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To the

Committee on the Judiciary of the

United States House of Representatives,

Subcommittee on Oversight

For A Hearing Titled:

"False Narratives Surrounding Detention Conditions at the Delaney Hall ICE Detention Center"

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Chairman Van Drew, Ranking Member Crockett, and members of the subcommittee, thank you for inviting me here today to discuss alien detention.

To address the issues raised by the committee, I have structured my written testimony to first explain the source of the immigration power in the United States and restrictions on state regulations of federal functions; second, to outline the criminal grounds of removal; third, to describe the laws governing immigration investigations, stops, and arrests; fourth, to examine on the reasons behind and the statutes governing detention under the Immigration and Nationality Act (INA); fifth, to explain the standards for due process in the removal process; sixth, to analyze so-called "sanctuary" policies and their impacts; and seventh, to address issues specific to the Delaney Hall ICE Detention Center.

I. CONGRESS'S PLENARY AUTHORITY OVER IMMIGRATION

Key to understanding how our immigration laws work is recognizing where the immigration authority in this country rests.

A. Article I, Section 8 of the U.S. Constitution

Article I, sec. 8 of the U.S. Constitution[1] states, in pertinent part: "Congress shall have Power . . . to establish an uniform Rule of Naturalization and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers".

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

As the Congressional Research Service (CRS)[5] has explained: "Long-standing Supreme Court precedent recognizes Congress as having plenary power[6] over immigration, *giving it almost*

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[1] U.S. Const. art. 1, § 8 (cleaned up). Source: https://uscode.house.gov/static/constitution.pdf.

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

[3] *See* sec. 101(a)(3) of the INA (2025) ("The term 'alien' means any person not a citizen or national of the United States."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[4] *See* section 101(a)(22) of the INA (2025) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

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

[6] *See plenary power*. Legal Information Inst. (undated) ("Complete power over a particular area with no limitations."). Source: https://www.law.cornell.edu/wex/plenary_power; *see generally* Feere, Jon. *Plenary Power: Should Judges Control U.S. Immigration Policy?* Ctr for Immigr. Studies (Feb. 25, 2009). Source: https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy.

complete authority to decide whether . . . aliens . . . 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*[7], the Court explained:

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

Section 212(a) of the INA[8] presents the various classes of aliens whom Congress has determined should be precluded 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[9], 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[10] lists the "classes of deportable aliens", aliens lawfully admitted to the United States who, for assorted reasons, Congress has directed immigration officials to remove 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[11]; aliens convicted of certain criminal acts[12] (as I will describe in section II, *infra*); and aliens who pose a national security, espionage, or terrorism risk[13].

B. The "Supremacy Clause", "Intergovernmental Immunity", and "Preemption"

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

[8] Sec. 212 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[9] Sec. 212(a)(7)(A)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[10] Sec. 237(a) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[11] Sec. 237(a)(1)(C) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[12] Sec. 237(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[13] Sec. 237(a)(4) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

To understand the issues in today's hearing, it is critical to understand how the Constitution limits the authority of the states and localities to control, regulate, and interfere in core federal issues like immigration, limitations that largely flow from a landmark early 19th century opinion of the Supreme Court.

The Second Bank of the United States was chartered by Congress in April 1816 to address financial issues related to the War of 1812, and it opened in Philadelphia in January 1817.[14]

The state of Maryland in 1818 passed legislation which attempted to impose taxes on the bank, and which the cashier of the bank's Baltimore branch, James W. McCulloch, refused to pay.[15]

Maryland's imposition of the tax was not purely fiscal, as at the time the Second Bank "was controversial due to competition with state banks, corruption, and the perception that the federal government was becoming too powerful" and the state legislature had intended "to close the Baltimore branch of the national bank by passing a tax on all banks created outside of the state".[16]

The state sued McCulloh for payment, contending (among other things) that the Constitution did not give the federal government the power to create such a bank, but did expressly grant the state of Maryland the power to tax.

John James sued McCulloh on his own behalf and on behalf of the state to recover "certain penalties" related to the state tax in the County Court of Baltimore County, which convicted McCulloh and imposed fines on him in a decision affirmed by the Maryland Court of Appeals.[17]

McCulloh, represented by Daniel Webster, appealed that state court opinion to the Supreme Court, where Chief Justice John Marshall (in a unanimous opinion) held Congress was authorized under the "necessary and proper clause" in Article I, section 8, clause 18 of the U.S. Constitution[18] to establish the Second Bank of the United States[19].

More importantly for this hearing, however, Chief Justice Marshall also concluded that:

> *Th[e] great principle* ***is that the Constitution and the laws made in pursuance thereof are supreme****; that they control* ***the Constitution and laws of the respective States, and cannot be controlled by them****. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to*

[14] *The Second Bank of the United States*. Fed. Reserve History (Dec. 5, 2015). Source: https://www.federalreservehistory.org/essays/second-bank-of-the-us.
[15] *McCulloch v. Maryland*, OYEZ (undated). Source: https://www.oyez.org/cases/1789-1850/17us316.
[16] *McCulloch v. Maryland* (1819). LANDMARK CASES OF THE SUPREME COURT (undated). Source: https://landmarkcases.org/cases/mcculloch-v-maryland/.
[17] *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819). Source: https://supreme.justia.com/cases/federal/us/17/316/.
[18] *See* U.S. Const. art. 1, § 8, cl. 18 (Congress has the power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. . ..."). Source: https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/.
[19] *McCulloch*, 17 U.S. at 419-425.

> *preserve; 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve; 3d. T***hat, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme***.*[20] *{emphasis added.]*

The Court continued:

> *The argument on the part of the State of Maryland is* ***not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it****, and that the Constitution leaves them this right, in the confidence that they will not abuse it.*
>
> . . . .
>
> *The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission****, but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not****. Those powers are not given by the people of a single State. They are given by the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme.* ***Consequently, the people of a single State cannot confer a sovereignty which will extend over them****. [Emphasis added.]*[21]

The chief justice concluded:

> *If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument.* ***We shall find it capable of arresting all the measures of the Government, and of prostrating it at the foot of the States. The American people have declared their Constitution and the laws made in pursuance thereof to be supreme, but this principle would transfer the supremacy, in fact, to the States****. [Emphasis added.]*[22]

[20] *Id*. at 426.
[21] *Id*. at 427-28, 429.
[22] *Id*. at 432.

Thus, *McCulloch* is one of the seminal cases interpreting and applying the Supremacy Clause[23] of the U.S. Constitution, and with it the "federal preemption"[24] doctrine – particularly in the field of immigration[25].

A separate but related principle has sprung from *McCulloch*: "intergovernmental immunity", the ability of the government to "remove all obstacles to its action within its own sphere" and "exempt its own operations from [state] influence."[26]

The Supreme Court applied this principle to bar all state laws that "increased the cost to the Federal Government of performing its functions"[27]. More recently, however, the Court has narrowed this principle, concluding: "A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."[28]

Aside from its holding, *McCulloh* is perhaps most noted for Chief Justice Marshall's observation that, "That the power to tax involves the power to destroy"[29]. The same axiom would apply to a state's unfettered attempt to regulate the U.S. government's actions related to immigration, a subject, as noted *supra*, the Constitution has exclusively left to the federal government.

II. THE CRIMINAL GROUNDS OF REMOVAL

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[23] *See* U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also Art VI. C2. 1 Overview of Supremacy Clause*. CONST. ANNOTATED (undated). Source: https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/.

[24] *See Federal Preemption: A Legal Primer*. CONG. RESEARCH SERV. (May 18, 2023). Source: https://www.congress.gov/crs-product/R45825.

[25] *See* Zota, Sejal. *Do State and Local Immigration Laws Violate Federal Law?* POPULAR GOV'T (Spring/Summer 2009) ("Faced with what they consider a lack of comprehensive immigration reform at the federal level, many states and localities are enacting their own immigration-related laws and ordinances. Many of these laws impose restrictions on unauthorized immigrants, while some aim to promote integration of immigrants into the society.... The U.S. Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration. A state or local law will be constitutionally preempted if it attempts to regulate immigration. Under this test, the relevant question is: Does the state or local law *regulate* immigration—does it make a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain—or does it simply *pertain* to immigrants? State and local laws that attempt to regulate immigration violate the Supremacy Clause of the U.S. Constitution and are therefore preempted by federal law, even in the absence of federal legislation.") (Emphasis in original; footnotes omitted). Source: https://www.sog.unc.edu/sites/default/files/articles/article3_7.pdf#:~:text=The%20U.S.,regulate%20immigration.

[26] *McCulloch*, 17 U.S. at 427.

[27] *See U.S. v. Cnty. of Fresno*, 429 U.S. 452, 460 ("For many years, the Court read the decision in *M'Culloch* as forbidding taxes on those who had contractual relationships with the Federal Government or with its instrumentalities whenever the effect of the tax was or might be to increase the cost to the Federal Government of performing its functions. In later years, however, the Court departed from this interpretation of *M'Culloch*. In *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), a contractor sought immunity from a state occupation tax measured by the gross receipts, insofar as those receipts had been receive under a contract with the Federal Government. The Court declared the tax valid even if "the gross receipts tax may increase the cost to the Government" under the contract. *Id.* at 302 U. S. 160. So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory, *id.* at 302 U. S. 150, or until Congress declares otherwise."). Source: https://supreme.justia.com/cases/federal/us/429/452/.

[28] *North Dakota v. U.S.*, 495 U.S. 423, 435 (1990) (plurality opinion); *see also id*. at 444 ("All agree in this case that state taxes or regulations that discriminate against the Federal Government or those with whom it deals are invalid under the doctrine of intergovernmental immunity.") (Scalia, J. concurring in judgment). Source: https://supreme.justia.com/cases/federal/us/495/423/.

[29] *McCulloch*, 17 U.S. at 431.

The INA contains separate grounds of inadmissibility and deportability for aliens who have been convicted of criminal offenses in the United States and abroad, the former applying to aliens who have not been admitted[30] to the United States and the latter applying to those who have been lawfully admitted but are removable on criminal grounds.

A. The Criminal Grounds of Inadmissibility

The criminal grounds of inadmissibility are set forth in section 212(a)(2) of the INA[31].

First, under section 212(a)(2)(A)(i)(I)[32], "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.

Note that inadmissibility under this provision does not require a conviction; rather, pursuant to the statute, an "admission" to a "crime involving moral turpitude" ("CIMT") is sufficient.

That said, to constitute a valid admission to a CIMT in this context, the alien must be presented with the statute from the jurisdiction in which the offense is alleged to have been committed; to have that statute explained in plain language; and to admit to the key elements of that offense.[33]

In general, as the Board of Immigration Appeals (BIA) has explained:

> *Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general*.[34]

"To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state."[35] Crimes in which the *mens rea* is negligence or less generally do not constitute CIMTs because such offenses "must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness".[36]

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[30] *See* sec. 101(a)(13)(A) of the INA (2026) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."). Source: https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-1994-title8-section1101&num=0.

[31] Sec. 212(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[32] Sec. 212(a)(2)(A)(i)(I) (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[33] *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). Source: https://immigrantdefenseproject.org/wp-content/uploads/2016/10/IN-THE-MATTER-OF-K-7-IN-Dec.-594-B.I.A..pdf.

[34] *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3068.pdf.

[35] *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Source: https://www.justice.gov/eoir/file/902461/dl.

[36] *Matter of Silva-Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008). Source: https://www.ilrc.org/sites/default/files/resources/n.7-crimes_involving_moral_turpitude.pdf.

"Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude."[37]

Similarly:

> *A theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.*[38]

"Burglary of a dwelling" has also been found to be a CIMT, even if the owner is not present.[39] Sex offenses will also generally constitute crimes involving moral turpitude.[40]

There are exceptions to inadmissibility under this ground for the offender's age at the time of the offense, the recency of the offense, and the sentence that could have been imposed.

Section 212(a)(2)(A)(ii)(I) of the INA provides that an alien is not inadmissible based upon a single CIMT if:

> *the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States*.[41]

And, under clause (II) therein[42], a single CIMT will not bar an alien from admission if:

> *the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).*

Finally, there is a waiver for this ground of inadmissibility at section 212(h) of the INA.[43]

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[37] *Jordan v. De George*, 341 U.S. 223, 229 (1951). Source: https://supreme.justia.com/cases/federal/us/341/223/.

[38] *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). Source: https://www.justice.gov/eoir/page/file/910821/dl?inline.

[39] *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017). Source: https://www.justice.gov/eoir/page/file/990986/dl?inline.

[40] *See generally Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 4 (BIA 2017). Source: https://www.justice.gov/eoir/page/file/955631/dl?inline.

[41] Sec. 212(a)(2)(A)(ii)(I) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[42] Sec. 212(a)(2)(A)(ii)(II) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[43] *See* sec. 212(h) of the INA (2026) ("Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E). The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if- (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-(i) the alien is inadmissible only under

Section 212(a)(2)(A)(i)(II) of the INA[44] renders an applicant for admission inadmissible if the alien has been:

> *convicted of, or . . . admits having committed, or . . . admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21[45]).*

Again, no conviction is required for a finding of inadmissibility on this ground, and as with CIMTs, there is a waiver available under section 212(h) of the INA for "a single offense" as defined in this provision involving "simple possession of 30 grams or less of marijuana".

Pursuant to section 212(a)(2)(B) of the INA[46], an applicant for admission is inadmissible if the alien has been:

> *convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more. . ..*

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subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and (iii) the alien has been rehabilitated; or (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or (C) the alien is a VAWA self-petitioner; and (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[44] Sec. 212(a)(2)(A)(i)(II) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[45] *See* 21 U.S.C. § 802 (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim.

[46] Sec. 212(a)(2)(B) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

Traffickers[47] in controlled substances and other listed substances and chemicals (as defined in 21 U.S.C. § 802[48]) are inadmissible under section 212(a)(2)(C)(i) of the INA[49], as are their spouses and adult children (under section 212(a)(2)(C)(ii) of the INA[50]) but in the latter case only if, "within the previous 5 years", they "obtained any financial or other benefit from the illicit activity of" their inadmissible spouse or parent "and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity".

Section 212(a)(2)(D)(i) of the INA[51] renders inadmissible any applicant for admission who:

> *(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,*
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> *(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or*
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> *(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution . . ..*

Aliens who have asserted immunity from prosecution for a "serious criminal offense" as defined in section 101(h) of the INA[52], have departed from the United States, and have not subsequently "submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense" are inadmissible under section 212(a)(2)(E) of the INA[53].

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[47] *See generally* 21 U.S.C. § 841 (2026) ("(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."). Source: https://www.law.cornell.edu/uscode/text/21/841; *but see Moncrieffe v. Holder*, 569 U.S. 184 (2013) (social sharing of a small amount of marijuana does not render a legal immigrant deportable). Source: https://supreme.justia.com/cases/federal/us/569/184/.

[48] *See* 21 U.S.C. § 802 (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim.

[49] Sec. 212(a)(2)(C)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[50] Sec. 212(a)(2)(C)(ii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[51] Sec. 212(a)(2)(D) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[52] *See* sec. 101(h) of the INA (2026) ("For purposes of section [212(a)(2)(E) of the INA], the term 'serious criminal offense' means- (1) any felony; (2) any crime of violence, as defined in section 16 of title 18; or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another."). Source: https://uscode.house.gov/view.xhtml?req=(title:8%20section:1101%20edition:prelim)%20OR%20(granuleid:USC-prelim-title8-section1101)&f=treesort&num=0&edition=prelim.

[53] Sec. 212(a)(2)(E) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

Under section 212(a)(2)(G) of the INA[54]: "Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22[55], is inadmissible."

"Significant traffickers in persons", those aliens who commit or conspire to commit "human trafficking offenses in the United States or outside the United States", as well as those who federal government officials know or have reason "to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in have engaged in severe forms of trafficking in persons", as defined in 22 U.S.C. § 7102(h)[56], are inadmissible under section 212(a)(2)(H)(i) of the INA.[57]

Similarly, "any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under" section 212(a)(2)(H)(i) of the INA", and who "has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible", with an exception for minor children of such an alien.[58]

Finally, under section 212(a)(2)(I) of the INA[59]:

> *Any alien- (i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956[60] or 1957[61] of title 18 (relating to laundering of monetary instruments); or (ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister,*

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[54] Sec. 212(a)(2)(G) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[55] *See* 22 U.S.C. § 6402(13) (2026) ("The term 'particularly severe violations of religious freedom' means systematic, ongoing, egregious violations of religious freedom, including violations such as— (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons."). Source: https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter73&edition=prelim.

[56] *See* 22 U.S.C. § 7102(h) (2026) ("Severe forms of trafficking in persons. The term 'severe forms of trafficking in persons' means- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."). Source: https://uscode.house.gov/view.xhtml?req=(title:22%20section:7102%20edition:prelim)%20OR%20(granuleid:USC-prelim-title22-section7102)&f=treesort&num=0&edition=prelim.

[57] Sec. 212(a)(2)(H)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[58] Secs. 212(a)(2)(H)(ii) and (iii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[59] Sec. 212(a)(2)(A)(i)(I) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[60] 18 U.S.C. § 1956 (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-2000-title18-section1956&num=0&edition=2000.

[61] 18 U.S.C. § 1957 (2026). Source: https://uscode.house.gov/view.xhtml?hl=false&edition=2000&req=granuleid%3AUSC-2000-title18-section1957&num=0&saved=%7CZ3JhbnVsZWlkOlVTQy0yMDAwLXRpdGxlMTgtc2VjdGlvbjE5NTY%3D%7C%7C%7C0%7Cfalse%7C2000.

conspirator, or colluder with others in an offense which is described in such section; is inadmissible.

B. The Criminal Grounds of Deportability

Section 237(a)(2) of INA[62] provides separate grounds of deportability for aliens who have been admitted to the United States, but who are removable on criminal grounds.

Under section 237(a)(2)(A)(i) of the INA[63], aliens convicted of CIMTs for which a sentence of a year or longer may be imposed committed within five years of admission are deportable.

In that vein, under section 237(a)(2)(A)(ii) of the INA[64]:

> *Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct[65], regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.*

The "aggravated felony" ground of deportation in section 237(a)(2)(A)(iii) of the INA[66] renders deportable any alien who has been admitted to the United States and who has been convicted of any of the more than 30 aggravated felony offenses defined in section 101(a)(43) of the INA[67].

Those offenses include: "murder, rape, or sexual abuse of a minor"[68]; "illicit trafficking[69] in a controlled substance (as defined in section 802 of title 21[70]), including a drug trafficking crime (as defined in section 924(c) of title 18[71])"; "illicit trafficking in firearms or destructive devices. . . or in explosive materials"[72] as defined under federal criminal statutes; crimes of violence as defined in 18 U.S.C. § 16[73] "for which a term of imprisonment of" a year or more was

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[62] Sec. 237(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[63] Sec. 237(a)(2)(A)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[64] Sec. 237(a)(2)(A)(iii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[65] *See Matter of Baeza-Galindo*, 29 I&N Dec. 1 (BIA 2025) ("Two crimes involving moral turpitude, premised on separate turpitudinous acts with different objectives, neither of which was committed in the course of accomplishing the other, constitute separate schemes of criminal misconduct."). Source: https://www.justice.gov/d9/2025-01/4085.pdf.

[66] Sec. 237(a)(2)(A)(ii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[67] Sec. 101(a)(43) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[68] Sec. 101(a)(43)(A) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[69] Sec. 101(a)(43)(B) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim; *see also* fn. 30, *supra*.

[70] *See* 21 U.S.C. § 802 (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim.

[71] 18 U.S.C. § 924(c) (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section924&num=0&edition=prelim.

[72] Sec. 101(a)(43)(C) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[73] 18 U.S.C. § 16 (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:18%20section:16%20edition:prelim).

imposed[74]; theft, receipt of stolen property, or burglary offenses for which a sentence of a year or more was imposed[75]; and child pornography offenses as defined in specified federal criminal statutes[76].

Admitted aliens convicted of "high speed flight from an immigration checkpoint" under 18 U.S.C. § 758[77] are also deportable[78], as are lawfully admitted aliens who have been convicted under 18 U.S.C. § 2250[79] for failing to register as sex offenders[80].

Section 237(a)(2)(B)(i) of the INA[81] renders deportable any alien:

> *who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21[82]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana . . ..*

Also deportable, under section 237(a)(2)(B)(ii) of the INA, is "any alien who is, or at any time after admission has been, a drug abuser or addict"[83], even absent a conviction.

In its 1958 decision in *Matter of F-S-C-*[84], the BIA considered similar language in a predecessor statute to section 237(a)(2)(B)(ii) of the INA and distinguished between "addicts" as used in that provision from mere "users"—the latter of which, the BIA concluded, were not deportable.

Pursuant to section 237(a)(2)(C) of the INA[85], admitted aliens are deportable if they have been convicted:

> *under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell,*

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[74] Sec. 101(a)(43)(F) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.
[75] Sec. 101(a)(43)(G) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.
[76] Sec. 101(a)(43)(I) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.
[77] 18 U.S.C. § 758 (2025). Source: https://www.law.cornell.edu/uscode/text/18/758.
[78] Sec. 237(a)(2)(A)(iv) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[79] 18 U.S.C. § 2250 (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:18%20section:2250%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section2250)&f=treesort&num=0&edition=prelim.
[80] Sec. 237(a)(2)(A)(v) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[81] Sec. 237(a)(2)(B)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[82] 21 U.S.C. § 802 (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section802&num=0&edition=prelim.
[83] Sec. 237(a)(2)(B)(ii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[84] *Matter of F-S-C-*, 8 I&N Dec. 108 (BIA 1958). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/27/Pg108.pdf.
[85] Sec. 237(a)(2)(C) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18[86]*) in violation of any law . . . .*

With respect to firearms, note that section 922(g)(5) of title 18[87] states:

> *It shall be unlawful for any person- who, being an alien- (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in [section 101(a)(26) of the INA]*[88]*), to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.*

The exception in 18 U.S.C. § 922(y)(2)[89] relates to nonimmigrant aliens "admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States", diplomats and other lawfully admitted foreign government officials, and certain foreign law enforcement officers.

All other aliens, aside from lawful permanent residents ("LPRs", i.e., "green card" holders), are barred by law from possessing or using firearms in this country.

To implement this provision, the Bureau of Alcohol, Tobacco, and Firearms (ATF) issued a regulation at 27 C.F.R. § 478.1, *et seq.*[90] defining "illegal alien" and other terms in section 922 of title 18.

That ATF regulation[91] specifically excludes from the definition of "illegal alien" (*inter alia*) aliens who have been paroled into the United States under section 212(d)(5)(A) of the INA[92], even though: (1) paroled aliens are not admitted to the United States, either as immigrants or nonimmigrants; (2) most parolees haven't been vetted for criminality through the consular vetting process[93]; and (3), according to the Government Accountability Office (GAO), "about

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[86] 18 U.S.C. § 921(a) (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:18%20section:921%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section921)&f=treesort&num=0&edition=prelim.

[87] 18 U.S.C. § 922(g)(5) (2026). Source: https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section922&f=treesort&num=0&saved=%7CKHRpdGxlOjE4IHNlY3Rpb246OTIxIGVkaXRpb246cHJlbGltKSBPUiAoZ3JhbnVsZWlkOlVTQy1wcmVsaW0tdGl0bGUxOC1zZWN0aW9uOTIxKQ%3D%3D%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim.

[88] Sec. 101(a)(26) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[89] 18 U.S.C. § 922(y)(2) (2026). Source: https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section922&f=treesort&num=0&saved=%7CKHRpdGxlOjE4IHNlY3Rpb246OTIxIGVkaXRpb246cHJlbGltKSBPUiAoZ3JhbnVsZWlkOlVTQy1wcmVsaW0tdGl0bGUxOC1zZWN0aW9uOTIxKQ%3D%3D%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim.

[90] 27 C.F.R. § 478.1 (2026). Source: https://www.ecfr.gov/current/title-27/chapter-II/subchapter-B/part-478.

[91] 27 C.F.R. § 478.11 (2026). Source: https://www.ecfr.gov/current/title-27/chapter-II/subchapter-B/part-478.

[92] Sec. 212(d)(5)(A) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[93] *See Terrorist Entry Through the Southwest Border: Hearing Before the H. Comm. on the Judiciary*, 118th Cong. (Sep. 2023) (testimony of Rodney Scott) ("Most aliens, and most Americans for that matter, do not understand what criminal history and

774,000" aliens were paroled under just three (of several) Biden-era parole programs between May 2022 and September 2024 alone[94].

That, as I have argued[95], has created a massive "gun loophole" and a significant criminal vulnerability Congress never intended.

Returning to the criminal grounds of deportability, section 237(a)(2)(D)[96] of the INA renders deportable certain aliens who have been convicted of a national security offense, including for espionage, sabotage, and "treason and sedition"[97] for which a sentence of five years or more has imposed; as well as those[98] who have made threats against the president[99], and aliens who have made a military expedition against a "friendly nation"[100]; and violators[101] of the Military Selective Service Act[102].

Aliens who have violated presidential travel orders[103], and those who imported any alien "for the purpose of prostitution, or for any other immoral purpose"[104] are also subject to deportation under section 237(a)(2)(D)(iv) of the INA[105].

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other information US law enforcement can access. Even more important for this discussion is the fact that most people do not seem to understand what US law enforcement can NOT access. When law enforcement officers at any level in the US use a person's biographical and biometric information to run records checks, that freshly collected information is being compared to existing records in specific US agency databases. It is extremely rare for any information about criminal acts committed by a foreign national outside the US to be documented within these US criminal history databases. When Secretary Mayorkas or any US official asserts that aliens are properly vetted, they are really telling you that they checked US databases to see if the alien had any known criminal history inside the US or if the alien had been identified and placed in the Terrorist Screening Database or Data Set. To ensure there is no confusion here, running records checks on any alien that has not been arrested by US law enforcement in the past or is not currently known by US intelligence is like looking for something on an empty hard drive. There is simply no data to compare it with. The alien could be a saint, or he/she could be serial killer."). Source: https://judiciary.house.gov/committee-activity/hearings/terrorist-entry-through-southwest-border.

94 *DHS Identified Fraud Risks in Parole Processes for Noncitizens and Should Assess Lessons Learned*. GAO-26-107433. GOV'T ACCOUNTABILITY OFF. (Dec. 2025). Source: https://www.gao.gov/assets/gao-26-107433.pdf.

95 Arthur, Andrew. *A 'Gun Loophole' for More than 2 Million Biden-Harris Migrants Here on Parole. A recipe for mischief, if not disaster*. CTR FOR IMMIGR. STUDIES (Nov. 26, 2024). Source: https://cis.org/Arthur/Gun-Loophole-More-2-Million-BidenHarris-Migrants-Here-Parole.

96 Sec. 237(a)(2)(D) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

97 Sec. 237(a)(2)(D)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

98 Sec. 237(a)(2)(D)(ii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim

99 *See* 18 U.S.C. § 871 (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:18%20section:871%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section871)&f=treesort&num=0&edition=prelim.

100 18 U.S.C. § 960 (2026). Source: https://www.law.cornell.edu/uscode/text/18/960.

101 Sec. 237(a)(2)(D)(iii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

102 50 U.S.C. App. 451 et seq. (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:50%20edition:prelim)&f=treesort&edition=prelim.

103 Sec. 215 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:8%20section:1185%20edition:prelim)%20OR%20(granuleid:USC-prelim-title8-section1185)&f=treesort&num=0&edition=prelim.

104 8 U.S.C. § 1328 (2026). Source: https://www.law.cornell.edu/uscode/text/8/1328.

105 Sec. 237(a)(2)(D)(iv) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

Finally, lawfully admitted aliens who have been convicted of crimes of "domestic violence", "stalking", violations of protection orders, and certain crimes against children are subject to deportation under section 237(a)(2)(E) of the INA[106], and those who have been convicted of any offense described in the "human trafficking" ground of inadmissibility at section 212(a)(2)(H)[107] of the INA are also deportable under section 237(a)(2)(F) of the INA[108].

III. LAWS AND REGULATIONS GOVERNING IMMIGRATION ARRESTS

Congress in the INA has given immigration officers expansive powers to investigate, question, and detain aliens. While those authorities are not directly related to the topic of today's hearing, they do inform many of the questions that this committee and subcommittee have been called upon to address, and are at least incidental to today's topic.

A. Administrative Arrest Warrants

Section 236(a) of the INA[109] permits immigration officers to issue *administrative* warrants to take into custody aliens believed to be removable from the United States, pending a decision on whether they are to be removed.

To be clear, nothing in the INA requires Immigration and Customs Enforcement (ICE) officers to seek a *judicial* warrant from a federal judge or magistrate before taking an alien into custody (regardless of what some[110] may believe the law requires), and in fact – as I have explained[111] in the past—there is no mechanism in the INA for seeking a judicial warrant for an individual alien's arrest.[112]

B. Warrantless Questioning and Arrests

Administrative warrants aside, section 287(a)(1) of the INA[113] allows immigration officers to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States", and section 287(a)(2)[114] allows officers to "arrest any alien in the United States",

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[106] Sec. 237(a)(2)(E) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[107] Sec. 212(a)(2)(H) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

[108] Sec. 237(a)(2)(F) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.

[109] Sec. 236(a) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim.

[110] *See* Ramirez Uribe, Maria. *NY comptroller Brad Lander demanded a 'judicial warrant' in courthouse. Do ICE agents need that?* POLITIFACT (Jun. 18, 2025). Source: https://www.politifact.com/article/2025/jun/18/Brad-Lander-ICE-required-warrant-arrest-immgirants/.

[111] *See* Arthur, Andrew. *Immigration Judicial Warrants Don't Exist*. CTR. FOR IMMIGR. STUDIES (Sep. 17, 2019). Source: https://cis.org/Arthur/Immigration-Judicial-Warrants-Dont-Exist.

[112] *But see* Cadman, Dan. *'Blackie's Warrants' and Sanctuary Jurisdictions*. CTR. FOR IMMIGR. STUDIES (Jul. 7, 2025) (discussing judicial worksite enforcement warrants). Source: https://cis.org/Cadman/Blackies-Warrants-and-Sanctuary-Jurisdictions

[113] Sec. 287(a)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1357&num=0&edition=prelim.

[114] Sec. 287(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1357&num=0&edition=prelim.

if they have "reason to believe that the alien so arrested is in the United States in violation of the INA and regulations" and "is likely to escape before a warrant can be obtained for his arrest".

That said, section 287(a)(2) also requires immigration officers to take any alien arrested without a warrant "without unnecessary delay" for a determination by an examining officer on whether the alien has a "right to enter or remain in the United States".

C. "Reasonable Suspicion"

The foregoing does not mean ICE officers can arrest or even just temporarily stop individuals based on whim or caprice, however.

The leading precedent on immigration arrests is *INS v. Lopez-Mendoza*[115], a Supreme Court opinion involving two separate cases in which aliens were subject to worksite arrest—one in an area agents were permitted by the employer to access permission, the other in which they weren't-- issued in 1984.

At issue in *Lopez-Mendoza* was whether the "exclusionary rule"[116]—a court-made principle that "prevents the government from using most evidence gathered in violation of the United States Constitution" in criminal cases-- also applies in civil deportation cases.

Simply put, the Court found the rule doesn't apply.

The purpose of the exclusionary rule, as the majority noted, is to deter misconduct by officers by barring the use of improperly obtained evidence, but as the Court held, "Several factors significantly reduce the likely deterrent value of the rule in such [immigration] proceedings."[117]

Specifically, the majority noted that "regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation"[118], given that the primary question in deportation proceedings is the respondent's identity and alienage.

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[115] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Source: https://supreme.justia.com/cases/federal/us/468/1032/.

[116] *See Exclusionary rule*. LEGAL INFORMATION INST. (undated) ("The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution. The decision in *Mapp v. Ohio* established that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. The decision in Miranda v. Arizona established that the exclusionary rule applies to improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment, and to evidence gained in situations where the government violated the defendant's Sixth Amendment right to counsel. However, the rule does not apply in civil cases, including deportation hearings."). Source: https://www.law.cornell.edu/wex/exclusionary_rule.

[117] *Lopez-Mendoza*, 468 U.S. at 1043.

[118] *Id*.

As the Court noted, the identity of a suspect cannot be suppressed under the exclusionary rule[119], and (as there is no presumption of citizenship under the INA), immigration judges can draw adverse inferences[120] from the respondent's silence after receiving other proof of alienage.

In addition, as the Court explained, few aliens ever challenge the lawfulness of their arrests, and thus applying the exclusionary rule in civil deportation proceedings likely wouldn't do much to change agents' behavior.[121]

As an aside, the majority in its opinion underscored the fact that: "In the course of a year, the average INS agent" was then-arresting "almost 500 illegal aliens".[122] If ICE were arresting aliens at the same pace today, immigration arrests would top *3 million* per annum.

D. Simple Questioning and Brief Detentions

Most critically, however, the majority concluded it wasn't necessary for courts to apply the exclusionary rule in civil deportation proceedings because the then-INS had "its own comprehensive scheme for deterring Fourth Amendment violations by its officers."[123]

That scheme was promulgated in regulations, which at 8 C.F.R. § 287.8[124] have carried over to ICE enforcement operations.

As paragraph (b)(1) therein explains:

> *Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.*[125]

In other words, ICE officers—like any member of the public-- can walk up to any individual and ask that person questions, provided those questioned feel free to walk away.

ICE questioning only becomes subject to legal standards when the subject in question does not feel free to leave, a scenario addressed in 8 C.F.R. § 287.8(b)(2)[126]:

> *If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be,*

[119] *Id.* at 1039-40.
[120] *See Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/17/2717.pdf.
[121] *See Lopez-Mendoza*, 468 U.S. at 1044.
[122] *Id*.
[123] *Id*.
[124] 8 C.F.R. § 287.8 (2026). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1).
[125] 8 C.F.R. § 287.8(b)(1) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1).
[126] 8 C.F.R. § 287.8(b)(2) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1).

engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

Such brief detentions are referred to in criminal scenarios as "*Terry* stops", after *Terry v. Ohio*[127], the 1968 case that delineated the "reasonable suspicion" standard.

More broadly, the Court there explained that "in justifying the particular intrusion, the police officer must be able to point to *specific and articulable facts which, taken together with rational inferences from those facts*, reasonably warrant that intrusion" (emphasis added).[128]

E. Formal Arrests

A formal arrest under the restrictions in 8 C.F.R. § 287.8(c)(2)[129], on the other hand, is only justified pursuant to the warrantless arrest authority in section 287(a)(2) of the INA "when the . . . immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States."

As the nonpartisan Congressional Research Service (CRS) has explained[130], "reviewing courts have interpreted the 'reason to believe' standard for warrantless immigration arrests" under section 287(a)(2) of the INA (and by extension the regulation) as "equivalent to the Fourth Amendment's probable cause standard."

CRS continues:

Under this [probable cause] standard, courts have held that an immigration officer must have sufficient facts that would lead a reasonable person to believe, based on the circumstances, that the alien has violated federal immigration laws and is likely to escape before an ICE warrant can be obtained.[131]

As an important aside, I will note that 8 C.F.R. § 287.8(c)(iii)[132] states:

At the time of the arrest, the designated immigration officer shall ***, as soon as it is practical and safe to do so****: (A) Identify himself or herself as an immigration officer who is authorized to execute an arrest; and (B) State that the person is under arrest and the reason for the arrest. [Emphasis added.]*

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[127] *Terry v. Ohio*, 392 U.S. 1 (1968). Source: https://supreme.justia.com/cases/federal/us/392/1/.

[128] *Id*. at 21; *but see* Arthur, Andrew. *Fed Judge Throws Up Roadblocks on ICE Stops, Arrests in L.A.* CENTER FOR IMMIGRATION STUDIES (Jul. 15, 2025) (discussing a recent temporary restraining order in *Perdomo v. Noem*, limiting the factors that ICE officers may consider during immigration stops and arrests). Source: https://cis.org/Arthur/Fed-Judge-Throws-Roadblocks-ICE-Stops-Arrests-LA.

[129] 8 C.F.R. § 287.8(c)(2) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.8#p-287.8(b)(1).

[130] Smith, Hillel R. *Immigration Arrests in the Interior of the United States: A Primer*. CONG. RESEARCH SERV. (Jun. 13, 2025). Source: https://www.congress.gov/crs-product/LSB10362.

[131] *Id*.

[132] 8 C.F.R. § 287.8(c)(iii) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287.

That language, promulgated in June 2003, long predates the current administration.[133]

IV. DETENTION UNDER THE IMMIGRATION AND NATIONALITY ACT

Detention of aliens subject to removal proceedings is required under various provisions of the INA, both for arriving aliens who are inadmissible "applicants for admission" as defined in section 235(a)(1) of the act[134], for certain aliens subject to deportability[135], and also for aliens under final orders of removal[136].

In its landmark 1896 opinion, *Wong Wing v. U.S.*[137], the Supreme Court explained the rationale behind civil immigration detention in upholding its constitutional legality:

> *We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person a wrongfully accused, but it is not imprisonment in a legal sense.*[138]

Section 241(g)(1) of the INA[139] specifically directs the DHS secretary to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal", and in paragraph (2) therein, Congress indicated its preference for civil immigration detention to occur in places already established and suitable for such purpose:

> *Prior to initiating any project for the construction of any new detention facility for [ICE], the [DHS secretary] shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.*[140]

Similarly, and directly relevant to the subject of today's hearing, section 103(a)(11) of the INA specifically authorizes the DHS secretary "in support of persons in administrative detention in non-Federal institutions":

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[133] *See Powers and Authority of Officers and Employees; Revisions to the Internal Review Process for Alleged Violations of the Standards for Enforcement Activities*, 68 Fed. Reg. 35273, 35280 (Jun. 13, 2003). Source: https://www.federalregister.gov/documents/2003/06/13/03-14931/powers-and-authority-of-officers-and-employees-revisions-to-the-internal-review-process-for-alleged.
[134] Sec. 235(a)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[135] *See* sec. 236 of the INA (2026) ("Apprehension and detention of aliens"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim.
[136] *See* sec. 241(a) of the INA (2026) ("Detention, release, and removal of aliens ordered removed"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.
[137] *Wong Wing v. U.S.*, 163 U.S. 228 (1896). Source: https://supreme.justia.com/cases/federal/us/163/228/.
[138] *Id*. at 235.
[139] Sec. 241(g)(1) of the INA (2026) ("Detention facilities of the Immigration and Naturalization Service"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.
[140] *Id*. at para. (2).

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [DHS] pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by [DHS].[141]

A. Detention Mandates in Section 235(b) of the INA

Under section 235(a)(1) of the INA[142], aliens in the United States who have not been admitted or who arrive in the United States at ports of entry or elsewhere and who have not been admitted "shall be deemed for purposes of this chapter an applicant for admission" and are subject to inspection under section 235(a)(3) of the INA[143].

If, following that inspection, an immigration officer determines the 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[144], that officer has two options.

Section 235(b)(1)(A)(i) of the INA[145] 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 under section 240 of the INA[146]-- "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 claims a fear of persecution if returned, the immigration officer must "refer the alien for

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[141] Section 103(a)(11) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim.

[142] Sec. 235(a)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[143] Sec. 235(a)(3) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[144] *See* sec. 212(a)(6)(C)(i) of the INA (2026) ("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.

[145] Sec. 235(b)(1)(A)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[146] *See* sec. 240 of the INA (2026) ("Removal proceedings"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

an interview by an asylum officer" with 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[147] 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[148].

Thus, "credible fear" is a screening standard, used 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[149], 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[150] 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 the inspection and removal processes because the credible fear standard is low, and asylum is particularly susceptible to fraud[151]. The release of aliens who receive positive credible fear determinations would incentivize other alien applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief.

Or as the House explained at the time it was drafting what would become the expedited removal provision:

> *Existing procedures to deny entry to and to remove illegal aliens from the United States are cumbersome and duplicative. Removal of aliens who enter the United States illegally, even those who are ordered deported after a full due process*

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[147] Sec. 235(b)(1)(B)(v) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[148] *See* sec. 208 of the INA (2026) ("Asylum"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

[149] Sec. 235(b)(1)(B)(iii)(V) of the INA (2026) (emphasis added). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[150] Sec. 235(b)(1)(B)(ii) of the INA (2026) (emphasis added). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[151] *See* Arthur, Andrew. *Fraud in the "Credible Fear" Process*. CTR. FOR IMMIGR. STUDIES (Apr. 19, 2017). Source: https://cis.org/Report/Fraud-Credible-Fear-Process; *see also* sec. 208(b)(1)(B)(ii) of the INA (2026) ("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. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. 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."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.

hearing, is an all-too-rare event. The asylum system has been abused by those who seek to use it as a means of "backdoor" immigration.[152]

The other choice immigration officers have during inspection under section 235 of the INA in the case of "applicants for admission" who are inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat them in the same manner 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[153].

As with aliens subject to expedited removal, aliens described in section 235(b)(2)(A) of the INA, that is, subject to removal proceedings under section 240 of the INA because they are not "clearly and beyond a doubt entitled to be admitted" must "be detained"[154].

In its May 2005 decision in *Matter of X-K-*[155], the BIA held that, the restrictions on release in section 235(b) of the INA notwithstanding, applicants for admission subject to expedited removal who were placed into removal proceedings after receiving positive credible fear determinations were eligible for bond redeterminations from immigration judges.

Thirteen years later, however, in *Jennings v. Rodriguez*[156], the Supreme Court concluded that section 235(b)(1) of the INA "mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin", calling into question *Matter of X-K-*.

Subsequently, in April 2019, then-Attorney General William Barr issued a precedential decision in *Matter of M-S-*[157], formally reversing *Matter of X-K-* and concluding that: "An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond."

The sole avenue for release of an inadmissible applicant pending removal proceedings is parole under section 212(d)(5)(A) of the INA[158].

That provision[159] 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*

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[152] H. Rep. No. 104-469, at 107 (1996), available at: https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf.
[153] *See* section 235(b)(2)(A) of the INA (2026) ("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.
[154] *Id*.
[155] *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3510.pdf.
[156] *Jennings v. Rodriguez*, 583 U.S. ___ (2018). Source: https://supreme.justia.com/cases/federal/us/583/15-1204/.
[157] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). Source: https://www.justice.gov/eoir/file/1154747/dl?inline=.
[158] Sec. 212(d)(5)(A) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[159] *Id*.

> *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 that statute.

First, parole may only be granted "on a case-by-case basis"[160], 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 in cases of either "urgent humanitarian reasons" or for "significant public benefit"[161]. Granting parole for any other purpose is thus *ultra vires*[162], 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.

Fourth, the DHS secretary may revoke parole at any time in his unreviewable discretion, if he is satisfied that the "purposes of such parole . . . have been served," after which the paroled alien *must* return or be returned to DHS custody.

B. Section 236(a) and the General Release Authority

Section 236(a) of the INA[163] authorizes immigration officers to arrest and detain an alien on an administrative warrant "pending a decision on whether the alien is to be removed from the United States".

In general, once those aliens are arrested and detained, section 236(a) of the INA permits DHS to continue to detain them or release them on a bond of not less than $1,500 or on conditional parole (which the BIA has held is "a distinct and different procedure from parole under section 212(d)(5)(A) of the Act"[164]).

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[160] *Id*.
[161] *Id*.
[162] *See ultra vires*. LEGAL INFORMATION INST. (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.
[163] Sec. 236(a) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim.
[164] *See Matter of Castillo-Padilla*, 25 I&N Dec. 257, 259 (BIA 2010) ("An alien paroled into the United States under section 212(d)(5) of the Act is authorized to come into the United States 'temporarily' for urgent humanitarian reasons or significant public benefit and under strict conditions defining his or her status. After the purpose of the parole has been served, the alien returns to custody, and his or her case is dealt with in the same manner as any other applicant for admission. In contrast, section 236(a) does not place any such restrictions on an alien who is released on conditional parole. The alien is merely released from detention 'pending a decision on whether the alien is to be removed from the United States.'"). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3683.pdf.

By regulation[165], and with exceptions, aliens detained by DHS can request release on bond either from DHS or alternatively from immigration judges in bond proceedings, and notably the latter proceedings must be "separate and apart"[166] from the underlying removal proceedings[167] in the alien's case.

That said, neither section 236(a) of the Act nor the applicable regulations confer any right to release on bond on an alien.[168]

Rather, when an alien (a "respondent" in removal and bond hearings) seeks a redetermination of his or her custody status under section 236(a), the respondent "must establish to the satisfaction of the Immigration Judge . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight."[169]

Conversely, DHS does not bear the burden of showing that the alien should be detained.[170]

C. Mandatory Detention Under Sections 236(c) and 241(a)(2) of the INA

As with the congressional restrictions on DHS's authority to release inadmissible applicants for admission under section 235(b) of the INA, other aliens – including aliens removable on criminal grounds-- are not eligible for release from immigration detention under statutory restrictions in the INA.

For example, section 241(a)(1) of the INA[171] directs DHS to remove all aliens under final orders of removal within a 90-day timeframe designated therein as the "removal period".

Section 241(a)(2)[172] of the INA, in turn, 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.

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[165] 8 CFR § 1003.19 (2026). Source: https://www.law.cornell.edu/cfr/text/8/1003.19.
[166] *Id*. at subsection (d) (2026); *see also Immigration Court Practice Manual*. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIG. REVIEW (undated), at chap. 9.3 ("In certain circumstances, an alien detained by the Department of Homeland Security (DHS) can be released from custody upon the payment of bond. Initially, the bond is set by DHS. Upon the alien's request, an Immigration Judge may conduct a "bond hearing," in which the Immigration Judge has the authority to redetermine the amount of bond set by DHS. Bond proceedings are separate from removal proceedings."). Source: https://www.justice.gov/eoir/reference-materials/ic/chapter-9/3.
[167] Sec. 240 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.
[168] *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020). Source: https://www.justice.gov/eoir/page/file/1258971/dl.
[169] *Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018). Source: https://www.justice.gov/eoir/page/file/1030706/dl.
[170] *See Matter of Fatahi*, 26 I&N Dec. 791, 795 n.3 (BIA 2016) ("Although section 236(a) of the Act does not specifically address the burden of proof, it provides that the Attorney General has broad discretion to detain an alien 'pending a decision on whether the alien is to be removed from the United States' and 'may continue to detain' or 'may release the alien' during that time. We have consistently held that aliens have the burden to establish eligibility for bond while proceedings are pending."). Source: https://www.justice.gov/eoir/file/881776/dl?inline=.
[171] Sec. 241(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim).
[172] Sec. 241(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim).

Similarly, section 236(c) of the INA[173] requires DHS to "take into custody any alien who": is inadmissible under the criminal grounds of inadmissibility in section 212(a)(2) of the INA[174]; is inadmissible or deportable under the "terrorist activities" grounds of inadmissibility and deportability in sections 212(a)(3)(B) of the INA[175] and 237(a)(4)(B) of the INA[176], respectively; is deportable under certain criminal grounds of deportability in section 237(a)(2) of the INA[177]; or "is charged with . . . arrested for, . . convicted of" or "admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person."

DHS must take aliens described in section 236(c) of the INA into custody "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense", and bars DHS from thereafter releasing them.

The detention mandate was added to section 236(c) by section 303 of Illegal Immigration Reform and Immigrant Responsibility Act of 1996[178] (IIRIRA), and as Congress explained in a conference report[179] for an earlier iteration of that act, "A chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings" – underscoring the crucial role of detention in immigration enforcement.

D. Secretary Mayorkas's "Guidelines for the Enforcement of Civil Immigration Law"

On September 30, 2021, then-DHS Secretary Alejandro Mayorkas issued a memorandum titled "Guidelines for the Enforcement of Civil Immigration Law"[180] (the "Mayorkas memo").

Notwithstanding the detention mandates in sections 242(a)(2) and 236(c) of the INA, the Mayorkas memo placed restrictions on the ability of ICE agents, officers, and attorneys to investigate, arrest, detain, prosecute, and deport removable aliens (collectively, take "enforcement action"), including aliens subject to removal on the delineated criminal grounds.

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[173] Sec. 236(c) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim.
[174] Sec. 212(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[175] Sec. 212(a)(3)(B) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[176] Sec. 237(a)(4)(B) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[177] Sec. 237(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim.
[178] Tit. III, sec. 303 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. 3009–585-87. Source: https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf.
[179] *See* H. Rept. 104-469—Immigration in the National Interest Act of 1995 (104th Cong., 2d Sess.).
[180] *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.

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.[181]

The aggravating factors were general and objective, relating to the facts of the aliens' criminal offenses and prior criminal history.

The mitigating factors, on the other hand, were 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.

E. *Texas v. U.S.* and the Laken Riley Act

As the Mayorkas memo facially contravened the detention mandates in sections 236(c) and 241, the states of Texas and Louisiana filed an amended complaint[182] in a case then pending before the U.S. District Court for the Southern District of Texas, *Texas v. U.S.*[183], to ask the court to set aside the guidelines in that memo for criminal aliens.

In June 2022, the judge assigned to *Texas* issued a Memorandum Opinion and Order enjoining the Mayorkas memo[184]. That injunction eventually made its way to the Supreme Court, where in June 2023, a majority of the justices held the states did not have standing to bring the case.[185]

In essence, the majority held that there is no precedent for a plaintiff — even a state — to request that a third-party (there, aliens removable on criminal grounds) be detained and prosecuted on either criminal or immigration grounds.

Justice Alito, in dissent, however, 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.*[186]

In response to that decision, the Mayorkas memo, the Biden administration's migrant release policies generally, and the threat posed by certain criminal aliens who had not been detained by DHS in accordance with the INA, this Congress in January 2025 passed Pub. L. 119-1, the "Laken Riley Act"[187].

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[181] *See id*. at 3-4.
[182] *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.
[183] *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.
[184] *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.
[185] *U.S. v. Texas*, 599 U.S. 670 (2023). Source: https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf.
[186] *Id*. at ___. Slip op., dissent at 1.
[187] The Laken Riley Act, Pub. L. 119-1 (2025). Source: https://www.congress.gov/bill/119th-congress/senate-bill/5/text.

Among other things, that act empowers state attorneys general to sue for injunctive relief to require DHS to detain: inadmissible applicants for admission at the borders and ports subject to mandatory detention under section 235(b) of the INA[188]; aliens inadmissible on any criminal ground and deportable aliens removable on specified criminal grounds described in section 236(c) of the INA[189]; and aliens ordered removed pending deportation under section 241(a)(2) of the INA[190] (criminal aliens in particular).

In addition, that act allows state attorneys general to sue the federal government for injunctive relief to force the secretary of State to "discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of" so-called "recalcitrant countries"[191] — governments that refuse to take back their nationals who have been ordered deported — as provided for in section 243(d) of the INA[192].

Finally, it allows states to sue the federal government to bar DHS from categorically releasing inadmissible applicants for admission on parole, or on any grounds aside from "urgent humanitarian reasons" or "a significant public benefit", restrictions—as noted-- Congress had already included in the parole provision in section 212(d)(5)(A) of the INA.[193]

V. DUE PROCESS IN REMOVAL PROCEEDINGS

Of all the clauses in the U.S. constitution, "due process" is the only one to appear twice: once in the Fifth amendment[194]; and again, in the 14th amendment[195].

The Fifth amendment provides that "no person shall be. . . deprived of life, liberty, or property, without due process of law".[196] Similarly, section 1 of the 14th amendment makes clear that no "State" can "deprive any person of life, liberty, or property, without due process of law".[197]

That 14th amendment bound the individual states to the rights enumerated in the constitution, but as noted *supra*, immigration is a fundamentally federal issue[198], the Fifth amendment has—since its enactment—bound the federal government.

Note that the founders didn't state that the Fifth amendment required any specific "process" before such a deprivation of "life, liberty, or property" occurred, only that the process required

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[188] Sec. 235(b) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[189] Sec. 236(c) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim.
[190] Sec. 241(a)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim.
[191] *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*. CONG. RESEARCH SERV. (updated July 10, 2020). Source: https://www.congress.gov/crs-product/IF11025.
[192] Sec. 243(d) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1253&num=0&edition=prelim.
[193] *See* sec. IV.A, *supra*.
[194] U.S. Const. amend. V. Source: https://constitution.congress.gov/constitution/amendment-5/.
[195] U.S. Const. amend. XIV §1. Source: https://constitution.congress.gov/constitution/amendment-14/.
[196] U.S. Const. amend. V. Source: https://constitution.congress.gov/constitution/amendment-5/.
[197] U.S. Const. amend. XIV §1. Source: https://constitution.congress.gov/constitution/amendment-14/.
[198] *See* section I, *supra*.

was what was "due" in the specific situation—an important modifier that expands or contracts the right depending on the situation.

Keep that in mind as I explain that in 2001, the Supreme Court recognized[199] that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent", but also held "the nature of that protection may vary depending upon status and circumstance"[200].

Just how that process works has been developed though precedent, with the Supreme Court holding at various times that: "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"[201]; "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"[202]; and that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society"[203].

A. Due Process for Illegal Entrants and Aliens at the Ports

To ensure aliens receive the process they are due, both the legislative and executive branches have crafted various procedures to determine whether aliens should be admitted, should be granted immigration benefits, and, alternatively, should be removed.

Up until 1996, the process due to illegal aliens hinged on whether they had made an "entry"[204] into the United States, regardless of whether they had been admitted or not, or instead had been stopped at the ports and the borders seeking admission or attempting entry[205].

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[199] *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Source: https://supreme.justia.com/cases/federal/us/533/678/.
[200] *Id*. at 694.
[201] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Source: http://cdn.loc.gov/service/ll/usrep/usrep494/usrep494259/usrep494259.pdf.
[202] *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Source: http://cdn.loc.gov/service/ll/usrep/usrep459/usrep459021/usrep459021.pdf.
[203] *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Source: http://cdn.loc.gov/service/ll/usrep/usrep339/usrep339763/usrep339763.pdf.
[204] *See* sec. 101(a)(13) of the INA (1994) ("The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."). Source: https://uscode.house.gov/view.xhtml?hl=false&edition=1994&req=granuleid%3AUSC-prelim-title8-section1101&num=0.
[205] See Wiegand III, Charles A. *Fundamentals of Immigration Law*. U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REVIEW (revised Oct. 2011), at 1 ("Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the decision as to whether an alien was subject to deportation proceedings or exclusion proceedings was based on whether or not the alien had made an "entry" into the U.S. An alien who had made an entry was entitled to a deportation hearing and the greater procedural safeguards it provided. An alien who had not made an entry was placed in exclusion proceedings. Former section 101(a)(13) of the Act defined entry as 'any coming of an alien into the U.S. from a foreign port or place.' . . . These two doctrines caused a great deal of litigation over the issue of whether certain aliens were properly placed in exclusion proceedings. They were rather time consuming and, since they dealt with the issue of whether or not the alien was in the proper proceeding, delayed the addressing of the ultimate issues in the cases, i.e. the issues of excludability and eligibility

The former group was entitled to a more expansive set of rights; the latter received only that process prior to expulsion Congress had provided them[206].

That "entry" calculus proved largely unworkable while at the same time it also encouraged aliens to evade inspection on their way into the United States, so in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[207] (IIRIRA), Congress eliminated it with respect to arriving aliens and recent illegal arrivals and substituted new standards.

Most crucially, IIRIRA created the "inspection protocol" in section 235 of the INA[208], which treats all "arriving aliens"— those at the ports and those attempting to enter illegally between the ports—equally, as "applicants for admission"[209].

Section 235(a)(3) of the INA requires "immigration officers"— U.S. Customs and Border Protection (CBP) officers at the ports of entry and Border Patrol agents (also in CBP) between them—to "inspect" those aliens to determine whether they're admissible, or more precisely, whether they're inadmissible under any of the grounds of inadmissibility in section 212(a) of the INA[210].

Unless an alien "clearly and beyond a doubt [is] entitled to be admitted,"[211] as explained in section IV.A, *supra*, the immigration officer must detain the alien for a removal hearing before an immigration judge under section 240 of the INA[212], with one crucial caveat.

Also as explained *supra*, aliens who are inadmissible because they lack proper documents that would allow them to be admitted (under section 212(a)(7) of the INA[213]) or because they sought

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for relief."). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf.

206 *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/.

207 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.

208 Sec. 235 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

209 Sec. 235(a)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

210 Sec. 212(a) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

211 Sec. 235(b)(2)(A) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

212 *See* sec. 240 of the INA (2026) ("Removal proceedings"). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

213 Sec. 212(a)(7) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.

admission through fraud or misrepresentation (under section 212(a)(6)(C) of the INA[214]) are subject to "expedited removal", under section 235(b)(1) of the INA[215].

Expedited removal allows immigration officers to bypass immigration court removal proceedings and order such aliens removed. The only exception[216], as noted, is where the alien subject to expedited removal claims a fear of persecution or other harm if returned or requests asylum.

As noted, the immigration officer must send an alien claiming a fear of persecution to be interviewed by a USCIS asylum officer to determine whether the alien has a "credible fear of persecution"[217], defined 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[218].

If the asylum officer finds the alien has a credible fear, the alien is no longer amenable to expedited removal and must be referred to removal proceedings before an immigration judge[219].

If the asylum officer finds that the alien does not have a credible fear, the alien can have that decision reviewed by an immigration judge in a truncated process separate from removal proceedings.[220]

If the immigration judge reverses the asylum officer's negative credible fear determination after review, the alien is then placed into removal proceedings.

If, however, the alien does not claim a fear of harm or does not request an immigration judge review of the asylum officer's negative credible fear determination, or if the immigration judge on review affirms the asylum officer's negative credible fear determination, the alien will be expelled.[221]

Under section 242(e) of the INA[222], the only issues aliens subject to expedited removal have a right to have reviewed in federal court on habeas are claims they are U.S. citizens; the question

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[214] Sec. 212(a)(6)(C) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim.
[215] Sec. 235(b)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[216] Sec. 235(b)(1)(A)(i) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[217] Sec. 235(b)(1)(B)(v) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim
[218] Sec. 208 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.
[219] Sec. 235(b)(1)(B)(ii) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[220] Sec. 235(b)(1)(B)(iii)(III) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim; *see also* 8 C.F.R. § 235.6(a)(2)(i) (2025). Source: https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-235/section-235.6.
[221] Sec. 235(b)(1)(B)(iii)(I) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim;
[222] Sec. 242(e)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim.

of whether they were ordered removed under section 235(b)(1) of the INA; and the question of whether they can prove "by a preponderance of the evidence" they were admitted as lawful permanent residents or refugees or have been granted asylum.

In its June 2020 opinion in *DHS v. Thuraissigiam*[223], the Supreme Court concluded expedited removal without further review under those standards in section 242(e) satisfied due process, even for aliens who had physically crossed and entered illegally (as opposed to being stopped at the ports).

As the Court held there:

> *In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum," and he was given that right. . .. Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, [section 242(e)(2) of the INA] does not violate due process.*[224]

B. Due Process for Other Aliens

The expedited removal provisions in section 235(b)(1) of the INA also allow—but do not require—DHS to apply that limited-review process to aliens in the interior who have not "affirmatively shown, to the satisfaction of an immigration officer" that they have "been physically present in the United States continuously for the 2-year period immediately prior to the date" they are encountered by DHS.[225]

DHS published a notice[226] in late January 2025 announcing it would be taking advantage of section 235(b)(1)(A)(iii) of the INA by expanding expedited removal to all illegal entrants who are unable to show they have been present here for at least two years.

That expansion was challenged[227], and on June 23, 2026, in *Make the Road N.Y. v. Mullin*, a split three-judge panel of the U.S. Court of Appeals for the District of Columbia (D.C. Circuit)

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[223] *DHS v. Thuraissigiam*, 591 US _, slip op. at 11-33 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

[224] *Id*. at 36.

[225] *See* sec. 235(b)(1)(A)(iii) of the INA (2026) ("Application to certain other aliens. (I) In general—[DHS] may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by [DHS]. Such designation shall be in the sole and unreviewable discretion of [DHS] and may be modified at any time. (II) Aliens described --An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph."). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[226] *Designating Aliens for Expedited Removal*. 90 Fed. Reg. 8139 (Jan. 24, 2025). Source: https://www.govinfo.gov/content/pkg/FR-2025-01-24/pdf/2025-01720.pdf.

[227] *See Make the Road N.Y. v. Huffman*, 1:25-cv-00190, Complaint (D. D.C. Jan. 22, 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.dcd.276674/gov.uscourts.dcd.276674.1.0_6.pdf.

vacated[228] a district court stay that had blocked it, concluding the expansion as implemented does not violate the Fifth amendment's Due Process Clause[229].

Make the Road strongly suggests (if not expressly concludes) that the truncated expedited review procedures in sections 235(b)(1) and 242(e) of the INA satisfy the due process rights of aliens who evaded apprehension and made their way into the interior before being detected, to the same degree they do for aliens stopped by DHS at the borders and the ports.

With those "expedited removal" exceptions aside, Congress has charged immigration judges with ensuring the due process rights of all other aliens during removal proceedings as an initial matter.

As noted, section 240 of the INA[230] governs removal hearings, and gives immigration judges the authority to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses" in determining whether aliens should be excluded, admitted, deported, or granted certain immigration benefits[231].

Under section 240(c)(2) of the INA[232], aliens charged with inadmissibility bear the burden of proving "clearly and beyond doubt" they are "entitled to be admitted and" are "not inadmissible under" section 212(a) of the INA.

By contrast, under section 240(c)(3) of the INA[233], the government must "establish[] by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable" under section 237(a) of the INA.

As that latter provision states: "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."[234]

In addition to the authorities and procedures for removal hearings in section 240, the Department of Justice (DOJ) has published implementing regulations[235] to protect aliens' due process rights in removal proceedings.

Those regulations are intended to ensure aliens understand the nature of the proceedings and their rights[236], allow them to be represented at no expense to the government[237], and provide for

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[228] *Make the Road N.Y. v. Mullin*, __ F.4th ___ (2026), slip op. at 4. Source: https://www.courthousenews.com/wp-content/uploads/2026/06/dc-circuit-trump-expedited-removal-policy-okay-opinion.pdf .

[229] *Id.* at 30.

[230] Sec. 240(a)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

[231] Sec. 240(b)(1) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

[232] Sec. 240(c)(2) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

[233] Sec. 240(c)(3) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

[234] *Id*.

[235] 8 C.F.R. § 1240.1, *et seq*. (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

[236] 8 C.F.R. §§ 1240.10(a)(1)-(4) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

[237] 8 C.F.R. §§ 1240.10(a)(1) and (2) (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

interpreters to be made available for those who don't speak English[238], and also include rules governing the submission of evidence[239] and the contents of the immigration judge's decision[240].

Reviewing courts have found that immigration judges' failures to comply with those procedural regulations constitute due process violations.[241]

In addition, 8 C.F.R. § 1240.2[242] provides for DHS to appoint counsel (from ICE's Office of the Principal Legal Advisor, "OPLA"[243]) in each case to present evidence on behalf of the United States and to interrogate, examine, and cross-examine the alien respondent and all other witnesses.

Note that in *Matter of S-M-J-*, the BIA recognized the specific obligations that both government counsel and immigration adjudicators owe to respondents in asylum cases:

> *Because this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold this law, we all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim*[244].

Under 8 C.F.R. § 1240.15[245], both aliens *and the government* are allowed to appeal immigration judge decisions to a different administrative DOJ tribunal, the BIA, as a matter of right (except where the respondent is ordered removed *in absentia*), and notably, section 240(c)(5) of the INA specifically states:

> *If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision*

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238 8 C.F.R. § 1240.44 (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

239 8 C.F.R. § 1240.7 (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

240 8 C.F.R. § 1240.12 (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

241 *See Due Process in Immigration Proceedings*. 9th Cir. (Feb. 2024), at pp. E-19- E-20 ("'[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.' *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (due process violation where IJ failed adequately to explain procedures to pro se applicant; IJ had an obligation to assist the pro se applicant in determining what evidence was relevant, and to explain how he could prove his claims); see also *Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021) (IJ has an obligation to explain what noncitizen must prove to establish the basis for the relief he seeks). Source: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/25/19-72893.pdf; *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000) (due process violation where "noncitizen appeared pro se and IJ failed sufficiently to explain that noncitizen could be a witness even without an attorney, inadequately explained hearing procedures, and failed to explain what the noncitizen had to prove to establish eligibility for asylum)"). Source: https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf.

242 8 C.F.R. § 1240.2 (2026). https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

243 *See Office of the Principal Legal Advisor*. U.S. Immig. and Customs Enf't (updated Feb. 20, 2026) (OPLA's "Field Legal Operations, or FLO, includes the 25 field locations across the United States. Each OPLA field location is led by a Chief Counsel, who guides DHS's advocacy before the local immigration courts and the Board of Immigration Appeals. FLO also provides a full suite of legal services, including customs law and employment law advice, to the local ERO Field Office and HSI Office of the Special Agent in Charge."). Source: https://www.ice.gov/opla.

244 *Matter of S-M-J-*, 21 I&N Dec. 722, 723 (BIA 1997). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3303.pdf.

245 8 C.F.R. §§ 1240.15 (2026). Source: https://www.ecfr.gov/current/title-8/chapter-V/subchapter-B/part-1240.

and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.[246]

In addition to their right to appeal adverse immigration judge decisions to the BIA, respondents may also file petitions for review with the federal circuit courts having jurisdiction over the places where their removal hearings were held, subject to the limits in section 242 of the INA[247], and may also seek certiorari before the Supreme Court.

Those courts, of course, can deny such petitions.

Reviewing courts have found that the procedures in sections 240 and 242 of the INA and in 8 C.F.R. § 1240.1 *et seq*. satisfy due process, and as even the Ninth Circuit has held: "Where an alien is given a full and fair opportunity to be represented by counsel, prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process"[248].

That said, as with failures to comply with the procedural regulations, immigration judges have been found to have violated aliens' due process rights when they prevented the full examination of aliens[249] and pressured aliens to drop certain claims for relief[250], and even when they have stood in "moral judgment" of an alien[251] and denied repeated continuances[252].

If, however, you are wondering why removal cases can drag on for years, in my experience it's largely because immigration judges are concerned that they will be second-guessed by circuit court judges who are often too quick to find due process violations.[253]

VI. "SANCTUARY POLICIES"

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[246] Sec. 240(c)(5) of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

[247] Sec. 242 of the INA (2026). Source: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim.

[248] *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926-27 (9th Cir. 2007). Source: https://scholar.google.com/scholar_case?case=3469142116965520476&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[249] *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). Source: https://law.justia.com/cases/federal/appellate-courts/F3/210/967/483872/.

[250] *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). Source: https://caselaw.findlaw.com/court/us-9th-circuit/1113619.html.

[251] *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007–09 (9th Cir. 2003). Source: https://caselaw.findlaw.com/court/us-9th-circuit/1292799.html.

[252] *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010). Source: https://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/22/10-72239.pdf.

[253] *See* Arthur, Andrew. *The Massive Increase in the Immigration Court Backlog*. CTR. FOR IMMIGR. STUDIES (Jul. 24, 2017) ("If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the IJ runs the risk of being accused of denying due process. Similarly, an IJ who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process. In such an instance, the IJ's reputation would be besmirched, and the BIA or circuit court would simply remand the case, in essence granting the continuance requested."). Source: https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog.

The Center uses the term "sanctuary jurisdictions"[254] to refer to states and localities with laws, ordinances, regulations, resolutions, policies, or other practices that obstruct immigration enforcement and shield criminal aliens from ICE enforcement— either by refusing to honor ICE detainers or prohibiting their agents from complying with those detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding the exchange of communication or information between their personnel and federal immigration officers.

A. History Of Sanctuary Policies

When I began my career as an INS trial attorney in San Francisco in the mid-1990s, it was all-but unheard of for states and localities to refuse to assist federal officers in their duties.

Immigration arrests took dangerous criminals off the street and spared localities the costs of reincarcerating recidivists.

Criminal recidivism is a serious issue for law enforcement. A May 2018 study from the Bureau of Justice Statistics[255] found that of 401,288 state prisoners released in 2005, 44 percent were rearrested during the first year after they were initially released, an estimated 68 percent within 3 years, 79 percent within 6 years, and 83 percent within 9 years.

Consequently, removing criminal aliens off the streets prevents future criminality, with all of its attendant human, fiscal, and societal costs.

That local cooperation with immigration enforcement changed, however, after the expansion[256] of the George W. Bush-era "Secure Communities"[257] program under the Obama administration.

As ICE has explained:

> *For decades, local jurisdictions have shared the fingerprints of individuals arrested and/or booked into custody with the FBI to see if those individuals have a criminal record and outstanding warrants. Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable, ICE takes enforcement action – prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history,*

[254] Vaughan, Jessica and Griffin. Bryan. *Map: Sanctuary Cities, Counties, and States*. CTR. FOR IMMIGR. STUDIES (May 7, 2025). Source: https://cis.org/Map-Sanctuary-Cities-Counties-and-States. Note that this analysis was recently referenced with approval by Justice Alito in his dissent in *Trump v. Barbara*, 609 U.S. __, slip op. at 35 (Alito, J. dissenting). Source: https://www.supremecourt.gov/opinions/25pdf/25-365_new_5if6.pdf.

[255] *Special Report, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS (MAY 2018). Source: https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf.

[256] *Activated Jurisdictions*. U.S. IMMIGR. AND CUSTOMS ENF'T (May 3, 2011). Source: https://web.archive.org/web/20110509095810/http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf.

[257] *Secure Communities*. U.S. IMMIGR. AND CUSTOMS ENF'T (undated). Source: https://www.ice.gov/secure-communities#:~:text=Secure%20Communities%20had%20a%20long,criminal%20aliens%20from%20the%20U.S..

and risk to public safety – as well as those who have violated the nation's immigration laws.[258]

Then-DHS Secretary Jeh Johnson ended Secure Communities in November 2014[259], asserting that: "Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation."

By that point, however, state and local officials concluded sanctuary policies were a winning political issue, and many "doubled down"[260] on those policies after Donald Trump's November 2016 election victory.

B. "Protecting the Rights of All Residents"

Most sanctuary jurisdictions contend they have adopted such policies for reasons roughly along the lines of Arlington County, Va.'s "Trust Policy"[261], which states: "The County is committed to protecting the rights of all residents, regardless of their immigration or citizenship status, and to ensuring every person in Arlington has an equal opportunity to participate in our economy."

As an aside, at a May 13, 2025, hearing, the Arlington County Board removed two sections of that policy "which previously allowed Arlington police to notify [ICE] when undocumented individuals **were arrested for serious crimes such as terrorism, gang activity, or human trafficking**"[262]—an unusual move for a jurisdiction that is home to the Pentagon.

"Protecting the rights of all residents" is an inapt rationalization for such policies given that alien criminals generally live in and prey upon immigrant communities—meaning such sanctuary policies only protect those criminals, not the community as a whole.

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258 *Id*.

259 *Memorandum from Jeh Johnson, Secretary of Homeland Security*. DEP'T OF HOMELAND SEC. (Nov. 20, 2014). Source: https://web.archive.org/web/20160401195026/https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

260 *See, e.g.,* Davis, Aaron. *D.C. will go 'beyond sanctuary,' create legal defense fund for illegal immigrants*. WASHINGTON POST (Jan. 9, 2017) ("In a statement, Bowser said the District is 'doubling down' on its status as a sanctuary city, where D.C. police have already been instructed to not cooperate with federal authorities working to deport residents."). Source: https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7_story.html.

261 *Arlington's Commitment to Strengthening Trust with Our Immigrant Communities*. ARLINGTON COUNTY BD. (updated May 13, 2025). Source: https://www.arlingtonva.us/files/sharedassets/public/v/1/county-board/documents/trust-policy-updated-may-13-2025.pdf; *see also* Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CTR. FOR IMMIG. STUDIES (Feb. 26, 2025) (review of sanctuary policies in the states of California and Illinois and the city of Chicago), Source: https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional.

262 Gonzalez, John. *Arlington board limits police collaboration with ICE, sparking debate over public safety*. ABC NEWS 7 (May 15, 2025) (emphasis added). Source: https://wjla.com/newsletter-daily/arlington-limits-police-collaboration-ice-united-states-immigration-customs-enforcement-county-board-immigrants-arrests-charges-violent-crimes-concerns-virginia-dmv-sparking-debate-public-safety.

Moreover, an October 2021 Center study[263] found no evidence that ICE cooperation reduces the rate at which immigrants report crimes locally, suggesting that the very rationale for sanctuary policies is based on an erroneous (or fallacious) premise.

C. Detainers

Detainers are the primary tool ICE uses to arrest criminal aliens in state and local custody. They are notices to other law enforcement agencies that ICE intends to assume custody of aliens, and include information on aliens' previous criminal history, immigration violations, and potential threats to public safety or security.

As ICE explains[264], the agency issues those requests to its law enforcement partners because:

> *When jails, prisons or other confinement facilities agree to honor immigration detainers, ICE officers can take custody of removable aliens in a safe, controlled environment instead of at-large in the community.*
>
> *At-large arrests are unpredictable and can be dangerous to the public, aliens and federal law enforcement officers. It's safer to assume custody of removable aliens in a secure, private environment.*
>
> *Detainers also conserve scarce government resources and taxpayer dollars. When a confinement facility allows ICE to take custody of removable aliens when they're released, the agency doesn't need to expend resources to locate and arrest an alien in the community.*

Simply put, when sanctuary jurisdictions refuse to honor ICE detainers, "officers pursue the alien in the community. These at-large arrests are more dangerous for the public, aliens and officers."[265]

In April 2025, my colleague Jessica Vaughan reported[266] that from the beginning of FY 2022 to February 6, 2025, "more than 25,000 detainers were declined by" jails in sanctuary jurisdictions, and "in more than 1,400 instances the jails failed to give adequate notification to ICE to take custody of the aliens".

That included 72 releases despite ICE detainers for aliens with homicide charges and convictions.[267]

[263] Camarota, Steven and Zeigler, Karen. *No Evidence that Cooperation with ICE Reduces Immigrant Crime Reporting*. CTR. FOR IMMIG. STUDIES (Oct. 19, 2021). Source: https://cis.org/Camarota/No-Evidence-Cooperation-ICE-Reduces-Immigrant-Crime-Reporting.
[264] *Immigration Detainers*. U.S. IMMIGR. AND CUSTOMS ENF'T (undated). Source: https://www.ice.gov/immigration-detainers.
[265] *Id*.
[266] Vaughan, Jessica. *Which Sanctuary Jurisdictions Have Released the Most Criminals?* CTR. FOR IMMIGR. STUDIES (Apr. 9, 2025). Source: https://cis.org/Vaughan/Which-Sanctuary-Jurisdictions-Have-Released-Most-Criminals.
[267] *Id*.

Former New York City Police Department Commissioner and Los Angeles Police Department Chief William Bratton recently echoed ICE's concerns and called into question the logic of sanctuaries' non-compliance with immigration detainers from a law enforcement perspective:

> *When a suspect in custody is subject to a final order of removal or an immigration detainer from . . . ICE... , we see no compelling rationale for shielding that person from federal authorities.* ***After all, in such cases, the city and state's own position is that the individual is guilty of a crime (hence the prosecution). Turning such offenders over to ICE would not only help keep them off the streets but also spare the city the costs of prosecution. It should be an easy call because it makes the public safer****.*
>
> *That said, reforming sanctuary policies to allow* ***for the smooth transfer of defendants to federal immigration authorities in controlled environments would also spare communities the fallout associated with large-scale, street-level federal immigration enforcement campaigns that can lead to confusion and chaos****. Federal immigration agencies are not well-suited for the complex police operations they've had to undertake in the face of coordinated disruption campaigns. The scenes out of Minnesota earlier this year illustrated that reality all too well.*[268] *[Emphasis added.]*

D. Communications Under 8 U.S.C. §§ 1373(a) and 1644

As a legal matter, many of those sanctuary policies may violate federal law. Specifically, 8 U.S.C. § 1373(a)[269] states:

> *Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.*

Similarly, 8 U.S.C. § 1644[270] provides:

> *Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States.*

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[268] Bratton, William J. and Mangual, Rafael A. *How Many Crimes Do Illegal Immigrants Commit?* CITY JOURNAL (Jul. 9, 2026). Source: https://www.city-journal.org/article/illegal-immigration-public-safety-crime-data.

[269] 8 U.S.C. § 1373(a) (2025). Source: https://www.law.cornell.edu/uscode/text/8/1373; *see also* Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CTR. FOR IMMIGR. STUDIES (Feb. 26, 2025) (legislative history of section 1373(a)). Source: https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional.

[270] 8 U.S.C. § 1644 (2025). Source: https://www.law.cornell.edu/uscode/text/8/1644; *see also* Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CTR. FOR IMMIGR. STUDIES (Feb. 26, 2025) (legislative history of section 1644). Source: https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional..

Attorney General Pam Bondi specifically referenced section 1373(a) in a February 5, 2025, memo[271] announcing that: "Sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice."

The next day, DOJ filed a federal complaint[272] against Illinois and the city of Chicago[273], alleging sanctuary policies in those jurisdictions: "undermine federal immigration law's protections for information sharing and are thus preempted" by and violate the Supremacy Clause[274]; discriminate against the federal government by "singl[ing] out federal immigration officials, expressly and implicitly, for unfavorable and uncooperative treatment when other law enforcement officials are not so treated"; and unlawfully regulate the federal government in that, "By refusing to honor civil detainers and warrants expressly authorized by Congress, Defendants have unlawfully eliminated these means for federal immigration officials to carry out their statutory functions".

In July 2025, Judge Lindsay Jenkins of the U.S. District Court for the Northern District of Illinois dismissed[275] the government's claims; DOJ has appealed[276] that order to the U.S. Court of Appeals for the Seventh Circuit (where it remains pending).

E. State and Local Policies Barring ICE Detention

Several sanctuary states and localities have also attempted to bar ICE from detaining aliens pending removal proceedings within their jurisdictions.

For example (and directly relevant to today's hearing), New Jersey in August 2021 enacted Assembly Bill (AB) 5207[277], prohibiting the state, its subdivisions, and (most importantly) private entities from contracting prospectively with ICE to own or operate detention facilities.

"Three New Jersey counties previously housed ICE detainees in their jails, but they stopped in 2021, just about the time the law in question took effect."[278] That left just CoreCivic, a private

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271 *Sanctuary Jurisdiction Directives, Memorandum from Pam Bondi, Attorney General*. U.S. DEP'T OF JUST. (Feb. 5, 2025). Source: https://www.justice.gov/ag/media/1388531/dl?inline.

272 *U.S. v. Illinois*, No. 1:25-cv-1285, Complaint (N.D. Ill. 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.ilnd.473062/gov.uscourts.ilnd.473062.1.0_2.pdf.

273 *See* Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CTR. FOR IMMIGR. STUDIES (Feb. 26, 2025) (review of sanctuary policies in the state of Illinois and the city of Chicago). Source: https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional.

274 *See* U.S. Const. art. VI, §. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Source: https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/.

275 *U.S. v. Illinois*, No. 1:25-cv-1285, Memorandum Opinion and Order (N.D. Ill. Jul. 25, 2025). Source: https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2025cv01285/473062/86/.

276 *U.S. v. Illinois*, No. 1:25-cv-1285, Notice of Appeal (N.D. Ill. Oct. 27, 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.ilnd.473062/gov.uscourts.ilnd.473062.93.0.pdf.

277 A.B. 5207 (2021), N.J. (enacted). Source: https://www.njleg.state.nj.us/bill-search/2020/A5207.

278 DeFilippo, Dana. *N.J. law barring prison operator from contracting with ICE is unconstitutional, judge says*. N.J. MONITOR (Aug. 29, 2023). Source: https://newjerseymonitor.com/2023/08/29/law-banning-immigrant-detention-in-new-jersey-is-unconstitutional-judge-rules/.

entity, at the time operating the only remaining ICE detention facility in the state (the Elizabeth Detention Center[279]), under a contract set to expire on August 31, 2023.

Consequently, in February 2023, CoreCivic filed a complaint[280] in federal district court in New Jersey, seeking declaratory and injunctive relief and alleging AB 5207 was unconstitutional because it was:

> *in conflict with federal immigration law, interferes with the purpose behind the federal immigration law, presents a substantial obstacle to the purposes of Congress in enacting the federal immigration law and, in intruding into federal immigration law, improperly imposes into an area where Congress has manifested its intent to occupy the entire field.*

On August 23, 2023, Judge Robert Kirsch of the U.S. District Court for the District of New Jersey struck down[281] that bill in part as unconstitutional, ruling:

> *Enforcing AB 5207 against [CoreCivic] would close the last remaining facility in New Jersey to which ICE has access. The result of any one of New Jersey's neighboring states passing a comparable law — let alone an ensuing domino effect to other states — would result in nothing short of chaos.* ***Although reference to the federal government was conveniently omitted from AB 5207, the statute is a dagger aimed at the heart of the federal government's immigration enforcement mission and operations****. Congress's assignment to the federal government the responsibilities to enforce the civil immigration laws, including, when necessary, through detention, renders AB 5207 unconstitutional under the Supremacy Clause. [Emphasis added.]*

The state appealed that order to the U.S. Court of Appeals for the Third Circuit, and on July 22, 2025, a split three-judge panel of the appellate court ruled[282] that AB 5207 violated the principle of "intergovernmental immunity", which (as noted *supra*) bars the states from: (1) regulating the federal government directly; or (2) discriminating against it and its contractors[283].

The majority held:

> *"The National Government is, and must be, controlled by the people without collateral interference by the State." Because New Jersey knew that it could not openly bar the federal government from contracting to detain immigrants, it instead eliminated everyone with whom the federal government might contract within its borders. It asks us not to notice the federal elephant in the room. Yet we*

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[279] *Elizabeth Detention Center*. CoreCivic (undated). Source: https://www.corecivic.com/facilities/elizabeth-detention-center.
[280] *CoreCivic v. Murphy*, No. 23-967, Complaint (D. N.J. Feb. 17, 2023), at 1, 14. Source: https://www.documentcloud.org/documents/23686412-complaint_230220_074306/.
[281] *CoreCivic v. Murphy*, No. 23-967, Opinion (D. N.J. Aug. 28, 2023). Source: https://newjerseymonitor.com/wp-content/uploads/2023/08/8-29-23-Corecivic.pdf.
[282] *CoreCivic, Inc. v. Gov. of N.J.*, __ F.4th___, slip op. at 8, 25 (3d. Cir. 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.ca3.120856/gov.uscourts.ca3.120856.96.0_1.pdf.
[283] *See U.S. v. Washington*, 596 U.S. 832, 838 (2022). Source: https://supreme.justia.com/cases/federal/us/596/21-404/.

can see the law for what it really is, "claiming the authority to dictate the manner in which the federal immigration function is carried out." Letting states do that would "change totally the character of" our federal system by "transferring the supremacy, in fact, to the states." The U.S. Constitution is supreme, and intergovernmental immunity protects that supremacy. New Jersey's law directly regulates the federal government, so it is unconstitutional as applied to CoreCivic.[284] *[Citations omitted; cleaned up.]*

The constitutionality of such laws aside, however, it's not clear sanctuary jurisdictions have considered the practical consequences of barring ICE detention in their localities.

If ICE cannot detain aliens in New Jersey or another sanctuary state, the agency is not going to release those aliens — it will send them (at taxpayer cost) to another jurisdiction, likely one far away from their lawyers and families and more amenable to immigration enforcement.

As I have noted[285]:

One issue in the case of Mahmoud Khalil — a Columbia University graduate and Palestinian activist currently facing removal on foreign policy grounds — is that after his arrest at his Manhattan apartment on March 8, DHS sent him briefly to New Jersey before then transporting him to ICE detention in Jena, La.

As I reported on April 15, Khalil filed a habeas petition in federal district court in New York on March 9, the day after he was arrested, prompting the government to file a motion to dismiss or instead transfer that case to the U.S. District Court for the Western District of Louisiana, with jurisdiction over Jena.

On March 19, however, the New York judge transferred the case instead to federal district court in New Jersey, because that's where Khalil was (briefly) being detained when he filed that petition.

I am unsure why Khalil was transferred from New Jersey to Louisiana, but it is possible—if not likely— it had something to do with a lack of ICE detention space in the former.

VII. DELANEY HALL

As the Associated Press (AP) has reported[286], Delaney Hall is a "1,000-bed facility along an industrial stretch of Newark Bay", which opened on May 1, 2025.

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[284] *CoreCivic, Inc* __ F.4th at __, slip op. at 25. Source: https://storage.courtlistener.com/recap/gov.uscourts.ca3.120856/gov.uscourts.ca3.120856.96.0_1.pdf

[285] Arthur, Andrew. *Why All the Hullabaloo Over ICE Detention in New Jersey?* CTR. FOR IMMIGR. STUDIES (May 14, 2025). Source: https://cis.org/Arthur/Why-All-Hullabaloo-Over-ICE-Detention-New-Jersey.

[286] Catalini, Mike. *What to know about the newly opened immigration detention center in New Jersey's biggest city*. AP (May 7, 2025). Source: https://apnews.com/article/new-jersey-immigration-detention-center-delaney-hall-fa6b16870bd033c5a66499e5d5963c0c.

It’s not possible to quickly stand-up and operate a “1,000-bed facility”, and in fact Delaney Hall — which sits next to a county prison — previously served as a halfway house run by GEO Group, a private entity.[287]

In February 2025, ICE reached an agreement with GEO to operate it as an immigration detention facility, and as the latter explained in its press release on that deal: “GEO’s support services include the exclusive use of the Facility by ICE, along with security, maintenance, and food services, as well as access to recreational amenities, medical care, and legal counsel.”[288]

As one local outlet reported in April 2025:

> *Plans to open Delaney Hall drew swift backlash from local officials and activists. At a March protest, Newark Mayor Ras Baraka — one of six candidates vying for the Democratic nomination for governor — vowed he’d “padlock” the facility if necessary to keep immigration detention out of the state’s largest city.*[289]

Immigration detention at Delaney Hall has been a point of contention between state and local officials, activists, and protestors (on the one side) and ICE, GEO, and the Trump administration (on the other) ever since.

According to NBC News on June 2, 2026:

> *Daily demonstrations outside Delaney Hall erupted on May 22, following reports of detainees holding a hunger strike in protest of the facility’s conditions. Detainees, attorneys representing them and advocates have alleged inadequate medical care, poor living conditions and delays in immigration proceedings. They also allege that some detainees who joined the strike were placed in solitary confinement or transferred to other facilities.*[290]

A. *Newark v. GEO*

Perhaps not coincidentally, the city of Newark sued[291] GEO in state court in New Jersey over the facility, “claiming that Geo Group was renovating the building without proper city permits and had barred city inspectors from accessing the building”.

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[287] *Id*.

[288] *The GEO Group Awarded 15-Year Contract by U.S. Immigration and Customs Enforcement for Company-Owned, 1,000-Bed Delaney Hall Facility in New Jersey*. The GEO Group, Inc. (Feb. 27, 2025). Source: https://investors.geogroup.com/news-releases/news-release-details/geo-group-awarded-15-year-contract-us-immigration-and-customs.

[289] Nieto-Munoz, Sophie. *Newark lawsuit aims to ‘cripple’ immigrant enforcement, prison company alleges*. N.J. Monitor (Apr. 10, 2025). Source: https://newjerseymonitor.com/2025/04/10/newark-lawsuit-aims-to-cripple-immigrant-enforcement-prison-company-alleges/.

[290] Acevedo, Nicole. *N.J. targets prison company running immigration detention center in lawsuits over conditions*. NBC News (Jun. 2, 2026). Source: https://www.nbcnews.com/news/us-news/nj-delaney-immigration-detention-lawsuit-geo-group-rcna348022.

[291] *Id*.

GEO had that case removed to the U.S. District Court for the District of New Jersey (D. N.J.) and contended in a motion[292] filed on April 9, 2025, that the city's effort "represents the latest in a series of efforts by New Jersey officials to cripple federal immigration enforcement in the state".

Notably, GEO also argued in that motion that:

> *Newark Mayor Ras Baraka — who is currently a candidate for governor — has attended organized protests outside of the Delaney Hall Facility and proclaimed that* ***"[r]egardless of the process****, an immigrant detention center is not welcomed here." [] Mayor Baraka has also publicly vowed to "padlock the building if necessary" to block federal immigration detention at Delaney Hall. [Emphasis in original.]*[293]

In essence, GEO argued that ICE is a necessary party to the case as the company has a contract with the agency for immigration detention at the facility, and because the agency has sovereign immunity, the matter must be dismissed.

That case is ongoing, but on August 13, 2025, counsel representing the city filed a letter to the court which stated, in pertinent part:

> *Defendant has since granted the city access to the property that is the subject of the instant lawsuit. . .. Presently, the parties are attempting to amicably resolve the remaining issues at dispute in the lawsuit with the assistance of the Court.*[294]

B. *Washington v. GEO*

On June 2, 2026, New Jersey Attorney General Jennifer Davenport filed suit[295] against GEO in the Superior Court of New Jersey, requesting the court allow inspectors from the state's Department of Health access to Delaney Hall.

As Gov. Mikie Sherrill stated in her press release[296] on the case, she and other elected officials went to the facility over the Memorial Day holiday "after some detainees began a hunger strike to protest their deplorable living conditions".

The governor argued therein:

> *If the GEO Group — with a $1 billion government contract — has nothing to hide and the conditions inside Delaney Hall are as safe and as sanitary as this private*

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[292] *City of Newark v. GEO*, No. 2:25-cv-02225-JKS-LDW, Defendant the GEO Group's Motion to Join a Necessary Party and Dismiss, or in the Alternative, Order a More Definite Statement, at 1 (D. N.J. Apr. 9, 2025). Source: https://newjerseymonitor.com/wp-content/uploads/2025/04/4-09-25-Geo-Group-memo.pdf.
[293] *Id*. at 2.
[294] *City of Newark v. GEO*, No. 2:25-cv-02225-JKS-LDW, Letter from Morrison Kent Fairbairn, Esq. to the Hon. Jamel K. Semper (Aug. 13, 2025). Source: https://storage.courtlistener.com/recap/gov.uscourts.njd.565061/gov.uscourts.njd.565061.57.0.pdf.
[295] *Washington v. GEO*, No. ESX-C-000131-26, Verified Complaint and Order to Show Cause (N.J. Super. Ct. Ch. Div. Jun. 2, 2026). Source: https://www.njoag.gov/wp-content/uploads/2026/06/2026-0602_Verified-Complaint.pdf.
[296] *Press Release: New Jersey Sues Delaney Hall Operator After It Refuses Full Access to Health Inspectors*. STATE OF N.J., GOV. MIKIE SHERRILL (Jun. 2, 2026). Source: https://www.nj.gov/governor/news/2026/20260602.shtml.

corporation and the Trump Administration claim, then there is no legitimate reason why my health inspectors are being kept from full access throughout the building. . .. The people of New Jersey deserve transparency and accountability, and I will continue using all the power of this office to advocate for the detainees and their families.[297]

More saliently for the purposes of today's hearing, that press release contended that:

On May 22, some detainees began a hunger strike to protest conditions at the facility, reportedly including spoiled or rotten food and no access to basic hygiene products such as toilet paper, menstruation products, or toothpaste. On May 23, U.S. Senator Andy Kim and Representative Rob Menendez went inside the facility to speak with detainees. Senator Kim met with a pregnant woman who said she is not receiving full obstetrics and gynecological care, and with a woman who had a miscarriage but received no care and was left to manage the miscarriage on her own.

Detainees have also told relatives and advocacy groups that the water tasted metallic and undrinkable; that people were being denied medical care or necessary medications; and that diseases such as the flu or COVID-19 were spreading throughout the facility. In addition, in late May, the Department received a report about a detainee taken to University Hospital with tuberculosis, a highly infectious disease.[298]

DHS spokesperson Lauren Bis dismissed the suit as "frivolous" while contending that "ICE is committed to transparency, and Delaney Hall complies with all required state and local laws".[299]

In any event, the case was quickly removed to the D. N.J., where it remains pending.[300]

On June 26, 2026, Robert Lindefjeld, Assistant Director of the DOJ Enforcement & Affirmative Litigation Branch, filed a letter with the court in which he referenced the governor's press release and contended that:

Once again, New Jersey appears more interested in prioritizing politics over process, rushing to the media even before the Court after Wednesday's inspection of the Delaney Hall facility. [ICE] continued the discussions with the State mentioned in the Statement of Interest . . . and authorized access to the facility for a reasonable and appropriate inspection pursuant to the State's written request.

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[297] *Id*.
[298] *Id*.
[299] Acevedo, Nicole. *N.J. targets prison company running immigration detention center in lawsuits over conditions*. NBC NEWS (Jun. 2, 2026). Source: https://www.nbcnews.com/news/us-news/nj-delaney-immigration-detention-lawsuit-geo-group-rcna348022.
[300] *See Washington v. GEO*, No. 2:26-cv-06466 (D. N.J.). Source: https://storage.courtlistener.com/recap/gov.uscourts.njd.599797/gov.uscourts.njd.599797.9.0.pdf.

The United States disagrees with numerous characterizations in Plaintiff's letter and the State's press release regarding that inspection. In any event, ICE conveyed to the State's inspectors that any follow-up requests for written materials or access to the facility must be submitted in writing pursuant to the same procedures as the State's initial request. On June 26, ICE received a follow-up request from the State seeking documents and an inspection next week, responded that the request is under consideration, and is actively considering the request.[301]

C. ICE's "National Detention Standards"

While the Due Process clause of the Fifth amendment[302] and the bar to "cruel and unusual punishment" in the Eighth amendment[303] serve as baseline standards for all detention in the United States, immigration detention has been augmented by agency standards for decades.

As one law review article explained in 2025:

After intense legislative scrutiny of detention conditions, the U.S. Immigration and Naturalization Service (INS) — the predecessor agency to ICE — began working on a set of detention standards in 1980 to manage its growing network of contract facilities. Released, amended, and reissued in 1998, 2000, 2008, 2011, 2016, and 2019, the detention standards remain the Agency's primary written set of rules regulating the conditions of confinement in the U.S. immigration detention system and serve as the basis of a congressionally mandated inspection system.[304] *[Footnotes omitted.]*

ICE's National Detention Standards (NDS) were revised and repromulgated thereafter in 2026[305], and as the agency explained therein, it:

is committed to ensuring that all immigration detention operations adhere to constitutional standards governing the treatment of civil immigration detainees. Detention conditions shall be non-punitive and ensure the due process, health, safety, and security of all individuals in custody. Facilities and personnel are required to maintain conditions of confinement that meet or exceed established constitutional requirements, including access to adequate medical care, reasonable safety measures and humane living conditions.[306]

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[301] *See Washington v. GEO*, No. 2:26-cv-06466, Letter from Robert Lindefjeld to the Hon. Jamel K. Semper (D. N.J. June. 26, 2026). Source: https://storage.courtlistener.com/recap/gov.uscourts.njd.599797/gov.uscourts.njd.599797.9.0.pdf.

[302] U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law".). Source: https://constitution.congress.gov/constitution/amendment-5/.

[303] U.S. Const. amend. VII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Source: https://constitution.congress.gov/constitution/amendment-8/.

[304] Das, Alina. *The Law and Lawlessness of U.S. Immigration Detention*. 138 Harv. L. Rev. 1186 (2025). Source:

[305] *National Detention Standards*. U.S. IMMIG. AND CUSTOMS ENF'T (revised 2026). Source: https://www.ice.gov/doclib/detention-standards/2026/nds2026.pdf#:~:text=Detention%20conditions%20shall,enforce%20immigration%20laws.

[306] *Id*. at *Forward*, at 1.

That said, ICE is quick to add:

> *Nothing in these standards is intended, nor shall it be construed, as a waiver of federal supremacy or the immunity of the United States Government or its detention facility contractors. The standards applicable to the care, health, safety, and transportation of aliens in ICE custody are set forth in the applicable federal ICE detention standards.*[307]

The ICE NDS governs GEO detention at Delaney Hall, and therefore, respectfully, I believe the subcommittee should be aware of what the standards require.

NDS standard 1.1 governs "language assistance", and it states:

> *Facilities must identify detainees with limited English proficiency (LEP) and provide them access to facility programs, services, and activities through language services (interpretation and translation) at no cost to the detainees. Language assistance applies to all aspects of detention, including admission and release, intake, use of force, placement in segregation, sexual abuse and assault prevention and intervention, disciplinary proceedings, staff-detainee communication, and medical and mental health services.*[308]

Section 2 of the NDS regulates "Security"[309] in ICE detention; section 3, "Order"[310]; section 5, "Activities"[311] (including "Religious Practices", standard 5.3[312]); section 6, "Justice"[313]; and section 7 "Administration and Management"[314].

Most relevant to the claims made against Delaney Hall, however, is section 4 of the NDS[315], "Care", which governs "Food Service", "Hunger Strikes", "Medical Care", and "Personal Hygiene", *inter alia*.

The Food Service standard begins: "The facility shall provide detainees with nutritious, attractively presented meals, prepared and served in a sanitary and hygienic food service operation."[316]

It continues:

> *Ordinarily detainees shall be served three meals every day, at least two of which shall be hot meals; however, the facility administrator may approve variations in*

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[307] *Id*.
[308] *Id*., sec. 1, std. 1.1.I ("Policy"), at 9.
[309] *Id*., sec. 2, stds. 2.1. to 2.11, at 26-97.
[310] *Id*., sec. 3, std. 3.1. ("Disciplinary System"), at 98-102.
[311] *Id*., sec. 5, stds. 5.1 to 5.6, at 154-184.
[312] *See id*., sec. 5, std. 5.3, at 161-64 ("The facility must designate a Chaplain or Religious Services Coordinator (RSC) to manage and oversee religious programs and services for detainees, ensuring access to religious practices and accommodations in accordance with their faith while adhering to facility policies and security requirements. The Chaplain or RSC shall have physical access to all areas of the facility to serve detainees.").
[313] *Id*., sec. 6, stds. 6.1 to 6.4, at 186-199.
[314] *Id*., sec. 7, stds. 7.1 and 7.2, at 201-208.
[315] *Id*., sec. 4, at 104-152.
[316] *Id*., sec. 4, std. 4.1.I ("Policy"), at 104.

the food service schedule during religious and civic holidays, provided that basic nutritional goals are met. The facility's meal schedule must allow no more than 14 hours between the evening meal and breakfast.

Clean, potable drinking water must be available.

Meals shall always be prepared, delivered, and served under staff (or detention facility contractor) supervision.[317]

Standard 4.2 addresses "Hunger Strikes", and it begins:

This detention standard protects detainees' health and well-being by monitoring, counseling, and providing appropriate treatment to any detainee who is on a hunger strike.

Nothing in this detention standard is intended to limit or override the exercise of sound medical judgment by the Clinical Medical Authority (CMA) responsible for a detainee's medical care. Each case must be evaluated on its own merits and specific circumstances, and treatment shall be given in accordance with accepted medical practice.[318]

Standard 4.3 controls "Medical Care", and it starts as follows:

All detainees shall have access to appropriate medical, dental, and mental health care, including emergency services.

In cases where a detainee has medical or mental health needs that exceed the capabilities of the facility, the facility shall notify ICE and request a transfer of the detainee. The facility will make the request as early as possible to allow ICE time to find an appropriate placement for the detainee.[319]

In general, the medical case standard provides that:

Every facility shall directly or contractually provide its detainee population with the following at no cost to the detainee:

1. Initial medical, mental health and dental screening;

2. Medically necessary and appropriate medical, dental and mental health care and pharmaceutical services;

3. Comprehensive, routine and preventive health, mental health, and dental care, as medically indicated;

4. Emergency care;

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[317] *Id*., sec. 4, std. 4.1.I(C)(1) ("Food Service Dining Room/Satellite Meal Operations, Policy"), at 105.
[318] *Id*., sec. 4, std. 4.2.I ("Policy"), 115.
[319] *Id*., std. 4.3.I ("Policy"), at 119.

5. Specialty health care, as medically required;

6. Timely responses to medical complaints; and

7. Hospitalization as needed within the local community.

The health care program and the medical facilities will be under the direction of an [Health Services Administrator, "HSA"] and/or CMA. When the HSA is not a physician, final clinical judgment shall rest with the facility's designated CMA.

Facilities shall employ sufficient medical staff to perform basic exams and treatments for all detainees. The HSA will negotiate and keep current arrangements with nearby medical facilities or health care providers to provide required health care not available within the facility. These arrangements will include appropriate custodial officers to transport and remain with the detainee for the duration of any off-site treatment or hospital admission.[320]

Finally, standard 4.4, "Hygiene", states that: "Good hygiene is essential to the well-being of detainees in ICE/ERO custody. ICE/ERO requires that all facilities provide detainees with regular exchanges of suitable and clean clothing, linens, blankets, and towels for as long as they remain in detention."[321]

That standard gets quite explicit and exacting when it comes to hygiene requirements, specifying how regularly bedding and clothing must be exchanged and provided[322]; how many bars of soap[323], tubes of toothpaste[324], and bottles of shampoo[325] must be provided per detainee; and how often female detainees must be provided with feminine hygiene items[326].

CONCLUSION

It would be an understatement to say that the rhetoric surrounding ICE enforcement is currently heated and becoming more so by the day.

The purpose of the Laken Riley Act—the first bill passed this Congress—was to require ICE to take criminal aliens into custody and detain them. And yet just months after that law was enacted, some argue ICE should not detain aliens at all.

[320] *Id*., std. 4.3.II ("Standards and Procedures"), at 119-20.
[321] *Id*., std. 4.4.I ("Policy"), at 133.
[322] *Id*., stds. 4.4.II(A), (B), and (C), at 133.
[323] *Id*., std. 4.4.II(F)(1), at 134.
[324] *Id*., std. 4.4.II(F)(3), at 134.
[325] *Id*., std. 4.4.II(F)(5), at 134.
[326] *See id*., std. 4.4.II(F) ("Female detainees shall be issued and may retain sufficient feminine hygiene items for use during the menstrual cycle. Sanitary pads must be provided; tampons should also be offered where available. The facility shall replenish personal hygiene items, including menstrual products, at no cost to the detainee on an as-needed basis, in accordance with written facility procedures. Menstrual products shall be provided in quantities sufficient to meet individual needs throughout the menstrual cycle. Staff shall not deny reasonable requests for menstrual products. Any denial must be documented in the detainee's detention file with detailed justification."), at 134.

In her November 29, 2023, Memorandum Opinion and Order in *Texas v. U.S. DHS*[327], U.S. District Court Judge Alia Moses explained:

> ***The immigration system . . . 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 Judge Moses was ruling in favor of the then-Biden administration when she made those findings, 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 agreed with the then-administration's immigration actions and policies, or that everyone today should agree with the current administration's immigration actions and policies.

Many Americans who have watched the gyrations of sundry immigration policies over the past decades may agree with Judge Moses's conclusions about "the status quo", however.

As explained *supra*, under our constitution, Congress has plenary authority to make rules concerning the admission of aliens, their presence in the United States, their detention, and their removal from this country, and states and localities have only limited authority to regulate those activities.

It is the role of the executive branch to faithfully 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 and allowed to work.

But if the immigration laws are harsh and unfair, I have faith in the American people to realize it and prompt their representatives to amend the laws; in the interim, the constitution mandates that those laws be enforced[328].

Thank you, and I look forward to your questions.

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[327] *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.

[328] *See* U.S. Const. art. II § 3 (the president "shall take Care that the Laws be faithfully executed"). Source: https://constitution.congress.gov/browse/essay/artII-S3-3-1/ALDE_00001160/.