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To the  
Committee on the Judiciary  
United States Senate

For A Hearing Titled:  
“How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and  
Devastate Our Economy”

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Room G50, Dirksen Senate Office Building  
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Chairman Durbin, Ranking Member Graham, and members of the committee, thank you for inviting me here today to discuss the impacts of possible U.S. immigration enforcement under the incoming administration.

To address the issues raised by the committee, I have structured my written testimony to first, explain the source of the immigration power; second, to describe and delineate the inspection and admission process for aliens coming to the United States; third, to detail the state of border security prior to the Biden administration; fourth, to explain the Biden administration's border policies and their impact on migrant releases; fifth, to assess the economic and public safety impacts of the Biden administration's migrant releases; sixth, to estimate the current unauthorized population and ICE's non-detained docket; seventh, to attempt to predict what the incoming administration's immigration and deportation policies will be; eighth, to explain prior administrations' interior enforcement guidelines and policies; ninth, to describe the impacts of the Biden administration's enforcement guidelines; and tenth, to speculate on the impact of the (second) Trump administration's immigration plans.

## I. CONGRESS' PLENARY AUTHORITY OVER IMMIGRATION

Key to understanding how our immigration laws *should* be enforced 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

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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/artI-S8-C18-8-1/ALDE\\_00001255/](https://constitution.congress.gov/browse/essay/artI-S8-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>.

law) *may enter or remain in the United States*” (emphasis added). Reference to Supreme Court precedent 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 legislative and judicial tissues of our body politic as any aspect of our government. [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>8</sup> delineates the various classes 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>9</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”.

Conversely, section 237(a) of the INA<sup>10</sup> lists the “classes of deportable aliens”, aliens lawfully admitted to the United States who, for various reasons, Congress has directed be removed from the United States.

Those classes include nonimmigrants who have overstayed their lawful periods of admission or who have otherwise violated the terms of their admission<sup>11</sup>, aliens convicted of certain criminal acts<sup>12</sup>, and aliens who pose a national security, espionage, or terrorism risk<sup>13</sup>.

## II. THE INSPECTION AND ADMISSION PROCESS

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>14</sup> that U.S. Customs and Border Protection (CBP) officers

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

<sup>8</sup> Sec. 212 of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>9</sup> *Id.* at cl. (a)(7)(A)(i).

<sup>10</sup> Sec. 237(a) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

<sup>11</sup> *Id.* at subpara. (a)(1)(C).

<sup>12</sup> *Id.* at para. (a)(2).

<sup>13</sup> *Id.* at para. (a)(4).

<sup>14</sup> Sec. 235 of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

(including Border Patrol agents) must follow when considering whether to admit an “applicant for admission”<sup>15</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>16</sup>-- a fact essential to assessing the legality of what has been occurring at the Southwest border.

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.

Section 302 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)<sup>17</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>18</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>19</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>20</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>21</sup> and received few constitutional protections.<sup>22</sup>

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<sup>15</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>16</sup> See *id.*

<sup>17</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>18</sup> See *Overview of INS History*. USCIS HISTORY OFFICE AND LIBRARY (undated) (“The Homeland Security Act of 2002 disbanded INS on March 1, 2003. Its constituent parts contributed to 3 new federal agencies serving under the newly []formed Department of Homeland Security (DHS): 1. Customs and Border Protection (CBP), 2. Immigration and Customs Enforcement (ICE), and 3. U.S. Citizenship and Immigration Services (USCIS).”). Source: <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf>.

<sup>19</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>20</sup> *Id.* at 1.

<sup>21</sup> See sec. 236 of the INA (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>22</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/>.

Aliens who had entered the country — even illegally — and who did so “free from actual and constructive restraint”<sup>23</sup> were placed into deportation proceedings under then-section 242 of the INA<sup>24</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>25</sup>

Applying the entry doctrine was challenging, however, in cases involving aliens who had entered illegally.<sup>26</sup> Did the alien “actually and intentionally evade inspection”? Was the alien “free from official restraint”?<sup>27</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>28</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>29</sup>

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<sup>23</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>24</sup> See sec. 242 of the INA (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>25</sup> See fn. 22 (*Shaughnessy*).

<sup>26</sup> See *Matter of G-*, 20 I&N Dec. 764 (BIA 1993) (“The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States. In the case of the *Golden Venture*, an alien will be found to have been ‘free from official restraint’ if he establishes that he was among the first of the ship’s occupants to reach the shore, that he landed on a deserted beach, or that he managed to flee into a neighboring community. In contrast, an alien who was escorted off the *Golden Venture*, pulled from the water by rescue personnel, or who landed in the cordoned-off area of the beach after it was secured will not be found to have been ‘free from official restraint,’ as his movements were restricted to the immediate vicinity of the beach that was cordoned-off and controlled by the enforcement officers of the various governmental organizations present at the site to prevent the ship’s occupants from absconding. In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. Where there is no evidence that an alien, who arrives at other than the nearest inspection point, deliberately surrenders himself to the authorities for immigration processing, or that, once ashore, he seeks them out, voluntarily awaits their arrival, or otherwise acts consistently with a desire to submit himself for immigration inspection, actual and intentional evasion of inspection at the nearest inspection point may be found.”). Source:

<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3215.pdf>.

<sup>27</sup> See *id.*

<sup>28</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>29</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

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA<sup>30</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>31</sup>, which has jurisdiction over the ports of entry.

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

If, following that inspection, 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>32</sup>, that officer has two options.

Section 235(b)(1)(A)(i) of the INA<sup>33</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>34</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.

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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>30</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>31</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>.

<sup>32</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>33</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>34</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>.

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>35</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>36</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. 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>37</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>38</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>39</sup>.

#### “Parole”

Although section 235(b) of the INA requires the Department of Homeland Security (DHS) to detain inadmissible applicants for admission, Congress gave the DHS secretary extremely limited authority in section 212(d)(5)(A) of the INA<sup>40</sup> to “parole” individual aliens into the United States in exceptional or emergent circumstances.

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<sup>35</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>36</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>.

<sup>37</sup> See 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>38</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>39</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>40</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>.

That provision<sup>41</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.

First, parole may only be granted “on a case-by-case basis”<sup>42</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>43</sup>. Granting parole for any other purpose is thus *ultra vires*<sup>44</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>45</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*

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</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>45</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>.



*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>46</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.

Congress rigidly cabined the parole authority in IIRIRA because various administrations abused parole to ignore Congress' plenary power over immigration and exceed the limits it set on the annual admission of immigrants<sup>47</sup>.

Note that when Congress amended the parole provision in IIRIRA<sup>48</sup>, it did so under the title "Limitation on the Use of Parole"<sup>49</sup>, clearly expressing its intent to restrain the parole authority.

In its 2011 opinion in *Cruz-Miguel v. Holder*<sup>50</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>51</sup> parole regulations in 1982:

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<sup>46</sup> Homeland Security Act of 2002, Pub. L. 107-206 (2002). Source: <https://www.congress.gov/bill/107th-congress/house-bill/5005/text>; see also *id.* at sec. 471(a) ("Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.").

<sup>47</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>48</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>49</sup> *Id.*

<sup>50</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>51</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>.

*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.]*

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; they did not in any way expand them.

I note, however, that the current version of the parole regulation, 8 CFR § 212.5<sup>52</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>53</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

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<sup>52</sup> 8 CFR § 212.5 (2024). Source: <https://www.law.cornell.edu/cfr/text/8/212.5>.

<sup>53</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>.

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.

Finally, it should be noted that even though aliens are paroled into the United States, the law treats them as if they are still awaiting admission. As the Fifth Circuit has explained:

*parole creates something of legal fiction; although a paroled alien is physically allowed to enter the country, the legal status of the alien is the same as if he or she were still being held at the border waiting for his or her application for admission to be granted or denied.*<sup>54</sup>

So, even though an alien who has been paroled can be released, seek work authorization, buy a house and a car, get married, and have children, in the eyes of the law that alien has never left the port of entry and has only the constitutional rights that any other alien sitting in a port has.

Which is to say, they don't have many rights at all.<sup>55</sup> Moreover, as the parole statute<sup>56</sup> shows, the DHS secretary has broad discretion to revoke a grant of parole, at which point the paroled alien must be returned to custody for removal proceedings.

These points are all crucial to this analysis because every alien paroled into the United States is facially inadmissible, and therefore removable unless and until that alien is either admitted to this country or allowed to withdraw his or her application for admission and depart.

### III. THE STATE OF BORDER SECURITY IMMEDIATELY PRIOR TO THE BIDEN ADMINISTRATION

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>57</sup>

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>58</sup>

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

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<sup>54</sup> *Duarte v. Mayorkas*, 27 F.4th 1044, 1058 (5th Cir. 2022). Source: <https://casetext.com/case/duarte-v-mayorkas-12>.

<sup>55</sup> See, e.g., *Landon v. Plasencia*, 459 U. S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”). Source: <https://supreme.justia.com/cases/federal/us/459/21/>; *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”). Source: <https://supreme.justia.com/cases/federal/us/338/537/>.

<sup>56</sup> See 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>57</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>58</sup> *Id.*

## “Remain in Mexico”

The most notable Trump border security program — and arguably the most effective — was the Migrant Protection Protocols (MPP)<sup>59</sup>, better known as “Remain in Mexico”.

MPP was first implemented by then-DHS Secretary Kirstjen Nielsen in January 2019<sup>60</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>61</sup>

Remain in Mexico was premised on DHS’s authority in section 235(b)(2)(C) of the INA<sup>62</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>63</sup>, while the Mexican government agreed to provide them with protection for the duration of their stays in that country.

MPP was expanded from a pilot site in San Ysidro, Calif.<sup>64</sup> in late January 2019, to Calexico, Calif.<sup>65</sup>, and El Paso, Tex.<sup>66</sup> in March of that year, and then in July 2019<sup>67</sup> to Laredo and Brownsville (both in Texas) before finally it was expanded to the Arizona border town of Nogales<sup>68</sup> in the late fall.

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<sup>59</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](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).

<sup>60</sup> *Id.*

<sup>61</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>62</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>63</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>64</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>65</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>66</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>67</sup> Roldan, Riane. *Asylum seekers will appear before judges via teleconferencing in tents as “Remain in Mexico” program expands to Laredo*. TEXAS TRIBUNE (Jul. 9, 2019). Source: <https://www.texastribune.org/2019/07/09/remain-mexico-program-expands-laredo-texas/>.

<sup>68</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).

When it was fully implemented, nearly 70,000 migrants<sup>69</sup> were sent back across the Southwest border to await their removal hearings under MPP.

In its October 2019 assessment<sup>70</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>71</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>72</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’ directive to DHS<sup>73</sup> in section 235(b) of the INA<sup>74</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 MPP is clear from CBP’s own statistics. In May 2019<sup>75</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>76</sup> (FMUs).

Four months later, in September 2019, apprehensions dropped to fewer than 41,000, fewer than 40 percent (15,824) of them in FMUs<sup>77</sup>. That’s a four-month overall decline of just less than 70 percent, and an 81 percent decline in family apprehensions over that period.

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

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<sup>69</sup> *Fact Sheet: The “Migrant Protection Protocols”*. AMERICAN IMMIGRATION COUNCIL (Jan. 7, 2022). Source: <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

<sup>70</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>71</sup> *See id.*

<sup>72</sup> *See Immigration Court Asylum Backlog*. TRAC IMMIGRATION (undated) (average days pending nationwide from court filing to asylum hearing is 1,424 days—nearly four than years-- through the end of December 2023). Source: <https://trac.syr.edu/phptools/immigration/asylumbl/>.

<sup>73</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>74</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>75</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>76</sup> *Id.*

<sup>77</sup> *Id.*

As a bipartisan federal panel<sup>78</sup> tasked with examining a then-massive surge in family entries in FY 2018 and FY 2019<sup>79</sup> determined in an April 2019 report<sup>80</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>81</sup>

Apprehensions kept falling thereafter even prior to the implementation of Title 42 in March 2020<sup>82</sup>, to fewer than 30,000 in January 2020<sup>83</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

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<sup>78</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>79</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>80</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>81</sup> *Id.* at 1.

<sup>82</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>83</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>.

To speed the review of credible fear claims by illegal entrants, the Trump administration implemented two separate border programs<sup>84</sup>: Prompt Asylum Case Review (PACR<sup>85</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.

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

While those numbers are relatively small, by ensuring 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' expedited removal process<sup>88</sup>. And because many of those aliens were removed before ICE had to release them, it lessened the likelihood that inadmissible aliens without asylum claims could exploit the system.

### Asylum Reforms

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

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

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

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<sup>84</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>85</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>86</sup> *See id.* ("DHS data indicate that CBP identified approximately 5,290 individuals who were eligible for screening under the pilot programs.")

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

<sup>88</sup> *See* sec. 235(b)(1) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. *See also infra*.

<sup>89</sup> *See Tit. II, chap. 1 of the INA, sections 201 through 210*. Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGI0bGU4LXNlY3Rpb24xMjMx%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>.

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

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

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

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

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

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

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

Thus, and logically (as 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 purely optional, because that clause<sup>100</sup> also makes clear that: “Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”

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<sup>92</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>93</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>94</sup> *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

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

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

<sup>97</sup> *Id.*

<sup>98</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>99</sup> *Id.* at cl. (b)(1)(B)(ii).

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



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

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

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

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

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<sup>101</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>102</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>103</sup> Arthur, Andrew. *AG Certification Explained*. CENTER FOR IMMIGRATION STUDIES (Nov. 5, 2019). Source: <https://cis.org/Arthur/AG-Certification-Explained>.

<sup>104</sup> See sec. 103(a)(1) of the INA (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>105</sup> *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). Source: <https://www.justice.gov/eoir/page/file/1070866/download>. *Vacated, Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

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

By statute<sup>107</sup>, reviews of expedited removal procedures are within the sole jurisdiction of that court, but notably, 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>108</sup>

In July 2019, the Trump administration published a “safe-third country” rule<sup>109</sup> that would have required illegal entrants and other aliens without proper documents at the Southwest border to apply for asylum 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>110</sup>, it is not unreasonable to require foreign nationals to seek humanitarian protection in a country they pass through before they are allowed to apply for asylum in the United States.

Nonetheless, a U.S. district court judge in Oakland, Calif., quickly enjoined<sup>111</sup> that rule, just months after he blocked<sup>112</sup> a different Trump rule<sup>113</sup> that rendered illegal entrants ineligible for asylum.

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

Finally, in December 2020 — the month after Trump lost reelection — the administration published a regulation<sup>115</sup> that would have (among other things) clarified and limited asylum

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

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

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

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

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

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

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

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

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

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

eligibility and raised the regulatory standard of proof for reasonable fear claims. It was enjoined<sup>116</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>117</sup>.

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

While the ACAs with El Salvador and Honduras weren't implemented before the Covid-19 pandemic was announced in March 2020 (they came into force in December<sup>118</sup> of that year), the United States did send more than 900 third-country nationals to Guatemala<sup>119</sup> prior to the pandemic, most of them from El Salvador and Honduras.

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

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

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

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

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

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

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

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

#### IV. BIDEN ADMINISTRATION'S BORDER POLICIES AND MIGRANT RELEASES

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>121</sup>, they were plainly taking their lead from the White House.

##### Reversal of Trump Administration Border Policies

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>122</sup>

Despite that promise, once in 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>123</sup>; the Secretary of State announced<sup>124</sup> — “[i]n line with the President’s vision” — that the administration was suspending and terminating the ACAs four days later; Attorney General Merrick Garland vacated Sessions’ order in *Matter of A-B-* in June 2021<sup>125</sup>; and DHS suspended new enrollments in MPP hours after the inauguration<sup>126</sup>.

President Biden did not simply reverse Trump-era border security policies, however. In a break from every one of its predecessors, the Biden administration until late 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>127</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>128</sup>

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

<sup>122</sup> Miroff, Nick, 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>123</sup> *Executive Order 14010, “Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”*, 86 Fed. Reg. 8267 (Feb. 2, 2021). Source: <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

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

<sup>125</sup> *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

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

<sup>127</sup> *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>128</sup> *Id.*

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>129</sup>

By “access our legal system”, Mayorkas meant to “apply for asylum”, and in fact the Biden-Harris administration has treated most illegal entrants as “asylum seekers”, regardless of the strength of their claims or even whether they come seeking asylum at all.<sup>130</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 also largely abandoned the key 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>131</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>132</sup> Even as illegal entries surged under the Biden administration and pandemic-related restrictions on detention eased, however, the number of prosecutions for improper entry have remained low.<sup>133</sup>

According to DOJ’s Prosecuting Immigration Crimes Report (PICR)<sup>134</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 apprehended nearly 1.381 million illegal entrants<sup>135</sup>, meaning that the referral rate for aliens who had improperly entered was just over .5 percent.

## Southwest Border Releases Under the Biden Administration

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<sup>129</sup> *Id.*

<sup>130</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>131</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>132</sup> *Major Swings in Immigration Criminal Prosecutions during Trump Administration.* TRAC IMMIGRATION (Dec. 18, 2020). Source: <https://trac.syr.edu/immigration/reports/633/>.

<sup>133</sup> *Criminal Immigration Referrals Up from the Border Patrol.* TRAC IMMIGRATION (Jul. 7, 2022). Source: <https://trac.syr.edu/immigration/reports/688/>.

<sup>134</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>135</sup> *Nationwide Encounters.* U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021.* U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

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

Border Patrol agents at the Southwest border set new yearly records for migrant apprehensions the Biden-Harris administration, first in FY 2021, as agents apprehended nearly 1.66 million illegal migrants<sup>136</sup>, and again in FY 2022, as apprehensions exceeded 2.2 million.<sup>137</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>138</sup>

While the administration’s FY 2025 budget request<sup>139</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”—again, as Congress mandated—Biden almost categorically released the ones who were not been expelled under Title 42.

The Center has conservatively estimated<sup>140</sup> that DHS under the Biden administration released roughly 88.5 percent of all inadmissible applicants for admission encountered by CBP through the end of November 2023 who weren’t expelled under Title 42.

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 except Mexico and Canada) apprehended by Border Patrol at the Southwest border since February 2021.<sup>141</sup>

Under section 235 of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>142</sup>, DHS must transfer UACs from non-contiguous countries to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) within 72 hours of encountering them, for placement with “sponsors” in the United States.

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<sup>136</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>137</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>138</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>139</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).

<sup>140</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>141</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>142</sup> Sec. 235, Pub. L. 110-457 (2008). Source: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text>.

If those children were all in the same school district, it would be the third largest in the United States<sup>143</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”.

On October 5, Reuters reported that more than 500,000 “school-age migrant children have arrived in the U.S. since 2022”, an ambiguous figure that does include children in FMUs.<sup>144</sup>

By my estimation<sup>145</sup>, between UACs and children in FMUs, somewhere between 700,000 and more than 1 million school-aged migrant children have entered illegally in the past three fiscal years and been released into the United States.

### 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>146</sup>

Not only were releases of illegal entrants without an NTA and a hearing date “unprecedented”<sup>147</sup>, releasing aliens on NTRs isn’t sanctioned by the INA. Not surprisingly, many of those migrants released with NTRs failed to later appear.<sup>148</sup> By October 2021, DHS had phased out NTR releases<sup>149</sup>, by which point<sup>150</sup> it had released 95,598 border migrants with Notices to Report.

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

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<sup>143</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>144</sup> Hesson, Ted, Cooke, Kristina, and Pell, M.B. *An American education: Classrooms reshaped by record migrant arrivals*. REUTERS (Oct. 5, 2024). Source: <https://www.reuters.com/investigations/an-american-education-classrooms-reshaped-by-record-migrant-arrivals-2024-10-05/>.

<sup>145</sup> Arthur, Andrew. *Reuters: 500K+ School-Age Migrant Children Have Arrived Since 2022, The real number is likely a few hundred thousand more, so expect your taxes to rise*. CENTER FOR IMMIGRATION STUDIES (Oct. 15, 2024). Source: <https://cis.org/Arthur/Reuters-500K-SchoolAge-Migrant-Children-Have-Arrived-2022>.

<sup>146</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>147</sup> *Id.*

<sup>148</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>149</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>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>.

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>151</sup> with “Notices to Appear”<sup>152</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>153</sup>

Border Patrol agents at the Southwest border only started releasing illegal entrants on parole in August 2021<sup>154</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>155</sup>

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<sup>151</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>152</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>153</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>154</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>155</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>156</sup>

While Border Patrol releases have declined since DHS issued an interim final rule captioned “Securing the Border” on June 7, 2024<sup>157</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>158</sup>, a figure that does not include aliens transferred to ICE who were subsequently released by that agency.

#### Lack of Statutory Authority for NTA/OR Releases of Border Migrants

Although CBP under the Biden administration has released hundreds of thousands of inadmissible applicants for admission under section 236(a) of the INA<sup>159</sup>, that provision provides CBP no authority to release border migrants.

By its express terms, that section gives DHS officers authority to arrest aliens on warrants.<sup>160</sup> After arrest, pursuant to that statute, DHS can continue to detain such aliens or to release them on bond or conditional parole.<sup>161</sup>

But 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>162</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.*

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

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<sup>156</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>157</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>158</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>159</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>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</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)).

section 236(a) of the INA. Or, as one district court judge held<sup>163</sup> in March: “This sleight of hand — using an ‘arrest’ warrant as de facto ‘release’ warrant — is administrative sophistry at its worst.”

### Biden Administration’s Parole Releases at the Border

Nor is there any authority for CBP to release hundreds of thousands of border migrants on parole<sup>164</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>165</sup>); and “Parole with Conditions” (PWC).

Parole+ATD came to light in a suit<sup>166</sup> filed by the state of Florida in September 2021 captioned *Florida v. U.S. (Florida I)*. The state alleged<sup>167</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>168</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>169</sup>.

That November 2021 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>170</sup>. Parole+ATD then 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 in *Florida I* 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>171</sup>

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<sup>163</sup> *Florida v. U.S.*, 3:21-cv-01066-TKW-ZCB, Opinion and Order, at 84 (N.D. Fla. Mar. 8, 2023) (Wetherell, J.). 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). See also “*Florida I*”, *supra*.

<sup>164</sup> See *infra*.

<sup>165</sup> See *Alternatives to Detention*. U.S. Immigration and Customs Enforcement (updated Jun. 24, 2024). Source: <https://www.ice.gov/features/atd>.

<sup>166</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>167</sup> See *id.* at 2.

<sup>168</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>169</sup> *Id.*

<sup>170</sup> *Id.* at 28-29.

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

Even though the administration announced in April 2022<sup>172</sup> that it would be ending Covid-19-related Title 42 expulsion orders in late May, the Parole+ATD “pathway” remained.<sup>173</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>174</sup>.

There were any number of problems with Parole+ATD, not the least of that it created a massive backlog for ICE officers in locating paroled aliens and issuing Notices to Appear (“NTAs”, the charging documents in removal proceedings) to those released under that program and with NTRs.<sup>175</sup>

As NBC News reported in February 2023<sup>176</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>177</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>178</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*

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<sup>172</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>173</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>.

<sup>174</sup> *Id.* at 30.

<sup>175</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>176</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>177</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>178</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>.

As noted *infra*, the parole statute<sup>179</sup> requires that a parolee “be returned to the custody from which he was paroled” after the purpose of the parole has been satisfied.

During oral argument<sup>180</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.

Referring to that admission at oral argument, the court held<sup>181</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>182</sup>. As the judge noted<sup>183</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>184</sup> that the Parole+ATD policy violated DHS’s duty under the parole statute<sup>185</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>186</sup>

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<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> 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>181</sup> *Id.* at 90.

<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 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>184</sup> *Id.* at 91.

<sup>185</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>186</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 91 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf)

Second, the sole focus of the case-by-case assessment under DHS’s Parole+ATD policy is “whether the alien is a public safety risk or flight risk, not on whether the alien meets the exceedingly high parole standard”.<sup>187</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>188</sup>

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>189</sup>

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

Finally, the court held<sup>190</sup> that Parole+ATD policy violated the statutory requirement that parole be granted only “for urgent humanitarian reasons or significant public benefit”<sup>191</sup>.

He concluded<sup>192</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>193</sup>

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

That day, Chief Ortiz issued a memo<sup>194</sup> directing agents to implement a new policy, “Parole with Conditions” (PWC), purportedly to reduce overcrowding at Border Patrol processing facilities.

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<sup>187</sup> *Id.* at 92.

<sup>188</sup> *Id.*

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

<sup>190</sup> *Id.* at 93.

<sup>191</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>192</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>193</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>194</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/>.

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>195</sup>

That policy sent the state of Florida back to court on May 10, 2023, to halt PWC parole releases, in a case captioned *Florida v. Mayorkas*<sup>196</sup> (*Florida II*).

Based on what little information it had about that policy (the memo hadn’t been publicly released yet), the state argued in its complaint<sup>197</sup> that the latest policy “may violate” the court’s March 8 vacatur of Parole+ATD in *Florida I*.

The state of Florida continued<sup>198</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) to stop PWC releases.<sup>199</sup>

Judge Wetherell was also assigned *Florida II*, and he concluded on May 11, 2023, that a TRO was in order<sup>200</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>201</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>202</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 *U.S. v. Texas*<sup>203</sup>

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

<sup>196</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Relief (N.D. Fla. May 10, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.1.0.pdf>.

<sup>197</sup> *Id.* at 1.

<sup>198</sup> *Id.* at 1-2.

<sup>199</sup> *Id.* at 7-8.

<sup>200</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>201</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>202</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>203</sup> *U.S. v. Texas*, 599 U.S. 670 (2023). Source: <https://supreme.justia.com/cases/federal/us/599/22-58/>.

A week later, Judge Wetherell issued an order<sup>204</sup> concluding jurisdiction was proper. The cases remain on appeal.

### The Largest Influx of Irregular Migrants in U.S. History

The Southwest border has experienced the largest influx of irregular migration in the nation's history since President Biden took office.<sup>205</sup> Since February 2021, CBP there has encountered more than 8.8 million inadmissible applicants for admission at the Southwest border, 7.5 million-plus apprehended by Border Patrol agents after illegal entry and more than 1.32 million applicants for admission deemed inadmissible by CBP officers at the Southwest border ports.<sup>206</sup>

Fewer than 2.453 million of those encounters resulted in expulsion<sup>207</sup> under orders<sup>208</sup> issued by the Centers for Disease Control (CDC) pursuant to Title 42 of the U.S. Code<sup>209</sup> in response to the Covid-19 pandemic.

Conversely, since February 2021, more than 6 million inadmissible applicants for admission encountered at the Southwest border during that period have been processed under the INA.<sup>210</sup> Not surprisingly, that massive surge in illegal migration has severely taxed CBP's limited resources, and the resources of the Border Patrol in particular.

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<sup>204</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>205</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 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>206</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

<sup>207</sup> *Id.*

<sup>208</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>209</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>210</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

At the end of FY 2020 (the last year for which staffing statistics<sup>211</sup> are available), there were fewer than 17,000 Border Patrol agents stationed along the 1,954-mile<sup>212</sup> Southwest border.

On paper, that equals 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.

Under the current administration, migrants have crossed the border illegally in groups consisting of hundreds of individuals<sup>213</sup>, an uncommon phenomenon in the past. Many if not most are so-called “give ups” (to contrast them with “got aways”<sup>214</sup>), that is aliens who enter illegally and wait for agents to arrive in the (legitimate) hope they will be processed and released.

While agents expend fewer resources to pursue such give ups, multiple agents must be sent at a time to report to those crossing scenes and more to then transport, process, and care for migrant groups of that size, pulling agents “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 involve UACs.

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>215</sup> who were travelling alone. That was nearly twice as many UACs as in FY 2019<sup>216</sup>, when agents apprehended just over 76,000 unaccompanied children at the Southwest border — a then-record.

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<sup>211</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>212</sup> *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (undated). Source: <https://www.cbp.gov/node/293681/printable/print>.

<sup>213</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>214</sup> See *infra*.

<sup>215</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>216</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->



That FY 2021 record was quickly broken, as agents caught an additional 149,000-plus UACs<sup>217</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>218</sup>. While that represented fewer aliens in FMUs than the nearly 473,700 apprehended at the Southwest border in FY 2019<sup>219</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>220</sup> (when just over 52,200 illegal entrants in FMUs were apprehended there).

FMU apprehensions rose even further in FY 2023, when agents caught more than 631,000 adults and children who had crossed the Southwest border together illegally<sup>221</sup>. In FY 2024<sup>222</sup>, there were more than 555,000 Border Patrol Southwest border FMU apprehensions.

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>223</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 first years of the Biden administration, hundreds of illegal entrants per day 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>224</sup>.

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[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/newsroom/stats/nationwide-encounters).

<sup>217</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

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

<sup>219</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>220</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</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>224</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=%7CKHRpdGxIOiYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

Congress added that definition to the U.S. Code by section 1092 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017)<sup>225</sup>, under the header “Border Security Metrics”, and is now codified at 6 U.S.C. §223<sup>226</sup>.

Section 1092 of NDAA 2017<sup>227</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.

DHS filed the last such report, for FY 2022<sup>228</sup>, in July 2023, but it only includes “detected got away” statistics from FY 2011 through the end of FY 2021.<sup>229</sup>

It reveals that during that 11-year period, got-ways at the Southwest border peaked in FY 2013 (171,051), and remained roughly static at 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>230</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>231</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>232</sup>. And those are just the got aways DHS is aware of.

That’s roughly 1.8 to 1.9 million aliens who entered illegally since President Biden took office, and evaded apprehension, largely free from any official constraint — more people than residents of Phoenix, Ariz.<sup>233</sup>, America’s fifth-largest city.

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

The Biden administration implemented two programs to allow inadmissible applicants to enter illegally through the ports of entry in lieu of entering illegally between the ports of entry,

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<sup>225</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>226</sup> See 6 U.S.C. § 223(a)(3) (2024) Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AU5C-prelim-title6-section223&num=0&saved=%7CKHRpdGxIOjYgc2VjdGlvbjovMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>227</sup> Sec. 1092 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>228</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>229</sup> See *id.* at 18.

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

<sup>231</sup> *Id.*

<sup>232</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>233</sup> *QuickFacts. Phoenix city, Arizona; United States*. U.S. CENSUS BUREAU (undated). Source: <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona,philadelphiacitypennsylvania,US/BZA210222>.

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:

*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 that many questionable statements 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 as a matter of law “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 it works: Any foreign national (either a Mexican national or 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

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<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/>.

<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.*

INA (or, as CBP has described it, “to be processed under Title 8”<sup>239</sup>, “Title 8” of the U.S. Code being the INA) at a Southwest border port.

By May 2023, DHS was making 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.

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), declared<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> 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. port protection. Provided OTMs can cross the

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<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>.

<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>.

southern Mexican border, they're 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 for either the Biden 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 “prevention of all unlawful *entries* into the United States, including entries by. . . other unlawful aliens” (emphasis added).

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 aliens 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 2023: “Overall, 95.8 percent of all inadmissible aliens who scheduled appointments through the app during this time were ultimately issued a [NTA] and released into the United States on parole.”

That astronomically high parole rate suggests that DHS’s CBP One paroles suffer from the same legal infirmities Judge Wetherell identified in CBP’s Parole+ATD policy.

In addition to its illegality, the CBP One app interview policy 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:

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<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>.

<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=%7CKHRpdGxlOiYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim.>

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

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

*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 Southwest 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.”

In July 2024, CBP officers at the Southwest 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 Southwest ports of entry is skyrocketing, and by Congress’ own metrics, the border is less secure.

Even putting aside Congress’ border security metrics, however, it is impossible for CBP officers at the ports to vet nearly 96 percent of the 1,450 aliens per day using the app for criminal histories abroad or terrorist intent in any meaningful way before paroling them into the United States.

In that vein, the DHS Office of Inspector General (DHS OIG) in August issued a report titled “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***

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<sup>250</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (revised Nov. 19, 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>.

*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 destinations.<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, and in turn presents law-enforcement and national-security risks.

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

***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.

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<sup>252</sup> *Id.* at “Highlights”.

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

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

<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).

Those are major vulnerabilities given that, according to CBP<sup>257</sup>, “more than 860,000 individuals have successfully scheduled appointments to present at ports of entry” as of the end of October.

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 turning Congress’s port inspection protocol into a conduit enabling inadmissible applicants for admission *to enter illegally*.

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

The offer of quick releases via the CBP One app interview policy is one carrot in the White House’s border plans. The first sticks 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 CLP rule”.

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 at all), the CLP 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>: 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 CLP 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 CLP rule.

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<sup>257</sup> *CBP Releases October 2024 Monthly Update*. U.S. CUSTOMS AND BORDER PROTECTION (Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-october-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*.

<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>.



According to the department, it subjected just 8,195 aliens to expedited removal processing under the CLP 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 CLP 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 CLP rule.<sup>267</sup>

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

*“Processes for Cubans, Haitians, Nicaraguans, and Venezuelans”*

The second border initiative the administration announced on January 5, 2023<sup>268</sup> extended its October 2022 parole program for Venezuelan nationals<sup>269</sup> to include Cuban, Haitian, and Nicaraguan, nationals, as well. That program is formally called “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans”<sup>270</sup>, but is better known as “CHNV Parole”.

As the White House explained<sup>271</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 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.*

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<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.*

<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> 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>270</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Aug. 29, 2024). Source: <https://www.uscis.gov/CHNV>.

<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/>.

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>272</sup>, Nicaragua<sup>273</sup>, Haiti<sup>274</sup>, and Cuba<sup>275</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: 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>276</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 that begins when a “supporter” in the United States files an I-134A<sup>277</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.

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.

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<sup>272</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>273</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>274</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>275</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>276</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>277</sup> *I-134A, Online Request to be a Supporter and Declaration of Financial Support*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Apr. 3, 2024). Source: <https://www.uscis.gov/i-134a>.

On August 2, Fox News revealed<sup>278</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>279</sup>.

Despite those indicia of fraud, however, DHS has resumed processing applicants for CHNV parole<sup>280</sup>. In a tweet<sup>281</sup>, former USCIS Director Emilio Gonzalez contended 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>282</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 531,620 Cubans, Haitians, Nicaraguans, and Venezuelans had already arrived on CHNV parole as of the end of October<sup>283</sup>.

Why would supporters file fraudulent applications? That is unclear, but as the Center explained in August 2023<sup>284</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 for filing Form I-134A on their behalf or for providing financial support while they are in the United States”.<sup>285</sup>

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<sup>278</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>279</sup> *Id.*

<sup>280</sup> See *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (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>281</sup> Gonzalez, Emilio. Source: <https://x.com/emiliotgonzalez/status/1830931211625136256/photo/1>.

<sup>282</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>283</sup> *CBP Releases October 2024 Monthly Update*. U.S. CUSTOMS AND BORDER PROTECTION (Nov. 19, 2024). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-october-2024-monthly-update>.

<sup>284</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>.

<sup>285</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Aug. 29, 2024). Source: <https://www.uscis.gov/CHNV>.

In any event, but importantly, there’s no authority for this programmatic parole program in the INA<sup>286</sup>, and not surprisingly, a 20-state coalition filed suit<sup>287</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>288</sup>. Nor, they contended, did the departments seek their opinions about the plan before proceeding.<sup>289</sup>

The states also argued the administration failed to “explain or analyze” how it would remove 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>290</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 531,620 CHNV nationals who have been allowed to enter on parole at the end of their two-year parole periods, but USCIS doesn’t even tell CHNV beneficiaries they’ll ever be required to leave.

On the “Frequently Asked Questions” webpage<sup>291</sup> for the program, and one question asks: “If I am paroled into the United States through these processes, what happens when my 2-year period of parole ends?”

USCIS’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>292</sup> Absent from that list is “you will be taken into custody and removed”.

The states’ points are valid, but on March 8, U.S. District Court Judge Drew Tipton issued an opinion and order<sup>293</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 CHNV parole 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.

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<sup>286</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>287</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>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</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>291</sup> *Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Sept. 3, 2024). Source: <https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

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

<sup>293</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).

In March, a Haitian national and CHNV beneficiary, local police arrested Cory Alvarez for aggravated rape of a 15-year-old girl in a Massachusetts migrant shelter<sup>294</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>295</sup>.

In a Fox News report<sup>296</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 had a supporter who lived in New Jersey<sup>297</sup>. He apparently received little support, however, given he was living in a state-funded shelter in a different state where the attack purportedly took place.

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>298</sup>. Reports indicate that Desire also entered under CHNV parole<sup>299</sup>.

#### Total Border and Port Releases of Inadmissible Aliens Under the Biden Administration

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

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<sup>294</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>295</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>296</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>297</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>.

<sup>298</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>299</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/>.

In June 2024, however, the Center determined that more than 2 million<sup>300</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 administration paroles to just fewer than 2.2 million—again, likely an undercount.

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>301</sup> and 95,000-plus others<sup>302</sup> with NTRs.<sup>303</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>304</sup>, whom DHS is required by law<sup>305</sup> to transfer to the HHS for placement with “sponsors” in the United States.

Nor does it include the dispositions of nearly 919,000 illegal migrants whom the DHS Office of Homeland Security Statistics (OHSS) reports<sup>306</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 almost 9,950 of the fewer than 20,000 aliens it was holding who had first been encountered by CBP, just short of half.<sup>307</sup>

Nor does that total—or can it—include the 1.8 million-plus “got-aways” whom Fox News<sup>308</sup> reported successfully evaded apprehension at the Southwest border and entered illegally.

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<sup>300</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>.

<sup>301</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>302</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>303</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>304</sup> See *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 28, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>305</sup> See fn. 141, *infra*.

<sup>306</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>307</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>308</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>.

That figure —purportedly based upon CBP statistics —is probably low, as the Congressional Budget Office (CBO) estimated<sup>309</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 likely correct when it reported<sup>310</sup> in August that: “In less than four years, the Biden-Harris Administration has released into 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”.

## V. ECONOMIC AND PUBLIC SAFETY IMPACTS OF BIDEN ADMINISTRATION MIGRANT RELEASES

### Economic Impacts

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>311</sup>

Similarly, at a September press conference, Federal Reserve Chairman Jerome Powell explained:

*[I]f you're having millions of people come into the labor force then, and you're creating a hundred thousand jobs, you're going to see unemployment go up. . . . We understand there's been quite an influx across the borders, and that has actually been one of the things that's allowed unemployment rate to rise, and the other thing is just the slower hiring rate. [Emphasis added.]*<sup>312</sup>

Those wage declines and that increased unemployment, coupled with increasing fiscal burdens on state and local budgets<sup>313</sup> and on public and health services, are imposing real costs on working Americans.

### Public Safety Impacts

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.

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<sup>309</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>310</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>.

<sup>311</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=eptpegps08jze7v>.

<sup>312</sup> *Federal Reserve Chair Powell speaks after Fed lowers interest rates by half point*. CNBC TELEVISION (Sep. 18, 2024). Source: <https://www.youtube.com/live/seEoCB97cDs?t=1637s>.

<sup>313</sup> See Jacobs, Elizabeth. *Illegal Immigration Is Expensive*. CENTER FOR IMMIGRATION STUDIES (Aug. 31, 2024). Source: <https://cis.org/Jacobs/Illegal-Immigration-Expensive>.

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>314</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>315</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>316</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.

And those a just a few of many.

## VI. AN ESTIMATE OF THE UNAUTHORIZED POPULATION AND ICE’S NON-DETAINED DOCKET

Due to these millions of migrant releases and got ways over the past four years, it is difficult to estimate the current size of the undocumented population in the United States.

Based on statistics from the Current Population Survey, however, my colleague Steven Camarota estimates<sup>317</sup> that the total population of aliens unlawfully present in the United States was 13.7 million as of January, and likely currently stands at or above 14 million.

Moreover, according to the ICE Annual Report for Fiscal Year 2023, as of October 3, 2023, there were 1,292,830 aliens on the agency’s non-detained docket who were under final orders of removal<sup>318</sup>.

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<sup>314</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>315</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>316</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>.

<sup>317</sup> Camarota, Steven. *Overview of Immigration Numbers*. CENTER FOR IMMIGRATION STUDIES (Nov. 27, 2024). Source: <https://cis.org/Camarota/Overview-Immigration-Numbers>.

<sup>318</sup> *Fiscal Year 2023 ICE Annual Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 29, 2023), at 23. Source: <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf>.



The most recent iteration of that report for FY 2024 has yet to be released, but at present there are likely at least 1.4 million to 1.6 million aliens under final orders in the United States.

One of the aliens on the ICE docket under a final order is Shenghua Wen, a 41-year-old Chinese national who was recently arrested and charged with buying and shipping military materiel to North Korea.<sup>319</sup>

The criminal complaint<sup>320</sup> in his case indicates that he entered the United States on a student visa in December 2012, remained illegally after that visa expired in December 2013, and was ordered removed in 2018—but hasn’t left yet.

It should be noted that section 241(a)(1) of the INA<sup>321</sup> directs DHS to remove all aliens under final orders of removal within 90 days (a period designated therein as the “removal period”).

Moreover, section 241(a)(2)<sup>322</sup> of the INA directs the department to detain those aliens during the removal period, and further makes clear that “[u]nder no circumstance during the removal period shall” DHS “release an alien who has been found” removable under the criminal and national-security grounds of inadmissibility and deportability.

As the foregoing shows, however, DHS has failed to comply with those congressional limitations and mandates.

## VII. WHAT IS “MASS DEPORTATION”?

All of this raises the (as-yet unanswered) question of how broad the president-elect’s proposed deportation program will be.

Securing the border will plainly be a top priority. Fox News reported on November 12<sup>323</sup> that the Trump administration’s first immigration actions will involve curbing the number of illegal entrants, including by ending CHNV parole and expanding migrant detention.

President-elect Trump has already discussed efforts the Mexican and Canadian governments can take to deter migrants from crossing through those nations on their way to the United States with (respectively) Mexican President Claudia Sheinbaum<sup>324</sup> and Canadian Prime Minister Justin Trudeau<sup>325</sup>.

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<sup>319</sup> Legare, Robert. *U.S. charges Chinese national for allegedly exporting guns and ammo to North Korea*. CBS NEWS (Dec. 3, 2024). Source: <https://www.cbsnews.com/news/shenghua-wen-north-korea-california/>.

<sup>320</sup> *U.S. v. Wen*, Case No. 2:24-MJ-07105-DUTY, Criminal Complaint by Telephone or Other Reliable Means (C.D. Cal. Nov. 26, 2024), at 15.

<sup>321</sup> Sec. 241(a)(1) of the INA (2024). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

<sup>322</sup> Sec. 241(a)(2) of the INA (2024). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

<sup>323</sup> Lee, Michael. *Trump likely to make several border security moves on first day, says expert*. FOX NEWS (Nov. 12, 2024). Source: <https://www.foxnews.com/politics/trump-likely-make-several-border-security-moves-first-day-says-expert>.

<sup>324</sup> Sheridan, Mary Beth and Masih, Niha. *Mexico’s president has ‘excellent’ talk with Trump, dismisses tariff threat*. WASHINGTON POST (Nov. 28, 2024). Source: <https://www.washingtonpost.com/world/2024/11/28/trump-mexico-president-talk-tariffs/>.

<sup>325</sup> Gillies, Rob. *Trudeau told Trump Americans would also suffer if tariffs are imposed, a Canadian minister says*. ABC NEWS (Dec. 2, 2024). Source: <https://abcnews.go.com/International/wireStory/trudeau-told-trump-americans-suffer-tariffs-imposed-canadian-116388796>.

That leaves the question of what interior removal plans the president-elect is making to deport some, most, or all of the millions of aliens unlawfully present from the United States.

In a July statement, Trump campaign press secretary spokesman Karoline Leavitt told NBC News<sup>326</sup>: “A majority of Americans want mass deportations for illegal immigrants. ... On Day One back in the White House, President Trump will begin the largest criminal deportation operation of illegal immigrants and restore the rule of law.”

Similarly, during his October rally at Madison Square Garden in New York City, N.Y., then-candidate Trump announced<sup>327</sup>:

*On Day 1, I will launch the largest deportation program in American history to get the criminals out. I will rescue every city and town that has been invaded and conquered, and we will put these vicious and bloodthirsty criminals in jail, then kick them the hell out of our country as fast as possible.*

More recently, during a November 11 interview on Fox News<sup>328</sup>, Tom Homan—former ICE Acting Director and Trump’s “border czar” designee—told host Sean Hannity there are “over 1.5 million convicted criminal aliens in this country with orders for removal who we’ll be looking for”.

And as Homan told NewsNation on December 2:

*The president has been very clear, so have I, that right out of the gate, we’re going to concentrate on public safety threats and national security threats. And we got plenty of them.*

*Because if you look at the stats, you compare the Trump administration to the Biden administration, the removal of criminal aliens has decreased 74%. We know a lot of criminals came across this border in the last four years. We’ve got a big block of criminal aliens we got to locate and remove from the country, and that’s why I’ve been pushing back on the sanctuary cities and the mayors and governors who are speaking out against it.*

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<sup>326</sup> Strickler, Laura, Martinez, Didi, Atkins, Chloe, and Ainsley, Julia. *How would mass deportation of migrants under Trump actually work?* NBC NEWS (Jul. 16, 2024). Source: <https://www.nbcnews.com/investigations/mass-deportation-migrants-trump-actually-work-rcna161637>.

<sup>327</sup> Long, Colleen and Merica, Dan. *Trump on Day 1: Begin deportation push, pardon Jan. 6 rioters and make his criminal cases vanish.* AP (Nov. 12, 2024). Source: <https://apnews.com/article/trump-day-1-priorities-deportations-drilling-ukraine-6747c6e64b0440978f59450b928f61d1>.

<sup>328</sup> *We're going to find those who are here illegally, says incoming Trump 'border czar'.* Fox News (Nov. 11, 2024). Source: <https://www.foxnews.com/video/6364573054112>.

*But . . . if you're in a country illegally, you're not off the table. It's not okay to be in this country legally. You enter the country illegally, which is a crime. You've been ordered removed by a judge, you got a problem.*<sup>329</sup>

Those statements suggest that the incoming administration is planning a removal program along the lines set forth in section 5 of Executive Order 13768<sup>330</sup>, which I will describe below.

## VIII. PRIOR INTERIOR ENFORCEMENT GUIDELINES AND POLICIES

The question then is whether such a “mass deportation” program is possible. To answer that question, it is crucial to examine other immigration enforcement programs in the past.

### Morton Memo of March 2, 2011

For most of the time immigration laws have been enforced in the United States, ICE — and its predecessor the INS — arrested, detained, and removed aliens who were excludable, deportable, or removable, without any particular focus on whether they were criminals or not.

That changed on March 2, 2011, when then-ICE Director John Morton issued a memorandum captioned “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”<sup>331</sup> (the Morton memo).

In that memo, Morton contended that ICE only had the resources to remove 4 percent (400,000) of the aliens illegally present in the United States<sup>332</sup>, and therefore the agency had to prioritize immigration enforcement.

The Morton memo identified three priorities for arrest, removal, detention, and removal, each of which had several “levels” and/or sub-priorities.

The first priority began with aliens who pose a danger to national security, including terrorists and spies.<sup>333</sup> Criminal aliens were included, as well, “with a particular emphasis on violent criminals, felons, and repeat offenders”<sup>334</sup>.

Participants in organized criminal gangs aged 16 and above were a top priority, as were aliens with outstanding criminal warrants, and there was a catch-all for other aliens who posed a serious risk to public safety.

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<sup>329</sup> Djordjevik, Patrick. ‘Border Czar’ Tom Homan says US has ‘no other option’ than mass deportations. NEWSNATION (Dec. 2, 2024). Source: <https://www.newsnationnow.com/us-news/immigration/border-czar-tom-homan-deportations/>.

<sup>330</sup> Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*. 82 Fed. Reg. 8799-8803 (Jan. 30, 2017). Source: <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf>.

<sup>331</sup> Morton, John. *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Mar. 2, 2011). Source: <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

<sup>332</sup> *Id.* at 1.

<sup>333</sup> *Id.* at 1-2.

<sup>334</sup> *Id.* at 2.

Criminals were broken down into three levels<sup>335</sup>: Level 1 was for aliens convicted of “aggravated felonies” as defined in section 101(a)(43) of the INA<sup>336</sup>, and aliens convicted of two or more crimes punishable by more than one year (other felonies). Level 2 included aliens convicted of one felony or three misdemeanors, and level 3 was for aliens convicted of a crime punishable by less than a year (a misdemeanor).

The second priority for enforcement under the Morton memo was recent illegal entrants.<sup>337</sup> Interestingly, Morton explained this was necessary, in part, “to avoid a return to the prior practice commonly and historically referred to as ‘catch and release’”.

The third priority consisted of fugitive aliens (*i.e.*, aliens ordered removed who failed to depart), illegal re-entrants, and others who had “obstruct[ed] immigration controls”.<sup>338</sup>

Fugitive aliens and those who had reentered illegally fell into sub-priorities, more or less reflecting priorities one and two therein, with non-criminal fugitives and reentrants the lowest. Aliens who were admitted or gained immigration benefits via fraud rounded out the list.

Notably, the Morton memo stated: “Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States.”<sup>339</sup> The priorities still took precedence, however, although headquarters approval was not required for action in non-priority cases.

Following the issuance of the Morton memo, ICE removals fell from 409,849 in FY 2012 to 315,943 in FY 2014<sup>340</sup> — a 23 percent decrease. More importantly, however, ICE interior removals fell from 180,970 in FY 2012<sup>341</sup> to 102,224 in FY 2014, a decline of more than 43 percent.

#### Jeh Johnson Memo of November 20, 2014

The Morton memo was superseded by a November 20, 2014, memo issued by then-DHS Secretary Jeh Johnson, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”<sup>342</sup> (the Jeh Johnson memo).

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<sup>335</sup> *Id.*

<sup>336</sup> See sec. 101(a)(43) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

<sup>337</sup> Morton, John. *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Mar. 2, 2011), at 2. Source: <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

<sup>338</sup> *Id.* at 2-3.

<sup>339</sup> *Id.*

<sup>340</sup> *FY 2016 ICE Immigration Removals*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/remove/removal-statistics/2016>.

<sup>341</sup> *ICE Enforcement and Removal Operations Report Fiscal Year 2015*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 22, 2015), at 8. Source: <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

<sup>342</sup> Johnson, Jeh. *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*. U.S. DEP’T OF HOMELAND SECURITY (Nov. 20, 2014). Source: [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion_0.pdf).

The Jeh Johnson memo pared down the enforcement priorities in the Morton memo, applying its own three priorities. Those priorities applied not only to ICE, but to CBP and USCIS, as well.

Again, Priority 1 began with national security threats, followed by aliens apprehended entering illegally and at the ports, gang members (with fairly significant restrictions), and aliens with aggravated felonies and non-immigration-related felonies.<sup>343</sup>

Those aliens were to be prioritized unless they were eligible for asylum or other relief, or unless a field-level supervisor determined that they would not pose a threat and should not be a priority.

The second priority<sup>344</sup> was much more detailed. It began with aliens convicted of three or more misdemeanors that arose out of separate incidents other than “minor traffic offenses” or offenses for which the alien's immigration status was “an essential element”.

Next<sup>345</sup> were aliens convicted of what the memo described as “significant misdemeanors”, including domestic violence, sexual abuse or exploitation, burglary, firearms possession, drug trafficking or distribution, DUI, and any misdemeanor for which the alien was sentenced to 90 days or more.

The third subcategory in Priority 2 was aliens — regardless of where they were apprehended — who had entered or re-entered after January 1, 2014. The fourth included aliens who had “significantly abused the visa or visa waiver system”, in the opinion of field-level ICE, CBP, and USCIS supervisors.

There was a similar restriction to that in Priority 2 for aliens eligible for protection or relief, or whom a field-level supervisor determined did not constitute “a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.”

Priority 3<sup>346</sup> for enforcement related to aliens ordered removed on or after January 1, 2014. Although those aliens had received due process, the Jeh Johnson memo nonetheless asserted: “Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority”.

There were opt-outs to enforcement for Priority 3 aliens who were eligible for relief (which they logically would have applied for and been denied already), and those who were “not a threat to the integrity of the immigration system”. Unlike in the case of Priority 2 aliens, though, that decision could be made by a street- or desk-level official.

Similar to the Morton memo, the Jeh Johnson memo stated: “Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein.”<sup>347</sup>

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<sup>343</sup> *Id.* at 3.

<sup>344</sup> *See id.* at 3-4.

<sup>345</sup> *Id.* at 4.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 5.

But, unlike under the Morton memo, the Jeh Johnson memo made clear that such determinations required ICE field-level (but not HQ) concurrence.

The Jeh Johnson memo drastically affected immigration enforcement.

ICE interior removals fell from (as noted) 102,224 in FY 2014<sup>348</sup> to 69,478 in FY 2015 — a 32-percent decrease. They fell again in FY 2016<sup>349</sup>, to 65,332. Total removals (including aliens apprehended at the border) that year were 201,020<sup>350</sup> —just more than half of the 400,000 Morton had asserted ICE could achieve.

#### EO 13768 of January 25, 2017

The then-incoming Trump administration scrapped the Jeh Johnson memo, but did not return to the status quo before the Morton memo. Rather, the new president crafted his own immigration enforcement priorities in a January 25, 2017, executive order, EO 13768, “Enhancing Public Safety in the Interior of the United States”.<sup>351</sup>

That EO prioritized the removal of aliens removable under the criminal, national security, expedited removal, and fraud grounds of inadmissibility and deportability, as well as aliens who had committed, had been charged with, or had been convicted of crimes.<sup>352</sup>

In addition, aliens who defrauded any government agency or abused public benefits programs were also priorities for removal.

Finally, under that EO the removal of aliens under final orders of removal but who had failed to depart the United States, as well as aliens who posed a risk to national security or public safety, were also prioritized.

Aliens removable strictly on immigration violations status were not specifically prioritized, but nothing in that EO prevented ICE from arresting, detaining, or removing those aliens.

Between FY 2017 and FY 2020, ICE removed 935,346 aliens, 65 percent of whom had criminal arrests or convictions.<sup>353</sup>

Most of the remaining 35 percent of non-criminal removals involved aliens encountered at the border, but in every fiscal year under the Trump administration, more than 89 percent of interior removals involved aliens with criminal convictions or facing criminal charges.

#### The Inauguration Day 2021 Pecoske Memo

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<sup>348</sup> *ICE Enforcement and Removal Operations Report Fiscal Year 2015*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 22, 2015), at 8. Source: <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>.

<sup>349</sup> *Fiscal Year 2016 ICE Enforcement and Removal Operations Report*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated), at 9. Source: <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>.

<sup>350</sup> *Id.* at 3.

<sup>351</sup> Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*. 82 Fed. Reg. 8799-8803 (Jan. 30, 2017). Source: <https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02102.pdf>.

<sup>352</sup> *Id.*, at sec. 5, p. 8800.

<sup>353</sup> Arthur, Andrew. *Misperceptions About ICE Enforcement Under Trump Warp Biden's Immigration Promises*. CENTER FOR IMMIGRATION STUDIES (Jan. 15, 2021). Source: <https://cis.org/Arthur/Misperceptions-About-ICE-Enforcement-Under-Trump-Warp-Bidens-Immigration-Promises>.

Shortly after President Biden was sworn in on January 20, 2021, Acting DHS Secretary David Pekoske issued a memo captioned “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities”<sup>354</sup> (Pekoske memo).

The Pekoske memo announced a review of immigration-enforcement policies, as well as a 100-day hold on almost all removals from the United States (the latter quickly blocked<sup>355</sup> by a federal judge).

Citing, once again, “limited resources”, the Pekoske memo restricted immigration enforcement to three specified “priorities”: spies, terrorists, and other threats to national security; aliens who entered illegally on or after November 1, 2020; and aliens convicted of aggravated felonies (again, as defined in section 101(a)(43) of the INA).<sup>356</sup>

Unlike its Obama-era predecessors, however, under the Pekoske memo, only aliens convicted of aggravated felonies and released after the date of that memo, and who were “determined pose a threat to public safety”, who were subject to arrest, detention, and prosecution.

Respectfully, in defining certain crimes as aggravated felonies, Congress has *already determined* that aliens convicted of those crimes “pose a threat to public safety” and already mandated their detention and prosecution. Nonetheless, the factors governing which aggravated felonies qualified as priorities were unclear from that memo.

#### Tae Johnson Memo of February 18, 2021

By its terms, the Pekoske memo was a placeholder until other enforcement guidelines were issued by DHS. Consequently, on February 18, 2021, then-Acting ICE Director Tae Johnson issued a new guidance memo, captioned “Interim Guidance: Civil Immigration Enforcement and Removal Priorities”<sup>357</sup> (Tae Johnson memo).

The Tae Johnson memo slightly expanded the class of aliens deemed priorities for ICE enforcement under the Pekoske memo.

Threats to national security and border security were still priorities, but the Tae Johnson memo also included non-detained aggravated felons and certain gang members, provided they “pose[] a risk to public safety”<sup>358</sup> (though it is hard to imagine many who don’t).

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<sup>354</sup> Pekoske, David. *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 20, 2021). Source: [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK\\_Sw1uJORroFP4s7MvbBEvE8d9xF2MHYf3\\_fFE](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK_Sw1uJORroFP4s7MvbBEvE8d9xF2MHYf3_fFE).

<sup>355</sup> See Aguilar, Julian. *Federal judge prevents Biden administration from pausing deportations for two more weeks*. THE TEXAS TRIBUNE (Feb. 9, 2021). Source: <https://www.texastribune.org/2021/02/09/biden-deportation-moratorium-texas-judge/>.

<sup>356</sup> Pekoske, David. *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 20, 2021), at 2. Source: [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK\\_Sw1uJORroFP4s7MvbBEvE8d9xF2MHYf3\\_fFE](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK_Sw1uJORroFP4s7MvbBEvE8d9xF2MHYf3_fFE).

<sup>357</sup> Johnson, Tae D. *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Feb. 18, 2021). Source: [https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf).

<sup>358</sup> *Id.* at 4-5.

*State of Texas v. U.S.*

The Pecoske and Tae Johnson memos were challenged by the states of Texas and Louisiana in a case captioned *State of Texas v. U.S.*<sup>359</sup>

U.S. District Court Judge Drew Tipton was assigned to the case, and on August 19, he issued an order<sup>360</sup> enjoining the restrictions in the Pecoske and Tae Johnson memos on immigration agents in their enforcement of the immigration laws against criminal aliens.

A month later, though, a three-judge panel of the Fifth Circuit limited the scope of that injunction.<sup>361</sup>

In its decision, the Fifth Circuit noted<sup>362</sup> that new guidance would be issued by the end of September by DHS. That's when things got interesting, because the states sought a rehearing of that decision before all 17 judges of the Fifth Circuit as a whole (en banc).

On November 30, 2021, the en banc panel of the Fifth Circuit granted the state's request, vacating the limitations the three-judge circuit panel had placed on Judge Tipton's original injunction.<sup>363</sup>

Secretary Alejandro Mayorkas's September 30, 2021, "Guidelines for the Enforcement of Civil Immigration Law"

By that point, however, DHS had issued new immigration enforcement guidance.

Specifically, on September 30, 2021, DHS Secretary Alejandro Mayorkas issued a memo captioned "Guidelines for the Enforcement of Civil Immigration Law"<sup>364</sup> (Mayorkas memo), which again placed restrictions on the ability of ICE officers and attorneys in the investigation, arrest, detention, prosecution, and deportation of removable aliens (collectively "enforcement action").

Relying on what the memo described as DHS's "prosecutorial discretion", the Mayorkas memo directed ICE officers and attorneys to consider certain "aggravating" and "mitigating" factors before taking any enforcement action, with limited exceptions.<sup>365</sup>

The aggravating factors are general and objective, relating to aliens' criminal offenses and prior criminal history.

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<sup>359</sup> *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Complaint (S.D. Tex. Apr. 6, 2021). Source:

[https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.1.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.1.0_1.pdf).

<sup>360</sup> *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Memorandum Opinion and Order (S.D. Tex. Aug. 19, 2021), at 157-58.

Source: [https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.79.0\\_4.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.79.0_4.pdf).

<sup>361</sup> *State of Texas v. U.S.*, No. 21-40618, slip op. at 15 (5th Cir. Sept. 15, 2021). Source:

<https://cases.justia.com/federal/appellate-courts/ca5/21-40618/21-40618-2021-09-15.pdf?ts=1631727092>.

<sup>362</sup> *Id.* at 5.

<sup>363</sup> *Texas v. U.S.*, No. 21-40618, On Petition for Rehearing En Banc, slip op. at 15 (5th Cir. Nov. 30, 2021) (en banc). Source:

<https://law.justia.com/cases/federal/appellate-courts/ca5/21-40618/21-40618-2021-11-30.html>.

<sup>364</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>365</sup> *See id.* at 3-4.



The mitigating factors, on the other hand, are more individualized 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 mandating the detention of certain criminal aliens.

First, section 236(c) of the INA<sup>366</sup> states DHS “shall take into custody” an alien removable on most criminal grounds “when the alien is released”.

Similarly, section 241(a) of the INA<sup>367</sup> requires DHS to take aliens ordered removed into custody during the 90-day removal period, paragraph (2) therein states, “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.

Back to *State of Texas v. U.S.*

Because the Mayorkas guidelines frustrate those detention mandates, the plaintiff states in *State of Texas v. U.S.* filed an amended complaint with the district court to set them aside.<sup>368</sup>

In June 2022, Judge Tipton issued a Memorandum Opinion and Order enjoining the Mayorkas memo<sup>369</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>370</sup>

In essence, the majority held there is no precedent for a plaintiff — even a state — to request that a third-party (here, 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>371</sup>

Kerry Doyle Memo of April 3, 2022

While this litigation was playing out, on April 3, 2022, Kerry Doyle—ICE Principal Legal Advisor (PLA) and head of the agency’s Office of the Principal Legal Advisor (OPLA), the cadre of lawyers who represent the United States in immigration court—issued a memo titled

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<sup>366</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>367</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>368</sup> *State of 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>369</sup> *State of 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>370</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).

<sup>371</sup> *Id.* at \_\_\_\_ . Slip op., dissent at 1.

“Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion”<sup>372</sup> (Doyle memo).

The purpose of the Doyle memo was “to guide” OPLA attorneys “in appropriately executing DHS’s enforcement priorities and exercising prosecutorial discretion”<sup>373</sup> under the Mayorkas memo, and it apparently remained in effect even while the Mayorkas memo was enjoined.

Among other things, the Doyle Memo says ICE attorneys are expected “to use their professional judgment to do justice in each case, whether the decision relates to: filing an NTA; moving to dismiss, administratively close, or continue proceedings; stipulating to issues, relief, or bond; or pursuing an appeal”.<sup>374</sup>

On October 24, 2024, the House Judiciary Committee issued an interim staff report<sup>375</sup>, which included the following findings:

- *Under the Biden-Harris Administration, more than 700,000 illegal aliens have had their cases dismissed, terminated, or administratively closed, allowing those aliens to stay in the country indefinitely without facing immigration consequences.*
- *For asylum decisions, the Executive Office for Immigration Review (EOIR), which houses the nation’s immigration courts, reported 109,089 cases as “not adjudicated” in fiscal year 2023, meaning that those cases were deemed “completed” but were largely terminated or dismissed and not adjudicated on the merits of the underlying claim.*
- *Through the first nine months of fiscal year 2024, the number of non-adjudicated asylum cases already eclipsed the 2023 record, with 109,568 asylum cases not adjudicated. By comparison, only 12,960 total asylum cases were reported as “not adjudicated” from fiscal year 2017 through fiscal year 2020 combined.*
- *[DHS] failed to file the necessary documentation to begin immigration court removal proceedings in roughly 200,000 additional cases, meaning that the overwhelming majority of those aliens can also remain in the U.S. indefinitely.*
- *An immigration court official admitted to the Committee and Subcommittee that decisions by the Biden-Harris DHS, such as DHS attorneys not appearing at scheduled hearings*

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<sup>372</sup> Doyle, Kerry. *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 3, 2022). Source: [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_guidanceApr2022.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf).

<sup>373</sup> *Id.* at 1.

<sup>374</sup> *Id.* at 9.

<sup>375</sup> *Interim Staff Report. Quiet Amnesty: How the Biden-Harris Administration Uses the Nation’s Immigration Courts to Advance an Open-Borders Agenda*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Oct. 24, 2024). Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-10-24%20Quiet%20Amnesty%20-%20How%20the%20Biden-Harris%20Administration%20Uses%20the%20Nation%27s%20Immigration%20Courts%20to%20Advance%20an%20Open-Borders%20Agenda.pdf>.

*and DHS failing to file proper paperwork with the courts, waste the immigration courts' time and resources and decrease efficiency.*<sup>376</sup>

The report largely blamed the Doyle memo for what it termed a “quiet amnesty” for those aliens whose cases were “dismissed, terminated, or administratively closed”, explaining:

*The Doyle Memo outlined how ICE attorneys “are expected to exercise discretion”—that is, move to dismiss immigration cases— “at all stages of the enforcement process.” In other words, ICE attorneys are expected to ensure that certain aliens' cases never move forward in immigration court . . .*<sup>377</sup>

#### The Factual and Legal Bases for the Mayorkas Memo

As noted, Secretary Mayorkas defended the enforcement restrictions in his September 2021 memo under the guise of prosecutorial discretion, the principle that law-enforcement officials have the inherent authority to *not* enforce the law.

In support of that point, DHS explained in a separate memo<sup>378</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 administration’s DHS secretary equated immigration enforcement under the laws passed by Congress and codified in the INA with the worst instances of discrimination in our nation’s past.

### IX. IMPACT OF THE BIDEN ADMINISTRATION’S ENFORCEMENT GUIDELINES

The Center has compared ICE criminal alien data under the three pre-Covid years of the Trump administration (FY 2017 to 2019) and the first three years of the Biden administration (FY 2021 to 2023) to assess the impact of the administration’s various enforcement guidance memos.<sup>379</sup>

We 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 criminal aliens fell 44 percent during the Biden-Harris years.

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<sup>376</sup> *Id.* at 2 (footnotes omitted).

<sup>377</sup> *Id.* at 5 (footnote omitted).

<sup>378</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 (footnotes omitted). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.122.7.pdf>.

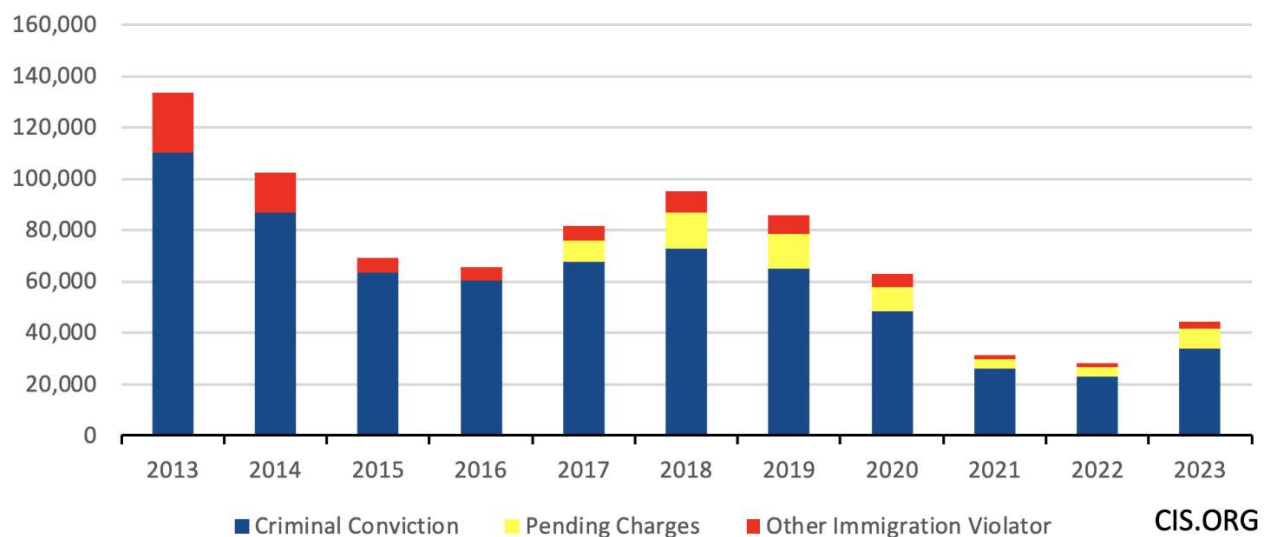
<sup>379</sup> See Feere, Jon. *Three Years of Biden Immigration Policies Have Benefitted Criminal Aliens*. CENTER FOR IMMIGRATION STUDIES (Jan. 9, 2024). Source: <https://cis.org/Report/Three-Years-Biden-Immigration-Policies-Have-Benefitted-Criminal-Aliens>.

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.

As an aside, it should be noted the Mayorkas memo asserts—without reference or 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>380</sup>

That’s notable because under the Jeh Johnson memo, alien domestic violence offenders were a *priority* for enforcement<sup>381</sup>, which is sensible 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>382</sup>.

In any event, the chart<sup>383</sup> below compares ICE interior removals by criminality over the 11-year period from FY 2013 (in the middle of the Obama administration) to FY 2023 (the third partial year of the Biden administration):



## X. IMPACT OF THE (SECOND) TRUMP ADMINISTRATION’S PLANS

It’s premature to assess any impacts the incoming Trump administration’s removal policies will have on alien families, our military, or the nation’s economy, because the parameters of those policies remain undefined.

<sup>380</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>381</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>382</sup> Domonoske, 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>.

<sup>383</sup> See Arthur, Andrew. *Two Graphs Explain Why Voters Want More Deportations*. CENTER FOR IMMIGRATION STUDIES (Sept. 25, 2024). Source: <https://cis.org/Arthur/Two-Graphs-Explain-Why-Voters-Want-More-Deportations>.

From the statements made by the president-elect, his spokesmen, and Homan, referenced above, however, it appears those policies as they relate to interior enforcement will—as under EO 13768—focus primarily on removable alien criminals, aliens who pose a threat to the national security, and aliens under final orders of removal.

That is not to say, however, that ICE officers and agents, and OPLA attorneys, will be forced to ignore the unlawful presence of or grant special benefits to other removable aliens—the fundamental premise of the Pekoske, Tae Johnson, Mayorkas, and Doyle memos (respectively).

If anything, those four Biden administration-era memos—and the Biden administration’s border policies generally—have created a significantly larger class of illegally present criminal aliens and aliens posing national-security risks that DHS under the incoming administration will be required to find, arrest, prosecute, and remove.

Such enforcement will likely prompt a significant and increasing number of aliens currently illegally present in the United States to leave voluntarily. Let me explain.

One 2021 study<sup>384</sup> estimated that 340,000 undocumented Mexican nationals voluntarily emigrated from the United States between 2018 to 2019 alone-- a figure that did not include aliens of other nationalities-- and stricter enforcement could<sup>385</sup> (and likely would) encourage such trends.

#### Economic Costs

Even assuming the incoming administration plans a more expansive removal program, however, it’s questionable whether such a program would impose greater costs on the public fisc than it would save taxpayers.

A recent post<sup>386</sup> from the American Enterprise Institute (AEI) explained that the cost of illegal immigration to the United States at the federal, state, and local levels was “at least \$150.7 billion” annually, or roughly \$957 per year per taxpayer “after factoring in taxes paid by illegal aliens”.

AEI further concluded<sup>387</sup> that “using existing estimates of the net lifetime fiscal impact (taxes paid minus costs) of immigrants by education indicates that the fiscal drain created by the average illegal immigrant is \$68,000.”

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<sup>384</sup> Warren, Robert. *In 2019, the US Undocumented Population Continued a Decade-Long Decline and the Foreign-Born Population Neared Zero Growth*. SAGE JOURNALS (Apr. 26, 2021). Source:

<https://journals.sagepub.com/doi/full/10.1177/2331502421993746#body-ref-fn2-2331502421993746>.

<sup>385</sup> See Van Hook, Jennifer, Gelatt, Julia, and Ruiz Soto, Ariel G. *A Turning Point for the Unauthorized Immigrant Population in the United States*. MIGRATION POLICY INST. (Sept. 2023) (“Multiple factors go into whether the U.S. unauthorized immigrant population has grown since mid-2021. . . . At the same time, emigration could also rise, driven by migrants’ decisions to return home or by stricter enforcement policies, offsetting the increases.”). Source: <https://www.migrationpolicy.org/news/turning-point-us-unauthorized-immigrant-population>.

<sup>386</sup> Weidinger, Matt. *Key Data on Federal Benefits Paid to Illegal Immigrant Households*. AMERICAN ENTERPRISE INST. (Nov. 7, 2024). Source: <https://www.aei.org/opportunity-social-mobility/key-data-on-federal-benefits-paid-to-illegal-immigrant-households/>.

<sup>387</sup> *Id.*

By contrast, as the Center has reported<sup>388</sup>:

*In April 2017, ICE estimated that the average cost per deportation was \$10,854 in FY 2016. This figure includes “all costs necessary to identify, apprehend, detain, process through immigration court, and remove an alien.” Based on this description, the estimate seems comprehensive, including the costs for both Enforcement and Removal Operations (ERO), which does most of the immigration removal work, and [OPLA]. These two entities comprise the overwhelming share of spending on removals.*

Thus, removing aliens unlawfully present in the United States would create a significant net fiscal benefit for U.S. taxpayers.

With respect to any “devastation” to our economy in that scenario, I presume such claims relate to a purported worker shortage that would develop if a large proportion of the currently present undocumented population were to be removed from the country.

According to the Pew Research Center<sup>389</sup>, there were approximately 8.3 million unauthorized immigrants in the U.S. workforce in 2022, representing 4.8 percent of the total U.S. workforce. Surprisingly, those unauthorized workers actually constitute .7 percent less of the total domestic workforce than those workers constituted in 2007, according to Pew.

But there are plenty of available American workers (both citizens and lawful immigrants) who aren’t in the labor force to fill that gap, however. As the Center explained in August 2023<sup>390</sup>:

*Using a broad definition of working age (16 to 64), the share of U.S.-born men in the labor force was 77.5 percent in April 2023, nearly the same as in 2019, pre-Covid. But this is significantly lower than the 83.1 percent in April 2000 and the 88.7 percent in 1960.*

.....

*If the same share of U.S.-born men (16 to 64) were in the labor force in 2023 as in 1960 there would be 9.5 million more U.S.-born men in the labor force. Even if the share returned to the 2000 level, it would still add 4.8 million men to the labor force.*

*The number of U.S.-born men (16 to 64) not in the labor force increased by 13.8 million from 1960 to 2023. At the same time the number of working-age immigrant men in the labor force increased by 13.7 million.*

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<sup>388</sup> Camarota, Steven A. *Deportation vs. the Cost of Letting Illegal Immigrants Stay*. CENTER FOR IMMIGRATION STUDIES (Aug. 3, 2017) (footnotes omitted). Source: <https://cis.org/Report/Deportation-vs-Cost-Letting-Illegal-Immigrants-Stay#5>.

<sup>389</sup> Passel, Jeffrey S. and Krogstad, Jens Manuel. *What we know about unauthorized immigrants living in the U.S.* PEW RESEARCH CTR. (Jul. 22, 2024). Source: <https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/#:~:text=Unauthorized%20immigrants%20in%20the%20labor,the%20U.S.%20workforce%20in%202022>.

<sup>390</sup> Camarota, Steven A. and Ziegler, Karen. *Working-Age, but Not Working*. CENTER FOR IMMIGRATION STUDIES (Aug. 21, 2023). Source: <https://cis.org/Report/WorkingAge-Not-Working>.

With respect to the social costs of millions of Americans being outside the workforce, that analysis continued:

*It should be obvious that being in the labor force significantly increases income and dramatically reduces the risk of being in poverty. There is also good evidence that not working is associated with a deterioration in mental health. In addition, being out of the labor force is linked with declining physical well-being. Research shows that not working has a negative effect on the incidence of obesity and the associated health problems this creates. Perhaps most important, there seems to be a strong association between not working and so-called “deaths of despair”, including suicide, drug overdose, and destructive levels of alcohol consumption and death from poisoning.*

Two things are clear from that analysis: (1) too many American workers are no longer in the workforce; and (2) it is in the interests of the United States to ensure working-age American workers are able to find employment for reasonable wages in safe working conditions.

In fact, the INA explicitly limits the number of lawful immigrants who may be admitted to the United States to those ends. Specifically, section 212(a)(5)(A)(i) of the INA<sup>391</sup> states:

*Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-*

*(I) **there are not sufficient workers who are able, willing, qualified (or equally qualified....) and available** at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and*

*(II) **the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.***  
*[Emphasis added.]*

The deleterious impact of large-scale immigration on the domestic workforce is not unique to the United States. Consider the following, from an address given by British Prime Minister Keir Starmer—head of the Labour Party—on the issue of migration on November 28:

*When we came into office – we immediately conducted an audit of public finances. And we found a £22 billion black hole.*

*Now – the independent Office of National Statistics [ONS] has conducted vital work on the state of immigration. As the ONS sets out, **nearly one million people came to Britain in the year ending June 2023. That is four times the migration levels compared with 2019.***

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<sup>391</sup> Sec. 212(a)(5)(A)(i) of the INA (2024). Source:

.....  
*But what we didn't hear, what the British people are owed, is an explanation. Because a failure on this scale isn't just bad luck. It isn't a global trend or taking your eye off the ball. No – this a different order of failure. This happened by design, not accident. Policies were reformed, deliberately to liberalise immigration.*

.....  
*Brexit was used for that purpose, to turn Britain into a one-nation experiment in open borders. Global Britain – remember that slogan, that is what they meant. A policy with no support.*

*Well that's unforgivable. And mark my words – this government will turn the page.*

*That begins in the economy. Because you cannot separate this failure from their refusal to do the hard yards on skills, on welfare reform, on giving our young people opportunities, rather than the easy answers of looking overseas.*

*Because clearly – the vast majority of people who entered this country did so to plug gaps in our workforce, skills shortages across the country, which have left our economy hopelessly reliant on immigration. 2.8 million people out of work on long-term sickness – a problem ignored, left to fester. One in 8 young people not in employment or education or training. Sectors of our economy, like engineering, where apprenticeships have almost halved in the last decade, while visas have doubled.<sup>392</sup> [Emphasis added; cleaned up.]*

Such impacts of mass immigration on the domestic workforce in this country used to be a bipartisan issue. Consider the following, from President Bill Clinton's 1995 State of the Union address:

*All Americans, not only in the States most heavily affected but in every place in this country, are rightly disturbed by the large numbers of illegal aliens entering our country. **The jobs they hold might otherwise be held by citizens or legal immigrants. The public service they use impose burdens on our taxpayers.** [Emphasis added]<sup>393</sup>*

Clinton continued:

*That's why our administration has moved aggressively to secure our borders more by hiring a record number of new border guards, **by deporting twice as many criminal aliens as ever before, by cracking down on illegal hiring, by***

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<sup>392</sup> PM speech on migration: 28 November 2024. Prime Minister Keir Starmer makes a speech on migration at 10 Downing Street. Gov.UK. Source: <https://www.gov.uk/government/speeches/pm-speech-on-migration-28-november-2024>.

<sup>393</sup> President Bill Clinton, State of the Union Address (Jan. 24, 1995). Source: <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-11>.



*barring welfare benefits to illegal aliens. In the budget I will present to you, we will try to do more to speed the deportation of illegal aliens who are arrested for crimes, to better identify illegal aliens in the workplace as recommended by the commission headed by former Congresswoman Barbara Jordan. We are a nation of immigrants. But we are also a nation of laws. It is wrong and ultimately self-defeating for a nation of immigrants to permit the kind of abuse of our immigration laws we have seen in recent years, and we must do more to stop it. [Emphasis added.]*<sup>394</sup>

Speaking of Barbara Jordan, here's what she told Congress in September 1994 in her role as the chairman of the U.S. Commission on Immigration Reform:

*Simply put, if we cannot demagnetize our economy for illegal aliens who come here to seek jobs, we cannot control illegal immigration. If we cannot control illegal immigration, we cannot sustain our national interest in legal immigration. Those who come here illegally, and those who hire them, will destroy the credibility of our immigration policies and their implementation. In the course of that, I fear, they will destroy our commitment to immigration itself.*<sup>395</sup>  
[Emphasis added.]

“Family Separation”

Again, the exact parameters of the incoming administration's immigration plans are unknown, but regardless some number of unauthorized aliens with U.S. citizen and lawful resident spouses, or U.S. citizen and lawful resident children, could be removed.

Such “family separations” are a fact of life in many non-immigration scenarios: when parents and spouses divorce; are incarcerated; are deployed in the armed services; or die.

Congress has already considered such impacts in the immigration context in section 240A(b) of the INA<sup>396</sup>, which provides a form of relief (cancellation of removal and lawful permanent residence) for aliens in removal proceedings with immediate relatives who are citizens and lawful permanent residents.

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<sup>394</sup> *Id.*

<sup>395</sup> Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform, Before the U.S. House of Reps., Comm. on the Judiciary, Subcomm. on International Law, Immigration and Refugees (Sept. 29, 1994), at 2. Source: <https://books.google.com/books?id=IWndDyAdbmgC&pg=PA27&lpg=PA27&dq=%22if+we+cannot+control+illegal+immigration,+we+cannot+sustain+our+national+interest+in+legal+immigration.+Those+who+come+here+illegally,+and+those+who+hire+them,+will+destroy+the+credibility+of+our+immigration+policies+and+their+implementation.+In+the+course+of+that,+I+fear,+they+will+destroy+our+commitment+to+immigration+itself.%22&source=bl&ots=8ZGqxlV27S&sig=ACfU3U09s4fJQta6wbuKVoN6knVcUJWICg&hl=en&sa=X&ved=2ahUKEwjKw8WkhrGHAXW078kDHWdtCYYQ6AF6BAglEAM#v=onepage&q=%22if%20we%20cannot%20control%20illegal%20immigration%2C%20we%20cannot%20sustain%20our%20national%20interest%20in%20legal%20immigration.%20Those%20who%20come%20here%20illegally%2C%20and%20those%20who%20hire%20them%2C%20will%20destroy%20the%20credibility%20of%20our%20immigration%20policies%20and%20their%20implementation.%20In%20the%20course%20of%20that%2C%20I%20fear%2C%20they%20will%20destroy%20our%20commitment%20to%20immigration%20itself.%22&f=false>.

<sup>396</sup> Section 240A(b) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229b&num=0&edition=prelim>.

It is commonly known as “42B cancellation” after its DOJ application form<sup>397</sup>, and in section 240A(b) of the INA, Congress made that relief available for up to 4,000 applicants<sup>398</sup> annually.

In addition to that annual cap, 42B relief comes with a number of exceptions, most notably that it can only be granted to aliens present here for 10 years or more prior to filing that application.<sup>399</sup>

Further, to be granted 42B cancellation, the alien must establish that his or her removal “would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”<sup>400</sup> (emphasis added).

If “exceptional and extremely unusual hardship” sounds like a heavy burden, that’s by design.

This 42B cancellation replaced a similar form of relief for aliens unlawfully present known as “suspension of deportation”.<sup>401</sup>

Suspension only required aliens to show that they had been here for seven years and that their deportation would result in extreme hardship to themselves or a qualifying U.S. citizen or lawful permanent resident (LPR) relative.

To say that this “extreme hardship” standard for suspension was weakened over the years would be an understatement.

In its 1996 decision in *Matter of O-J-O*<sup>402</sup>, for example, the Board of Immigration Appeals (BIA) granted suspension to a 24-year-old Nicaraguan national who, among other equities was “an avid fan of softball and baseball” and “participate[d] as a player in local softball and baseball leagues”<sup>403</sup>.

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<sup>397</sup> See Form EOIR-42B, *Application for Cancellation of Removal and Adjustment for Certain Nonpermanent Residents*, U.S. DEP’T OF JUSTICE, EXEC. OFF. FOR IMMIGRATION REVIEW (rev. Feb. 2022). Source: <https://www.justice.gov/eoir/page/file/904291/dl>.

<sup>398</sup> See section 240A(e)(1) of the INA (2024) (“Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section [244(a) of the INA] (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such [section 244(a) of the INA]. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such [section 244(a) of the INA].” Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229b&num=0&edition=prelim>.

<sup>399</sup> *Id.* at subpara. (b)(1)(A).

<sup>400</sup> *Id.* at subpara. (b)(1)(D).

<sup>401</sup> See *suspension of deportation*. LEGAL INFORMATION INST. (updated Apr. 2022) (“Suspension of deportation is a relief rule for aliens in deportation proceedings under the Immigration and Nationality Act (INA) of 1952, which authorizes an immigration judge the discretion to relieve aliens of deportations. This rule was repealed under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and replaced with 2 types of cancellation of removal (to permanent/nonpermanent residents) under INA of 1997.”). Source: [https://www.law.cornell.edu/wex/suspension\\_of\\_deportation](https://www.law.cornell.edu/wex/suspension_of_deportation).

<sup>402</sup> *Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3280.pdf>.

<sup>403</sup> *Id.* at 382.

Congress specifically referenced the BIA’s “hardship” finding in *Matter of O-J-O-* in the IIRIRA conference report<sup>404</sup> to explain why it was replacing suspension with 42B cancellation in the INA.

There is also a specific provision at section 245(i) of the INA<sup>405</sup> that permits aliens who entered or worked unlawfully or who failed to maintain lawful status to adjust status to lawful permanent resident, which could benefit alien spouses of United States citizens and LPRs facing removal.

Notably, however, that relief only applies to aliens who were the beneficiaries of immigrant visa petitions or labor certification applications filed on or before April 1, 2001.<sup>406</sup>

Congress set that date in 2000<sup>407</sup>, and despite efforts to extend it, has not amended it since.<sup>408</sup>

Thus, any hardship removable aliens and their LPR family members would suffer under any Trump administration enforcement policies would be solely due to decisions made by Congress, not the executive branch, assuming those policies enforce Congress’s dictates in the INA.

### The Military

The president-elect has indicated<sup>409</sup> that there will be a role for the U.S. military in his immigration-enforcement plans.

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<sup>404</sup> See H. Rept. 104-828 (Sep. 24, 1996), at 213 (“The managers have deliberately changed the required showing of hardship from ‘extreme hardship’ to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien’s deportation. The ‘extreme hardship’ standard has been weakened by recent administrative decisions holding that forced removal of an alien who has become ‘acclimated’ to the United States would constitute a hardship sufficient to support a grant of suspension of deportation. See *Matter of O–J–O–*, Int. Dec. 3280 (BIA 1996).”). Source:

<https://www.congress.gov/congressional-report/104th-congress/house-report/828/1?outputFormat=pdf>.

<sup>405</sup> Sec. 245(i) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1255&num=0&edition=prelim>.

<sup>406</sup> See *id.* at subpara (i)(1)(B).

<sup>407</sup> See *Green Card through INA 245(i) Adjustment*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Oct. 11, 2024) (“Section 245(i) of the Immigration and Nationality Act (INA), as amended by the Legal Immigration Family Equity (LIFE) Act and LIFE Act Amendments of 2000 (Pub. L. 106-553 and -554), enables certain individuals who are present in the United States who would not normally qualify to apply for adjustment of status in the United States to obtain lawful permanent residence (get a Green Card) regardless of: The manner they entered the United States; Working in the United States without authorization; or Failing to continuously maintain lawful status since entry.”). Source: <https://www.uscis.gov/green-card/green-card-eligibility/green-card-through-ina-245i-adjustment>.

<sup>408</sup> See *245(i) Extension Left Unfinished*. CQ ALMANAC (2002) (“The House easily passed a four-month extension in May, but the proposal stalled in the Senate, where many wanted to give the program a longer life span. The Senate passed an extension through April 2002 on Sept. 6, and that version was scheduled for floor action Sept. 11, when the Capitol was evacuated. The vote was never taken. The White House supported attaching the extension to the fiscal 2002 Commerce-Justice-State (CJS) spending bill. The Senate version of the bill contained a permanent extension of 245(i) that was opposed by House conservatives. House Judiciary Chairman F. James Sensenbrenner Jr., R-Wis., said the 245(i) bill should go through regular order and asked his Republican colleagues to drop it from the CJS conference report, which they reluctantly did. (Appropriations, p. 2–9)”). Source: <https://library.cqpress.com/cqalmanac/document.php?id=cqal01-106-6376-328253>.

<sup>409</sup> See Diamante, Reena. *Trump’s pledge to use military for immigration plan sparks legal, political debate*. SPECTRUM NEWS (Nov. 28, 2024). Source: <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2024/11/28/donald-trump-us-military-immigration-mass-deportation>.

Again, what role the military will play, if any, is unclear, but it should be noted that military assets have been used at various times by the past four administrations, and under the Carter and Reagan administrations, as well.

In May 2006, President George W. Bush launched “Operation Jump Start”<sup>410</sup>, “a plan to use National Guard troops to assist the Border Patrol in restoring order” to the Southwest border.

As the National Guard has explained:

*For the next two years, up to 6,000 National Guard soldiers and airmen at a time rotated in contingents throughout the Southwest. They monitored electronic surveillance systems, manned isolated outposts, and flew helicopters equipped with sophisticated radar systems, their presence freeing up hundreds of Border Patrol agents to perform the actual apprehension of illegal migrants and drugs. Guard engineers built dozens of roads, particularly in the mountains of southeastern Arizona, increasing the Border Patrol’s mobility and earning the gratitude of its agents, who still patrol this rugged country on horseback as they have done since the 1920s.*<sup>411</sup>

Similarly, in July 2010, President Obama initiated “Operation Phalanx”<sup>412</sup>. As the U.S. Army explained in May 2011:

*Operation Phalanx is the successor operation to Operation Jump Start, which was declared by former President Bush authorizing up to 6,000 National Guard Soldiers and Airmen from 2006 through 2008. Operation Phalanx, scheduled to end in June 2011, provides support primarily from the Southwest Border States of California, Arizona, New Mexico, and Texas.*

.....

*The National Guard Soldiers and Airmen assigned to Operation Phalanx have been serving as a force multiplier for the U.S. Border Patrol by spotting border intrusions and providing technical support. The National Guard has performed tasks such as ground surveillance, criminal investigative analysis, command and control, mobile communications, transportation, logistics, and training support.*<sup>413</sup>

Thereafter, during a surge in unaccompanied alien children and family migrants in 2014, the Obama administration placed more than 7,700 migrant children on three military bases (Fort Sill

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<sup>410</sup> *Operation Jump Start*. NATIONAL GUARD (undated). Source: <https://www.nationalguard.mil/Resources/Image-Gallery/Historical-Paintings/Heritage-Series/Jump-Start/>.

<sup>411</sup> *Id.*

<sup>412</sup> Shoichet, Catherine E. *Trump says he’ll send the military to the border. Bush and Obama did, too*. CNN POLITICS (Apr. 4, 2018). Source: <https://www.cnn.com/2018/04/03/politics/border-troops-deployed-obama-bush/index.html>.

<sup>413</sup> *Army National Guard Operation Phalanx*. U.S. ARMY (May 19, 2011). Source: [https://www.army.mil/article/56819/army\\_national\\_guard\\_operation\\_phalanx](https://www.army.mil/article/56819/army_national_guard_operation_phalanx).

in Lawton, Okla., Lackland Air Force Base near San Antonio, Tex. and Naval Base Ventura County in California) under the supervision of HHS.<sup>414</sup>

That was not the first time that migrants were housed on military facilities. According to CRS:

*In 1991, the United States opened a refugee center at Naval Station Guantanamo Bay in Cuba for Haitians fleeing their country by boat in the aftermath of a coup. At one point, nearly 13,000 Haitians were housed there. The refugee center closed in July 1993 but it was reopened in June 1994 to again house Haitian refugees fleeing their country. In August 1994, the United States reversed a previous policy allowing Cuban refugees into the United States and required instead that they be brought to Guantanamo Bay. Approximately 12,000 Haitians and 33,000 Cubans were housed at Guantanamo Bay in September of 1994. The refugee camp closed in February 1996.*

....

*Starting in April 1980, Eglin Air Force Base, FL, Fort Indiantown Gap, PA, Fort McCoy, WI, and Fort Chaffee, AR, were used as refugee resettlement centers to house an influx of Cuban refugees who arrived in the United States via the “Mariel Boatlift.” By October 1980, Eglin Air Force Base, Fort Indiantown Gap, and Fort McCoy were closed and their remaining refugees were transferred to Fort Chaffee. Fort Chaffee housed 25,390 refugees, of whom about 5,800 had been transferred from Fort McCoy, Eglin Air Force Base, and Fort Indiantown Gap. The refugee center at Fort Chaffee closed in February 1982.<sup>415</sup>*

In April 2018, President Trump issued a “Memorandum on Securing the Southern Border of the United States”<sup>416</sup>, which stated:

*The Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country. The Secretary of Defense shall request use of National Guard personnel to assist in fulfilling this mission, pursuant to section 502 of title 32, United States Code, and may use such other authorities as appropriate and consistent with applicable law.*

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<sup>414</sup> Rogers, David. *Kid shelters at military posts to close*. POLITICO (Aug. 4, 2014). Source:

<https://www.politico.com/story/2014/08/border-children-no-military-facility-housing-109692>.

<sup>415</sup> *History of Use of U.S. Military Bases to House Immigrants and Refugees*. CONG. RESEARCH SERV. (Jul. 26, 2018). Source: <https://crsreports.congress.gov/product/pdf/IN/IN10937>.

<sup>416</sup> Trump, Donald J. *Memorandum on Securing the Southern Border of the United States*. THE AMERICAN PRESIDENCY PROJECT (Apr. 4, 2018). Source: <https://www.presidency.ucsb.edu/documents/memorandum-securing-the-southern-border-the-united-states>.

That led to “Operation Guardian Support”, under which thousands of National Guard troops were deployed<sup>417</sup> by their respective state governors to the border, again to fill support roles.

By that October, the Department of Defense (DoD) launched “Operation Faithful Patriot”, under which activity duty troops were deployed to the border to provide DHS “with ‘planning assistance, engineering support, fixed and rotary wing aviation support to move personnel’ as well as medical assistance, temporary housing and protective equipment for border patrol members”.<sup>418</sup>

In February 2019, President Trump issued Presidential Proclamation (PP) 9844, “Declaring a National Emergency Concerning the Southern Border of the United States”.<sup>419</sup> It directed:

*The Secretary of Defense, or the Secretary of each relevant military department, as appropriate and consistent with applicable law, [to] order as many units or members of the Ready Reserve to active duty as the Secretary concerned, in the Secretary’s discretion, determines to be appropriate to assist and support the activities of the Secretary of Homeland Security at the southern border.*<sup>420</sup>

Ten days later, DHS asked DoD for assistance in constructing “fences [,] roads, and lighting” within 11 specified project areas, “to block drug-smuggling corridors across the international boundary between the United States and Mexico.”<sup>421</sup>

The reprogramming of DoD funds for fence and infrastructure construction went through various legal actions but was eventually allowed to proceed by the Supreme Court.<sup>422</sup>

PP 9844 was terminated by President Biden on Inauguration Day 2021, when he issued PP 10142, “Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction”.<sup>423</sup>

In that proclamation, Biden also paused work<sup>424</sup> on the Southwest Border Wall System<sup>425</sup>.

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<sup>417</sup> See *Mission at the Border*. U.S. DEP’T OF DEFENSE (Oct. 24, 2018). Source: <https://www.defense.gov/News/News-Stories/Article/Article/1671555/mission-at-the-border/>.

<sup>418</sup> Shane III, Leo and Copp, Tara. *Forces headed to border to confront migrant caravan could total ‘in the thousands’*. MILITARY TIMES (Oct. 29, 2018). Source: <https://www.militarytimes.com/news/pentagon-congress/2018/10/29/white-house-plan-to-send-5000-troops-to-the-mexican-border-catches-pentagon-off-guard/>.

<sup>419</sup> *Presidential Proclamation 9884, Declaring a National Emergency Concerning the Southern Border of the United States*. 84 Fed. Reg. 4949-50 (Feb. 15, 2019). Source: <https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf>.

<sup>420</sup> *Id.* at sec. 1.

<sup>421</sup> Arthur, Andrew. *Republican Senators Ask GAO to Review Biden Border Wall Freeze*. CENTER FOR IMMIGRATION STUDIES (Mar. 25, 2021). Source: <https://cis.org/Arthur/Republican-Senators-Ask-GAO-Review-Biden-Border-Wall-Freeze>.

<sup>422</sup> *Id.*

<sup>423</sup> *Presidential Proclamation 10142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*. 86 Fed. Reg. 7225-27 (Jan. 20, 2021). Source: <https://www.govinfo.gov/content/pkg/FR-2021-01-27/pdf/2021-01922.pdf>.

<sup>424</sup> *Id.*, at sec. 1.

<sup>425</sup> *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sep. 6, 2024). Source: <https://www.cbp.gov/border-security/along-us-borders/border-wall-system>.

In May 2023, however, Biden administration Defense Secretary Lloyd Austin approved a DHS request to send 1,500 active-duty troops to the Southwest border.<sup>426</sup>

In March, DoD reported:

*Defense support to civil authorities is an important DOD activity, supporting the American public and U.S. partners in responding to disasters, public health emergencies and border security, so long as these activities do not impair warfighting readiness, [Rebecca Zimmerman, Acting Assistant Secretary of Defense for Homeland Defense and Hemispheric Affairs and Principal Deputy Assistant Secretary of Defense for Homeland Defense and Hemispheric Affairs] noted.*

*Today between 2,500 and 3,000 military personnel are deployed to the Southwest border, supporting U.S. Customs and Border Protection activities. DOD has supported this mission for 18 of the last 21 years, she said.*<sup>427</sup>

## CONCLUSION

In her November 29, 2023, Memorandum Opinion and Order in *Texas v. U.S. DHS*<sup>428</sup>, U.S. District Court Judge Alia Moses explained:

*The U.S.-Mexico border presents a unique challenge that is equal parts puzzling to outsiders and frustrating to locals. **The immigration system at the heart of it all, dysfunctional and flawed as it is, would work if properly implemented. Instead, the status quo is a harmful mixture of political rancor, ego, and economic and geopolitical realities that serves no one.** So destructive is its nature that the nation cannot help but be transfixed by, but simultaneously unable to correct, the present condition. [Emphasis added.]*

Note that this order favored the Biden administration, allowing it to continue to cut concertina wire barriers Texas had erected along the Rio Grande to prevent the unlawful entry of migrants. But that didn't mean the court was happy or agreed with the administration's actions.

Respectfully, many Americans who've watched the pendular gyrations of sundry immigration policies over the past three administrations would concur with her conclusions about "the status quo".

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<sup>426</sup> Garamone, Jim. *Austin Approves Homeland Security Request for Troops at Border*. DOD News (May 2, 2023). Source: <https://www.defense.gov/News/News-Stories/Article/Article/3382272/austin-approves-homeland-security-request-for-troops-at-border/>.

<sup>427</sup> Vergun, David. *Leaders Discuss Security Priorities for Western Hemisphere*. DOD News (Mar. 12, 2024). Source: <https://www.defense.gov/News/News-Stories/Article/Article/3704761/leaders-discuss-security-priorities-for-western-hemisphere/>.

<sup>428</sup> *Texas v. U.S. DHS*, Case No. DR-23-CV-00055-AM, Memorandum Opinion and Order, at 6 (W.D. Tex. Nov. 29, 2023) (Moses, J.). Source: <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Concertina%20Wire%20PI%20Denial%20File%20Stamped.pdf>.

Under our Constitution, Congress has plenary authority to make rules concerning the admission of aliens, their presence in the United States, and their removal from this country. It is the role of the executive branch to carry out those rules, consistent with due process.

I concur with Judge Moses's conclusion that our immigration system would work if it were properly implemented. Unfortunately, past administrations have stepped out of their constitutional role and applied our immigration laws not as written, but instead as they believe Congress should have acted.

Arguments can be made that the immigration laws Congress has written are unduly harsh and unfair, that they fail to recognize economic realities, and that they are in need of amendment.

In response to such arguments, I would offer the words of President Ulysses S. Grant in his first inaugural address<sup>429</sup>:

*I shall on all subjects have a policy to recommend, but none to enforce against the will of the people. Laws are to govern all alike — those opposed as well as those who favor them. I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.*

Thank you, and I look forward to your questions.

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<sup>429</sup> Ulysses S. Grant, First Inaugural Address, March 4, 1869. LIBRARY OF CONGRESS (undated). Source: <https://www.loc.gov/item/today-in-history/april-27/#:~:text=I%20shall%20on%20all%20subjects,Ulysses%20S.>