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To the  
Committee on Oversight and Accountability  
United States House of Representatives

For A Hearing Titled:  
“A Legacy of Incompetence: Consequences of the Biden-Harris Administration’s Policy  
Failures”  
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Chairman Comer, Ranking Member Raskin, and members of the committee, thank you for inviting me here today to discuss our nation’s ongoing immigration crisis and its impacts on the United States.

## Congress’ Plenary Authority Over Immigration

Key to understanding how immigration policy *should* work is recognizing where the immigration authority in this country rests.

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

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

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

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

*Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the*

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

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

<sup>3</sup> See sec. 101(a)(3) of the INA (2024) (“The term ‘alien’ means any person not a citizen or national of the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

<sup>4</sup> See section 101(a)(22) of the INA (2024) (“The term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

<sup>5</sup> *Constitution Annotated, Art. 58. C18.8.1 Overview of Congress’s Immigration Powers*. CONGRESSIONAL RESEARCH SERV. (undated). Source: [https://constitution.congress.gov/browse/essay/art1-58-C18-8-1/ALDE\\_00001255/](https://constitution.congress.gov/browse/essay/art1-58-C18-8-1/ALDE_00001255/).

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

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

*legislative and judicial tissues of our body politic as any aspect of our government. [Emphasis added.]*

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

Thus, when it comes to allowing aliens to enter and remain in the United States, Congress makes the rules and the executive is supposed to carry them out.

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

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

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

To implement its “policies pertaining to the entry of aliens”, Congress created an inspection protocol in section 235 of the INA<sup>11</sup> that U.S. Customs and Border Protection (CBP) officers (including Border Patrol agents) must follow when considering whether to admit an “applicant for admission”.<sup>12</sup>

That statutory term, “applicant for admission”, includes both aliens seeking entry at the ports of entry and migrants apprehended crossing the land and coastal borders between those ports<sup>13</sup>-- a fact essential to assessing the legality of what is occurring at the Southwest border now.

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

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

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

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

<sup>11</sup> Sec. 235 of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

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

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

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

Prior to that amendment, officers at the then-Immigration and Naturalization Service (INS)<sup>15</sup> — precursor to both CBP and U.S. Immigration and Customs Enforcement (ICE) in immigration enforcement — were required by case law to apply a factual and legal analysis known as the “entry doctrine”<sup>16</sup> 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<sup>17</sup>, and on 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<sup>18</sup> and received few constitutional protections.<sup>19</sup>

Aliens who had entered the country — even illegally — and who did so “free from actual and constructive restraint”<sup>20</sup> were placed into deportation proceedings under then-section 242 of the INA<sup>21</sup>, in which they were accorded greater rights and procedural benefits.

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

Applying the entry doctrine was challenging, however, in cases involving aliens who had entered illegally.<sup>23</sup> Did the alien “actually and intentionally evade inspection”? Was the alien “free from

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

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

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

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

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

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

<sup>20</sup> *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973). Source:

[https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals\\_of\\_Immigration\\_Law.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf).

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

<sup>22</sup> See fn. 19 (*Shaughnessy*).

<sup>23</sup> See *Matter of G-*, 20 I&N Dec. 764 (BIA 1993) (“The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States. In the case of the Golden

official restraint”<sup>24</sup> Application of the entry doctrine required a time- and resource-intensive analysis of often disputed facts.

In its IIRIRA amendments to section 235 of the INA, Congress dispensed with these questions by treating all “arriving aliens” — those at the ports and those apprehended entering illegally between them — as applicants for admission<sup>25</sup>, subject to what is now called “inadmissibility” under section 212 of the INA.

In place of exclusion and deportation proceedings, Congress created a single process in which the inadmissibility or deportability of every alien was determined and eligibility for relief assessed, known as “removal proceedings”.<sup>26</sup>

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA<sup>27</sup>, which mandates that all applicants for admission be “inspected by immigration officers” to determine whether they are inadmissible under any of the grounds of inadmissibility in section 212(a) of the INA.

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

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

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

<sup>25</sup> See Sec. 235(a)(1) of the INA (2024) (“Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>26</sup> See Sec. 240(a)(1) of the INA (2024) (“Removal proceedings. (a) Proceeding (1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Source:

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

<sup>27</sup> Sec. 235(a)(3) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

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

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

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

Section 235(b)(1)(A)(i) of the INA<sup>30</sup> 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-- “unless the alien indicates either an intention to apply for asylum ... or a fear of persecution”. This process is known as “expedited removal”.

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

The term “credible fear of persecution” is defined in section 235(b)(1)(B)(v) of the INA<sup>31</sup> as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under” section 208 of the INA.

Thus, it is a screening standard, to determine whether the alien *may* be eligible for asylum.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA<sup>32</sup>, that aliens “*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed”, and is equally clear in section 235(b)(1)(B)(ii) of the INA<sup>33</sup> that if an asylum officer “determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*” (emphasis added).

Detention in this context is critical to the credibility of this process because the credible fear standard is low and because, as I will explain below, asylum is particularly susceptible to fraud.

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<sup>29</sup> 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>.

<sup>30</sup> 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>.

<sup>31</sup> Sec. 235(b)(1)(B)(v) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>32</sup> Sec. 235(b)(1)(B)(iii)(V) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>33</sup> Sec. 235(b)(1)(B)(ii) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

The release of aliens who pass credible fear incentivizes other alien applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief.

With only extremely limited exceptions<sup>34</sup>, the “consideration of the application for asylum” in that context is performed by an immigration judge in removal proceedings under section 240 of the INA.<sup>35</sup>

The other choice immigration officers — again, OFO CBP officers at the ports or Border Patrol agents between them — have during the inspection protocol under section 235 of the INA in the case of “applicants for admission” inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat them the same as aliens inadmissible under the other grounds in section 212(a)(2) of the INA, and to place them directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA.<sup>36</sup>

### “Parole”

Although section 235(b) of the INA requires the Department of Homeland Security (DHS) to detain inadmissible applicants for admission, Congress gave DHS extremely limited authority in section 212(d)(5)(A) of the INA<sup>37</sup> to “parole” individual aliens into the United States in exceptional or emergent circumstances.

That provision<sup>38</sup> states, in pertinent part, that the DHS secretary:

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

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

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<sup>34</sup> Arthur, Andrew. *Biden Administration to ‘Pause’ Radical Asylum Officer Rule*. CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2023). Source: <https://cis.org/Arthur/Biden-Administration-Pause-Radical-Asylum-Officer-Rule>.

<sup>35</sup> See sec. 240 of the INA (2024) (“Removal proceedings”); see also *id.* at para. (a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *id.* at para. (c)(4) (“Applications for relief from removal”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>; *id.* at para. (c)(4) (“

<sup>36</sup> See section 235(b)(2)(A) of the INA (2024) (“in the case of an alien who is an applicant for admission, if the examining immigration officer *determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted*, the alien shall be detained for a” removal proceeding under section 240 of the INA) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>37</sup> Sec. 212(d)(5)(A)(1) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>38</sup> *Id.*



First, parole may only be granted “on a case-by-case basis”<sup>39</sup>, and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens, or programmatically.

Second, DHS may only grant parole for either “urgent humanitarian reasons” or for “significant public benefit”.<sup>40</sup> Granting parole for any other purpose is thus *ultra vires*<sup>41</sup>, 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 he or she held when parole was granted.

Consequently, an alien apprehended entering illegally without proper documents (as nearly all are) or who has been deemed inadmissible at a port of entry under section 212(a)(7)(A)(i) of the INA, and who has been paroled, remains amenable to expedited removal once “the purposes of such parole . . . have been served” and parole is revoked.

Congress first provided the executive branch with that parole authority when it enacted the INA in 1952<sup>42</sup>, at which time the parole statute read as follows:

*The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe **for emergent reasons or for reasons deemed strictly in the public interest** any alien applying for admission to the United States, but such parole of such alien shall not be 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 officer given the statutory authority to grant parole under the Homeland Security Act of 2002<sup>43</sup> (although the current text has not been formally amended), but most importantly the highlighted text reveals the tighter restrictions Congress has placed on the DHS secretary in granting parole in the intervening seven decades.

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

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

<sup>41</sup> See *ultra vires*. Legal Information Institute (undated) (“Latin, meaning ‘beyond the powers.’ Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.”). Source: [https://www.law.cornell.edu/wex/ultra\\_vires](https://www.law.cornell.edu/wex/ultra_vires).

<sup>42</sup> Sec. 212(d)(5) of the Immigration and Nationality Act of 1952, Pub. L. 88-414, 66 Stat. 188 (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>43</sup> Homeland Security Act of 2002, Pub. L. 107-206 (2002). Source: <https://www.congress.gov/bill/107th-congress/house-bill/5005/text>; see also *id.* at sec. 471(a) (“Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.”).



Congress rigidly cabined the parole authority in IIRIRA because various administrations had abused parole to ignore its plenary power over immigration and exceed the limits it set on the annual admission of immigrants.<sup>44</sup>

Note that when Congress amended the parole provision in IIRIRA<sup>45</sup>, it did so under the title “Limitation on the Use of Parole”<sup>46</sup>, clearly expressing its intent to restrain the parole authority.

In its 2011 opinion in *Cruz-Miguel v. Holder*<sup>47</sup>, the Second Circuit described how IIRIRA amended the parole statute and explained why Congress had constrained the executive’s parole power therein:

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

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

Fortunately, the then-INS explained in detail what their predecessor phrases — “emergent reasons” and “reasons deemed strictly in the public interest” — meant when it first promulgated<sup>48</sup> a 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.” [Emphasis added.]*

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<sup>44</sup> See Fishman, George. *The Pernicious Perversion of Parole, A 70-year battle between Congress and the president*. CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2022). Source: <https://cis.org/Report/Pernicious-Perversion-Parole>.

<sup>45</sup> Tit. VI, sec. 602 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009–689 (1996). Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

<sup>46</sup> *Id.*

<sup>47</sup> *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011). Source: <https://casetext.com/case/cruz-miguel-v-holder>.

<sup>48</sup> *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul. 9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

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

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

I note, however, that the current version of the parole regulation, 8 CFR § 212.5<sup>49</sup>, states:

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

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

That seemingly broad regulatory catch-all parole authority, however, actually derives from the aforementioned 1982 parole regulation, when that provision<sup>50</sup> read as follows:

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

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

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

## **Border Security Before Biden**

When President Biden took office, he inherited what his first Border Patrol chief, Rodney Scott, described in a September 2021 letter to Senate leadership as “arguably the most effective border security in” U.S. history.<sup>51</sup>

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<sup>49</sup> 8 CFR § 212.5 (2024). Source: <https://www.law.cornell.edu/cfr/text/8/212.5>.

<sup>50</sup> See 8 CFR § 212.5(2) (1982) as amended by *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul.9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

<sup>51</sup> Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

The new administration, Scott complained, allowed border security to quickly “disintegrate” as “inexperienced political appointees” ignored “common sense border security recommendations from experienced career professionals.”<sup>52</sup>

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

**Remain in Mexico.** The most notable Trump border security program — and arguably the most effective — was the Migrant Protection Protocols (MPP)<sup>53</sup>, better known as “Remain in Mexico”.

MPP was first implemented by then-DHS Secretary Kirstjen Nielsen in January 2019<sup>54</sup>, and it allowed DHS to return certain “other than Mexican” (OTM) migrants who entered illegally or without proper documents at the Southwest border back to Mexico to await removal hearings.<sup>55</sup>

Remain in Mexico was premised on DHS’s authority in section 235(b)(2)(C) of the INA<sup>56</sup> to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings. Aliens subject to MPP were thereafter paroled into the United States to apply for asylum at port courts<sup>57</sup>, while the Mexican government agreed to provide them with protection for the duration of their stays in that country.

The program was expanded from a pilot site in San Ysidro, Calif.<sup>58</sup> in late January 2019, to Calexico, Calif.<sup>59</sup>, and El Paso, Texas.<sup>60</sup> in March of that year, and then in July 2019<sup>61</sup> to Laredo

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<sup>52</sup> *Id.*

<sup>53</sup> See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019). Source: [https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20\(MPP,of%20their%20immigration%20proceedings%2C%20w here.](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20(MPP,of%20their%20immigration%20proceedings%2C%20w here.)

<sup>54</sup> *Id.*

<sup>55</sup> Arthur, Andrew. *Why Trump’s Border Security Didn’t Last, Part 3*. CENTER FOR IMMIGRATION STUDIES (Jul. 17, 2023). Source: <https://cis.org/Arthur/Why-Trumps-Border-Security-Didnt-Last-Part-3>.

<sup>56</sup> See section 235(b)(2)(C) of the INA (2024) (“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>.

<sup>57</sup> Arthur, Andrew. *Tent Courts Aren’t Tents — and Provide Due Process. Inside the Laredo MPP hearing facility, and then the view from the other side*. CENTER FOR IMMIGRATION STUDIES (Feb. 4, 2020). Source: <https://cis.org/Arthur/Tent-Courts-Arent-Tents-and-Provide-Due-Process>.

<sup>58</sup> Averbuch, Maya and Sieff, Kevin. *Asylum seeker is sent back to Mexico as Trump administration rolls out new policy*. WASHINGTON POST (Jan. 29, 2019). Source: [https://www.washingtonpost.com/world/the\\_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084\\_story.html](https://www.washingtonpost.com/world/the_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084_story.html).

<sup>59</sup> Rose, Joel. *‘Remain In Mexico’ Immigration Policy Expands, But Slowly*. NPR (Mar. 12, 2019). Source: <https://www.npr.org/2019/03/12/702597006/-remain-in-mexico-immigration-policy-expands-but-slowly>.

<sup>60</sup> Montes, Aaron. *El Paso begins Trump policy that sends migrant asylum seekers back to Mexico*. EL PASO TIMES (Mar. 16, 2019). Source: <https://www.elpasotimes.com/story/news/immigration/2019/03/16/trump-immigration-metering-policy-migrant-protection-protocols-implemented-el-paso-juarez/3177682002/>.

<sup>61</sup> Roldan, Riane. *Asylum seekers will appear before judges via teleconferencing in tents as “Remain in Mexico” program expands to Laredo*. TEXAS TRIBUNE (Jul. 9, 2019). Source: <https://www.texastribune.org/2019/07/09/remain-mexico-program-expands-laredo-texas/>.

and Brownsville (both in Texas) before finally it was expanded to the Arizona border town of Nogales<sup>62</sup> in the late fall.

When it was fully implemented, nearly 70,000 migrants<sup>63</sup> were sent back across the Southwest border to await their removal hearings under MPP.

In its October 2019 assessment<sup>64</sup> of the program, DHS lauded MPP as “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 protection claims when apprehended.<sup>65</sup>

That’s because many if not most of those aliens requesting asylum at the border aren’t seeking protection so much as they are coming to live and work here for the time (usually years<sup>66</sup>) that it takes for their claims to be heard. Remain in Mexico denied them the ability to do so.

Returning those migrants to Mexico also enabled the Trump administration to comply with Congress’s directive to DHS<sup>67</sup> in section 235(b) of the INA<sup>68</sup> not to release inadmissible aliens stopped at the border and ports into the United States until they receive asylum or are removed, as described above

DHS’s assessment of the program aside, the impact of Remain in Mexico is clear from CBP’s own statistics. In May 2019<sup>69</sup>, before MPP was fully implemented, Border Patrol agents at the Southwest border apprehended nearly 133,000 illegal entrants, 63.6 percent of whom (nearly 84,500) were adult aliens travelling with children in family units<sup>70</sup> (FMUs).

Four months later, in September, apprehensions dropped to fewer than 41,000, fewer than 40 percent (15,824) of them in FMUs<sup>71</sup>. That’s a four-month overall decline of nearly 70 percent, and an 81 percent decline in family apprehensions over that period.

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<sup>62</sup> Prendergast, Curt. *Remain in Mexico' program begins in Nogales*. TUCSON.COM (Dec. 17, 2019). Source: [https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article\\_95f757ac-1851-11ea-b29e-47f1d679e3d8.html](https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article_95f757ac-1851-11ea-b29e-47f1d679e3d8.html).

<sup>63</sup> *Fact Sheet: The “Migrant Protection Protocols”*. AMERICAN IMMIGRATION COUNCIL (Jan. 7, 2022). Source: <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

<sup>64</sup> *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP’T OF HOMELAND SECURITY (October 28, 2019). Source: [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf).

<sup>65</sup> See *id.*

<sup>66</sup> See *Immigration Court Asylum Backlog*. TRAC IMMIGRATION (undated) (average days pending nationwide from court filing to asylum hearing is 889 days—more than years— through the end of December 2023). Source: <https://trac.syr.edu/phptools/immigration/asylumbl/>.

<sup>67</sup> Arthur, Andrew. *DHS Can’t Just Release Illegal Migrants at the Border*. CENTER FOR IMMIGRATION STUDIES (Oct. 22, 2021). Source: <https://cis.org/Arthur/DHS-Cant-Just-Release-Illegal-Migrants-Border>.

<sup>68</sup> See secs. 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV), and 235(b)(2)(A) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>69</sup> *Southwest Border Migration FY 2019*. U.S. Customs and Border Protection (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>70</sup> *Id.*

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

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

As a bipartisan federal panel<sup>72</sup> tasked with examining a then-massive surge in family entries in FY 2018 and FY 2019<sup>73</sup> determined in an April 2019 report<sup>74</sup>:

*Migrant children are traumatized during their journey to and into the U.S. The journey from Central America through Mexico to remote regions of the U.S. border is a dangerous one for the children involved, as well as for their parent. There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money.*

.....

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

With respect to minors, the panel report explained: “In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States. . . .”<sup>75</sup>

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<sup>72</sup> See Arthur, Andrew. *2019 Bipartisan Border Plan Would Solve Today's Migrant Crisis, Tell Biden, Mayorkas, and Congress: 'Read the damn report!'*. CENTER FOR IMMIGRATION STUDIES (Mar. 16, 2021) (“Karen Tandy, the chairwoman, was originally appointed to that position by Jeh Johnson, the last DHS secretary under the Obama/Biden administration. Jim Jones, chairman of Monarch Global Strategies, was initially appointed to the panel by the first Obama/Biden DHS Secretary Janet Napolitano. And Leon Fresco was a principal advisor to Sen. Chuck Schumer (D-N.Y.) when Schumer was chairman of the Senate Judiciary Subcommittee on Immigration. After that, he was deputy assistant attorney general for the Office of Immigration Litigation. In that role, he was the Obama/Biden administration's immigration lawyer at the Justice Department.”). Source: <https://cis.org/Arthur/2019-Bipartisan-Border-Plan-Would-Solve-Todays-Migrant-Crisis>.

<sup>73</sup> See *Total Family Unit Apprehensions By Month - FY 2018* and *Total Family Unit Apprehensions By Month - FY 2019*. U.S. Border Patrol (undated) (107,212 FMU Border Patrol Southwest border apprehensions in FY 2018 and 473,682 FMU Border Patrol Southwest border apprehensions in FY 2019). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf).

<sup>74</sup> *Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019), at 6. Source: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

<sup>75</sup> *Id.* at 1.

Apprehensions kept falling thereafter even prior to the implementation of Title 42 in March 2020<sup>76</sup>, to fewer than 30,000 in January 2020<sup>77</sup> (fewer than 5,200 in family units, 17.6 percent of the total), before rising slightly to just over 30,000 the next month (just 15.3 percent in FMUs).

**PACR and HARP.** To speed the review of credible fear claims by illegal entrants, the Trump administration implemented two separate border programs<sup>78</sup>: Prompt Asylum Case Review (PACR<sup>79</sup>), for aliens from Central America; and Humanitarian Asylum Review Program (HARP), for Mexican nationals. Under PACR and HARP, credible fear interviews were conducted while illegal entrants were in CBP custody.

The Government Accountability Office (GAO) has reported<sup>80</sup> that PACR was launched as a pilot program in El Paso in October 2019, with Border Patrol leadership expanding it to the component's Rio Grande Valley (Texas) sector in December 2019 and Yuma (Ariz.) sector in January 2020.<sup>81</sup> Those sectors were chosen because each had temporary structures where migrants subject to that process could be housed.

HARP, on the other hand, started out<sup>82</sup> under the auspices of OFO at the border ports in October 2019, before being expanded to Border Patrol in January 2020.<sup>83</sup> At that point, inadmissible aliens encountered by OFO were sent to Border Patrol for HARP processing.<sup>84</sup>

All told, according to GAO, nearly 5,300 aliens<sup>85</sup> encountered by CBP at the Southwest border were subject to PACR and HARP through September 2020. Of that total, 1,210 received positive credible fear determinations and were sent to immigration court, while more than 3,700 were removed.<sup>86</sup>

While those numbers are relatively small, by ensuring that inadmissible applicants for removal would have their credible fear claims screened quickly while they were in custody, PACR and HARP preserved ICE detention resources while allowing CBP to employ Congress's expedited removal process<sup>87</sup> And because many of those aliens were removed before ICE had to release

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<sup>76</sup> Arthur, Andrew. *SCOTUS Keeps Title 42 Going — For Now*. CENTER FOR IMMIGRATION STUDIES (Dec. 28, 2022). Source: <https://cis.org/Arthur/SCOTUS-Keeps-Title-42-Going-Now>.

<sup>77</sup> *Southwest Border Migration FY 2020*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sept. 19, 2023). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>.

<sup>78</sup> Misra, Tanvi and DeChalus, Camila. *DHS expands programs that fast-track asylum process*. THE HILL (Feb. 26, 2020). Source: <https://rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>.

<sup>79</sup> Montoya-Galvez, Camilo. *Program to expedite deportations of asylum-seekers at border expands*. CBS NEWS (Dec. 31, 2019). Source: <https://www.cbsnews.com/news/immigration-program-expediting-deportations-of-asylum-seekers-at-border-expands/>.

<sup>80</sup> *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry*. GOV'T ACCOUNTABILITY OFC. (Jan. 2021). Source: <https://www.gao.gov/assets/720/711974.pdf>.

<sup>81</sup> *Id.*

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

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

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

<sup>85</sup> *See id.* ("DHS data indicate that CBP identified approximately 5,290 individuals who were eligible for screening under the pilot programs.")

<sup>86</sup> *Id.*

<sup>87</sup> *See* sec. 235(b)(1) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. *See also infra*.



them, it lessened the likelihood that inadmissible aliens without asylum claims could exploit the system.

**Asylum Reforms.** Asylum is the most significant statutory exception to the limitations<sup>88</sup> Congress has placed in the INA on immigration to the United States. And it is likely the most abused.

As the Supreme Court has held, “Many ask for asylum, claiming that they would be persecuted if returned to their home countries. ... Most asylum claims, however, ultimately fail, and some are fraudulent.”<sup>89</sup>

According to the Department of Justice (DOJ)<sup>90</sup>, of the aliens subject to expedited removal between FY 2008 and FY 2019 who claimed a fear of harm or requested asylum, USCIS asylum officers found that 81 percent had a credible fear of persecution or torture<sup>91</sup>, and 2 percent were determined to have a credible fear by immigration judges on review<sup>92</sup> — 83 percent in total.

Of those aliens determined to have a credible fear of persecution or torture, however, fewer than 17 percent<sup>93</sup> (14 percent of the total of aliens who had requested asylum or claimed a fear of harm) were ultimately granted asylum. By contrast, 32.5 percent of the aliens found to have a credible fear were ordered removed *in absentia* when they failed to appear in court.<sup>94</sup>

With respect to fraud, evidence presented at a 2014 congressional hearing<sup>95</sup> revealed USCIS had determined “only 30 percent of asylum cases from a random sample were confirmed to be fraud-free”<sup>96</sup>.

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<sup>88</sup> See *Tit. II, chap. 1 of the INA, sections 201 through 210*. Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGI0bGU4LXNlY3Rpb24xMjMx%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>.

<sup>89</sup> *DHS v. Thuraissigiam*, 591 U.S. \_\_\_, slip op. at 1 (2020). Source: [https://www.supremecourt.gov/opinions/19pdf/19-161\\_g314.pdf](https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf).

<sup>90</sup> *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

<sup>91</sup> See sec. 235(b)(1)(B)(v) of the INA (2024) (defining “credible fear of persecution”). Source:

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>92</sup> See sec. 235(b)(1)(B)(iii)(III) of the INA (2024) (“Review of determination. The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>93</sup> *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

<sup>94</sup> *Id.*

<sup>95</sup> See Vaughan, Jessica. *House Hearing on Asylum Reveals Rampant Fraud, More Abuse of Executive Discretion*. CENTER FOR IMMIGRATION STUDIES (Feb. 11, 2014). Source: <https://cis.org/Vaughan/House-Hearing-Asylum-Reveals-Rampant-Fraud-More-Abuse-Executive-Discretion>.

<sup>96</sup> *Id.*

One of the reasons why asylum is so susceptible to fraud is clear from the asylum statute itself, section 208 of the INA.<sup>97</sup> Clause (b)(1)(B)(ii)<sup>98</sup> therein, which governs the alien’s burden for obtaining that protection, states that:

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

Thus, and logically (persecutors are unlikely to provide corroborating evidence), extrinsic or documentary evidence is not 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<sup>99</sup> also states clearly that: “Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”

There are few restrictions<sup>100</sup> barring aliens in the United States from seeking asylum. Notably, section 208(a)(1) of the INA<sup>101</sup> states: “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival...), irrespective of such alien's status, may apply for asylum.”

An administration can implement immigration policy changes either through procedural rulemaking (by publishing new regulations) or binding precedential decisions<sup>102</sup> issued by the

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<sup>97</sup> Sec. 208 of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

<sup>98</sup> *Id.* at cl. (b)(1)(B)(ii).

<sup>99</sup> *Id.*

<sup>100</sup> See section 208(a)(2) of the INA (2024) (“Exceptions. (A) Safe third country. Paragraph [208(a)(1) of the INA] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States. (B) Time limit. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. (C) Previous asylum applications. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien if the alien has previously applied for asylum and had such application denied. (D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph [208(a)(2)(B) of the INA] . . .”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

<sup>101</sup> Sec. 208(a)(1) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

<sup>102</sup> Arthur, Andrew. *AG Certification Explained*. CENTER FOR IMMIGRATION STUDIES (Nov. 5, 2019). Source: <https://cis.org/Arthur/AG-Certification-Explained>.

attorney general, whose determinations, under the INA, control “all questions of law”<sup>103</sup>. With respect to asylum, the Trump administration used both.

Of course, regardless of which path an administration takes, the resulting policy is subject to judicial review. If either a precedent decision or a regulation is blocked by a district court (through injunction, vacatur, restraining order, or in the case of precedent, reversal), it can take years — absent a stay — for a final ruling to be issued by either a circuit court or the Supreme Court, during which time the policy languishes.

In his June 2018 decision in *Matter of A-B*<sup>104</sup>, then-Attorney General Sessions provided bright-line rules for adjudicators (including immigration judges and asylum officers) to follow when considering asylum claims by aliens who assert they fear “persecution” at the hands of non-state criminal actors — usually gangs or spousal abusers. Those are the among the most common border claims.

That December, however, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia permanently enjoined<sup>105</sup> that decision as it related to credible fear claims.

By statute<sup>106</sup>, 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, however, that his limited review authority gave him jurisdiction. The D.C. Circuit concurred, largely affirming that order in a July 2020 opinion.<sup>107</sup>

In July 2019, the Trump administration published a “safe-third country” rule<sup>108</sup> that would have required illegal entrants and other aliens without proper documents at the Southwest border to apply for asylum or protection against torture in a third country where protection was available through which those aliens passed before seeking that protection in the United States.

Given that every country in the Western Hemisphere — save Cuba (an island) and Guyana (an isolated and largely coastal enclave) — grants some form of asylum protection<sup>109</sup>, it is not unreasonable to require foreign nationals to seek humanitarian protection in any country they pass through before they are allowed to apply for asylum in the United States.

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<sup>103</sup> See sec. 103(a)(1) of the INA (2024) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim>.

<sup>104</sup> *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018). Source: <https://www.justice.gov/eoir/page/file/1070866/download>. *Vacated*, *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

<sup>105</sup> See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). Source: <https://casetext.com/case/grace-v-whitaker>.

<sup>106</sup> Sec. 242(e)(3)(A) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

<sup>107</sup> *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). Source: <https://casetext.com/case/grace-v-barr>.

<sup>108</sup> *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (Jul. 16, 2019). Source: <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

<sup>109</sup> *World: State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol - As of September 2012*. United Nations Office for the Coordination of Humanitarian Affairs (Sep. 11, 2012). Source: <https://reliefweb.int/map/world/world-state-parties-1951-convention-relating-status-refugees-and-or-its-1967-protocol>.

Nonetheless, a U.S. district court judge in Oakland, Calif., quickly enjoined<sup>110</sup> that rule. That wasn't much of a surprise, however, because a few months earlier the same judge had blocked<sup>111</sup> a different Trump rule<sup>112</sup> that rendered illegal entrants ineligible for asylum.

In any event, the Ninth Circuit affirmed the district court injunction of Trump's safe-third country rule in July 2020.<sup>113</sup>

Finally, in December 2020 — the month after Trump lost reelection — the administration published a regulation<sup>114</sup> that would have (among other things) clarified and limited asylum eligibility and raised the regulatory standard of proof for reasonable fear claims. It was enjoined<sup>115</sup> less than a month later by a different district court judge, this one in San Francisco.

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

Using his foreign policy power, Trump negotiated safe third country “Asylum Cooperative Agreements” (“ACAs”) with El Salvador, Guatemala, and Honduras.<sup>116</sup>

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

While the ACAs with El Salvador and Honduras weren't implemented before the Covid-19 pandemic was announced in March 2020 (they came into force in December<sup>117</sup> of that year), the United States did send more than 900 third-country nationals to Guatemala<sup>118</sup> prior to the pandemic, most of them from El Salvador and Honduras.

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<sup>110</sup> *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. 2019). Source:

[https://scholar.google.com/scholar\\_case?case=15492460766902773338&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=15492460766902773338&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>111</sup> *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST, Order Granting Temporary Restraining Order; Order to Show Cause Re Preliminary Injunction (N.D. Cal. Nov. 19, 2018). Source: [https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/east-bay-sanctuary-v-trump-ist/C18-6810-JST\\_Order-Granting-TRO.pdf](https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/east-bay-sanctuary-v-trump-ist/C18-6810-JST_Order-Granting-TRO.pdf).

<sup>112</sup> *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*. 83 Fed. Reg. 55934 (Nov. 9, 2018). Source: <https://www.govinfo.gov/content/pkg/FR-2018-11-09/pdf/2018-24594.pdf>.

<sup>113</sup> *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). Source:

[https://scholar.google.com/scholar\\_case?case=717263077632091124&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=717263077632091124&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>114</sup> *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*. 85 Fed. Reg. 80274 (Dec. 11, 2020). Source: <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

<sup>115</sup> *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). Source: <https://casetext.com/case/pangea-legal-servs-v-us-dept-of-homeland-sec-1>.

<sup>116</sup> *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*. U.S. Dep't of Homeland Security (undated). Source: [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).

<sup>117</sup> *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, U.S. Dep't of Homeland Security (Dec. 29, 2020). Source: <https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation>.

<sup>118</sup> Sieff, Kevin and Sheridan, Mary Beth. *The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says*, WASHINGTON POST (Jan. 16, 2021). Source:

[https://www.washingtonpost.com/world/the\\_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/world/the_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html).

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

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

As AP explained in December 2019<sup>119</sup>, Trump “threatened crippling tariffs on all Mexican goods unless Mexico stepped up efforts to curb the flow of migrants. Mexico responded by deploying thousands of members of its newly formed National Guard along migration routes.” Illegal migrants can’t cross the Southwest border if they are unable to get there, and due to the pressure that the Mexican government imposed, many couldn’t.

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

Although as noted *infra*, Chief Scott blamed the rapid decline in border security under the Biden administration on “inexperienced political employees” who “ignored and stymied” what he referred to as “[c]ommon sense border security recommendations from experienced career professionals”<sup>120</sup>, they were plainly taking their lead if not directions from the White House.

Notably, while Joe Biden had campaigned on reversing Trump’s border policies (including and especially MPP), as president-elect he explained he would end those policies “at a slower pace than he initially promised, to avoid winding up with ‘2 million people on our border’”, and only after “‘setting up the guardrails’ to find a solution to the immigration issue”.<sup>121</sup>

Despite that promise, once in the Oval Office, Biden quickly ended nearly all the Trump policies that had created the border security that Scott described in the first place: PACR and HARP were ended by executive order on February 2, 2021<sup>122</sup>; the Secretary of State announced<sup>123</sup> — “[i]n line with the President’s vision” — that the administration was suspending and terminating the

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<sup>119</sup> *What crackdown? Migrant smuggling business adapts, thrives.* ASSOCIATED PRESS (Dec. 19, 2019). Source: <https://apnews.com/article/us-news-ap-top-news-international-news-az-state-wire-immigration-202a751ac3873a802b5da8c04c69f2fd>.

<sup>120</sup> Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>121</sup> Miroff, Nick, and Sacchetti, Maria. *Biden says he’ll reverse Trump immigration policies but wants ‘guardrails’ first.* WASHINGTON POST (Dec. 22, 2020). Source: [https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16\\_story.html](https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html).

<sup>122</sup> *Executive Order 14010, “Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”*, 86 Fed. Reg. 8267 (Feb. 2, 2021). Source: <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

<sup>123</sup> Blinken, Anthony J. *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras.* U.S. DEPT OF STATE (Feb. 6, 2021). Source: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.



ACAs four days later; Attorney General Merrick Garland vacated Sessions’ order in *Matter of A-B-* in June 2021<sup>124</sup>; and DHS suspended new enrollments in MPP hours after the inauguration.<sup>125</sup>

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

Nowhere is this shift better demonstrated than in an exchange between DHS Secretary Alejandro Mayorkas and Bret Baier, on the May 1, 2022, edition of “Fox News Sunday”.<sup>126</sup> Baier asked Mayorkas: “Is it the objective of the Biden administration to reduce, sharply reduce, the total number of illegal immigrants coming across the southern border? Is that the objective?”<sup>127</sup>

To which Mayorkas replied: “It is the objective of the Biden administration to make sure that we have safe, legal, and legal pathways to individuals to be able to access our legal system.”<sup>128</sup>

By “access our legal system”, Mayorkas means to “apply for asylum”, and in fact the Biden-Harris administration has treated illegal entrants as “asylum seekers”, regardless of the strength of their claims or even whether they come seeking asylum at all.<sup>129</sup>

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

Illegal entry is both a civil violation (subjecting the offender to removal) and a criminal offense, punishable as a misdemeanor carrying a sentence of up to six-months and a fine for the first offense and a felony subject to up to two years’ imprisonment and a fine for subsequent offenses under section 275 of the INA.<sup>130</sup>

Criminal prosecutions under this provision peaked in 2018 and 2019 under Trump and then plummeted with the onset of the Covid-19 pandemic, which reduced detention space.<sup>131</sup> Even as illegal entries surged under the Biden administration and pandemic-related restrictions on

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<sup>124</sup> *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

<sup>125</sup> *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*. U.S. Dep’t of Homeland Security (Jan. 20, 2021). Source: <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

<sup>126</sup> *Sec. Mayorkas: 'I'm looking forward to testifying before the US Senate'*. Fox News (May 1, 2022). Source: <https://www.foxnews.com/video/6305481541112>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Arthur, Andrew. *Biden’s Plan to Enable Everyone in the World to Apply for Asylum in the U.S.* CENTER FOR IMMIGRATION STUDIES (May 11, 2022). Source: <https://cis.org/Arthur/Bidens-Plan-Enable-Everyone-World-Apply-Asylum-US>.

<sup>130</sup> Sec. 275(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1325&num=0&edition=prelim#:~:text=Any%20individual%20who%20knowingly%20establishes,%2C%20%A7275%2C%2066%20Stat>. Accessed on 1 Mar. 2023.

<sup>131</sup> *Major Swings in Immigration Criminal Prosecutions during Trump Administration*. TRAC IMMIGRATION (Dec. 18, 2020). Source: <https://trac.syr.edu/immigration/reports/633/>.



detention have eased, however, the number of prosecutions for improper entry has remained low.<sup>132</sup>

According to DOJ’s Prosecuting Immigration Crimes Report (PICR)<sup>133</sup>, in the first nine months of FY 2024, 4,718 defendants were referred to federal magistrate courts and 2,667 were referred to federal district courts for prosecution under section 275 of the INA, 7,385 referrals in total.

During that period, however, Border Patrol agents had apprehended nearly 1.381 million illegal entrants<sup>134</sup>, meaning that the referral rate for aliens who had improperly entered was just over 0.5 percent.

## Southwest Border Releases Under the Biden Administration

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

Since the start of the Biden-Harris administration, Border Patrol agents at the Southwest border have set new yearly records for migrant apprehensions, first in FY 2021, as agents apprehended nearly 1.6 million illegal migrants<sup>135</sup>, and again in FY 2022, as apprehensions exceeded 2.2 million.<sup>136</sup>

Despite that historically unprecedented surge in illegal migrants, however, the administration asked Congress to cut the number of beds DHS has available for immigration detainees, from 34,000 per day to 25,000 (a 26.5 percent reduction), in its FY 2024 budget request.<sup>137</sup>

While the administration’s FY 2025 budget request<sup>138</sup> would have left the number of daily ICE detention beds static at 34,000, there are still too few available to comply with congressional mandates.

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

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<sup>132</sup> *Criminal Immigration Referrals Up from the Border Patrol*. TRAC IMMIGRATION (Jul. 7, 2022). Source: <https://trac.syr.edu/immigration/reports/688/>.

<sup>133</sup> Prosecuting Immigration Crimes Report (PICR). U.S. DEP’T OF JUSTICE (updated Jul. 9, 2024). Source: <https://www.justice.gov/usao/resources/PICReport>.

<sup>134</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>135</sup> Arthur, Andrew. *All-Time Record for Southwest Border Apprehensions in FY 2021*. CENTER FOR IMMIGRATION STUDIES (Oct. 22, 2021). Source: <https://cis.org/Arthur/AllTime-Record-Southwest-Border-Apprehensions-FY-2021>.

<sup>136</sup> ARTHUR, Andrew. *Late Night CBP ‘News Dump’ Reveals the Border’s in Freefall*. CENTER FOR IMMIGRATION STUDIES (Oct. 24, 2022). Source: <https://cis.org/Arthur/Late-Night-CBP-News-Dump-Reveals-Borders-Freefall>.

<sup>137</sup> See *U.S. Immigration and Customs Enforcement, Budget Overview*. U.S. DEP’T OF HOMELAND SECURITY (Mar. 2023), at 18 (“This program change reduces average daily population (ADP) by 9,000, from an ADP of 34,000 in the FY 2023 Enacted to an ADP of 25,000 (including 1,000 beds funded via fees).”). Source: [https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT_Remediated.pdf).

<sup>138</sup> *FY 2025, Budget in Brief*. U.S. DEP’T OF HOMELAND SECURITY (undated), at 3. Source: [https://www.dhs.gov/sites/default/files/2024-03/2024\\_0311\\_fy\\_2025\\_budget\\_in\\_brief.pdf](https://www.dhs.gov/sites/default/files/2024-03/2024_0311_fy_2025_budget_in_brief.pdf).

The Center has conservatively estimated<sup>139</sup> that DHS under Biden-Harris released roughly 88.5 percent of all inadmissible applicants for admission encountered by CBP through the end of November 2023.

It should be noted that this figure includes more than 400,000 unaccompanied alien children (UACs) from “non-contiguous countries” (that is, every foreign country other than Mexico and Canada) apprehended by Border Patrol at the Southwest border since February 2021.<sup>140</sup>

Under section 235 of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>141</sup>, DHS is required to transfer UACs from non-contiguous countries to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) within 72 hours of encountering them, for placement with “sponsors” in the United States.

If those children were all in the same school district, it would be the third largest in the United States<sup>142</sup>, ahead of the Chicago school district — which has more than 378,000 students — in terms of enrollment. And that figure does not include children who entered in “family units”.

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

Initially, Border Patrol under the Biden administration released many of the aliens who were not expelled under Title 42 with “Notices to Report” (NTRs), documents directing those migrants to appear at an ICE office near their intended destinations in the United States within 60 days, at which time they would be served with a “Notice to Appear” (NTA), the charging document in removal proceedings.<sup>143</sup>

Not only were releases of illegal entrants without an NTA and a hearing date “unprecedented”<sup>144</sup>, releasing aliens on NTRs isn’t statutorily authorized under the INA. Not surprisingly, many of those migrants released with NTRs failed to later appear.<sup>145</sup> By October 2021, DHS had phased out NTR releases<sup>146</sup>, by which point<sup>147</sup> it had released 95,598 border migrants with Notices to Report.

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<sup>139</sup> *Have 70 Percent — or 85 Percent — of Illegal Migrants Been Released Under Biden? Likely more. DHS Secretary Mayorkas ‘knows the data’ — and so do the smugglers.* CENTER FOR IMMIGRATION STUDIES (Jan. 12, 2024). Source: <https://cis.org/Arthur/Have-70-Percent-or-85-Percent-Illegal-Migrants-Been-Released-Under-Biden>.

<sup>140</sup> *Nationwide Encounters.* U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>141</sup> Sec. 235, Pub. L. 110-457 (2008). Source: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text>.

<sup>142</sup> *Top 10 Largest School Districts by Enrollment and Per Pupil Current Spending.* U.S. CENSUS BUREAU (revised Oct. 28, 2021). Source: <https://www.census.gov/library/visualizations/2019/comm/largest-school-districts.html>.

<sup>143</sup> Kight, Stef. *Scoop: 50,000 migrants released; few report to ICE.* AXIOS (Jul. 27, 2021). Source: <https://www.axios.com/2021/07/27/migrant-release-no-court-date-ice-dhs-immigration>.

<sup>144</sup> *Id.*

<sup>145</sup> Arthur, Andrew. *Sen. Ron Johnson Releases Explosive Information on Migrant No-Shows.* CENTER FOR IMMIGRATION STUDIES (Jan. 12, 2022). Source: <https://cis.org/Arthur/Sen-Ron-Johnson-Releases-Explosive-Information-Migrant-NoShows>.

<sup>146</sup> Alvarez, Priscilla. *DHS stops releasing some migrants without providing immigration court dates.* CNN (Nov. 16, 2021). Source: <https://www.cnn.com/2021/11/16/politics/dhs-migrants-paperwork-ice-notice-to-appear/index.html>.

<sup>147</sup> *See Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

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

Since October 2021, the administration has been releasing border migrants encountered by CBP either on their own recognizance under section 236(a) of the INA<sup>148</sup> with “Notices to Appear”<sup>149</sup> (“NTAs”, the DHS charging documents placing aliens into removal proceedings) — a policy referred to as “NTA/OR” — or on parole.

Agents began releasing illegal entrants at the Southwest border on NTA/OR on President Biden’s first day in office (January 20, 2021), and by the end of FY 2021, had released more than 154,000 of them in this manner.<sup>150</sup>

Border Patrol agents at the Southwest border only started releasing illegal entrants on parole in August 2021<sup>151</sup>, and had granted parole to more than 25,000 apprehended migrants there by the end of FY 2021.

In FY 2022, more than 378,000 illegal migrants apprehended by Border Patrol at the Southwest border were paroled into the United States, while nearly 311,000 others were released on NTA/OR.<sup>152</sup>

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<sup>148</sup> See sec. 236(a) of the INA (2024) (“Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—(1) may continue to detain the arrested alien; and (2) may release the alien on— (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole; but (3) may not provide the alien with work authorization (including an ‘employment authorized’ endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>149</sup> See sec. 239(a)(1) of the INA (2024) (“Initiation of removal proceedings. (a) Notice to appear. (1) In general. In removal proceedings under [section 240 of the INA], written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated. (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection [239(b)(2) of the INA]. (F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under [section 240 of the INA]. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien’s address or telephone number. (iii) The consequences under [section 240(b)(5) of the INA] of failure to provide address and telephone information pursuant to this subparagraph. (G)(i) The time and place at which the proceedings will be held. (ii) The consequences under [section 240(b)(5) of the INA] of the failure, except under exceptional circumstances, to appear at such proceedings.”). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1229%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1229%20edition:prelim)).

<sup>150</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>151</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>152</sup> *Custody and Transfer Statistics FY2022, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2022). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>.

In FY 2023, Border Patrol agents paroled nearly 304,000 illegal migrants they apprehended at the Southwest border into the United States, and more than more than 793,000 others were released on their own recognizance with NTAs.<sup>153</sup>

While Border Patrol releases have declined since DHS issued an interim final rule captioned “Securing the Border” on June 7, 2024<sup>154</sup>, agents still released more than 840,000 migrants apprehended at the Southwest border on NTA/OR in the first 10 months of FY 2024<sup>155</sup>, a figure that does not include aliens transferred to ICE who were subsequently released by that agency.

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

Although CBP under President Biden has released hundreds of thousands of inadmissible applicants for admission under section 236(a) of the INA<sup>156</sup>, that provision provides CBP no authority to release border migrants.

By its express terms, that section of the INA gives DHS officers authority to arrest aliens on warrants.<sup>157</sup> After arrest, pursuant to that statute, DHS can continue to detain such aliens or to release them on bond or conditional parole.<sup>158</sup>

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

Congress gave Border Patrol agents the authority to make such warrantless arrests in section 287(a)(2) of the INA<sup>159</sup>. It states, in pertinent part:

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

As a formality, agents and officers may subsequently issue a “Warrant for Arrest” for such aliens, but that does not convert a warrantless arrest into an arrest on warrant that would allow

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<sup>153</sup> *Custody and Transfer Statistics FY2023, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Dec. 19, 2023). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>154</sup> *Securing the Border*, 89 Fed. Reg. 48710-772 (Jun. 7, 2024). Source: <https://www.govinfo.gov/content/pkg/FR-2024-06-07/pdf/2024-12435.pdf>.

<sup>155</sup> *Custody and Transfer Statistics FY2024, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>156</sup> Sec. 236(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Sec. 287(a)(2) of the INA (2024). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1357%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1357%20edition:prelim)).

for release under section 236(a) of the INA. Or, as one district court judge held<sup>160</sup> in March: “This sleight of hand — using an ‘arrest’ warrant as de facto ‘release’ warrant — is administrative sophistry at its worst.”

## **Biden-Harris Administration’s Parole Releases at the Border**

Nor is there any authority for CBP to release hundreds of thousands of border migrants on parole<sup>161</sup>, either.

By way of background, the Biden administration implemented two separate formal programs under which Border Patrol agents were directed to parole illegal entrants: “Parole+ATD” (parole under section 212(d)(5)(A)(1) of the INA plus so-called “alternatives to detention”<sup>162</sup>); and “Parole with Conditions” (PWC).

Parole+ATD came to light because of a suit<sup>163</sup> filed by the state of Florida in September 2021 captioned *Florida v. U.S. (Florida I)*. The state alleged<sup>164</sup> the administration was deliberately “ignoring” the congressional detention mandate in section 235(b) of the INA by releasing migrants apprehended at the border, directly resulting in fiscal harm to the state.

More than a year of discovery uncovered a November 2, 2021, memo<sup>165</sup> from then-Border Patrol Chief Raul Ortiz formally adopting Parole+ATD releases (although, as the court eventually found, the record established that Border Patrol “started using ‘parole’ as a means of improving ‘processing efficiencies’” that July).<sup>166</sup>

That November memo applied this parole policy only to aliens in family units, justifying its use on a “need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities”.<sup>167</sup> Parole+ATD then also only applied in the Border Patrol’s Rio Grande Valley and Del Rio sectors, but the memo noted it could be extended to reduce crowding in CBP facilities elsewhere.

The court explained that the November Memo “concluded by stating that ‘when COVID-19 conditions eventually improve, it is expected that there will no longer be a need for this alternative pathway’”.<sup>168</sup>

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<sup>160</sup> *Florida v. U.S.*, 3:21-cv-01066-TKW-ZCB, Opinion and Order, at 84 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>161</sup> See *infra*.

<sup>162</sup> See *Alternatives to Detention*. U.S. Immigration and Customs Enforcement (updated Jun. 24, 2024). Source: <https://www.ice.gov/features/atd>.

<sup>163</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Complaint for Declaratory and Injunctive Relief (N.D. Fla. Sep. 28, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.1.0.pdf>.

<sup>164</sup> See *id.* at 2.

<sup>165</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 25-26 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

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

<sup>167</sup> *Id.* at 28-29.

<sup>168</sup> *Id.*

Even though the administration announced in April 2022<sup>169</sup> that it would be ending the Covid-19-related Title 42 in late May, the Parole+ATD “pathway” remained.<sup>170</sup> In fact, the policy “was effectively reauthorized in a July 18, 2022, memorandum jointly issued by CBP and ICE titled ‘Policy on the Use of Parole Plus Alternatives to Detention to Decompress Border Locations’”<sup>171</sup>.

There were any number of problems with Parole+ATD, not the least of that it created a massive backlog for ICE officers in finding paroled aliens and issuing NTAs to those released under that program and with NTRs.<sup>172</sup>

As NBC News reported in February 2023<sup>173</sup>:

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

How long would migrants have to wait for their NTAs? According to the New York Post<sup>174</sup>, by the middle of March 2023, the New York City ICE office was “fully booked” for migrant call-in appointments through October 2032.

U.S. district court Judge T. Kent Wetherell II, assigned to hear the state’s claims in *Florida I*, concluded in his March 8, 2023, order<sup>175</sup> vacating Parole+ATD that this policy was “contrary to law in three ways”:

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

**No Return to Custody.** As noted *infra*, the parole statute<sup>176</sup> requires that a parolee “be returned to the custody from which he was paroled” after the purpose of the parole has been satisfied.

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<sup>169</sup> See Arthur, Andrew. *Title 42 Reportedly to End May 23*. CENTER FOR IMMIGRATION STUDIES (Mar. 31, 2022). Source:

<https://cis.org/Arthur/Title-42-Reportedly-End-May-23>.

<sup>170</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 29-30 (N.D. Fla. Mar. 8, 2023). Source:

[https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>171</sup> *Id.* at 30.

<sup>172</sup> See *id.* at 34 (“ICE officials estimated that it would take nearly 3 years (and \$25 million) to clear the ‘backlog’ and issue NTAs to these 110,000 aliens if the Parole+ATD policy was stopped at that point. For every 30 days that the policy continued in place, approximately an additional year and \$8 million were added to the time and cost of clearing the backlog.”).

<sup>173</sup> Ainsley, Julia. *Nearly 600,000 migrants who crossed the border since March 2021 were released in the U.S. with no immigration court dates*. NBC NEWS (Feb. 3, 2023). Source: <https://www.nbcnews.com/politics/immigration/nearly-600000-migrants-crossed-border-released-inside-us-rcna68687>.

<sup>174</sup> Nelson, Steven. *NYC ICE office ‘fully booked’ for migrant appointments through late 2032: document*. New York Post (Mar. 13, 2023). Source: <https://nypost.com/2023/03/13/nyc-ice-office-fully-booked-for-migrant-appointments-through-late-2032/>.

<sup>175</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 88 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>176</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.



During oral argument<sup>177</sup> in *Florida I*, the government admitted that “the ‘purpose’ of parole” in this context was to move “aliens out of CBP facilities faster than would occur if the alien were processed consistent with the requirements of” section 235 of the INA.

Referencing that admission at oral argument, the court held<sup>178</sup>:

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

Thus, the administration was expressly violating the parole statute.

The parole statute also contemplates that the alien return to his or her “case” once the purpose of parole is completed.<sup>179</sup> As the judge noted<sup>180</sup>, however, “the entire purpose of the Parole+ATD policy is to expedite the processing of aliens at CBP facilities without initiating an immigration proceeding against them”, and therefore the alien had no removal “case” to return to.

**“Case-by-Case” Requirement for Parole.** Judge Wetherell further held<sup>181</sup> that the Parole+ATD policy violated DHS’s duty under the parole statute<sup>182</sup> to assess the circumstances in individual parole cases on a “case-by-case” basis, in numerous ways.

First, although the July memo “pays lip service to assessments of individual aliens, it’s largely focused on DHS’s operational circumstances [its detention capacity] rather than an individual alien’s circumstances”.<sup>183</sup>

Second, the sole focus of the case-by-case assessment under DHS’s Parole+ATD policy is “whether the alien is a public safety risk or flight risk, not on whether the alien meets the exceedingly high parole standard”.<sup>184</sup>

Third, that memo “turns the parole standard on its head by providing ineligibility criteria rather than eligibility criteria. In other words, the July Memo essentially establishes a presumption of parole when the relevant ‘triggers’ are met”.<sup>185</sup>

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<sup>177</sup> See *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 89 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>178</sup> *Id.* at 90.

<sup>179</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>180</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 90 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>181</sup> *Id.* at 91.

<sup>182</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>183</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 91 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

<sup>184</sup> *Id.* at 92.

<sup>185</sup> *Id.*

The court also noted that Border Patrol’s time estimate for completing the Parole+ATD process was “15 to 30 minutes”, concluding that it would be “implausible” for agents to “meaningfully assess an alien’s individual circumstances” in that brief period.<sup>186</sup>

**Urgent Humanitarian Reasons or Significant Public Benefit Requirement.** Finally, the court held<sup>187</sup> that Parole+ATD policy violated the statutory requirement that parole be granted only “for urgent humanitarian reasons or significant public benefit”<sup>188</sup>.

He concluded<sup>189</sup>:

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

**Florida II.** On these and other bases, Judge Wetherell vacated DHS’s Parole+ATD policy.<sup>190</sup>

Judge Wetherell’s order did stop Border Patrol from releasing migrants on parole, but only until May 10, 2023, the day before Title 42 ended.

That day, Chief Ortiz issued a memo<sup>191</sup> directing agents to implement a new policy called “Parole with Conditions” (PWC), purportedly to reduce overcrowding at Border Patrol processing facilities.

Under PWC, Border Patrol was again directed to release aliens in its custody on parole without issuing them NTAs and court dates, or as that memo put it “in advance of the issuance of an NTA”.<sup>192</sup>

That policy sent the state of Florida back to court on May 10 to halt PWC parole releases, in a case captioned *Florida v. Mayorkas*<sup>193</sup> (*Florida II*).

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

<sup>187</sup> *Id.* at 93.

<sup>188</sup> Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>189</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 93-94 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

<sup>190</sup> *Id.* at 108-109. See also Arthur, Andrew. *Federal Judge Vacates Biden’s ‘Parole+ATD’ Border Release Policy*. CENTER FOR IMMIGRATION STUDIES (Mar. 10, 2023). Source: <https://cis.org/Arthur/Federal-Judge-Vacates-Bidens-ParoleATD-Border-Release-Policy>.

<sup>191</sup> Taer, Jennie. *EXCLUSIVE: Here Are The Docs Instructing Border Patrol To Release Waves Of Migrants Into The Country*. Daily Caller (May 11, 2023). Source: <https://dailycaller.com/2023/05/11/border-patrol-docs-migrants-title-42/>.

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

<sup>193</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Relief (N.D. Fla. May 10, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.1.0.pdf>.

Based on what little information it had about that policy (the memo hadn't been released yet), Florida argued in its complaint<sup>194</sup> that the latest policy “may violate” the court’s March 8 vacatur of Parole+ATD in *Florida I*.

The state continued<sup>195</sup>, however, noting: “But it is unquestionably cynical, in bad faith, and contrary to both the [INA] and the [Administrative Procedure Act, 'APA’]. It is also, unfortunately, consistent with the game of whack-a-mole DHS has been playing with Florida and this court for almost two years.”

On these grounds, the state asked the district court for a temporary restraining order (TRO) stopping PWC releases.<sup>196</sup>

*Florida II* was also assigned to Judge Wetherell, who concluded on May 11, 2023, that a TRO was in order<sup>197</sup> given:

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

The administration sought a stay of the orders in *Florida I* and *Florida II*, which was denied<sup>198</sup> by the U.S. Court of Appeals for the Eleventh Circuit on June 5, 2023.

On February 13, 2024, the circuit court remanded<sup>199</sup> those cases back to Judge Wetherell for limited further consideration of whether he had jurisdiction to consider the state’s claims in light of the Supreme Court’s decision in *Texas v. U.S.*<sup>200</sup>

A week later, Judge Wetherell issued an order<sup>201</sup> concluding jurisdiction was proper. The cases remain on appeal.

## **Largest Influx of Irregular Migrants in History**

The Southwest border has experienced the largest influx of irregular migration in the nation’s history since President Biden took office.<sup>202</sup> Since February 2021, CBP has encountered more

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<sup>194</sup> *Id.* at 1.

<sup>195</sup> *Id.* at 1-2.

<sup>196</sup> *Id.* at 7-8.

<sup>197</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Temporary Restraining Order, at 8 (N.D. Fla. May 10, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0_2.pdf).

<sup>198</sup> *Florida v. U.S.*, No. 23-11528, Order of the Court, (11<sup>th</sup> Cir. Jun. 5, 2023). Source:

<https://law.justia.com/cases/federal/appellate-courts/ca11/23-11528/23-11528-2023-06-05.html>.

<sup>199</sup> *Florida v. U.S.*, No. 23-11528, Order of the Court (11<sup>th</sup> Cir. Feb. 13, 2024). Source: <https://clearinghouse-umich-production.s3.amazonaws.com/media/doc/146127.pdf>.

<sup>200</sup> *U.S. v. Texas*, 599 U.S. 670 (2023). Source: <https://supreme.justia.com/cases/federal/us/599/22-58/>.

<sup>201</sup> *Florida v. U.S.*, Case 3:21-cv-01066-TKW-ZCB, Corrected Order Regarding Jurisdiction (N.D. Fla. Feb. 20, 2024). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.180.0.pdf>.

<sup>202</sup> *Compare Southwest Border Sectors, Total Encounters By Fiscal Year*. U.S. BORDER PATROL (undated) (covering FY 1960 to FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF>. and *Southwest Border*

than 8.2 million inadmissible applicants for admission, 7.045 million-plus apprehended by Border Patrol agents after illegal entry and more than 1.173 million applicants for admission deemed inadmissible by CBP officers at the Southwest border ports.<sup>203</sup>

Fewer than 2.453 million of those encounters resulted in expulsion<sup>204</sup> under orders<sup>205</sup> issued by the Centers for Disease Control (CDC) pursuant to Title 42 of the U.S. Code<sup>206</sup> in response to the Covid-19 pandemic.

Conversely, nearly 5.766 million inadmissible applicants for admission encountered by CBP at the Southwest border during that period have been processed under the INA. Not surprisingly, that massive surge in illegal migration has severely taxed CBP's limited resources, and Border Patrol's in particular.

At the end of FY 2020 (the last year for which staffing statistics<sup>207</sup> are available), there were fewer than 17,000 Border Patrol agents stationed along the 1,954-mile<sup>208</sup> Southwest border.

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

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

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*Migration FY 2020*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sept. 19, 2023). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>. with *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024) (covering FY 2021 to present). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>203</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>204</sup> *Id.*

<sup>205</sup> See, e.g., *Order Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists*. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 20, 2020). Source: [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).

<sup>206</sup> See *id.*; 42 U.S.C. § 265 (2023) (“Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.”). Source: [https://uscode.house.gov/view.xhtml?req=\(title:42%20section:265%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:42%20section:265%20edition:prelim)).

<sup>207</sup> See *Border Patrol Agent Nationwide Staffing by Fiscal Year*. U.S. BORDER PATROL (undated) (16,878 agents on the Southwest border in FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf>.

<sup>208</sup> *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (undated). Source: <https://www.cbp.gov/node/293681/printable/print>.

Under the current administration, migrants have crossed the border illegally in groups consisting of hundreds of individuals<sup>209</sup>, an uncommon phenomenon in the past. Many if not most are so-called “give ups” (to contrast them with “got aways”<sup>210</sup>), that is aliens who enter illegally and wait for agents to arrive in the (well-founded) hope that they will be processed and released.

While agents expend fewer resources to pursue such give ups, numerous agents must be dispatched at a time to report to those crossing scenes and more to then transport, process, and care for migrant groups of that size, pulling them off the line for indeterminate periods.

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

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

In FY 2021, Border Patrol agents set a record for UAC apprehensions at the Southwest border, encountering nearly 145,000 alien children<sup>211</sup> who were travelling alone. That was nearly twice as many UACs as in FY 2019<sup>212</sup>, when agents apprehended just over 76,000 unaccompanied children at the Southwest border — a then-record.

That FY 2021 record was quickly broken, as agents caught an additional 149,000-plus UACs<sup>213</sup> at the Southwest border in FY 2022.

As for family units, agents apprehended more than 451,000 adults and children travelling in FMUs in FY 2021.<sup>214</sup> While that represented fewer aliens in FMUs than the nearly 473,700 apprehended at the Southwest border in FY 2019<sup>215</sup> (a year in which more than 55 percent of Southwest border apprehensions involved aliens in FMUs), it was a 764-percent increase over FY 2021<sup>216</sup> (when just over 52,200 illegal entrants in FMUs were apprehended there).

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<sup>209</sup> See, e.g., Caralle, Katelyn. “The ticking border time bomb: 1,000 migrants in the largest caravan in HISTORY crosses the Rio Grande into El Paso - with huge numbers being released onto the streets and just nine days until Title 42 ends”. DAILY MAIL (Dec. 12, 2022). Source: <https://www.dailymail.co.uk/news/article-11529519/Largest-migrant-caravan-HISTORY-illegally-crosses-Rio-Grande-El-Paso.html>.

<sup>210</sup> See *infra*.

<sup>211</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>212</sup> *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month - FY 2019*. U.S. BORDER PATROL (undated). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf).

<sup>213</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>214</sup> *Id.*

<sup>215</sup> *Southwest Border Migration FY 2019*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>216</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

FMU apprehensions rose even further in FY 2023, when agents caught more than 631,000 adults and children who had crossed the Southwest border illegally.<sup>217</sup> In the first 10 months of FY 2024<sup>218</sup>, there have been more than 526,000 Border Patrol Southwest border FMU apprehensions, and agents are on track for more than 632,000 by the end of the fiscal year.

The illicit crossing of large groups of migrants together — and in particular groups including significant numbers of aliens in family units and/or unaccompanied alien children — isn't mere happenstance, as Chief Scott explained<sup>219</sup>:

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

### “Got Aways”

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

Increasingly under the Biden administration, hundreds of illegal entrants per day have evaded apprehension by overwhelmed Border Patrol agents and made their way successfully into the interior of the United States. Those aliens are defined in statute as “got aways”.<sup>220</sup>

That definition was added to the U.S. Code by section 1092 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017)<sup>221</sup>, under the header “Border Security Metrics”, now codified at 6 U.S.C. §223.<sup>222</sup>

Section 1092 of NDAA 2017<sup>223</sup> requires the DHS secretary to “develop metrics, informed by situational awareness, to measure the effectiveness of security between ports of entry”, and to provide an annual report on the results to the GAO and to the Senate Homeland Security and Governmental Affairs and House Homeland Security Committees.

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Letter from Rodney Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sept. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>220</sup> See 6 U.S.C. § 223(a)(3) (2024) (“Got away. The term ‘got away’ means an unlawful border crosser who- (A) is directly or indirectly observed making an unlawful entry into the United States; (B) is not apprehended; and (C) is not a turn back.”). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>221</sup> Sec. 1092 of National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>222</sup> See 6 U.S.C. § 223(a)(3) (2024) Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>223</sup> Sec. 1092 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.



The last such report, for FY 2022<sup>224</sup>, was filed with GAO and the committees in July 2023, but it only includes “detected got away” statistics from FY 2011 through the end of FY 2021.<sup>225</sup>

It reveals that during that 11-year period, got-aways at the Southwest border peaked in FY 2013 (171,051), and remained roughly static just over 101,000 between FY 2015 and FY 2017 before jumping again in FY 2018 (127,944) and FY 2019 (150,090), then dipping again in FY 2020 (135,593), roughly coinciding with the implementation of MPP and Title 42.<sup>226</sup>

In FY 2021, however, CBP detected more than 389,000 got aways at the Southwest border, 128 percent more than the previous record set in FY 2013.<sup>227</sup>

Again, those are the last published got-away numbers, but Fox News reported in May that there were an additional 606,131 known got aways in FY 2022, 670,674 in FY 2023, and more than 175,000 in FY 2024 as of the date of that report.<sup>228</sup> And those are just the got aways DHS is aware of.

That’s roughly 1.8 million aliens who entered illegally since President Biden took office, evaded apprehension, and are now living in the United States, largely free from any official constraint — more people than residents of Phoenix, Ariz.<sup>229</sup>, America’s fifth-largest city.

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

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

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

Here is how Blas Nuñez-Neto, DHS’s current Assistant Secretary for Border and Immigration Policy<sup>230</sup> explained it in a June 2023 declaration, under the header “Hemispheric conditions are driving encounter levels that strain DHS resources”:

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<sup>224</sup> *Department of Homeland Security Border Security Metrics Report: 2022*. U.S. DEP’T OF HOMELAND SECURITY (Jul. 3, 2023). Source: [https://ohss.dhs.gov/sites/default/files/2023-12/2023\\_0703\\_plcy\\_fiscal\\_year\\_2022\\_border\\_security\\_metrics\\_report\\_2021\\_data\\_0.pdf](https://ohss.dhs.gov/sites/default/files/2023-12/2023_0703_plcy_fiscal_year_2022_border_security_metrics_report_2021_data_0.pdf).

<sup>225</sup> *See id.* at 18.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Shaw, Adam and Melugin, Bill. *New data reveals Illegal immigrants eluding Border Patrol spiked under Biden, surpassing predecessors*. FOX NEWS (May 15, 2024). Source: <https://www.foxnews.com/politics/new-data-reveals-illegal-immigrants-eluding-border-patrol-spiked-under-biden-surpassing-predecessors>.

<sup>229</sup> *QuickFacts. Phoenix city, Arizona; United States*. U.S. CENSUS BUREAU (undated). Source: <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona,philadelphiacitypennsylvania,US/BZA210222>.

<sup>230</sup> *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST, Declaration of Blas Nuñez-Neto (N.D. Cal. Jun. 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.176.2.pdf>.

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

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

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

Again, *Florida I* was a suit filed by the state of Florida<sup>231</sup>, which alleged the administration was “ignoring” the congressional detention mandates in section 235(b) INA by refusing to detain illegal border migrants.

In his opinion, Judge Wetherell found that:

*[T]he evidence establishes that [the federal government has] effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing “alternatives to detention” over actual detention and by releasing more than a million aliens into the country—on “parole” or pursuant to the exercise of “prosecutorial discretion” under a wholly inapplicable statute—without even initiating removal proceedings.<sup>232</sup>*

The court continued:

*There were undoubtedly geopolitical and other factors that contributed to the surge of aliens at the Southwest Border, but [the administration’s] **position that the crisis at the border is not largely of their own making because of their more***

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<sup>231</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, 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](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

<sup>232</sup> *Id.* at pp. 4-5.

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

*It is particularly noteworthy that [Border Patrol Chief Raul] Ortiz testified that the current surge differs from prior surges that he seen over his lengthy career in that most of the aliens now being encountered at the Southwest Border are turning themselves in to [Border Patrol] officers rather than trying to escape the officers. It is reasonable to infer (and just plain common sense) that aliens are doing this because they are aware that they will be expeditiously processed and released into the country. Indeed, on this point, Chief Ortiz credibly opined based on his experience that the aliens are likely “turning themselves in because they think they’re going to be released.” [Emphasis added.]<sup>233</sup>*

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

### **“Biden-Harris Administration Announces New Border Enforcement Actions”**

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

To that end, it has implemented two programs to allow inadmissible applicants for admission to enter illegally through the ports of entry in lieu of entering illegally between the ports of entry, summarized in a January 5 White House “fact sheet”<sup>234</sup> captioned “Biden-Harris Administration Announces New Border Enforcement Actions”.

**The CBP One App Interview Policy.** According to that fact sheet:

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<sup>233</sup> *Id.* at 21-22.

<sup>234</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

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

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

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

Second, the CBP One app interview policy didn’t start “when Title 42 eventually lifted” (on May 11<sup>235</sup>); it was rolled out a week after that announcement on January 12, as CBP subsequently admitted.<sup>236</sup>

That said, here’s how that policy works: Any foreign national (either a Mexican national or an OTM) can now download and access the CBP One mobile app<sup>237</sup>, which, as DHS explains, “serves as a single portal to a variety of CBP services”.<sup>238</sup>

Mexican nationals anywhere in the country, and OTMs in central and northern Mexico or in the southernmost Mexican states of Tabasco and Chiapas (bordering Guatemala), can then use the app to schedule an “appointment” to present themselves for inspection under section 235 of the INA (or, as CBP has described it, “to be processed under Title 8”<sup>239</sup>, Title 8 being the INA) at a Southwest border port.

By May 2023, DHS made 1,000 CBP One app port appointment slots available daily, but on June 1, 2023<sup>240</sup>, the agency expanded that to 1,250 daily appointment slots. Later that month<sup>241</sup>, the number of CBP One port interview slots was expanded further, to 1,450 per day — or 529,000-plus per year.

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<sup>235</sup> Krikorian, Mark and Bensman, Todd. *5/11: The End of Title 42*. CENTER FOR IMMIGRATION STUDIES (May 11, 2023). Source: <https://cis.org/Parsing-Immigration-Policy/511-End-Title-42>.

<sup>236</sup> See *CBP Releases May 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) (“From January 12, when the scheduling function was introduced, until May 31, 2023, more than 106,000 individuals used the CBP One mobile application to schedule an appointment to present at a southwest border port of entry for inspection.”). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

<sup>237</sup> *CBP One™ Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

<sup>238</sup> *Id.*

<sup>239</sup> *CBP Releases May 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

<sup>240</sup> *Id.*

<sup>241</sup> *CBP One™ Appointments Increased to 1,450 Per Day*. U.S. Customs and Border Protection (Jun. 30, 2023). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>.

After CBP announced in August it would be extending CBP One appointment coverage to the two Mexican states bordering Guatemala, the Mexican National Institute of Migration (INM), announced<sup>242</sup> it would be launching a “safe mobility corridor” for OTMs travelling into the country from the south, one at Villahermosa in Tabasco and the other in Tapachula, Chiapas.

As the institute’s press release explains:

*The INM will issue a Multiple Migration Form (FMM) valid for 20 days for those people with a confirmed CBP One appointment who choose to travel to the scheduled appointment location through the Emerging Safe Mobility Corridor, which will allow them to have regular stay status during their journey.*

*In a joint security effort, buses that are authorized to carry out the transfer will be accompanied by security institutions at the federal, state and municipal levels; in addition, food will be provided during the corresponding trips.*

Thus, it appears the Mexican government is providing free bus transportation from its border with Guatemala to the U.S. Southwest border for OTM migrants who have scheduled port appointments using the CBP One app.

To assist the Mexican government in identifying OTM migrants who scheduled appointments using CBP One, on August 22, CBP announced<sup>243</sup> that it was “allow[ing] the Government of Mexico access to a tool which will permit certain Government of Mexico personnel to validate an individual’s CBP One appointment and change the locations in Mexico from which individuals can request appointments via CBP One”.

That effectively moves the U.S. Southwest border to Mexico’s border with Guatemala and places the Mexican government in charge of U.S. border protection. Provided OTMs can cross the southern Mexican border, they are all but certain of being allowed to enter the United States on CBP One parole.

This policy is illegal, for at least two reasons.

First, there is no authority in the INA that allows either the Biden-Harris administration or DHS to use the ports of entry to process facially inadmissible aliens.

In fact, section 2 of the Secure Fence Act of 2006<sup>244</sup> directs the DHS secretary to “take all actions . . . necessary and appropriate to achieve and maintain operational control over the entire international land. . . borders of the United States”, defining the term “operation control” as the

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<sup>242</sup> *The Government of Mexico and the INM articulate an emerging safe mobility corridor for the transfer of foreign persons with a CBP One appointment.* INSTITUTO NACIONAL DE MIGRACION (Aug. 31, 2024). Source: <https://www.gob.mx/inm/prensa/el-gobierno-mexicano-y-el-inm-articulan-corredor-emergente-de-movilidad-segura-para-el-traslado-de-personas-extranjeras-con-cita-cbp-one>.

<sup>243</sup> *Agency Information Collection Activities; Emergency Revision; Collection of Advance Information From Certain Undocumented Individuals on the Land Border.* 89 Fed. Reg. 67953 (Aug. 22, 2024). Source: <https://www.govinfo.gov/content/pkg/FR-2024-08-22/pdf/2024-18847.pdf>.

<sup>244</sup> Secure Fence Act of 2006, Pub. L. 109-367, at sec. 2 (Oct. 26, 2006). Source: <https://www.congress.gov/109/plaws/publ367/PLAW-109publ367.pdf>.

“prevention of all unlawful entries into the United States, including entries by. . . other unlawful aliens”.

This policy plainly violates that mandate, in that it facilitates the “unlawful entry” of “unlawful aliens”, i.e., aliens applying for admission without proper admission documents.

Second, and relatedly, the vast majority of inadmissible applicants for admission who schedule appointments using the app are thereafter paroled into the United States, in violation of the strict limitations on that authority.

As the House Homeland Security Committee reported<sup>245</sup> in October: “Overall, 95.8 percent of all inadmissible aliens who scheduled appointments through the app during this time were ultimately issued a ‘Notice to Appear’ (NTA) and released into the United States on parole.”

Given that astronomically high parole rate, it is apparent that DHS’s CBP One paroles suffer from the same legal infirmities Judge Wetherell identified in the CBP’s Parole+ATD policy.

In addition to its illegality, the CBP One app port interview scheme undermines border security. As noted *infra*, section 1092 of NDAA 2017<sup>246</sup> established metrics for measuring border security between the ports, now codified at 6 U.S.C. §223.<sup>247</sup>

Section 1092(c)(1) of NDAA 2017<sup>248</sup> also establishes metrics Congress has deemed critical in assessing whether, and to what degree, DHS is securing the border *at* the ports of entry.

The first set of metrics, subparagraph (A)<sup>249</sup>, focuses exclusively on inadmissible applicants for admission, requiring the DHS secretary to report, on an annual basis, his:

*Estimates ... of . . . : (i) Total inadmissible travelers who attempt to, or successfully, enter the United States at a port of entry. (ii) The rate of refusals and interdictions for travelers who attempt to, or successfully, enter the United States at a port of entry. (iii) The number of unlawful entries at a port of entry.*

The only reason aliens schedule interviews using the app is they are inadmissible to the United States under section 212(a)(7)(A)(i) of the INA because they lack proper admission documents.

Thus, the CBP One app interview policy boosts both the number of “inadmissible travelers who attempt to, or successfully, enter the United States” at the Southwestern border ports of entry and “the rate of refusals and interdictions for travelers who attempt to, or successfully, enter the United States at a port of entry”.

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<sup>245</sup> *New Documents Obtained by Homeland Majority Detail Shocking Abuse of CBP One*. U.S. HOUSE OF REPS., COMM. ON HOMELAND SECURITY (Oct. 23, 2023). Source: <https://homeland.house.gov/2023/10/23/new-documents-obtained-by-homeland-majority-detail-shocking-abuse-of-cbp-one-app/>.

<sup>246</sup> Sec. 1092 of National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>247</sup> 6 U.S.C. § 223 (2024). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>248</sup> *Id.* at para. (c)(1).

<sup>249</sup> *Id.* at subpara. (c)(1)(A).



In July 2024, CBP officers at the Southwestern border ports of entry encountered nearly 48,000 inadmissible aliens<sup>250</sup>, a 160-percent increase compared to June 2022, before this policy took effect. That increase is largely driven by the tens of thousands of aliens per month taking advantage of the CBP One app interview policy.

And, because nearly all aliens who take advantage of that policy are allowed to enter the United States, “the number of unlawful entries at” the Southwestern ports of entry is skyrocketing, and by Congress’s own metrics, the border is less secure.

Even putting aside Congress’s border security metrics, however, there’s no way CBP officers at the ports have the resources to vet nearly 96 percent of the 1,450 aliens per day using the app for criminal histories or terrorist intent in any meaningful way before releasing them into the United States.

In that vein, the DHS Office of Inspector General (DHS OIG) recently issued a report captioned “CBP Did Not Thoroughly Plan for CBP One™ Risks, and Opportunities to Implement Improvements Exist”.<sup>251</sup>

As DHS OIG explained therein:

*Although CBP uses biographic and biometric information submitted into CBP One™ in advance to determine whether arriving noncitizens have derogatory records, it does not leverage the information to identify suspicious trends as part of its pre-arrival vetting procedures. Based on our analysis of CBP One™ data, we identified potentially unrelated noncitizens who repeatedly claimed identical intended U.S. residences. CBP currently does not have a mechanism to routinely analyze CBP One™ data submitted across the eligible POEs for trends, which may be useful intelligence to help guide front-line CBP officers when interviewing noncitizens during appointment processing.<sup>252</sup> [Emphasis added.]*

DHS OIG analyzed CBP data and concluded that nearly 209,000 of the just over 264,550 initial users (79 percent)<sup>253</sup> gave the same intended address in the United States as at least one other user “despite appearing to be unrelated”.

If that’s not suspicious enough, DHS OIG identified seven individual U.S. addresses that nearly 1,700 different app users had claimed as their intended destination.<sup>254</sup>

This is indicative of fraud in a program that lacks statutory authority and that all but ensures the entry of inadmissible aliens. That presents law-enforcement and national-security risks.

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<sup>250</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (revised Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>251</sup> *CBP Did Not Thoroughly Plan for CBP One™ Risks, and Opportunities to Implement Improvements Exist*. OIG-24-48. U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN. (Aug. 19, 2024). Source: <https://www.oig.dhs.gov/sites/default/files/assets/2024-08/OIG-24-48-Aug24.pdf>.

<sup>252</sup> *Id.* at “Highlights”.

<sup>253</sup> *Id.* at 14.

<sup>254</sup> *Id.*

Those risks are heightened by the fact that CBP lacks the intelligence to properly vet those migrants. As the House Judiciary Committee recently explained:

*Immigration authorities do not vet illegal aliens against databases in the aliens' countries of origin. As a result, if there is derogatory information about an alien in that alien's home country, the current checks are unlikely to reveal it. As former Border Patrol Chief Rodney Scott testified to [Congress] in 2023, the U.S. government has "very, very minuscule data" available when an alien arrives at the southwest border because "[c]rimes committed by a foreign national outside the U.S. rarely appear in [U.S.] databases." [Emphasis added; footnotes omitted.]<sup>255</sup>*

Those risks have already appeared. An August 5 report<sup>256</sup> from the House Judiciary Committee revealed that eight Tajikistani nationals "with potential ISIS ties" were arrested by ICE in June 2024, three of whom "were released into the country after using the Biden-Harris-Administration's CBP One phone application to schedule an appointment at a port of entry".

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

Those are all major vulnerabilities given that, according to CBP<sup>257</sup>, "more than 765,000 individuals have successfully scheduled appointments to present at ports of entry" as of the end of July.

As set forth above, the purpose of the inspection protocol Congress crafted in section 235 of the INA<sup>258</sup>, and CBP's primary role in that process (both between the ports and at them), is to ensure inadmissible aliens are unable to enter unlawfully.

The administration's CBP One app interview policy turns that process on its head by using the inspection protocol at the ports as a conduit by which inadmissible applicants for admission *can* enter illegally.

**The "Circumvention of Lawful Pathways" Rule.** The offer of quick releases via the CBP One app port interview scheme is the carrot in the administration's border plans. The first sticks that

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<sup>255</sup> *The Consequences of the Biden-Harris Administration's Open-Borders Policies: The Cases of Four Illegal Aliens Who Viciously Attacked a Man on a Chicago Train*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 21, 2024), at 7. Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/08-21-2024%20The%20Cases%20of%20Four%20Illegal%20Aliens%20Who%20Viciously%20Attacked%20a%20Man%20on%20a%20Chicago%20Train.pdf>.

<sup>256</sup> *Terror at Our Door: How the Biden-Harris Administration's Open-Borders Policies Undermine National Security and Endanger Americans*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 5, 2024), at 3. Source: [https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/FILE\\_6538.pdf](https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/FILE_6538.pdf).

<sup>257</sup> *CBP Releases July 2024 Monthly Update*. U.S. CUSTOMS AND BORDER PROTECTION (Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2024-monthly-update>.

<sup>258</sup> Sec. 235 of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. See also *infra*.

the administration attempted to use to finally deter illegal entrants are a series of asylum restrictions for those who bypass the ports and enter illegally.

Those restrictions were included in a joint DOJ and DHS rule published on May 16, 2023<sup>259</sup>, captioned “Circumvention of Lawful Pathways”, or the “CLAP”.

In contrast to aliens prescheduling their illegal entries at the ports via the CBP One app interview policy, whose fear claims are processed under extremely loose, pre-existing asylum and credible fear standards (to the degree they are assessed), the CLAP rule imposes a rebuttable presumption that illegal crossers between the ports who failed to seek asylum on the way to the United States aren’t eligible for such protection.<sup>260</sup>

That “rebuttable presumption” is not absolute, however. There are three exceptions<sup>261</sup> to that rule: one for aliens who scheduled port appointments using the CBP one app; a second for those who applied for asylum elsewhere unsuccessfully; and a third for those who unsuccessfully tried to use the app due to a serious technical or language-related obstacle.

Under the rule, migrants can rebut that presumption by showing they have an acute medical emergency, “faced an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture, or murder”, or were a victim of trafficking.<sup>262</sup>

On May 11, 2023, DHS issued a “fact sheet”<sup>263</sup> concerning its efforts under the CLAP rule.

According to the department, it subjected just 8,195 aliens to expedited removal processing under the CLAP rule standards between May 12 and June 13.<sup>264</sup> Of those, 3 percent established they were subject to an exception, 8 percent rebutted the presumption, and 88 percent (7,243 aliens) were subject to the presumption.<sup>265</sup>

Some 72 percent of those who qualified for an exception to the CLAP rule asylum restrictions cleared the credible-fear bar, as did 77 percent of those who rebutted the presumption that they weren’t eligible for asylum.<sup>266</sup> Among those who were subject to the presumption, just 42 percent were found to have a credible fear under the heightened standards in the CLAP rule.<sup>267</sup>

These statistics demonstrate two things: first, few illegal migrants are offering fear claims that can hold up to any kind of serious scrutiny; and second, how rarely the Biden-Harris DHS was subjecting illegal entrants to expedited removal.

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<sup>259</sup> *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023). Source: <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

<sup>260</sup> *See id.*

<sup>261</sup> *See Fact Sheet: Circumvention of Lawful Pathways Final Rule*. U.S. DEP’T OF HOMELAND SECURITY (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule>.

<sup>262</sup> *Id.*

<sup>263</sup> Arthur, Andrew. *Border Fear Claim Denials Spike Under New Border Rules — Kind Of*. CENTER FOR IMMIGRATION STUDIES (Jul. 10, 2023). Source: <https://cis.org/Arthur/Border-Fear-Claim-Denials-Spike-Under-New-Border-Rules-Kind>.

<sup>264</sup> *Id.*

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

<sup>266</sup> *See East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST, Declaration of Blas Nuñez-Neto (N.D. Cal. Jun. 16, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.176.2.pdf>.

<sup>267</sup> *Id.*

In that vein, in its January 5 fact sheet<sup>268</sup>, the White House asserted:

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

Secretary Mayorkas later doubled down on that expedited removal claim, vowing in a May 11 White House press conference<sup>269</sup> announcing his department’s post-Title 42 plans that: “The vast majority of individuals will indeed be placed in expedited removal, and if they do not qualify, will be removed in a matter of days, if not weeks, from the United States.”

Despite that promise, in the first eight months of FY 2024 (October 2023 to May 2024), of the nearly 1.3 million illegal entrants Border Patrol agents apprehended at the Southwest border, fewer than 205,000 (16 percent) were subject to expedited removal.<sup>270</sup>

**“Processes for Cubans, Haitians, Nicaraguans, and Venezuelans”.** The second border initiative the administration announced on January 5, 2023<sup>271</sup> extended its October 2022 parole program for Venezuelan nationals<sup>272</sup> to include Cuban, Haitian, and Nicaraguan, nationals, as well. That program is formally called “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans”<sup>273</sup>, but is better known as “CHNV parole”.

As the White House explained<sup>274</sup>:

*Today, the Biden Administration is announcing it will extend the successful Venezuela parole process and expand it to nationals of Nicaragua, Haiti, and Cuba. Up to 30,000 individuals per month from these four countries, who have an eligible sponsor and pass vetting and background checks, can come to the United States for a period of two years and receive work authorization. Individuals who irregularly cross the Panama, Mexico, or U.S. border after the date of this*

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<sup>268</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>269</sup> *Secretary Mayorkas Remarks at a White House Press Briefing Ahead of the Lifting of the Title 42 Public Health Order.* U.S. DEP’T OF HOMELAND SECURITY (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/secretary-mayorkas-remarks-white-house-press-briefing-ahead-lifting-title-42-public>.

<sup>270</sup> *Custody and Transfer Statistics, USBP Monthly Southwest Border Encounters by Processing Disposition.* U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>271</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>272</sup> *See DHS Announces New Migration Enforcement Process for Venezuelans.* U.S. DEP’T OF HOMELAND SECURITY (Oct. 12, 2022) (“Our comprehensive effort to reduce the irregular migration of Venezuelans also includes a new process to lawfully and safely bring up to 24,000 qualifying Venezuelans into the United States”). Source: <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

<sup>273</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans.* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Aug. 29, 2024). Source: <https://www.uscis.gov/CHNV>.

<sup>274</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

*announcement will be ineligible for the parole process and will be subject to expulsion to Mexico, which will accept returns of 30,000 individuals per month from these four countries who fail to use these new pathways.*

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

That's especially true given that on January 9, 2023, the administration published notices in the Federal Register on its implementation of this parole program for nationals of Venezuela<sup>275</sup>, Nicaragua<sup>276</sup>, Haiti<sup>277</sup>, and Cuba<sup>278</sup>, which allow those CHNV nationals who bypass the parole program and enter illegally “a one-time option to voluntarily depart or voluntarily withdraw their application for admission to maintain eligibility to participate in this parole process”.

That negates any border deterrence value CHNV parole had entirely: if nationals of those countries enter illegally and aren't apprehended, they can remain indefinitely; but if they are apprehended, they can withdraw their applications for admission and get in line for a CBP One app interview or apply for parole under CHNV parole.

Nor is this program simply allowing migrants to escape persecution in the CHNV countries. As the Center discovered<sup>279</sup> after a lengthy FOIA battle, beneficiaries are flying into the United States from 77 different countries, including Australia, Argentina, and Iceland.

Moreover, there are significant fraud concerns associated with CHNV parole.

To explain, it's important to note that the CHNV parole application is a multi-step process, which begins when a “supporter” in the United States files an I-134A<sup>280</sup>, “Online Request to be a Supporter and Declaration of Financial Support”, through a USCIS portal. In that form, the supporter agrees to financially support a given CHNV national.

Once USCIS confirms those supporters, it sends beneficiaries e-mails directing them to set up an online account attesting to eligibility and averring they're not inadmissible on medical grounds.

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<sup>275</sup> *Implementation of Changes to the Parole Process for Venezuelans*, 88 Fed. Reg. 1279 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00253/implementation-of-changes-to-the-parole-process-for-venezuelans>.

<sup>276</sup> *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. 1255 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans>.

<sup>277</sup> *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1243 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians>.

<sup>278</sup> *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. 1266 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans>.

<sup>279</sup> Bensman, Todd. *New Data: Many Migrants in Biden's 'Humanitarian' Flights Scheme Coming in from Safe Countries and Vacation Wonderlands*. CENTER FOR IMMIGRATION STUDIES (Jun. 17, 2024). Source: <https://cis.org/Bensman/New-Data-Many-Migrants-Bidens-Humanitarian-Flights-Scheme-Coming-Safe-Countries-and>.

<sup>280</sup> *I-134A, Online Request to be a Supporter and Declaration of Financial Support*. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Apr. 3, 2024). Source: <https://www.uscis.gov/i-134a>.

Beneficiaries are then sent to the CBP One app to upload photos and biographic information. At that point, they are notified through the online account whether CBP will give them permission to fly to the United States to seek parole at a port of entry.

On August 2, Fox News revealed<sup>281</sup> that the program was placed on hold in July “after an internal report unearthed large amounts of fraud in applications for those sponsoring the applicants”.

The outlet explained that an internal report by USCIS’s Fraud Detection and National Security (FDNS) directorate concluded 100,948 CHNV supporter forms had been completed by 3,218 so-called “serial sponsors — those whose number appears on 20 or more forms”.

Worse, according to Fox News, FDNS also found that 24 of the 1,000 Social Security numbers most used by sponsors “belonged to a dead person. Meanwhile, 100 physical addresses were used between 124 and 739 times on over 19,000 forms”<sup>282</sup>.

Despite those indicia of fraud, however, DHS has resumed processing applicants for CHNV parole<sup>283</sup>. In a tweet<sup>284</sup>, former USCIS Director Emilio Gonzalez contends that the program was restarted notwithstanding its susceptibility to fraud because Mexican authorities complained there were “too many migrant camps” in the country.

That makes sense, given that congressional disclosures<sup>285</sup> reveal that 1.6 million inadmissible applicants for admission from the CHNV countries were awaiting travel authorizations under the program as of mid-October 2023. By this point, that figure likely well exceeds 2 million, despite the fact that more than 520,000 Cubans, Haitians, Nicaraguans, and Venezuelans had already arrived on CHNV parole as of the end of July<sup>286</sup>.

Why would supporters file fraudulent applications? That’s unclear, but as the Center explained in August 2023<sup>287</sup>, CHNV parole is uniquely “ripe for human exploitation” by smugglers and sex- and human-traffickers who pose as would-be sponsors.

USCIS is plainly aware of these dangers, as it warns CHNV applicants they “are not obligated to repay, reimburse, work for, serve, marry, or otherwise compensate their supporter in exchange

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<sup>281</sup> Shaw, Adam. *Biden admin freezes controversial migrant flight program after fraud revelations*. Fox News (Aug. 2, 2024). Source: <https://www.foxnews.com/politics/biden-admin-freezes-controversial-migrant-flight-program-after-fraud-revelations>.

<sup>282</sup> *Id.*

<sup>283</sup> *See Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Aug. 29, 2024) (“DHS has resumed processing of Advance Travel Authorizations (ATAs) in the parole processes for certain nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV).”). Source: <https://www.uscis.gov/CHNV>.

<sup>284</sup> Gonzalez, Emilio. Source: <https://x.com/emiliotgonzalez/status/1830931211625136256/photo/1>.

<sup>285</sup> *Chairman Green Blasts Biden-Harris Administration’s CHNV Mass-Parole Program Amid Horrific Crimes by Recent Parolees*. U.S. HOUSE OF REPS., COMM. ON HOMELAND SECURITY (Sept. 5, 2024). Source: <https://homeland.house.gov/2024/09/05/chairman-green-blasts-biden-harris-administrations-chnv-mass-parole-program-amid-horrific-crimes-by-recent-parolees/>.

<sup>286</sup> *CBP Releases July 2024 Monthly Update*. U.S. Customs and Border Protection (Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2024-monthly-update>.

<sup>287</sup> Arthur, Andrew. *Biden’s CHNV Parole Program — Ripe for Human Exploitation*. CENTER FOR IMMIGRATION STUDIES (Aug. 25, 2023). Source: <https://cis.org/Arthur/Bidens-CHNV-Parole-Program-Ripe-Human-Exploitation>.



for filing Form I-134A on their behalf or for providing financial support while they are in the United States”.<sup>288</sup>

In any event, but importantly, there is no congressional authority for this programmatic parole program in the INA<sup>289</sup>, and not surprisingly, a 20-state coalition filed suit<sup>290</sup> to block CHNV parole.

The state plaintiffs claimed that the administration “did not provide an opportunity for public comment” and failed to “undertake a formal notice-and-comment rulemaking process”.<sup>291</sup> Nor, they contend, did the departments ask the states their opinions about the plan before proceeding.<sup>292</sup>

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

That is particularly salient given the requirement in the parole statute<sup>293</sup> that every parolee “be returned to the custody from which he was paroled”.

Not only would it cost hundreds of millions of dollars to detain the 360,000 CHNV nationals allowed to enter on parole annually at the end of their two-year periods, but USCIS doesn’t even tell CHNV beneficiaries they’ll ever be required to leave.

USCIS has a “Frequently Asked Questions” webpage<sup>294</sup> for the program, and one question is: “If I am paroled into the United States through these processes, what happens when my 2-year period of parole ends?”

The agency’s response: “There are a full range of existing lawful immigration pathways, including an extension of parole, immigrant and nonimmigrant visas, asylum, and Temporary Protected Status (TPS), that certain parolees may be eligible for in accordance with U.S. laws.”<sup>295</sup> Absent from that list is “you will be taken into custody and removed”.

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<sup>288</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Aug. 29, 2024). Source: <https://www.uscis.gov/CHNV>.

<sup>289</sup> See Sec. 212(d)(5)(A)(i) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>. See also *infra*.

<sup>290</sup> *Texas v. U.S. DHS*, 6:23-cv-00007, Complaint (S.D. Tex. Jan. 24, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.1.0.pdf>.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Sec. 212(d)(5)(A)(i) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>294</sup> *Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Sept. 3, 2024). Source: <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

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

All the states' points are valid, but on March 8, federal district court Judge Drew Tipton issued an opinion and order<sup>296</sup> dismissing the states' claims, finding they failed to establish standing to bring the suit. The states have appealed that order to the Fifth Circuit.

Finally, while USCIS claims that CHNV applicants must “undergo and clear robust security vetting”, at least two migrants who entered under the program have been accused of committing high-profile sex offenses.

In March, a Haitian national and CHNV beneficiary, Cory Alvarez, was arrested for aggravated rape of a 15-year-old girl in a Massachusetts migrant shelter.<sup>297</sup> A local judge refused to honor an ICE detainer for the alien, forcing the agency to take Alvarez into custody at his residence on August 13.<sup>298</sup>

In a Fox News report<sup>299</sup> on that ICE arrest, the outlet quoted an agency official who complained:

*As part of the Alvarez case, for months now, **our office has repeatedly asked questions of state and federal officials about specifics of the CHNV process.** We have received little to no answers. There is clearly a reason that the U.S. Department of Homeland Security has paused the issuance of travel authorizations for new CHNV beneficiaries while it undertakes a massive review of the process. [Emphasis added.]*

Apparently, DHS won't share information about CHNV parole even with its own agencies.

Alvarez did have a supporter, who lived in New Jersey.<sup>300</sup> He apparently received little support from that individual, however, given he was living in the state-funded shelter where the attack purportedly took place.

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<sup>296</sup> *Texas v. U.S. DHS*, 6:23-cv-00007, Memorandum Opinion and Order (S.D. Tex. Mar. 8, 2024). Source: [https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.305.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.305.0_1.pdf).

<sup>297</sup> Melugin, Bill; Shaw, Adam; Jenkins, Griff; and Wehner, Greg. *Haitian migrant charged with rape of 15-year-old girl entered via controversial parole program: sources*. Fox News (Mar. 15, 2024). Source: <https://www.foxnews.com/politics/haitian-migrant-charged-rape-15-year-old-girl-entered-controversial-parole-program-sources>.

<sup>298</sup> *ERO Boston arrests Haitian national accused of raping child in Massachusetts migrant shelter*. U.S. Immigration and Customs Enforcement (Aug. 13, 2024). Source: <https://www.ice.gov/news/releases/ero-boston-arrests-haitian-national-accused-raping-child-massachusetts-migrant>.

<sup>299</sup> Hagstrom, Anders and Melugin, Bill. *ICE finds, arrests Haitian migrant who was released on \$500 bond after being charged with raping child in MA*. Fox News (Aug. 13, 2024). Source: <https://www.foxnews.com/us/ice-finds-arrests-haitian-migrant-who-released-500-bond-after-being-charged-raping-child-ma>.

<sup>300</sup> See Melugin, Bill; Shaw, Adam; Jenkins, Griff; and Wehner, Greg. *Haitian migrant charged with rape of 15-year-old girl entered via controversial parole program: sources*. Fox News (Mar. 15, 2024) (“Alvarez’s charges relate to a March incident in which he was accused of raping a 15-year-old girl while staying at a migrant hotel in Massachusetts.”). Source: <https://www.foxnews.com/politics/haitian-migrant-charged-rape-15-year-old-girl-entered-controversial-parole-program-sources>.

On September 4, ICE arrested a second Haitian national, Akim Marc Desire, who also has been charged with sexually assaulting a minor in Massachusetts.<sup>301</sup> Reports indicate that Desire also entered under CHNV parole.<sup>302</sup>

## “Root Causes”

Having reversed most of the Trump border initiatives and abandoned deterrence as a border policy, the Biden-Harris administration opted in February 2021 to focus almost exclusively on the “root causes” of illegal migration — the push factors encouraging migrants to leave their homes.<sup>303</sup>

That root causes strategy had five goals: fighting corruption; ensuring the rights of civil society; countering criminal violence and trafficking; “combating sexual, gender-based, and domestic violence”; and “addressing economic insecurity and inequality”.<sup>304</sup>

Three issues undermined this effort. First, this “root causes” strategy focused solely on the three “Northern Triangle” countries of Central America: El Salvador; Guatemala; and Honduras. As illegal migration surged from South America and elsewhere, the strategy was never expanded.

Second, each of those issues is endemic in the Northern Triangle countries, and therefore such a strategy would take decades to succeed, even assuming it ever could.

Third, and relatedly, at the same time it began to address those push factors, the Biden-Harris administration was exacerbating the key pull factors drawing migrants to come illegally to this country (the opportunity to live and work here indefinitely) by releasing nearly every illegal migrant who wasn’t expelled under Title 42.

At a public event at the White House on March 24, 2021<sup>305</sup>, President Biden tasked the vice president with overseeing this root causes strategy. Harris thereafter made two trips abroad to meet with regional leaders as part of that effort: to Guatemala City and Mexico City in June 2021 and to Tegucigalpa, Honduras, in January 2022.

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<sup>301</sup> *ERO Boston arrests Haitian national charged with sexually assaulting Massachusetts minor*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Sept. 4, 2024). Source: <https://www.ice.gov/news/releases/ero-boston-arrests-haitian-national-charged-sexually-assaulting-massachusetts-minor#:~:text=ERO%20Boston%20officers%20arrested%20Akim,of%20children%20in%20our%20community>.

<sup>302</sup> *Haitian migrant accused of molesting child is in US via controversial Biden-Harris program*. WFIN (Sept. 4, 2024). Source: <https://wfin.com/fox-political-news/haitian-migrant-accused-of-molesting-child-is-in-us-via-controversial-biden-harris-program/>.

<sup>303</sup> See *FACT SHEET: Strategy to Address the Root Causes of Migration in Central America*. WHITE HOUSE (Jul. 29, 2021). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-strategy-to-address-the-root-causes-of-migration-in-central-america/>.

<sup>304</sup> Executive Order (E.O.) 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), section 2. Source: <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>.

<sup>305</sup> *Remarks by President Biden and Vice President Harris in a Meeting on Immigration*. WHITE HOUSE (Mar. 24, 2021). Source: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/24/remarks-by-president-biden-and-vice-president-harris-in-a-meeting-on-immigration/>.

**Guatemala City.** On June 7, 2021, Harris met with Guatemalan President Alejandro Giammattei in Guatemala City to discuss regional concerns.<sup>306</sup> As Harris explained after that meeting:

*The President and I discussed a fundamental belief that most people don't want to leave home. They don't want to leave the place where they grew up, where the language they know is spoken, where their culture that they know is present and has been, in this case, for centuries. Most people don't want to leave where their grandmother lives.*

*And when they do, it is usually for one of two reasons: because they are fleeing some type of harm or because to stay means that they cannot provide for their essential needs and the needs of their family.*<sup>307</sup>

According to Harris, her meeting with Giammattei focused on three key issues: “security”, and in particular “work to manage migration” and drug smuggling “at Guatemala’s northern and southern borders”; “economic development. . . the root causes of migration, in particular the lack of economic opportunity for many people . . . in Guatemala”; and “the importance of anti-corruption and the importance of an independent judiciary”.<sup>308</sup>

**Mexico City.** On her way back from Guatemala, the vice president stopped in Mexico City, where she met with Mexican President Andrés Manuel López Obrador on June 8, 2021.<sup>309</sup> As the White House readout for that meeting explains, obliquely:

*[T]o address root causes of migration in El Salvador, Guatemala, and Honduras, the United States joined Mexico in a new strategic partnership to share information and strategies and co-manage new programs to foster economic opportunity through agricultural development and youth empowerment. The two leaders also agreed to increase cooperation to further secure our borders and ensure orderly immigration.*<sup>310</sup>

**Tegucigalpa.** On January 27, 2022, Vice President Harris met<sup>311</sup> with the then-newly inaugurated president of Honduras, Xiomara Castro, the wife of former Honduran President Manuel Zelaya, who had been overthrown<sup>312</sup> in a 2009 coup.

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<sup>306</sup> Remarks by Vice President Harris and President Giammattei Of Guatemala in Joint Press Conference. WHITE HOUSE (Jun. 7, 2021). Source: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/07/remarks-by-vice-president-harris-and-president-giammattei-of-guatemalain-joint-press-conference/>.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Statement by Senior Advisor and Chief Spokesperson Symone Sanders on Vice President Kamala Harris’s Bilateral Meeting with President Andrés Manuel López Obrador of Mexico. WHITE HOUSE (Jun. 8, 2021).

<sup>310</sup> *Id.*

<sup>311</sup> Readout of Vice President Harris’s Meeting with President Castro of Honduras. WHITE HOUSE (Jan. 27, 2022). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/readout-of-vice-president-harris-meeting-with-president-castro-of-honduras/>.

<sup>312</sup> Honduras president arrested in military coup. THE GUARDIAN (Jun. 28, 2009). Source: <https://www.theguardian.com/world/2009/jun/28/honduras-coup-president-zelaya>.

The White House readout<sup>313</sup> for that meeting reported the two “discussed deepening our cooperation across a broad range of issues, including addressing the root causes of migration, combatting corruption, and expanding economic opportunity”.

It continued:

*Vice President Harris emphasized that combating corruption and impunity remains at the center of our commitment to address the root causes of migration. To that end, Vice President Harris welcomed President Castro’s focus on countering corruption and impunity, including her intent to request the assistance of the United Nations in establishing an international anti-corruption commission and commitment to advancing necessary legislative reforms to enable such a commission to succeed.*

**Economic Development.** A March 2024 “Fact Sheet”<sup>314</sup> on this strategy reports that the administration is “on track to meet its commitment to provide \$4 billion in economic development assistance to the Northern Triangle in four years”, including “U.S. government support for as many as 23,000 private sector firms in northern Central America has helped create and sustain up to an estimated 250,000 jobs”.

The White House has partnered with various private sector companies — including Microsoft, Nespresso, Mastercard, and PepsiCo — to make investments in the Northern Triangle as part of its root causes strategy.

According to an April 2022 White House “root causes” report, one partner company “is investing \$150 million in a new yarn spinning facility in Honduras”, which — that report claimed — would “increase indirect job growth in Honduras and in the United States”<sup>315</sup>.

In October 2023, however, that company closed three plants in Hillsville, Va., “laying off more than 300 employees”<sup>316</sup>, though it is not clear whether those closures were related to its investments in Honduras.

**Impacts.** It is difficult to assess how successful (or not) that root causes strategy has been, given the surge in illegal immigration generally since February 2021 and the impacts of Title 42.

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<sup>313</sup> *Readout of Vice President Harris’s Meeting with President Castro of Honduras.* WHITE HOUSE (Jan. 27, 2022). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/readout-of-vice-president-harriss-meeting-with-president-castro-of-honduras/>.

<sup>314</sup> *FACT SHEET: Update on the U.S. Strategy for Addressing the Root Causes of Migration in Central America.* WHITE HOUSE (Mar. 25, 2024). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/25/fact-sheet-update-on-the-u-s-strategy-for-addressing-the-root-causes-of-migration-in-central-america-3/>.

<sup>315</sup> *Report on the U.S. Strategy for Addressing the Root causes of Migration in Central America.* WHITE HOUSE (Apr. 19, 2022). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/19/report-on-the-u-s-strategy-for-addressing-the-root-causes-of-migration-in-central-america/>.

<sup>316</sup> *Parkdale Mills to close three plants.* THE CARROLL NEWS (Sept. 25, 2023). Source: [https://www.thecarrollnews.com/news/parkdale-mills-to-close-three-plants/article\\_7b5934d2-5bdd-11ee-8230-2f9cfa2d5d.html](https://www.thecarrollnews.com/news/parkdale-mills-to-close-three-plants/article_7b5934d2-5bdd-11ee-8230-2f9cfa2d5d.html).

In FY 2021, the year Harris assumed the root causes portfolio, CBP under the Biden-Harris administration encountered just over 604,500 illegal entrants<sup>317</sup> from the Northern Triangle.

Southwest border encounters of nationals of those three countries dropped to fewer than 542,000 in FY 2022 and declined further to just over 495,000 in FY 2023. In the first 10 months of FY 2024, CBP has encountered more than 365,000 Northern Triangle migrants at the Southwest border and are on track to make 438,295 encounters of migrants from those country this year.<sup>318</sup>

That only gives a partial picture, however, because many of those encounters prior to the end of Title 42 on May 11, 2023, likely involved migrants previously expelled under those CDC orders.

Focusing solely on migrants processed for removal proceedings under the INA — as opposed to the ones expelled under Title 42 — tells a different story.

Beginning in February 2021, CBP encountered fewer than 292,000 Northern Triangle migrants at the Southwest border who were processed under the INA in FY 2021; just over 197,000 more in FY 2022; 356,700-plus in FY 2023; and just short of 365,250 in the first 10 months of FY 2024 (again, with CBP on track to tally 438,295 Northern Triangle encounters by year's end).

That would suggest that the root causes strategy has had — at best — no impact on illegal migration from the Northern Triangle at all.

**Corruption in Honduras.** That strategy plainly does not appear to have had any positive impact on “countering corruption and impunity” in Honduras, the focus of the vice president’s discussions with President Castro in January 2022.

Here’s how the U.S. State Department described the situation there in its latest Country Reports on Human Rights Practices for Honduras: “The law provided for criminal penalties for corruption by officials, but authorities did not implement the law effectively, and officials continued to engage in corrupt practices with impunity. There were numerous reports of government corruption”.<sup>319</sup>

In fact, AP reported<sup>320</sup> last June that Gabriela Castellanos, director of the NGO, “National Anti-Corruption Council” (CNA), had fled the country “due to threats”. She left not long after the council “warned of the dangers posed by a ‘concentration of power’ from government posts going to the sons and other relatives of Castro and her husband, former President Manuel Zelaya”.

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<sup>317</sup> *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>318</sup> *Id.*

<sup>319</sup> *2023 Country Reports on Human Rights Practices: Honduras*. U.S. DEP’T OF STATE (undated). Source: <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/honduras/>.

<sup>320</sup> *Leader of Honduran anti-corruption group leaves country under threats*. AP (Jun. 19, 2023). Source: <https://apnews.com/article/honduras-corruption-xiomara-castro-a6440cc4025260f7b58e5abd54c66c92>.



There's reason to take CNA's nepotism warnings seriously. As Americas Quarterly (AQ) explained in March: "Castro's eldest child is her private secretary, her youngest daughter is in Congress, her brother-in-law is the president of Congress, and his son is the defense minister".<sup>321</sup>

Some of those relatives no longer hold office, apparently due to recent corruption revelations in the country, as noted below.

More recently, on September 4, CNA Director Castellanos sent a public letter to Castro, demanding she resign "based on the serious accusations of drug trafficking that have been presented against your family, whom you have appointed to work in the State".<sup>322</sup>

According to AP:

*The demand comes after a rocky week for Castro, who won the presidency on an anti-corruption campaign.*

*The day before the letter was sent, a video recorded in 2013 was released purportedly showing drug traffickers currently imprisoned in the United States offering more than \$525,000 to the president's brother-in-law and congressional leader, Carlos Zelaya.*

That demand came after Honduras announced on August 29 that it would be ending its 112-year-old extradition treaty with the United States following criticism by U.S. Ambassador to Honduras Laura Dogu about a meeting between Honduran and Venezuelan officials.<sup>323</sup>

As the New York Times explains, Ambassador Dogu told reporters after that meeting that "she was 'surprised' to see Honduras's defense minister and a top general" — Roosevelt Leonel Hernández — "seated next to a narco-trafficker in Venezuela".<sup>324</sup>

The "narco-trafficker" in question is apparently Venezuelan defense chief Gen. Vladimir Padrino López, "charged in 2020 by U.S. prosecutors with conspiracy to smuggle drugs".<sup>325</sup> According to the Times, the Honduran foreign minister is terminating the extradition treaty because he fears it "could be used as a 'political weapon'" by the United States.<sup>326</sup>

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<sup>321</sup> Avila, Jennifer. *Honduras' Anti-Corruption Push Has Stalled*. Americas Quarterly (Mar. 18, 2024). Source: <https://americasquarterly.org/article/honduras-anti-corruption-push-has-stalled/>.

<sup>322</sup> *Honduras' president is asked to resign after corruption scandal she says is a plot to oust her*. AP (Sept. 4, 2024). Source: <https://apnews.com/article/xiomara-castro-coup-carlos-zelaya-honduras-corruption-60fc69e941f8b8ed55b770da530468bf>.

<sup>323</sup> Wagner, James and Suazo, Joan. *Honduras Says It Will End Extradition Treaty With United States*. NEW YORK TIMES (Aug. 29, 2024). Source: <https://www.nytimes.com/2024/08/29/world/americas/honduras-extradition-us.html>.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

Costa Rican news outlet, Tico Times, reports that the termination of the treaty has triggered protests in Honduras, with thousands of right-wing opponents of President Castro taking to the streets.<sup>327</sup>

It explains:

*Right-wing political groups accuse the ruling Liberty and Refoundation (Libre) party, led by Castro’s husband, former president Manuel Zelaya—who was ousted in 2009—of seeking to establish a government similar to Venezuela or Nicaragua under the guise of “democratic socialism.” The opposition also alleges that Castro ended the extradition treaty with Washington to protect members of her administration and her family.*

*Just three days after the decision, two of the president’s relatives resigned: her brother-in-law and her nephew. Carlos Zelaya, the Secretary of Congress, stepped down after admitting to the Attorney General’s Office that he had met with drug traffickers in 2013, a revelation made public by a leaked video earlier that week. José Manuel Zelaya, the Minister of Defense and the president’s son, also resigned.<sup>328</sup>*

All of this calls into question how effective the Biden-Harris root causes strategy has been, or how any such strategy could be given how intractable those “root causes” are.

## **“The Senate Border Bill”**

The Biden-Harris administration has touted the Amendment in the Nature of a Substitute to H.R. 815<sup>329</sup>, introduced by Sen. Patty Murray (D. Wash.) as a critical tool necessary to securing the border. That amendment is better known as the “bipartisan Senate border bill”.

It is the product of negotiations conducted through the fall and early winter by Sens. James Lankford (R-Okla.), Krysten Sinema (I-Ariz.), and Chris Murphy (D-Conn.). Prior to its release, but plainly aware of its contents, President Biden issued the following statement<sup>330</sup> about the bill on January 26:

*What’s been negotiated would – if passed into law – be the toughest and fairest set of reforms to secure the border we’ve ever had in our country.*

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<sup>327</sup> *Thousands Protest in Honduras After Extradition Treaty Canceled*. TICO TIMES (Sept. 7, 2024). Source: <https://ticotimes.net/2024/09/07/thousands-protest-in-honduras-after-extradition-treaty-canceled>.

<sup>328</sup> *Id.*

<sup>329</sup> Amendment in the Nature of a Substitute to H.R. 815 (Feb. 4, 2023). Source: [https://www.appropriations.senate.gov/imo/media/doc/emergency\\_national\\_security\\_supplemental\\_bill\\_text.pdf](https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_bill_text.pdf).

<sup>330</sup> *Statement from President Joe Biden On the Bipartisan Senate Border Security Negotiations*. WHITE HOUSE (Jan. 26, 2024). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/26/statement-from-president-joe-biden-on-the-bipartisan-senate-border-security-negotiations/>.

*It would give me, as President, a new emergency authority to shut down the border when it becomes overwhelmed. And if given that authority, I would use it the day I sign the bill into law.*

Similarly, in her acceptance speech<sup>331</sup> at the Democratic National Convention on August 23, Vice President Harris stated:

*Last year, Joe and I brought together Democrats and conservative Republicans to write the strongest border bill in decades. The border patrol endorsed it. . .*

*Well, I refuse to play politics with our security, and here is my pledge to you. As president, I will bring back the bipartisan border security bill that he killed, and I will sign it into law. I know — I know we can live up to our proud heritage as a nation of immigrants and reform our broken immigration system.*

There appears to be some disagreement — if not lack of understanding — about what the provisions in the bill would actually do if enacted.

As noted *infra*, section 235(b) of the INA mandates the detention of inadmissible applicants for admission — aliens apprehended entering illegally and aliens denied admission at the ports of entry. The current border crisis, as Judge Wetherell held in *Florida I*<sup>332</sup>, is largely due to the Biden-Harris administration’s failure to comply with that detention mandate.

**Section 3141.** Section 3141<sup>333</sup> of the Senate border bill would allow the DHS secretary — in his unfettered discretion based only on undefined “operational circumstances” — to send inadmissible applicants for admission encountered by CBP to “Provisional Noncustodial Removal Proceedings” (PNRP) if they express a fear of persecution or request asylum.

Those are the same triggers for credible fear interviews in expedited removal proceedings under section 235(b)(1) of the INA for inadmissible applicants for admission at the borders and the ports who lack proper entry documents.

At those PNRPs, those aliens’ protection claims would be adjudicated by USCIS asylum officers — not immigration judges as under the current removal proceeding process. If this provision were enacted, it would codify a similar administrative asylum procedure implemented by Biden-Harris in March 2022<sup>334</sup>, which is being challenged<sup>335</sup> by a group of states in federal court.

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<sup>331</sup> Full Transcript of Kamala Harris’s Democratic Convention Speech. NEW YORK TIMES (Aug. 23, 2024). Source: <https://www.nytimes.com/2024/08/23/us/politics/kamala-harris-speech-transcript.html>.

<sup>332</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order (N.D. Fla. Mar. 8, 2023) at 21-22. Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

<sup>333</sup> Amendment in the Nature of a Substitute to H.R. 815 (Feb. 4, 2023), sec. 3141. Source: [https://www.appropriations.senate.gov/imo/media/doc/emergency\\_national\\_security\\_supplemental\\_bill\\_text.pdf](https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_bill_text.pdf)

<sup>334</sup> *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*. 87 Fed. Reg. 18078-226 (Mar. 29, 2022). Source: <https://www.govinfo.gov/content/pkg/FR-2022-03-29/pdf/2022-06148.pdf>.

<sup>335</sup> See *Arizona v. Garland*, 6:22-cv-01130 (W.D. La.). Source: <https://www.courtlistener.com/docket/63271112/arizona-v-garland/?page=2>.

More saliently, however, section 3141<sup>336</sup> would also *mandate* that DHS *release* from custody inadmissible applicants for admission referred to those PNRP’s — essentially codifying the Biden-Harris administration’s migrant release policies that Judge Wetherell concluded<sup>337</sup> were largely driving the border crisis.

**Section 3146(b).** Similarly, section 3146(b) of the bill would amend DHS’s general arrest and release authority in section 236(a) of the INA<sup>338</sup>, to allow DHS to release any “alien encountered at the border” on the alien’s own recognizance (OR) with an NTA.

As noted *infra*, Border Patrol agents acting pursuant to Biden-Harris policies have released more than 840,000 migrants apprehended at the Southwest border on NTA/OR in the first 10 months of FY 2024<sup>339</sup> alone, purportedly under their existing authority in the current version of section 236(a) of the INA.

Section 3146(b) proves that those ongoing NTA/OR border releases actually violate the INA, but more critically if it implemented it would — as is true of section 3141 of the Senate bill — codify the administration’s “catch and release” policies that are the main driving force behind the border crisis.

**Summary of the Senate Border Bill.** Not only isn’t the Senate border bill “the toughest and fairest set of reforms to secure the border we’ve ever had in our country” or “the strongest border bill in decades”, but rather it would weaken border security by making it more likely that inadmissible applicants for admission would be released into the United States, where they would be able to live and work for years — the ultimate “pull factor” for illegal immigration.

## The “Proclamation IFR”

Unable to secure passage of the Senate border bill, and despite the fact that the CLAP rule remains in effect, on June 4, President Biden issued a “Proclamation on Securing the Border”<sup>340</sup> that also limits the availability of asylum protection for illegal migrants apprehended crossing the border illegally.

In that proclamation, the president blamed “global conditions” and “our broken immigration system” for “historic migration throughout the Western Hemisphere”, including at the U.S. Southwest border.<sup>341</sup>

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<sup>336</sup> Amendment in the Nature of a Substitute to H.R. 815 (Feb. 4, 2023), sec. 3141. Source:

[https://www.appropriations.senate.gov/imo/media/doc/emergency\\_national\\_security\\_supplemental\\_bill\\_text.pdf](https://www.appropriations.senate.gov/imo/media/doc/emergency_national_security_supplemental_bill_text.pdf)

<sup>337</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order (N.D. Fla. Mar. 8, 2023) at 21-22. Source:

[https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

<sup>338</sup> Section 236(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>339</sup> CBP NEWSROOM (2024). “Custody and Transfer Statistics FY2024, USBP Monthly Southwest Border Encounters by Processing Disposition.” U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source:

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

<sup>340</sup> *A Proclamation on Securing the Border*. WHITE HOUSE (Jun. 4, 2024). Source: <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

<sup>341</sup> *Id.*

That, coupled with Congress’s “failure to update an immigration and asylum system that is simply broken” and the fact that it had “chronically underfunded our border security and immigration system”, the president contended, has “severely strained our capacity at the border”.<sup>342</sup>

The result, according to that proclamation:

*is a vicious cycle in which our United States Border Patrol facilities constantly risk overcrowding, our detention system has regularly been at capacity, and our asylum system remains backlogged and cannot deliver timely decisions, all of which spurs more people to make the dangerous journey north to the United States.*<sup>343</sup>

For those reasons, the president explained, he was utilizing his authority under sections 212(f)<sup>344</sup> and 215(a) of the INA<sup>345</sup> to suspend and limit entries of illegal migrants once certain CBP encounter levels (“a 7-consecutive-calendar-day average of 2,500 encounters or more”) were met or exceeded at the Southwest border.<sup>346</sup>

Subsequently, on June 7, DHS and DOJ issued an interim final rule (IFR)<sup>347</sup> implementing that proclamation (“Proclamation IFR”).

As a DHS fact sheet<sup>348</sup> explains, the Proclamation IFR makes “three key changes” to DHS’s processing of illegal entrants.

First, “during periods of high border encounters”, migrants crossing the Southwest border illegally “will generally be ineligible for asylum, absent exceptionally compelling circumstances and unless they are excepted by the Proclamation”.

Second, aliens encountered at the border who are subject to expedited removal while those limitations are in effect will only be referred for a credible fear screening if they expressly request asylum or assert a fear of harm.

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<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Sec. 212(f) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?edition=prelim&num=0&req=granuleid%3AUSC-prelim-title8-section1182>.

<sup>345</sup> Sec. 215(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1185&num=0&edition=prelim>.

<sup>346</sup> *A Proclamation on Securing the Border*. WHITE HOUSE (Jun. 4, 2024). Source: <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

<sup>347</sup> *Securing the Border*. U.S. DEP’T OF HOMELAND SECURITY AND U.S. DEP’T OF JUSTICE, EXEC. OFC. FOR IMMIGRATION REVIEW, 89 Fed. Reg. 48710-72 (Jun. 7, 2024). Source: <https://www.govinfo.gov/content/pkg/FR-2024-06-07/pdf/2024-12435.pdf>.

<sup>348</sup> *Fact Sheet: Presidential Proclamation to Suspend and Limit Entry and Joint DHS-DOJ Interim Final Rule to Restrict Asylum During High Encounters at the Southern Border*. U.S. DEP’T OF HOMELAND SECURITY (Jun. 4, 2024). Source: <https://www.dhs.gov/news/2024/06/04/fact-sheet-presidential-proclamation-suspend-and-limit-entry-and-joint-dhs-doj>.

It should be noted that this is already the credible-fear referral standard under section 235(b)(1) of the INA.<sup>349</sup>

Third, aliens barred from receiving asylum under the proclamation will still be eligible for two other forms of protection — statutory withholding and protection under the Convention Against Torture (CAT)<sup>350</sup> — but will have to meet the higher regulatory “reasonable fear” standard<sup>351</sup> to be able to apply for those protections.

There is little public visibility into the implementation of the Proclamation IFR, though notably the number of illegal entrants subject to expedited removal has increased significantly since it was published.

Of the nearly 140,000 illegal entrants apprehended by Border Patrol agents at the Southwest border in June and July, CBP reports<sup>352</sup> that 5,000-plus were subject to expedited removal and nearly 59,000 others were specifically subject to expedited removal under the proclamation — combined more than 45 percent of total apprehensions and a significant increase over the administration’s prior expedited-removal rate.

What is unknown, however, is how many of those migrants subject to expedited removal were subsequently released from custody. In any event, however, uncertainty surrounding the implementation of the rule has apparently deterred illegal migration, at least in the short run—raising the question of why the administration failed to take such actions sooner.

## **Border Releases Under the Biden-Harris Administration**

The Biden-Harris administration has failed to provide a total figure on the number of inadmissible applicants for admission it has released in contravention of the detention mandates in section 235(b) of the INA.

In June 2024, however, the Center determined that more than 2 million<sup>353</sup> such aliens had been released into the United States since February 2021 just under DHS’s limited parole authority, an incomplete total given that much of DHS’s data was preliminary.

Adding just aliens who arrived under CHNV and the CBP One app interview policy since that figure was compiled to the earlier estimate brings the total of Biden-Harris paroles to nearly 2.2 million — again, likely an undercount.

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<sup>349</sup> See section 235(b)(1)(A)(i) of the INA (2024) (immigration officer shall order an alien subject to expedited removal removed “unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>350</sup> See *Model Hearing Program Substantive Law Lecture: Asylum, Withholding of Removal, and Protection Under the U.N. Convention Against Torture*. U.S. DEPT OF JUSTICE, EXEC. OFC. FOR IMMIGRATION REVIEW (Oct. 2021). Source: <https://icor.eoir.justice.gov/substantive-law-lecture-asylum-withholding-cat-accessible.pdf>.

<sup>351</sup> 8 CFR § 1208.31 (2024). Source: <https://www.law.cornell.edu/cfr/text/8/1208.31>.

<sup>352</sup> *Custody and Transfer Statistics, USBP Monthly Southwest Border Apprehensions by Transfer Destination*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>353</sup> See Arthur, Andrew. *Biden Has Paroled In Two Million-Plus Inadmissible Aliens*. Center for Immigration Studies (Jun. 21, 2024). Source: <https://cis.org/Arthur/Biden-Has-Paroled-Two-MillionPlus-Inadmissible-Aliens>.



In addition, CBP statistics reveal that Border Patrol agents released more than 2 million illegal migrants apprehended at the Southwest border on NTA/OR between February 2021 and the end of July<sup>354</sup> and 95,000-plus others<sup>355</sup> with NTRs.<sup>356</sup>

Those figures do not include more than 410,000 unaccompanied alien children encountered by CBP at the Southwest border between February 2021 and the end of July<sup>357</sup>, whom DHS is required by law<sup>358</sup> to transfer to the HHS for placement with “sponsors” in the United States.

Nor does it include the ultimate dispositions of nearly 919,000 illegal migrants whom the DHS Office of Homeland Security Statistics (OHSS) reports<sup>359</sup> Border Patrol transferred to ICE between February 2021 and the end of May — some or all of whom ICE thereafter released. Note that in the month of May 2022 alone, ICE released nearly 9,950 of the fewer than 20,000 aliens it was holding who had first been encountered by CBP, just short of half.<sup>360</sup>

Nor does it — or can it — include more than 1.8 million “got aways” whom Fox News<sup>361</sup> reports successfully evaded apprehension at the Southwest border and entered illegally. That figure — purportedly based upon CBP statistics — is almost certainly an undercount, given that the Congressional Budget Office (CBO) estimated<sup>362</sup> in January that there were 860,000 got aways in FY 2023, not 670,674 as Fox News reported.

Given these statistics, the House Judiciary Committee was almost definitely correct when it recently reported<sup>363</sup>: “In less than four years, the Biden-Harris Administration has released into

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<sup>354</sup> See *Custody and Transfer Statistics, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>; *Custody and Transfer Statistics Fiscal Year 2023, USBP Monthly Southwest Border Encounters by Processing Disposition*. 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, USBP Monthly Southwest Border Encounters by Processing Disposition*. 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 FY 2021, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 5, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021>.

<sup>355</sup> *Southwest Border: Challenges and Efforts Implementing New Processes for Noncitizen Families*. GOV’T ACCOUNTABILITY OFC. (Sept. 28, 2022), GAO-22-105456. Source: <https://www.gao.gov/products/gao-22-105456>.

<sup>356</sup> Total figure: 2,004,965 Border Patrol NTA/OR releases at the Southwest border between February 2021 and the end of July 2024.

<sup>357</sup> See *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>358</sup> See fn. 141, *infra*.

<sup>359</sup> See *Immigration Enforcement and Legal Processes Monthly Tables*. U.S. DEP’T OF HOMELAND SECURITY, OFC. OF HOMELAND SECURITY STATISTICS (undated). Source: <https://ohss.dhs.gov/topics/immigration/immigration-enforcement/immigration-enforcement-and-legal-processes-monthly>.

<sup>360</sup> *Biden v. Texas*, Case No. 2:21-cv-00067-Z, Defendants’ Monthly Report for May 2022 (N.D. Tex. Jun. 15, 2022). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.140.2.pdf>.

<sup>361</sup> Shaw, Adam and Melugin, Bill. *New data reveals Illegal immigrants eluding Border Patrol spiked under Biden, surpassing predecessors*. FOX NEWS (May 15, 2024). Source: <https://www.foxnews.com/politics/new-data-reveals-illegal-immigrants-eluding-border-patrol-spiked-under-biden-surpassing-predecessors>.

<sup>362</sup> See *The Demographic Outlook: 2024 to 2054*. CONG. BUDGET OFC. (January 2024), at 21. Source: <https://www.cbo.gov/system/files/2024-01/59697-Demographic-Outlook.pdf#page=9>.

<sup>363</sup> *The Consequences of the Biden-Harris Administration’s Open-Borders Policies: The Cases of Four Illegal Aliens Who Viciously Attacked a Man on a Chicago Train*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 21, 2024). Source: <https://judiciary.house.gov/media/press-releases/consequences-biden-harris-administrations-open-borders-policies-cases-four>.

the United States more than 5.6 million illegal aliens, with another 1.9 million illegal alien ‘gotaways’ escaping into the country during the same time”.

## Impacts of Migrant Releases

As the Wall Street Journal has explained:

*Recent immigrants tend to earn less than U.S.-born workers because of their lower level of education, lack of English, and in some cases because they are working without permission. They might also compete with existing workers with less education and put downward pressure on their wages, too.*<sup>364</sup>

Those wage declines, coupled with increasing fiscal strains on state and local budgets<sup>365</sup> and on public and health services, are imposing real costs on working Americans.

Moreover, a number of illegal migrants apprehended at the Southwest border and released into the United States have been charged in connection with a number of recent high-profile crimes.

Jose Ibarra, a 26-year-old Venezuelan national charged with the February murder of 22-year-old Augusta University College of Nursing student Laken Riley in Athens, Ga., was apprehended after entering illegally in September 2022 and released.<sup>366</sup>

Venezuelan nationals Johan Jose Martinez-Rangel, 22, and Franklin Jose Peña Ramos, 26, charged with capital murder in the June 16 killing of 12-year-old Houston resident Jocelyn Nungaray, entered the United States illegally.<sup>367</sup> Each was apprehended near El Paso, shortly after crossing, Martinez-Rangel on March 14 and Peña on May 28.

Angel Matias Castellanos-Orellana, a 19-year-old Honduran national arrested in Kenner, La., in February “in connection with the brutal assault of a 14-year-old girl and the ‘repeated stabbing of a man during a robbery’” had been apprehended by Border Patrol near Eagle Pass, Tex., last October.<sup>368</sup>

Despite the fact that he claimed no fear of return, he was released on NTA/OR “due to ‘a lack of space’” and told to report to ICE in New Orleans, despite the fact that detention space was available.

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<sup>364</sup> Kiernan, Paul. *How Immigration Remade the U.S. Labor Force*. Wall Street Journal (Sept. 4, 2024). Source: <https://www.wsj.com/economy/how-immigration-remade-the-u-s-labor-force-716c18ee?st=eptpegpso8jze7v>.

<sup>365</sup> See Jacobs, Elizabeth. *Illegal Immigration Is Expensive*. CENTER FOR IMMIGRATION STUDIES (Aug. 31, 2024). Source: <https://cis.org/Jacobs/Illegal-Immigration-Expensive>.

<sup>366</sup> Conklin, Audrey. *Laken Riley murder: Illegal immigrant suspect in Georgia college student slaying asks to hide certain evidence*. Fox News (Aug. 30, 2024). Source: <https://www.foxnews.com/us/laken-riley-murder-illegal-immigrant-suspect-georgia-college-student-slaying-asks-hide-certain-evidence>.

<sup>367</sup> *Judge sets \$10M bond for second Venezuelan man accused of killing a 12-year-old Houston girl*. AP (Jun. 26, 2024). Source: <https://apnews.com/article/girl-murder-houston-undocumented-venezuelans-bond-22153232c69dbdb0ee62a5ffb19035e0>.

<sup>368</sup> *The Consequences of the Biden-Harris Administration's Open-Borders Policies: The Case of the Illegal Alien Who Brutally Assaulted a Teenage Louisiana Girl*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Sept. 3, 2024) at 5-6 (cleaned up). Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/09-03-2024%20The%20Case%20of%20the%20Illegal%20Alien%20Who%20Brutally%20Assaulted%20a%20Teenage%20Louisiana%20G.irl.pdf>.

And those a just a few of many.

## “Guidelines for the Enforcement of Civil Immigration Law”

Not all of the Biden-Harris immigration policies have focused strictly on the border, however.

On September 30, 2021, DHS Secretary Alejandro Mayorkas issued his “Guidelines for the Enforcement of Civil Immigration Law”<sup>369</sup>, which placed restrictions on the ability of ICE officers and attorneys.

Specifically, those guidelines direct ICE officers and attorneys to consider certain “aggravating” and “mitigating” factors before they investigate, question, arrest, detain, prosecute, or remove deportable aliens (collectively: “enforcement action”), with limited exceptions.

The aggravating factors are general and objective, relating to the alien’s specific criminal offenses and prior criminal history. The mitigating factors, on the other hand, are more individual and subjective, having to do with the alien’s age, health, eligibility for relief from removal, and — interestingly — whether any of the alien’s family members were in the military or worked for the government.

Among the issues with those guidelines is that they contravene two provisions of the INA that require DHS to detain certain criminal aliens.

Section 236(c) of the INA<sup>370</sup> states the department “shall take into custody” an alien removable on most criminal grounds “when the alien is released”.

Similarly, section 241(a) of the INA<sup>371</sup> requires DHS to take aliens ordered removed into custody during a 90-day removal period, and paragraph (2) therein states that, “Under no circumstance during the removal period shall [DHS] release an alien who has been found” removable on any of the criminal grounds of removability.

Because the Mayorkas guidelines frustrate those mandates, a group of plaintiff states led by Texas sued the Biden-Harris administration to set them aside.<sup>372</sup>

In June 2022, a U.S. district court judge enjoined the Mayorkas guidelines<sup>373</sup>. That injunction eventually made its way to the Supreme Court, where in June 2023 a majority of justices held that the states lacked standing to bring the case.<sup>374</sup>

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<sup>369</sup> *Guidelines for the Enforcement of Civil Immigration Law*. U.S. DEP’T OF HOMELAND SECURITY (Sept. 30, 2021). Source: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>370</sup> Section 236(c) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>371</sup> Section 241(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim>.

<sup>372</sup> *Texas v. U.S.*, Case No. 6:21-cv-00016, First Amended Complaint (S.D. Tex. Oct. 22, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.109.0.pdf>.

<sup>373</sup> *Texas v. U.S.*, Case No. 6:21-cv-00016, Memorandum Opinion and Order (S.D. Tex. Jun. 10, 2022). Source: [https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.240.0\\_4.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.240.0_4.pdf).

<sup>374</sup> *U.S. v. Texas*, 599 U.S. 670 (2023). Source: [https://www.supremecourt.gov/opinions/22pdf/22-58\\_i425.pdf](https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf).

In essence, the majority held there is no precedent for a plaintiff — even a state — to request that some third-party (in this case a criminal alien) be prosecuted on either criminal or immigration grounds.

Justice Alito, in dissent, found:

*In order to reach this conclusion, the Court . . . holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress’s power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. I would not blaze this unfortunate trail.*<sup>375</sup>

In any event, the Center has compared ICE criminal alien data under the three pre-Covid years of the Trump administration (FY 2017-2019) and three years of the current administration (FY 2021-2023).

It found that arrests of criminal aliens had declined 57 percent, that there was a 67 percent decrease in deportations of criminal aliens, and that ICE detainers of criminals fell 44 percent during the Biden-Harris years.<sup>376</sup>

That decline in arrests covered every crime category identified by ICE, and included a 63-percent decrease with respect to larcenies, 55 percent for burglaries, a 48-percent drop in assault cases, a 47-percent decline in burglary cases, and a 34-percent drop in aliens with kidnapping records.

Moreover, in those guidelines, Secretary Mayorkas proclaims — without citation — that “a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct”.<sup>377</sup>

That’s particularly interesting given that under the Obama-Biden administration, alien domestic violence offenders were a *priority* for ICE enforcement<sup>378</sup>, which makes more sense given that the CDC has found that “over half of female homicide victims in the U.S. are killed by a current or former male intimate partner”<sup>379</sup>.

Secretary Mayorkas defends these enforcement restrictions under the guise of prosecutorial discretion, the principle that law-enforcement officials have the inherent authority to *not* enforce the law.

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<sup>375</sup> *Id.* at \_\_\_\_\_. Slip op., dissent at 1.

<sup>376</sup> Feere, Jon. *Three Years of Biden Immigration Policies Have Benefitted Criminal Aliens*. CENTER FOR IMMIGRATION STUDIES (Jan. 9, 2024). Source: <https://cis.org/Report/Three-Years-Biden-Immigration-Policies-Have-Benefitted-Criminal-Aliens>.

<sup>377</sup> *Guidelines for the Enforcement of Civil Immigration Law*. U.S. DEP’T OF HOMELAND SECURITY (Sept. 30, 2021), at 4. Source: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>378</sup> See *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*. U.S. Dep’t of Homeland Security (Nov. 20, 2014), at 4 (“aliens convicted of a ‘significant misdemeanor,’ which for these purposes is an offense of domestic violence”, are “Priority 2” misdemeanants). Source: [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>379</sup> Domanoske, Camila. *CDC: Half Of All Female Homicide Victims Are Killed By Intimate Partners*. NPR (Jul. 21, 2017). Source: <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners>.

As DHS explained in a separate memo<sup>380</sup> implementing those guidelines:

*On his first day in office, President Biden affirmed that "advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government." In the immigration enforcement context, scholars and professors have observed that prosecutorial discretion guidelines are essential to advancing this Administration's stated commitment to "advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." [Footnotes omitted.]*

In other words, the Biden-Harris DHS equates immigration enforcement in the INA with the worst instances of discrimination in our nation's past.

## **Conclusion**

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

*In the decade before September 11, 2001, border security — encompassing travel, entry, and immigration — was not seen as a national security matter. Public figures voiced concern about the "war on drugs," the right level and kind of immigration, problems along the southwest border, migration crises originating in the Caribbean and elsewhere, or the growing criminal traffic in humans. The immigration system as a whole was widely viewed as increasingly dysfunctional and badly in need of reform. In national security circles, however, only smuggling of weapons of mass destruction carried weight, not the entry of terrorists who might use such weapons or the presence of associated foreign-born terrorists.<sup>381</sup>*

That lesson has apparently been lost on this administration. In my more than three decades of involvement in immigration and border security — both before and after September 11 — our borders have never been less secure, nor have Americans ever previously been more vulnerable to predation by criminal aliens.

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

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<sup>380</sup> *Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law*. U.S. Dep't of Homeland Security (Sept. 30, 2021), at 7. Source:

<https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.122.7.pdf>.

<sup>381</sup> *The 9/11 Commission Report*. NAT'L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES (Aug. 21, 2004) at 383-84. Source: <https://9-11commission.gov/report/>.