it lets it perpetuate bad — but politically favorable — law in the Ninth Circuit by settling before reaching the Supreme Court, and then throw up its hands and say it is bound by that law****. [Emphasis added; internal citations omitted.]*

I will not comment on the accusations Judge VanDyke makes in his dissenting opinions, but what is apparent from the latest *East Bay* orders is that the courts are amenable to executive branch amendments to the regulations governing applications for asylum by illegal entrants at the Southwest border.

The only question is whether the administration has the will to promulgate, implement, and fully litigate those restrictions.

Diplomatic Efforts

Using his foreign-policy power, President Trump negotiated safe third country "Asylum Cooperative Agreements" (ACAs or "safe-third country agreements") with El Salvador, Guatemala, and Honduras[245].

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

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[244] *Id*. at 6-7.

[245] *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.

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[246] of that year), the United States was able to send more than 900 third-country nationals to Guatemala[247] prior to the pandemic, most of them from El Salvador and Honduras.

That not only demonstrated that "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.

President Biden's secretary of State, Anthony Blinken, announced[248] on February 6, 2021, however that — "In line with the President's vision" — the administration was suspending and terminating the ACAs.

As important as those ACAs were, the diplomatic pressure the Trump administration brought to bear to force the Mexican government to secure its own southern border to transit by illegal OTM migrants was even more effective.

As AP explained in December 2019[249], 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 cannot cross the Southwest border if they cannot get there, and as a result of the enforcement efforts the Mexican government imposed within its own country, many could not.

The Biden administration can use its diplomatic authority to enter into safe-third country agreements like the ones that the Trump administration forged with our Central American partners, which would deter OTM migrants from crossing the border illegally.

As for Mexican-government assistance, my colleague, Todd Bensman surveyed media in that country and revealed in January that shortly after Secretary of State Blinken and DHS Secretary

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[246] *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.

[247] 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.

[248] 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-governmentsel-salvador-guatemala-and-honduras/.

[249] *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.

Mayorkas returned from Mexico in December, Mexico City began a migrant crackdown on third-country nationals.[250]

He reported:

> *Mexican law enforcement officials are rounding up immigrants in the country's north and shipping them by bus and airplane to southern cities like Tapachula in Chiapas State and Villahermosa in Tabasco State. They are all expected to go home or stay put alongside those continuing to enter from Guatemala. They'll be held back to wait for a molasses-slow bureaucracy to approve individual travel papers.*
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> . . . .
>
> *To eliminate another obvious draw, Mexican authorities have emptied and then bulldozed at least one longstanding migrant camp, the sprawling one in Matamoros across the Rio Grande from Brownsville and dug deep anti-pedestrian trenches to deny further easy access to popular crossings there. It was done "under U.S. pressure," one Mexican newspaper said.*
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> *Perhaps one of Mexico's most impactful slow-down measures is that, finally, it is doing something about "La Bestia," the system of cargo trains that have super-powered the Biden border crisis for three years running by transporting hundreds of thousands of migrants from deep southern Mexico to its northern border cities.*[251]

These actions have received scant attention in U.S. media outlets, but to the extent that the Biden administration is engaged in diplomatic efforts with Mexico to prevent the cross-transit of OTM migrants traveling to enter the United States illegally, those efforts should continue.

Border Infrastructure

Presidents Obama and Trump both utilized border infrastructure — roads, sensors, fencing, lights, and cameras, collectively (if unartfully) known as the "border wall system"[252]—to increase security at the Southwest border.

As a senator, Obama — like then-Sen. Joe Biden (D-Del.) — voted in favor[253] of the Secure Fence Act of 2006 (SFA)[254]. The SFA both authorized and mandated the construction of portions

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[250] Bensman, Todd. *Has Biden bribed Mexico to control border – and help him win the election?* NEW YORK POST (Jan. 18, 2024). Source: https://nypost.com/2024/01/18/opinion/has-biden-bribed-mexico-to-control-border-and-help-him-win-election/.

[251] *Id*.

[252] *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jul. 24, 2023). Source: https://www.cbp.gov/border-security/along-us-borders/border-wall-system.

[253] Roll Call Vote, 109th Congress - 2nd Session, On Passage of the Bill (H.R. 6061) (Sep. 29, 2006). Source: https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00262.htm.

[254] Secure Fence Act of 2006, Pub. L. 109-367 (2006). Source: https://www.congress.gov/bill/109th-congress/house-bill/6061/text.

of the border wall system, and cleared the way for DHS secretaries to create the infrastructure Border Patrol agents require to apprehend and deter illegal entrants and smugglers.

Most of the work—at least 500 miles[255]-- authorized by the SFA was completed under the George W. Bush administration, but still, the Obama administration completed more than 130 additional miles[256] of that border wall system.

Few would dispute that President Trump was a major proponent of the border wall system, and in fact, a December 2018 demand[257] from his administration for $5 billion in construction funding led to a weeks-long government shutdown.

In the end, on February 15, 2019[258], Trump agreed to $1.375 billion for border-barrier funding, and the impasse ended. Shortly thereafter, however, he also issued a proclamation[259] declaring a national emergency at the Southwest border and directing the Department of Defense (DoD) to assist in securing that border.

Ten days later[260], DHS asked DoD for assistance in constructing "fences[,] roads, and lighting" within 11 specified project areas, "to block drug-smuggling corridors across the international boundary between the United States and Mexico". That construction was in addition to the $1.375 billion that Congress had appropriated for border-wall funding.

The reprogramming of DoD funds for fence and infrastructure construction went through various legal actions but the Supreme Court eventually allowed it to proceed.[261]

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[255] *Border Fence Project Surpasses 500-Mile Mark*. U.S. CUSTOMS AND BORDER PROTECTION (Dec. 19, 2008). Source: https://law.utexas.edu/humanrights/borderwall/maps/dhs-500-mile-mark.pdf.

[256] Montoya Bryan, Susan. *Past projects show border wall building is complex, costly*. AP (Jan. 12, 2019). Source: https://apnews.com/article/north-america-donald-trump-us-news-george-w-bush-immigration-ab1b07e15e6f4e9a9274b576ff3a1d45.

[257] *See* Davis, Julie Hirschfeld and Cochrane, Emily. *Government Shuts Down as Talks Fail to Break Impasse*. NEW YORK TIMES (Dec. 21, 2018) ("The federal government shut down early Saturday after congressional and White House officials failed to find a compromise on a spending bill that hinged on President Trump's demands for $5.7 billion for a border wall."). Source: https://www.nytimes.com/2018/12/21/us/politics/trump-shutdown-border-wall.html.

[258] Sec. 230 of the Consolidated Appropriations Act, 2019, Pub. L. 116-6 (2019). Source: https://www.congress.gov/116/plaws/publ6/PLAW-116publ6.pdf.

[259] *Proclamation 9844*, *Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949 (Feb. 20, 2019). Source: https://www.federalregister.gov/documents/2019/02/20/2019-03011/declaring-a-national-emergency-concerning-the-southern-border-of-the-united-states.

[260] *See Trump v. Sierra Club*, No. 19A60, *Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court and Request for an Immediate Stay*, at 6-7 (Ju;. 12, 2019). Source: https://www.scotusblog.com/wp-content/uploads/2019/07/19A60-Trump-v.-Sierra-Club-stay-application.pdf.

[261] *Trump v. Sierra Club*, 588 U. S. ____ (2019). Source: https://www.supremecourt.gov/opinions/18pdf/19a60_o75p.pdf.

Congress included additional funding of $1.375 billion "for the construction of [a] barrier system along the southwest border" in both the appropriations bills for FY 2020[262] and FY 2021[263].

By December 31, 2019, DHS had used that funding to build or replace more than 112 miles of border wall, a portion of the 452-plus miles[264] of border barriers built or replaced under the Trump administration.

One of President Biden's first acts[265], however, was to issue a proclamation that placed a "pause" on further construction on the system.

Then-candidate Joe Biden argued on his 2020 campaign website[266] that Trump's "obsession with building a wall does nothing to address security challenges while costing taxpayers billions of dollars". He continued: "Building a wall will do little to deter criminals and cartels seeking to exploit our borders."[267]

In October 2023, the Biden administration nevertheless announced that it would recommence construction of the border wall system in limited areas of the border in the Rio Grande Valley of Texas.[268] As the *New York Times* reported:

> *Alejandro N. Mayorkas, the Homeland Security secretary, says Mr. Biden is building up to 20 miles of border wall because he has to.*
>
> *The administration said that it was bound to build this section of new wall because Congress already appropriated the funding to do so in 2019. It had been unsuccessful in convincing Congress to rescind the funding, Mr. Mayorkas said.*
>
> *"From Day 1, this administration has made clear that a border wall is not the answer," Mr. Mayorkas said on Thursday in Mexico City, after a member of the Mexican news media asked about the apparent reversal. "That remains our position, and our position has never wavered."*[269]

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[262] Section 209(a)(1) of the Consolidated Appropriations Act, 2020, Pub. L. 116-93 (2019). Source: https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.pdf.
[263] Section 210 of the Consolidated Appropriations Act of 2021, Pub. L. 116-260 (2020). Source: https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf.
[264] Giles, Christopher. *Trump's wall: How much has been built during his term?* BBC (Jan. 12, 2021). Source: https://www.bbc.com/news/world-us-canada-46748492.
[265] *Proclamation 10142, Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, WHITE HOUSE (Jan. 20, 2021). Source: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/.
[266] *The Biden Plan for Securing Our Values As a Nation of Immigrants*, BIDEN-HARRIS (undated). Source: https://web.archive.org/web/20201107002051/https:/joebiden.com/immigration/#.
[267] *Id*.
[268] Sullivan, Eileen and Edmonds, Colbi. *Biden, the Border, and Why a New Wall Is Going Up*. NEW YORK TIMES (Oct. 6, 2023). Source: https://www.nytimes.com/2023/10/06/us/border-wall-biden.html.
[269] *Id*.

That said, in a notice published in the Federal Register that month, Secretary Mayorkas stated:

> *There is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project areas pursuant to sections 102(a) and 102(b) of IIRIRA. In order to ensure the expeditious construction of the barriers and roads in the project areas, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of IIRIRA.*[270]

Fencing and border infrastructure does little to deter the majority of current illegal migrants, known by agents as "give ups"[271] who actively seek out agents as soon as they cross.

That said, the roads and lighting that are parts of the border wall system allow agents to locate and take custody of those aliens. During my frequent trips to the Southwest border over the last three years, I have seen that the infrastructure is in place to complete the roads and activate the lights, but when fence construction was paused in the wake of that Biden proclamation, those projects were shelved, as well.

More importantly, however, the roads, lights, cameras, and sensors in the border wall system—and especially the fencing -- are a "force multiplier" for overwhelmed agents as they attempt to apprehend aliens evading encounter, identified in statute[272] as "got aways".

The Congressional Budget Office (CBO) recently estimated[273] that there were 860,000 such got aways in FY 2023, while a House Resolution[274] passed in January stated that, "during the Biden administration, more than 1.7 million known illegal alien 'gotaways' have successfully evaded U.S. Border Patrol along the southwest border".

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[270] *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 88 Fed. Reg. 69214, 69215 (Oct. 5, 2023). Source: https://www.federalregister.gov/documents/2023/10/05/2023-22176/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility#:~:text=SUMMARY%3A,border%20in%20Starr%20County%2C%20Texas..

[271] *See* Miroff, Nick. *Across southern Arizona, a full range of border woes for Biden*. WASHINGTON POST (Jul. 8, 2022) ("The polyglot queue in Yuma of what authorities call 'give ups' presented a jarring contrast to the wild chases happening about 300 miles farther east along the border. Under a blazing afternoon sun in Nogales a day earlier, young men from Mexico wearing head-to-toe camouflage climbed over the border wall every few minutes in choreographed intervals, racing into dry creek beds, residential backyards and a sprawling junkyard. A dozen or so U.S. agents charged after them on ATVs, bicycles and horseback, badly outnumbered.").. Source: https://www.washingtonpost.com/national-security/interactive/2022/border-arizona-immigration-biden/.

[272] *See* 6 USC § 223(a)(3) (2024) ("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?path=/prelim@title6/chapter1/subchapter4&edition=prelim.

[273] *The Demographic Outlook: 2024 to 2054*, CONG. BUDGET OFF. (Jan. 2024). Source: https://www.cbo.gov/system/files/2024-01/59697-Demographic-Outlook.pdf#page=9.

[274] *Denouncing the Biden administration's open-borders policies, condemning the national security and public safety crisis along the southwest border, and urging President Biden to end his administration's open-borders policies*, H.Res. 957 (2024). Source: https://www.congress.gov/bill/118th-congress/house-resolution/957/all-actions.

Fencing would have slowed down those aliens and facilitated their apprehension, the sensors would have notified agents of those got-aways' entries, and the lights and roads would have made it much easier for agents to apprehend them.

Given that Secretary Mayorkas claims the administration must resume border construction because funding for that purpose remains from FY 2019 appropriations, it stands to reason that DHS also has money left over from the FY 2020 and FY 2021 appropriations to pay for such infrastructure, as well, although the amounts remaining are not publicly available.

Section 212(f)

Section 212(f) of the INA[275] states, in pertinent part:

> *Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

Compare that authority to the power given bon Congress to the Centers for Disease Control (CDC) in 42 U.S.C. § 265[276], the public-health provision on which the so-called "Title 42" border-expulsion orders[277] were based:

> *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.*

Plainly, the president's section 212(f) suspension authority is broader in scope than CDC's expulsion power in section 265 of Title 42, although the triggering mechanism—a presidential proclamation—makes it facially more onerous for the president to use his power.

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[275] Section 212(f) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[276] 42 U.S.C. § 265 (2024). Source: https://www.law.cornell.edu/uscode/text/42/265.

[277] *See, e.g.*, *Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 87 Fed. Reg. 19941 (Apr. 6, 2021). Source: https://www.federalregister.gov/documents/2022/04/06/2022-07306/public-health-determination-and-order-regarding-suspending-the-right-to-introduce-certain-persons.

That said, as the Supreme Court held[278] in 2018, section 212(f) of the INA:

> *exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that [section 212(f) of the INA] vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA.*

Some critics of the Biden administration's border policies[279]—including Speaker Mike Johnson (R-La.)[280]—have called on President Biden to use his authority under section 212(f) to bar illegal migrants from entering the country, and published reports[281] have suggested he may do so.

As *CNN*[282] has explained, however:

> *In 2018, Trump tried to use 212f, which gives the president broad authority to implement immigration restrictions to restrict border crossings. But ultimately, a federal appeals court ruled that the authority conflicts with asylum law and the 212f authority doesn't override it.*
>
> *The case – known as* ***East Bay Sanctuary Covenant v. Trump*** *– served as an example of why the president is limited in his ability to shut down the border. It's*

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[278] *Trump v. Hawaii*, 585 U.S. __, slip op. at 10-11 (2018). Source: https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf.

[279] *See* Judis, John. *How Biden Could Act on the Border and Help Himself in November*. NEW YORK TIMES (Feb. 9, 2024) ("Mr. Biden has authority to act under Section 212(f) of the 1952 Immigration and Nationality Act, which says that the president can 'suspend the entry of all aliens or any class of aliens' whose entry he finds 'would be detrimental to the interests of the United States.'"). Source: https://www.nytimes.com/2024/02/09/opinion/biden-congress-border-immigration.html.

[280] *See* Brooks, Emily. *Speaker Johnson urges Biden to take executive action on the border*. THE HILL (Dec. 21, 2023) ("'I also urge you to utilize Section 212(f) of the Immigration and Nationality Act to regain operational control of the border,' Johnson wrote. 'That provision empowers the President to 'suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate' if the President 'finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States.'"). Source: https://thehill.com/homenews/house/4371872-speaker-johnson-biden-executive-action-border/.

[281] *See* Montoya-Galvez, Camilo. *Biden weighs invoking executive authority to stage border crackdown ahead of 2024 election*. CBS NEWS (Feb. 22, 2024) ("Mr. Biden is weighing citing a law dating back to 1952 to severely restrict access to the U.S. asylum system, which has buckled under the weight of record levels of migrant arrivals along the border with Mexico, the sources said, requesting anonymity to discuss internal government deliberations. That law, known as 212(f), allows the president to 'suspend the entry' of foreigners when it is determined their arrival is not in the best interest of the country."). Source: https://www.cbsnews.com/news/biden-weighs-invoking-executive-authority-stage-border-crackdown-212f/.

[282] Alvarez, Priscilla, and Lee, M.J. *Biden considering new executive action to restrict asylum at the border, sources say*. CNN (Feb. 21, 2024). Source: https://www.cnn.com/2024/02/21/politics/biden-considering-executive-action-to-close-southern-border-sources-say/index.html.

likely to face legal challenges if the White House were to move forward with it. [Emphasis added.]

That is the same *East Bay* caselaw I analyzed extensively above in discussing regulatory asylum reforms, and among the Ninth Circuit's decisions that circuit court Judge Lawrence VanDyke criticized.

Both the presidential proclamation in that matter[283] and the Port of Entry rule[284] on which it relied were premised on section 212(f). As the proclamation clearly states:

> *NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) [285] of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a), respectively) hereby find that, absent the measures set forth in this proclamation, the entry into the United States of persons described in section 1 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.* [286]

DOJ, in turn, also relied on that presidential authority in the *East Bay* litigation to support its argument that the then-administration could rely on section 212(f) to deny asylum to aliens who crossed the border illegally.

The Ninth Circuit rejected that argument, however, finding that:

> *The [Port of Entry rule] . . . is not an exercise of the President's authority under [section 212(f)of the INA] because it does not concern the suspension of entry or otherwise "impose on the entry of aliens ... restrictions [the President] deem[s] to be appropriate." . . . To be sure, the rule of decision attempts to discourage illegal entry by penalizing aliens who cross the Mexican border outside a port of entry by denying them eligibility for asylum.* ***But the rule of decision imposes the penalty on aliens already present within our borders. By definition, asylum concerns those "physically present in the United States," [section 208(a)(1) of***

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[283] *Proclamation 9822 of November 9, 2018, Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018). Source: https://www.federalregister.gov/documents/2018/11/15/2018-25117/addressing-mass-migration-through-the-southern-border-of-the-united-states.

[284] *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.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection.

[285] *See* section 215(a)(1) of the INA (2024) ("(a) Restrictions and prohibitions. Unless otherwise ordered by the President, it shall be unlawful- (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe".). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1185&num=0&edition=prelim.

[286] *Proclamation 9822 of November 9, 2018, Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661, 57763 (Nov. 9, 2018). Source: https://www.federalregister.gov/documents/2018/11/15/2018-25117/addressing-mass-migration-through-the-southern-border-of-the-united-states.

> ***the INA], and "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality."***[287]
> *[Citations omitted; emphasis added.]*

The validity of the court's conclusion that the president's section 212(f) authority has no impact on aliens who have crossed into the United States illegally is questionable, however, in light of an opinion issued by the Supreme Court two years later in *DHS v. Thuraissigiam*[288], where the justices clarified what constitutes an "entry" for purposes of the INA.

The respondent in that case was an alien who was apprehended shortly after he entered illegally and subjected to expedited removal, and who received a negative credible fear determination that he sought to have reviewed by the circuit court— an action facially barred under the judicial review provisions in the INA.[289]

Before the Court, however, Thuraissigiam argued that the expedited removal provisions in section 235(b)(1) of the INA violated the due process rights he was entitled to by reason of his illegal entry.[290]

As I explained above, prior to IIRIRA, aliens who entered illegally free from official restraint were deemed to have greater due process rights than those stopped at the ports, a rule Congress overrode in creating the inspection protocol in section 235 of the INA. In *Thuraissigiam*, the Court weighed in on the constitutionality of Congress's action.

The Supreme Court rejected the respondent's argument, finding that:

> *It disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: "[T]he power to admit or exclude aliens is a sovereign prerogative," . . . the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit, . . . and a concomitant of that power is the power*

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[287] *East Bay Sanctuary Covenant v. Trump*, 932 F.3d at 773-74. Source: https://casetext.com/case/covenant-v-trump-1..

[288] *DHS v. Thuraissigiam*, 591 U. S. ____, slip. op. at 35-36 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

[289] *See* section 242(a)(2) of the INA (2024) ("Matters not subject to judicial review. (A) Review relating to [section 235(b)(1) of the INA]. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review- (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [section 235(b)(1) of the INA], (ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section, (iii) the application of such section to individual aliens, including the determination made under [section 1225(b)(1)(B) of the INA], or (iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of [section 235(b)(1) of the INA."]. Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim.

[290] *DHS v. Thuraissigiam*, 591 U. S. ____, slip. op. at 34-35 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

> *to set the procedures to be followed in determining whether an alien should be admitted. . ..*
>
> ***This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil.*** *When an alien arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are "treated" for due process purposes "as if stopped at the border." . . . . .*
>
> ***The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an "applicant for admission," . . .. and an alien who is detained shortly after unlawful entry cannot be said to have "effected an entry," . . .. Like an alien detained after arriving at a port of entry, an alien like respondent is "on the threshold."*** *. . . . The rule advocated by respondent and adopted by the Ninth Circuit would undermine the "sovereign prerogative" of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location.*[291]

Accordingly, under *Thuraissigiam*, aliens apprehended directly after crossing illegally haven't "entered" the United States and therefore—putatively-- could fall within the scope of a presidential proclamation issued under section 212(f).

The question then would be whether such a proclamation could be used to bar an alien who entered illegally from applying for asylum. In *Hawaii*, the Supreme Court assumed, without deciding, that section 212(f) "does not allow the president to expressly override particular provisions of the INA"[292].

Thus, if section 208(a)(1) of the INA guarantees aliens who enter illegally the right to be granted asylum, it would be an open question whether the president could use his section 212(f) authority to "override" that guarantee and suspend illegal entries.

If asylum trumped section 212(f), then it would likely "swallow" any section 212(f) rule that attempted to suspend illegal entries, because aliens could evade that rule simply by requesting asylum.

Aliens' rights to be granted asylum under section 208 of the INA, however, are not as absolute as many proponents contend. Which brings me back to the asylum arguments in *East Bay*.

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[291] *Id*. at 35-36.

[292] *Hawaii*, 585 U. S. ____, slip op. at 15. (2018). Source: https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf.

As noted above, section 208(a)(1) of the INA[293] allows any alien physically present in this country to *apply* for asylum, but section 208(b)(2) of the INA[294], commonly known as the "asylum bars", bars certain aliens from being *granted* asylum.

As enumerated in statute, the asylum bars apply to persecutors, specified criminals, and aliens who pose a threat to national security, as well as to aliens firmly resettled in a third country.

Critically, however, and in addition to those enumerated bars, section 208(b)(2)(C) of the INA[295] also provides: "The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum . . .."

It was that section 208(b)(2)(C) authority that DHS and DOJ relied on in the Port of Entry rule to bar aliens subject to the Trump Proclamation from being granted asylum,[296] and as the Ninth Circuit summarized DOJ's argument defending that rule, the structure of section 208 of the INA:

> *splits asylum applications [section 208(a)] and eligibility [section 208(b)] into two different subsections; therefore, the government explains, Congress intended to allow DOJ to promulgate limitations on asylum eligibility without regard to the procedures and authorizations governing asylum applications. The text in section [208(a)] requires only that migrants arriving between ports of entry be permitted to "apply for asylum," and the Rule does not prevent migrants from submitting futile asylum applications.*[297]

The circuit court tersely rejected DOJ's contentions about that "split" in section 208, holding:

> *[DOJ's] argument is unconvincing. We avoid absurd results when interpreting statutes. . .. Explicitly authorizing a refugee to file an asylum application because he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity.*[298] *[Citations omitted.]*

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[293] Section 208(a)(1) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[294] Section 208(b)(2) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[295] Section 208(b)(2)(C) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[296] *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934, 55939 (Nov. 9, 2018) ("Pursuant to section 208(b)(2)(C) of the INA. . . the Departments are revising 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar on eligibility for asylum for certain aliens who are subject to a presidential proclamation suspending or imposing limitations on their entry into the United States pursuant to section 212(f) of the INA . . .and who enter the United States in contravention of such a proclamation after the effective date of this rule."). Source: https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection.

[297] *East Bay Sanctuary Covenant v. Biden*, 993 F.3d at 670. Source: https://casetext.com/case/e-bay-sanctuary-covenant-v-biden.

[298] *Id*.

"Absurd" or not, section 208 *explicitly*, in separate subsections, provides different rules to govern aliens' eligibility to apply for asylum and their eligibility to receive it. For example, while an alien who has been convicted of an aggravated felony[299] can file an asylum application[300], that application must be denied[301].

And that's more or less how Judge Bumatay viewed section 208 in his dissent from the Ninth Circuit's denial of review *en banc*[302] in *East Bay*:

> *The panel . . . justified its departure from the plain text by arguing that this reading would lead to "absurd results" . . .. The 'absurdity canon isn't a license for us to disregard statutory text where it conflicts with our policy preferences.' . . . And frankly, there is no absurdity here at all. The Rule says that everyone who arrives outside of a port of entry is able to apply for asylum, but because of the identified migrant crisis, for the 90-day period at the southern border, applicants must come in through a port of entry to successfully gain asylum. While the panel majority may disagree with that policy decision, there is nothing absurd about it. Indeed, [section 208 of the INA] sets numerous categorical exclusions from asylum eligibility for aliens who are statutorily authorized to apply for asylum.") (citations omitted.)*

The Pathways rule promulgated by DOJ and DHS under the Biden administration—currently at issue in *East Bay*—expressly did not mention the president's section 212(f) authority[303].

But as Judge VanDyke's latest dissent referenced above explains[304], "If this case gets before the Supreme Court, the safe bet is that it would overrule" the earlier precedents in *East Bay* (which as noted above he termed "erroneous") expressly limiting that 212(f) authority.

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[299] *See* section 101(a)(43) of the INA (2024) (defining "aggravated felony"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[300] Section 208(a)(1) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[301] *See* section 208(b)(1)(A)(ii) of the INA (2024) ("Paragraph (1) shall not apply to an alien if the Attorney General determines that-- the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"); section 208(b)(2)(B)(i) of the INA (2024) ("Conviction of aggravated felony. For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime."). Source:

[302] *East Bay Sanctuary Covenant v. Biden*, 993 F.3d at 696. Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[303] *See* 88 Fed. Reg. at 31372 ("Regarding the suggestion to suspend entry pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), the Departments note that suspension of entry requires a presidential proclamation, which is beyond the Departments' authorities."). Source: https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.

[304] *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, slip op. at 14 (9th Cir. Feb. 21, 2024). Source: https://cdn.ca9.uscourts.gov/datastore/opinions/2024/02/21/23-16032.pdf.

My colleague, George Fishman, has explained[305] that:

> *The 9th Circuit [in East Bay] prevented the Trump administration from implementing a § 212(f) proclamation that could have actually been successful. The court's decision was an utter travesty. But, unfortunately,* ***while it stands****, any § 212(f) proclamation seeking to remedy the current border crisis will sadly be ineffectual — except to the extent that it occasions a naval blockade or other means of preventing prospective illegal migrants from entering the United States in the first place. [Emphasis added.]*

That highlighted phrase, "while it stands", is key. DOJ could seek Supreme Court review of those Ninth Circuit *East Bay* decisions, and thereby obtain a binding ruling that could—and likely would—allow the president to use his section 212(f) suspension authority to deter illegal migration and secure the border.

The decision to do so, however, rests with President Biden and his attorney general, Merrick Garland.

Expedited Removal

Finally, the executive possesses the expedited removal authority Congress has given it in section 235(b)(1) of the INA[306] to quickly deport aliens who have entered the United States illegally.

Of the nearly four million aliens[307] agents apprehended at the Southwest border and processed for removal under the INA between February 2021 and February 2024, just fewer than 458,000[308] were subject to expedited removal—roughly 11.5 percent of the total.

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[305] Fishman, George. *Temporarily Suspend Asylum by Suspending Entry? Commentators have called for it, but can it be done?* CENTER FOR IMMIGRATION STUDIES (Oct. 17, 2023). Source: https://cis.org/Report/Temporarily-Suspend-Asylum-Suspending-Entry.

[306] Section 235(b)(1) of the INA (2024). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[307] *See Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 13, 2024) (3,983,974 alien encounters at the Southwest border by Border Patrol). Source: https://www.cbp.gov/newsroom/stats/nationwide-encounters.

[308] *See Custody and Transfer Statistics FY 2024*, U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 14, 2024). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics; *Custody and Transfer Statistics FY 2023*. U.S. CUSTOMS AND BORDER PROTECTION (modified Dec. 19, 2023). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2023; *Custody and Transfer Statistics FY 2022*, U.S. CUSTOMS AND BORDER PROTECTION (modified Dec. 19, 2023). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22; *Custody and Transfer Statistics FY2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 11, 2023). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021 (457,837 aliens encountered by Border Patrol at the Southwest border subject to expedited removal).

By contrast, the aforementioned House Resolution[309] passed in January stated that, "the Biden administration has released at least 3.3 million. . . illegal aliens [encountered by CBP at the Southwest border] into the interior of the United States".

The administration plainly recognizes the effectiveness of expedited removal in securing the border. For example, on January 5, 2023, the White House issued a fact sheet captioned "Biden-Harris Administration Announces New Border Enforcement Actions"[310], which explained:

> *Under the new enforcement measures announced today, the Biden-Harris Administration will:*
>
> *Impose New Consequences for Individuals who Attempt to Enter Unlawfully*
>
> *To facilitate a return to the processing of all noncitizens under Title 8 authorities when Title 42 eventually lifts, the Department of Homeland Security (DHS) is:*
>
> *Increasing the Use of Expedited Removal. 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****.*[311] *[Emphasis added.]*

Similarly, at a White House press conference[312] on May 11, 2023 (the day Title 42 expired), DHS Secretary Mayorkas asserted that: "The vast majority of individuals [encountered at the Southwest border] 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."

Unfortunately, while expedited removals have ticked up slightly since then, still, only a minority of illegal entrants have been subject to that process of late. For example, of the 124,220 aliens apprehended by Border Patrol at the Southwest border in January, just 23,750 of them were subject to expedited removal[313]-- less than 20 percent of the total.

By contrast, Border Patrol simply released 70,250 of those aliens into the country with NTAs on their own recognizance—more than 56.5 percent of the total.

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[309] *Denouncing the Biden administration's open-borders policies, condemning the national security and public safety crisis along the southwest border, and urging President Biden to end his administration's open-borders policies*, H.Res. 957 (2024). Source: https://www.congress.gov/bill/118th-congress/house-resolution/957/all-actions.

[310] *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/.

[311] *Id*.

[312] *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.

[313] *Custody and Transfer Statistics FY 2024*, U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 14, 2024). Source: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics

Presumably, DHS would argue that it lacks the resources to screen more aliens for credible fear. Historically, however, most aliens subject to expedited removal at the Southwest border have not made credible-fear claims.

Below is a chart that included in its October 28, 2019, assessment of the Migrant Protection Protocols[314], showing the number of aliens subject to expedited removal between FY 2006 and FY 2018 and the number making credible fear claims:

1: Aliens Subject to Expedited Removal and Share Making Fear Claims, FY 2006 - 2018

Fiscal Year	Subjected to Expedited Removal	Referred for a Credible Fear Interview	Percentage Referred for Credible Fear
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	241,442	36,035	15%
2014	240,908	51,001	21%
2015	192,120	48,052	25%
2016	243,494	94,048	39%
2017	178,129	78,564	44%
2018	234,591	99,035	42%

As you can see, even though the number and percentage of aliens subject to expedited removal who made credible fear claims rose significantly during that 13-year period, a majority of aliens subject to expedited removal never made fear claims at all.

CBP can and should fully utilize expedited removal for all illegal entrants. Not all are "asylum seekers" and DHS should quickly remove those who are not, as DHS Secretary Mayorkas promised[315] his department would do.

Additionally, the administration could implement programs like PACR and HARP to alleviate the resource demands associated with resolving credible fear claims, as well as policy changes to make the credible fear process operate more efficiently (like applying the law of the circuit in

[314] *Assessment of the Migrant Protection Protocols (MPP) October 28, 2019.* U.S. DEP'T OF HOMELAND SECURITY (Oct. 28, 2019), at 7. Source: https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf .

[315] *See* fn. 308.

which the alien is encountered instead of the circuit law most favorable to the alien's claim and raising the standard for showing a credible fear of torture).

Such improvements would reduce the amount of time that applicants with non-meritorious claims spend in CBP and ICE custody and alleviate the burdens on agents and asylum officers.

If Congress wants DHS to expand its use of expedited removal, however, it should increase the resources available to the department to detain encountered aliens pending that process and to require the department to utilize those resources.

Conclusion

In his 1995 State of the Union Address[316], then-President Clinton explained:

> *All Americans, not only in the states most heavily affected, but in every place in this country, are rightly disturbed by the large numbers of illegal aliens entering our country. The jobs they hold might otherwise be held by citizens or legal immigrants. The public service[s] they use impose burdens on our taxpayers. . .. We are a nation of immigrants. But we are also a nation of laws. It is wrong and ultimately self-defeating for a nation of immigrants to permit the kind of abuse of our immigration laws we have seen in recent years, and we must do more to stop it.*

More than 26 years later, during a September 28, 2021, interview[317] with *ABC*'s "Good Morning America", former President Obama explained the dilemma that faces the United States when it comes to securing the border:

> *Immigration is tough. It always has been because, on the one hand, I think we are naturally a people that wants to help others. And we see tragedy and hardship and families that are desperately trying to get here so that their kids are safe, and they're in some cases fleeing violence or catastrophe. ... At the same time, we're a nation state. We have borders. The idea that we can just have open borders is something that ... as a practical matter, is unsustainable.*

Those two statements—one by a then-serving president and one by a retired president-- aptly describe the biggest challenges our federal government face when dealing with the ongoing surge of illegal immigration at the Southwest border: balancing our humanitarian interests as a people with our critical need to prevent exploitation of those interests and control illegal immigration.

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[316] *Administration of William J. Clinton, 1995/Jan. 24, Address Before a Joint Session of the Congress on the State of the Union*, U.S. GOV'T PRINTING OFF. (Jan. 24, 1995), at 80-81. Source: https://www.govinfo.gov/content/pkg/PPP-1995-book1/pdf/PPP-1995-book1-doc-pg75.pdf.

[317] *See* Zaru, Dayna, Ghebremedhin, Sabina, and Anderson, Jade. *Obama says Haitian migrants' plight is 'heartbreaking,' but Biden knows system is broken*. ABC NEWS (Sep. 28. 2021). Source: https://abcnews.go.com/Politics/obama-haitian-migrants-plight-heartbreaking-biden-system-broken/story?id=80267478.

As former Rep. Barbara Jordan (D-Tex.), then chairman of the U.S. Commission on Immigration Reform told this subcommittee in September 1994, however:

> *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.*[318]

Recent surveys have revealed that the current migrant crisis at the Southwest border, and its impacts on states, cities, and towns across the United States, are having exactly the impact Chairman Jordan warned about and predicted.

The latest Gallup polling[319] shows that 28 percent of Americans believe that "immigration" is the "most important problem facing the country", up from just 20 percent in January and the leading issue out of 15 surveyed.

Worse, 55 percent of those polled deemed "illegal immigration" to be a "critical threat" to the United States, a new high for an issue that Gallup has surveyed since 2004.[320]

A 2023 Gallup poll[321] from July 2023 showed that a majority of Americans, 68 percent, believe that "on the whole", immigration is a "good thing" for the country. That said, 27 percent deemed it to be a "bad thing", up from 19 percent four years prior, while the number of Americans who concluded that immigration is an overall good has declined from 77 percent in May 2020.

Given the importance of legal immigration to the United States, it is incumbent on Congress and the administration to reverse these trends and restore Americans' faith in and commitment to lawful immigration. That starts with securing the border.

Congress must provide the president the resources he needs to accomplish that task. But the president, like his immediate predecessors, already has ample statutory authorities in the INA to secure the border. How and whether the president chooses to use those authorities, however, is up to him.

Thank you again, and I look forward to your questions.

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[318] *Hearing before the Subcomm. on International Law, Immigration and Refugees of the H. Comm. on the Judiciary*, 103d Cong. (1994) (testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform), at 2. Source: https://www.numbersusa.com/testimony-of-barbara-jordan-before-the-house-judiciary-committee-august-3-1994-2/.

[319] Jones, Jeffrey M. *Immigration Surges to Top of Most Important Problem List*. GALLUP (Feb. 27, 2024). Source: https://news.gallup.com/poll/611135/immigration-surges-top-important-problem-list.aspx.

[320] *Id*.

[321] 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.