THE BORDER CRISIS: IS THE LAW BEING
FAITHFULLY EXECUTED?

HEARING

BEFORE THE
SUBCOMMITTEE ON IMMIGRATION INTEGRITY,
SECURITY, AND ENFORCEMENT
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTEENTH CONGRESS
FIRST SESSION

WEDNESDAY, JUNE 7, 2023

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COMMITTEE ON THE JUDICIARY

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CHRISTOPHER HIXON, Majority Staff Director
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### LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

All materials submitted for the record by the Subcommittee on Immigration Integrity, Security, and Enforcement are listed below.

Materials submitted by the Honorable Jeff Van Drew, a Member of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of New Jersey, for the record:

- An articles entitled, “Influx of migrants in Massachusetts continues to overwhelm state resources—and more may be on the way,” May 10, 2023, The Boston Globe
- An articles entitled, “City of Portland, social services organizations overwhelmed by surging number of asylum seekers,” Jan. 26, 2022, News Center Maine
- An articles entitled, “Like NYC, Chattanooga, Tenn. overwhelmed by migrant surge from Texas,” Aug. 16, 2022, New York Post

A case document entitled, “Third Presentment of the Twenty-First Statewide Grand JuryRegarding Unaccompanied Alien Children (UAC),” Mar. 29, 2023, Supreme Court of Florida, submitted by the Honorable Tom Tiffany, a Member of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of Wisconsin, for the record.
Materials submitted by the Honorable Pramila Jayapal, Ranking Member of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of Washington, for the record
A memorandum opinion, Casa de Maryland v. Chad Wolf, Sept. 11, 2020, United States District Court for the District of Maryland
A statement from the Church World Service (CWS)
A statement from Human Rights First, Jun. 7, 2023
A letter from Chad Mizelle, Senior Official Performing the Duties of the General Counsel of the Department of Homeland Security, Aug. 17, 2020, submitted by the Honorable Tom McClintock, Chair of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of California, for the record
An article entitled, “Listen to Children Who’ve Just Been Separated From Their Parents at the Border,” June 18, 2018, ProPublica, submitted by the Honorable Veronica Escobar, Member of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of Texas, for the record

QUESTIONS AND RESPONSES FOR THE RECORD

Materials submitted by the Honorable Tom McClintock, Chair of the Subcommittee on Immigration Integrity, Security, and Enforcement from the State of California, for the record
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THE BORDER CRISIS: IS THE LAW BEING
FAITHFULLY EXECUTED?

Wednesday, June 7, 2023

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON IMMIGRATION INTEGRITY, SECURITY,
AND ENFORCEMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. Tom McClintock [Chair of the Subcommittee] presiding.

Present: Representatives McClintock, Buck, Biggs, Tiffany, Roy, Van Drew, Nehls, Moore, Hunt, Jayapal, Lofgren, Correa, Escobar, Jackson Lee, Ross, Swalwell, and Nadler.

Mr. MCCLINTOCK. The Subcommittee will come to order.

Without objection, the Chair will be authorized to declare a recess at any time.

The Subcommittee convenes today to examine the enforcement of our immigration laws. Prior to inauguration day, the border was secure. The laws were being enforced. The border wall was nearing completion. The Remain in Mexico policy had slowed illegal immigration to a trickle, and court ordered deportations were being enforced.

Of course, all that changed when the new administration took office and immediately canceled the border wall, ended the Remain in Mexico policy, and ordered ICE to stop enforcing deportation orders.

Since then, we have seen more than two million illegal immigrants deliberately released into this country, a population the size of the entire State of Nebraska. Meanwhile, more than million and a half known gotaways have also entered illegally, an additional population the size of Hawaii.

Our previous hearings have documented the unfolding human tragedy of the border crisis. For Americans, it means classrooms flooded with non-English-speaking students, hospitals overwhelmed with illegal immigrants demanding care, fentanyl poisoning our young people, catastrophic strains on the social safety net meant to help Americans in need, criminal cartels and their affiliated gangs introduced into our communities, working wages suppressed by a flood of cheap illegal labor. Now we observe the irony of offi-
cials in so-called sanctuary cities, like New York and Chicago, and sanctuary States, like California, warning that they cannot handle this influx.

For the illegal immigrants, it means a harrowing ordeal subjecting them to exploitation by the criminal cartels, including sex trafficking, drug trafficking, and labor trafficking, even of small children. Many arrive in physical distress, destitute, and deeply in debt to their human smugglers. Thousands never make it. They die horrific deaths along the way.

Well, now we raise the question why. Clearly our immigration laws are not being enforced by this administration. That fact is self-evident when we compare this administration to the last one.

The law specifically provides that any asylum claimant shall be detained while their claim is heard. This is now routinely ignored.

The law specifically provides that parole is to be granted only on a case-by-case basis for urgent humanitarian reasons or significant public benefit. This law is now being ignored, while parole is granted en masse to release many tens of thousands of immigrants illegally into our country.

The law requires deportation orders to be enforced, yet, despite record numbers of illegal entries, we see the lowest rate of deportations in our history with more than a million deportation orders simply ignored.

Federal courts have ordered this administration to enforce the law, yet time and again the administration seems reluctant to do so. Without enforcement, there is no immigration law. Without immigration law, there are no borders, and, without borders, we have no country.

This crisis now reaches into every community and constitutes a clear and present danger to our national sovereignty, prosperity, and security.

We Americans have always prided ourselves as being a Nation of laws and not of men, and yet it appears that our immigration laws are now routinely ignored, altered, or perverted by the whims of individuals within this administration. It’s important in the inquiry today that we separate out policy differences from actual violations of law. The Founders anticipated that foolish people would sometimes occupy the offices of our government, and they left it to voters to correct maladministration at the ballot box. Lincoln put it this way: The voters are everything. If the voters get their backsides too close to the fire, they’ll just have to sit on the blisters awhile.

Mayor Eric Adams of New York City seems to be a poster child for this phenomenon.

The more troubling question arises if this unprecedented illegal migration results not from incompetence and folly, but rather from a deliberate and calculated violation and subversion of the laws of the land.

We need to determine what laws have allowed this calamity to befall our Nation. As the Legislative Branch of government, it’s our duty to correct them. We also need to determine what laws are being willfully violated by those commanded to faithfully execute them. In that case, we need to identify who is responsible and what remedies are available within our system of checks and balances.
With that, I am now pleased to recognize the Ranking Member for her opening statement.

Ms. JAYAPAL. Thank you, Mr. Chair.

Well, another week, another immigration hearing on the border. After using harmful rhetoric and fearmongering that ending the Title 42 public health policy would result in a high number of migrants coming to the border, we have seen a month where border numbers are down over 70 percent from their peak. As Politico put it, it is, quote: “The migrant crisis that still hasn't arrived.”

Unable to stoke media fears any further around the end of Title 42, it appears that my Republican colleagues have shifted their focus to the next attention-grabbing headline, laying the groundwork for the impeachment of Secretary Mayorkis.

Despite this being our fifth immigration hearing in about five months, the majority is yet to call any witness from the current administration to testify before this Committee. It is no surprise that my colleagues have shifted to discussing if Secretary Mayorkis should be impeached. After all, extreme MAGA Republican Representative Marjorie Taylor Greene said just last week, in exchange for voting for the debt limit deal, she wanted some, quote, “sides and desserts.” Her, quote, “beautiful dessert” was that—and this is a quote from her: “Somebody needs to be impeached.” She specifically singled out Secretary Mayorkis as the, quote, “lowest-hanging fruit.”

Of course, my colleagues jumped at the chance to cater to the extreme MAGA Republicans in their party, and before the vote on the debt ceiling had even occurred, they noticed this hearing.

According to a report from CNN just a few weeks ago, the Chair of this Committee, which would be tasked with launching impeachment proceedings, and GOP leadership have an understanding that the impeachment of Mayorkis is inevitable. According to the article, quote: “It is not a matter of if; it is a matter of when.”

Anyone who tuned into last April’s Judiciary Committee hearing where Secretary Mayorkis testified as part of his oversight duties would not be at all surprised. Republicans on this Committee made their intentions quite clear. Mr. Johnson of Louisiana stated that Secretary Mayorkis had committed, quote, “impeachable offenses.” He went on to say, quote: “My advice to you is to begin your search for a different career very soon because there will be an election.”

Mr. Biggs of Arizona stated: “You should be impeached.”

Earlier this year, Mr. Biggs followed through on that statement and became the second Republican to file Articles of Impeachment against Secretary Mayorkis. That resolution is cosponsored by multiple Members of this Committee, including Mr. Gaetz and Mr. Nehls.

Mr. Roy of Texas, who is not one of those cosponsors, even has a 13-page memo from October 2021 entitled, “Case for Impeachment of Secretary Mayorkis.”

Representative Ben Cline from Virginia, who serves on the Full Committee, told CNN that he has communicated to Chair Jordan that, quote: “We need to start the process as soon as possible.”

Last, when our Chair, Mr. Jordan, was asked in an interview in October of last year if the Secretary should be impeached, he said:
“Mayorkis deserves it.” More recently, he said: “The Committee thinks it is,” quote, “warranted.”

Now, of course, the idea of impeaching the Secretary is ridiculous. You do not impeach a Cabinet Secretary over policy disagreements. The border is not, quote, “open.” No administration has ever had complete, quote, “operational control of the border, detained every asylum seeker, or not used parole in some form.”

As a former Chair of the House Committee on Homeland Security, Chair McCaul of Texas said: “Well, we talk a lot about operational control, and that’s having a better understanding of who’s coming in and who’s leaving and what that threat really is. We’re never really going to get that.”

The Biden Administration is continuing to try to clean up the mess left by the previous administration. They’re putting forward real workable solutions to manage migration and expand legal pathways. On top of the parole programs created by the Biden Administration earlier this year, the administration announced the creation of additional legal pathways that are intended to relieve pressure at the border.

Now, it’s not all perfect. In fact, some of my colleagues would argue that some of the administration’s policies are too heavy-handed. Recently, the administration put forward a regulation which limits asylum, something many people within our Democratic Caucus are justifiably concerned about.

Unfortunately, today’s hearing appears to be the start of a sad new chapter for this Committee. Certainly, I look forward to hearing from all our witnesses today and the perspectives they bring on this issue.

I yield back.

Mr. McClintock. The gentlelady leads back.

The Chair notes the presence of the Ranking Member of the Full Committee, Mr. Nadler, and recognizes him for an opening statement.

Mr. Nadler. Thank you, Mr. Chair.

Mr. Chair, it took just over five months, but the day that so many of my Republican colleagues have waited for has finally arrived. Today Judiciary Republicans are laying the groundwork to impeach the Homeland Security Secretary Alejandro Mayorkis.

To be clear, they do not allege wrongdoing or malfeasance of any kind. They are simply catering to the most extreme Members of their caucus who have demanded impeachment of somebody, anybody, as the price of their support for the Speaker. They have decided to make their first target Secretary Mayorkis. Why? Because they have policy disagreements. No matter how much they may dislike him, that is not a basis for impeachment.

Republicans are so desperate to begin impeachment, however, that they’re evening jockeying for position on who gets to take the lead. Today’s hearing, just like the first immigration hearing we held, appears to be the latest spat in the ongoing turf war between Chair Jordan and Chair Green of the Homeland Security Committee.

Just a couple of weeks ago, Homeland Security noted that they are taking a lead role in building the case for impeachment
through a quote, “five-phase accountability plan before handing it off to the Judiciary Committee.”

In furtherance of this plan, just this morning, they noticed the Full Committee hearing entitled, quote, “Open Borders, Closed Case: Secretary Mayorkis Dereliction of Duty on the Border Crisis.” Not to be outdone, Chair Jordan raced to announce this hearing to ensure that we beat the Homeland Security Committee by a few days.

This is not a serious process. As Ranking Member Jayapal noted, we have still not had a single government witness come before the Committee on the issue of immigration. Instead, my Republican colleagues continue to hide behind the use of transcribed interviews to talk to agency officials, seemingly afraid to have public hearings. Despite all the evidence to the contrary, we are still hearing the same claims that we heard at our first immigration hearing this year, that the southern border is open, that President Biden and Secretary Mayorkis opened it deliberately, that it is mostly migrants who are smuggling drugs across our southern border.

Yet, as my colleagues and I have discussed for months, none of these statements are true. Far from having an open border, the Biden Administration used Title 42 to expel migrants with no due process for significantly longer than many of my colleagues on the committee felt was appropriate.

The administration also has recently enacted a new asylum regulation that we are concerned limits access to asylum. That regulation even earned the administration rare praise from Chair Jordan. These are not the policies of an open border. They are the opposite.

My Republican colleagues have not once let facts get in the way of their Fox News talking points, certainly not the fact that encounters at the border have plummeted by 70 percent in recent weeks, thanks to new policies put in place.

There is a lot that the Biden Administration is doing with immigration that I support. For example, the use of parole, expansion of legal pathways, revamping of the refugee program, and opening new regional processing centers in the hemisphere are all positive steps to repairing a broken immigration system.

There are some policies I do not like, but that is the point: We have policy disagreements.

You do not impeach a Cabinet Secretary because you do not like his policies. You work to pass legislation. You conduct oversight. You try to work in a constructive manner to convince your colleagues that you have the better argument. We need to work in bipartisan way to fix the immigration system, not just messaging bills that have no chance of being enacted into law and embark on a purely political impeachment process.

I would note that we now know for certain that the Republicans’ extreme, cruel, and unworkable border bill cannot pass the Senate. As part of the time agreement to ensure that we did not default for the first time in history, Senate Republicans demanded a vote on H.R. 2, the Republicans’ border bill. The bill got 46 “yes” votes and 51 “no” votes, encountering bipartisan opposition. That bill is a nonstarter. Are my colleagues on the other side ready to sit down and discuss how we move forward with bipartisan immigration legislation?
As I noted in our first hearing, Judiciary Committee Democrats stand ready to work on meaningful solutions to serious problems. Unfortunately, instead, it appears that the next side show is beginning today. Make no mistake, as the Ranking Member noted, it is clear that Chair Jordan and Members of the Committee have already made up their minds. Instead of serious solutions to solve complex problems, we will simply engage in more political theater.

I look forward to hearing from our witnesses today, and I yield back the balance of my time.

Mr. McClintock. All right. Just to put my Democratic colleagues at ease, administration witnesses could be called by the Committee Democrats. To date, they have chosen not to do so. I believe Mr. Mayorkis is scheduled to appear before the Full Committee in late July. It is a very, very big leap for merely asking why our laws are not being enforced to advocating something like impeachment.

I would remind my friends that they are not our teachers. I, for one, would not seek to invent grounds for impeachment as the majority—or the former majority did in several proceedings. We’re here to ask a very simple question: Why are our laws not being enforced?

Now, I will introduce today’s witnesses.

The Honorable Chad Wolf is the Executive Director and Chief Strategy Officer at America First Policy Institute. He’s also Chair of the Center for Homeland Security and Immigration at AFPI. Secretary Wolf was the Acting Secretary of the Department of Homeland Security. He’s also a veteran of both Capitol Hill and the private sector. Secretary Wolf is a recipient of the U.S. Secretary of Transportation 9/11 Medal, the U.S. Secretary of Homeland Security Distinguished Service Medal, and the National Intelligence Distinguished Service Medal.

Mr. Joseph Edlow is the founder of the Edlow Group, a visiting fellow at the Heritage Foundation, and a former Acting Director of U.S. Citizenship and Immigration Services. Prior to that he served as the USCIS Chief Counsel and a Deputy Assistant Attorney General in the Office of Legal Policy at the Department of Justice. He is a veteran of Capitol Hill, serving as counsel on this Subcommittee and counsel to Congressman Raul Labrador. He began his immigration-related career as a trial attorney in the Baltimore Immigration Court. Mr. Edlow has a J.D. from the Case Western Reserve University School of Law and completed his undergraduate degree at Brandeis University in Waltham, Massachusetts.

Mr. Steven Bradbury is a distinguished fellow at the Heritage Foundation and was the general counsel of the U.S. Department of Transportation from November 2017–January 2021, where he oversaw all of DOT’s rulemaking and enforcement actions. He is also Acting Deputy Secretary of Transportation and briefly served as the Acting Secretary of Transportation. He was the Principal Deputy and Acting Assistant Attorney General for the Office of Legal Counsel at the U.S. Department of Justice during the George W. Bush Administration. Mr. Bradbury is a veteran of private practice and served as a clerk on the Supreme Court of the United States, as well as on the U.S. Court of Appeals for the D.C. Circuit.
He earned a J.D. at Michigan Law School and a B.A. from Stanford University.

Finally, Mr. Aaron Reichlin-Melnick is currently the Policy Director at the American Immigration Council, where he has also served as Policy Counsel and a staff attorney. Prior to that, he was a justice fellow in the Immigrant Justice Corps and the Legal Aid Society in New York. He earned a J.D. from Georgetown University Law Center and a B.A. from Brandeis University.

I'd like to welcome all our witnesses today and thank them for appearing here. We'll begin by swearing you in.

Would you please rise and raise your right hand.

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record reflect the witnesses have answered in the affirmative. Thank you.

Please be seated.

Please know that your written testimony will be entered in the record in its entirety. Accordingly, we would ask that you summarize your testimony in five minutes.

Mr. Wolf, we'll begin with you.

STATEMENT OF THE HON. CHAD WOLF

Mr. Wolf. Chair McClintock, Ranking Member Jayapal, thank you for the opportunity to testify today.

Today's hearing is titled, "The Border Crisis: Is the Law Being Faithfully Executed?" Unfortunately, the answer by any objective measure or metric is a resounding no. I understand the difficulty and the complexity of running the Department of Homeland Security, so I do not say this lightly. The U.S. Constitution requires the administration to, quote, "take care that the immigration and border security laws be faithfully executed."

It is clear to me and to millions of Americans that the Biden Administration has failed to do so.

Today's border security system is unrecognizable from the America First policies of the Trump Administration or even what was in place during the administrations of Presidents Clinton, Bush, or Obama.

In all candor, the Biden Administration is the first administration of either political party to deliberately take steps to diminish the security along our southern border. Therefore, it is my opinion that new leadership is needed at the department.

In contrast, under President Trump's leadership, the department established the most secure southern border in my lifetime by building the most advanced border wall system, reaching historic diplomatic agreements with Nations, and putting in place across-the-board policies that deterred illegal immigration, disrupted the Mexican cartels, disincentivized the deadly flow of fentanyl, and enforced the laws enacted by Congress.

I think the results are clear. During the Trump Administration, fraudulent asylum claims declined, those who qualified for humanitarian relief faster. Lives were saved as migrants stopped taking that dangerous journey North when they realized they would not be allowed and released into American communities.
In stark contrast, today we see a border not only in chaos but in crisis because the Biden Administration has dismantled all the proven policies. Recommendations and concerns by career Border Patrol experts were ignored, and political correctness and rank ideology supplemented common sense and adherence to our immigration laws.

To be clear, these laws did not change between the Trump Administration and the Biden Administration, just the decision by this one not to follow those laws. They have embraced destructive and unlawful policies that have made American communities dangerous and have enriched the Mexican drug cartels.

Here are a few examples:

*Nationwide catch and release.* The Biden Administration has intentionally decided to ignore its legal mandate to detain illegal aliens or to make them wait in Mexico throughout their immigration court proceedings, and a Federal District Judge has struck down this practice.

DHS was then unable to process the volumes of illegal aliens fast enough under this catch-and-release scheme, so it resorted to issuing Notices to Report. These are essentially an honor system document that asks illegal aliens to self-report to a local ICE office when they reach their final destination. Again, the courts have blocked the implementation of this practice.

*Next, a de facto amnesty.* On day one, the Biden Administration issued a 100-day deportation freeze on all illegal aliens, including those with criminal convictions. Let me say that again: Including those with criminal convictions. Again, a Federal judge has blocked the nullification of this interior enforcement.

*Another de facto amnesty* of this administration is when the DHS Secretary’s enforcement priorities exempt 99 percent of illegal aliens from the threat of deportation, including the declaration that being here unlawfully is no longer grounds for removal.

Perhaps the most egregious example of violating the law is the unlawful use of parole authority. The INA could not be clearer that parole is a remarkably narrow authority and only allowable on a case-by-case basis. The numerous unlawful categorical parole programs that the department has implemented are not new, safe, or legal pathways, but a diversion of illegal aliens between ports of entry to ports of entry.

It is very clear that the current administration is lying to the American people about the severity of the problem, so here’s the reality. Large-scale catch-and-release policy has resulted in more than 4.5 million illegal aliens, including 1.5 million gotaways, being allowed into American communities. That is a population larger than every major U.S. city, except for New York City. There have been more than 200 known or suspected terrorists apprehended at the southern border in the last two years, compared to just 11 during the four-years of the Trump Administration. The border is effectively controlled by the Mexican cartels who crave these open border policies to further their business model. More migrants have been found dead in the desert or have drowned in the river during the journey than ever before. According to *The New York Times,* the Biden Administration has lost contact with more than 85,000 children after releasing them to sponsors here in the U.S.
These are the results of a process that the administration calls safe, orderly, and humane. To whom exactly? Not to the migrants being abused, extorted, or dying along the journey, not to the American communities that have been overrun, and not to Border Patrol officers who have been assaulted. Instead, the processes that have been created over the last two years can be more accurately described as dangerous, corrupt, and inhumane. These policies are unlawful, and this is a crisis by design.

Thank you. Look forward to the questions.

[The prepared statement of the Hon. Wolf follows:]
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON IMMIGRATION INTEGRITY,
SECURITY, AND ENFORCEMENT

THE BORDER CRISIS: IS THE LAW BEING
FAITHFULLY EXECUTED?
JUNE 7, 2023

WRITTEN TESTIMONY OF CHAD WOLF
EXECUTIVE DIRECTOR, CHIEF STRATEGY OFFICER, & CHAIR OF THE
CENTER FOR HOMELAND SECURITY & IMMIGRATION
AMERICA FIRST POLICY INSTITUTE
Chairman McClintock and Ranking Member Jayapal:

Thank you for the opportunity to testify today before the House Judiciary's Subcommittee on Immigration Integrity, Security, and Enforcement.

Today's hearing is titled, "The Border Crisis: Is the Law Being Faithfully Executed?" Unfortunately, the answer, by any objective measure or metric, is a resounding No. As someone who understands the difficulty and complexity of running the Department of Homeland Security (DHS), I do not say this lightly. It is clear to me and millions of Americans that the Biden Administration has failed in its constitutional duty to "take Care that the [immigration and border security] Laws be faithfully executed."

I have reached this inescapable conclusion after having had the distinct privilege of serving at DHS at its inception under President Bush and throughout President Trump's Administration, including the last 14 months as Acting Secretary of Homeland Security. For the last 27 months since I left office, I have followed closely the national security and humanitarian crisis unfolding along the southern border and have been publicly critical of the Biden Administration’s policies and operations. That criticism is not expressed because we are from different political parties but rather, it comes from my own experience as Acting Secretary and the apparent and deliberate destruction of what was, not so very long ago, the most effective border security in recent memory.

One of my philosophies as Acting Secretary was based on one simple axiom: If you do not have borders, you do not have a country. Sovereignty does not exist if you are not sovereign over your own borders—territorial, maritime, or aerial.

To that end, today's border security system is unrecognizable from the America First border security policies of the Trump Administration or even the border security apparatus in place during the administrations of Presidents Clinton, Bush, and Obama. In all candor, the Biden Administration is the first administration of either political party to actively take steps to diminish the security along our southern border.

In contrast, under President Trump's leadership, a talented group of professionals and I helped implement a body of policies that established the most secure southern border in my lifetime. In addition to building the most advanced border wall system, we put in place across-the-board policies that

1 U.S. Const. Art. II, § 3 (cleaned up).
deterring illegal immigration, disrupted the Mexican cartels, disincentivized the flow of deadly fentanyl, and enforced the laws enacted by Congress.

In fact, when confronted with caravans of illegal aliens surging to the southern border in 2018-2019, we were honest with the American people that it was a crisis. So, we went straight to work to restore order and maintain America’s sovereignty.

The Trump Administration utilized previously untapped legal authority found at section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to put in place the highly successful Remain in Mexico policy, or Migrant Protection Protocols, and President Trump struck historic Asylum Cooperative Agreements with the Northern Triangle countries to redirect illegal aliens to seek asylum closer to their home country under the authority provided by section 208(a)(2)(A) of the INA. The Trump Administration also issued a third-country transit regulation under section 208(b)(2)(C) of the INA to thwart asylum forum shopping, bolstered internal relocation guidance for adjudicators, streamlined asylum cases at the border to speed up deportations of those found ineligible, and restored the definition of refugee to Congress’s intent of requiring persecution by a government actor on one or more of the protected grounds. No Presidential Administration can do more under existing law—and none should do any less.

These policies were necessary because economic migrants and human traffickers were exploiting the loopholes in our laws by making fraudulent asylum claims to block their quick deportation under expedited removal. Only between 10-15% of illegal aliens apprehended at the southern border who claim asylum actually qualify for this humanitarian relief. The rest, to put it mildly, are trying to game the system. Under the Immigration and Nationality Act (INA), they need to—but they cannot—satisfy the appropriately rigorous “well-founded fear of persecution” standard in order to obtain humanitarian relief. Such artful circumvention of the law is the same as breaking the law. And every President has a bona fide duty to stop the lawbreakers. Anything short is a contravention of the laws Congress has gone to all the trouble of enacting—repeatedly.

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4 8 C.F.R. 208.13(b)(3).
The Trump Administration utilized the fullest extent of its legal authority to combat this asylum fraud by making aliens wait in Mexico or detaining them in the U.S., the only two options permissible under section 235 of the INA and, importantly, quickly returning them when an immigration judge denies their claim. We never forgot the violence that illegal immigration cruelly inflicts on defenseless women and children, who are raped, trafficked, and scarred for life by the lawbreakers.

The evidence speaks for itself. During the Trump Administration, fraudulent asylum claims declined, those who qualified got humanitarian relief faster, lives were saved as migrants stopped taking the dangerous journey north when they realized they would not be allowed into American communities.

In stark contrast, today we see a border in chaos and crisis because the Biden Administration ideologically and arbitrarily dismantled all of these successful policies on Day One and sidelined career Border Patrol experts who continued to warn that a historic surge of illegal aliens would overwhelm the border in the absence of any deterrent policies. Political correctness and rank ideology supplanted common sense and the clear command of our immigration laws.

And even as the warnings of career Border Patrol experts came to pass, the Biden Administration sat idly by and did little to curtail this crisis. The result is that since President Biden was sworn into office, nearly 5.5 million illegal aliens—and counting—have unlawfully come into our country plus at least another 1.5 million “gotaways” who completely bypassed the Border Patrol and made it into American communities.9

To be clear - the laws didn’t change between administrations, just the refusal of the current one to follow their legal obligations. Instead, they embraced destructive and unlawful policies that have made American communities less safe and enriched the Mexican cartels to new heights because open borders is a lucrative business.

But the abuse of the law doesn’t end there. Here are some additional, non-exhaustive examples:

- **Nationwide Catch-and-Release:** The Biden Administration intentionally decided to ignore its legal mandate to detain illegal aliens or make them wait in Mexico throughout their immigration court proceedings. Instead, this Administration re-implemented the

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dangerous catch-and-release policies ended by President Trump and instead began mass releasing illegal aliens into American communities.

Federal District Court Judge Wetherell struck down this practice, writing “The Court finds in favor of Florida because, as detailed below, the evidence establishes that [the Biden Administration] have effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing ‘alternatives to detention’ over actual detention and by releasing more than a million aliens into the country—on ‘parole’ or pursuant to the exercise of ‘prosecutorial discretion’ under a wholly inapplicable statute—without even initiating removal proceedings.”

- **Issuing Notices to Report (NTRs):** Unable to process the volume of illegal aliens out of DHS custody fast enough under catch-and-release, DHS early on under the Biden Administration resorted to issuing Notices to Report—essentially an honor-system document that asks illegal aliens to self-report to a local Immigration and Customs Enforcement (ICE) office when they reach their destination.

  Unsurprisingly, few reported and now these illegal aliens lack immigration court dates because they were not issued a Notice to Appear (NTA), the formal charging document. This means that removal proceedings will not even begin until ICE encounters them in the future, further prolonging the amount of time these illegal aliens remain in the U.S. This process was discontinued for some time but as the administration scrambled to deal with the expiration of Title 42, they attempted to resume NTRs.

  Again, the court blocked the implementation of this policy, holding that it “appears that DHS is preparing to flout the Court’s order,” noting that this policy “sounds virtually identical” to the catch-and-release policy he blocked in March 2023. The judge further explained, “In both instances, aliens are being released into the country on an expedited basis without being placed in removal proceedings and with little to no vetting and no monitoring.”

- **Canceling Notices to Appear (NTAs):** For those illegal aliens who received NTAs, their court dates are multiple years down the road because the volume of illegal aliens the Biden Administration allowed

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into the U.S. has overwhelmed the immigration courts. Instead of ending catch-and-release and reinstating deterrence policies, the Biden Administration unilaterally canceled thousands of NTAs which removes them from the immigration court backlog. These illegal aliens still lack a lawful right to be in the U.S. and this unlawful action by the Biden Administration makes their future deportation nearly impossible.

As a broader point, such travesty of the Rule of Law dishonors not only our Nation and our law-abiding citizens—it also makes light of the sacrifices borne by countless lawful immigrants who patiently stood in line to come to this country the legal way. This Administration’s message could not be more unambiguous—those who waited their turn, filled out applications, and paid fees for visas were foolish for obeying our immigration laws. The Biden Administration tells lawful immigrants that the enormous sacrifices they and their families made in coming to America by following the law count for nothing. When the current Administration arbitrarily excuses the contravention of our laws by some, it is diminishing and demeaning to us all.

- **Nullifying Interior Enforcement:** On Day One, the Biden Administration issued a 100 Day deportation freeze for all illegal aliens, including those with criminal convictions. Federal District Judge Drew Tipton enjoined this non-enforcement policy on the grounds that it was "arbitrary and capricious" and that the policy "fails to provide any concrete, reasonable justification for a 100-day pause on deportations."102 DHS has since issued "enforcement" priorities that exempt 99% of illegal aliens from the threat of deportation. The Biden Administration has sidelined ICE agents and effectively accomplished the goals of the extremist "Defund ICE" movement.

- **De Facto Amnesty:** President Biden campaigned on granting amnesty to all illegal aliens—a policy that even the previous Congress rejected. But the President was undeterred. Ignoring the Constitution’s grant of the legislative power to the Congress (and not to the President), he decided to achieve in practice what Congress did not permit him to achieve in principle. As a result, the DHS Secretary implemented a de facto amnesty when he declared that being here unlawfully is not grounds for removal. The obvious remedy corresponding to a violation of the law was arbitrarily taken off the table.

This edict directly and incontestably contradicts the law and mocks our Nation’s time-honored immigration court system. In keeping with that

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policy choice, the current Administration’s claims of prioritizing limiting resources are disingenuous, perhaps flatly risible. After all, there are over 1 million aliens with final orders of removal who are still in the U.S.; yet, the Biden Administration has removed the lowest levels of illegal aliens, including criminal aliens, in modern history.13

- **Giving USCIS Asylum Officers Jurisdiction over Border Asylum Claims:** Through an unlawful regulation, the Biden Administration has given U.S. Citizenship and Immigration Services asylum officers the ability to decide the asylum claims of illegal aliens apprehended at the border. Congress created DHS through the Homeland Security Act of 2002, with much—but not all—immigration jurisdiction that was held by the former Immigration and Naturalization Service within the Department of Justice transferred to DHS.14 By this authorizing statute, only immigration judges have the legal authority to hear asylum claims of aliens in removal proceedings as this authority was not delegated to DHS.15 It is apparent that the Biden Administration made this unlawful move under the belief that USCIS employees will be more like to grant relief. DHS data shows that USCIS asylum officers are granting asylum at nearly twice the historical rate of immigration judges.16

- **Categorical Parole:** Perhaps the most egregious example of violating the law is the DHS Secretary’s unlawful use of the parole authority. Section 212(d)(5) of the INA could not be clearer that the right to grant this kind of parole comes from a remarkably narrow sliver of statutory authority, only allowable on a case-by-case basis for: (1) urgent humanitarian reasons or (2) significant public benefit.17 DHS has ignored the statutory requirements and turned this limited authority into an override of the legal immigration system.

You know the law is not in your favor when you suddenly discover a slender reed in some old statutory provision that, only when it is totally divorced from context, gives you the slightest hope. That’s why, as the Supreme Court reminded us less than a year ago in *West Virginia v. EPA*, when the Executive Branch “claims to discover in a long-extant

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17 8 U.S.C. 1182(d)(5).
statute an unheralded power representing a transformative expansion in its regulatory authority," that's usually a sign of desperation because the President and/or the agency know in their heart of hearts that they do not have the statutory authority they are claiming. Everyone else knows it as well. As if that Supreme Court prescription wasn't enough, the Court in *West Virginia* also said that when the Executive suddenly "locate[s] [its] newfound power in the vague language of an ancillary provision of the [law]," its claimed authority is on conspicuously shaky, and presumptively unsound, ground.  

So too here. The mass parole system devised by the Biden Administration turns our immigration law framework on its head. After all, statutes have to be interpreted, to the extent possible, as a harmonious whole, so why would Congress have enacted the rest of the INA if Presidents, operating whimsically, could circumvent it by issuing paroles *ad nauseam*? This question, like all such questions, answers itself.

Just think: The parole program for Cubans, Haitians, Nicaraguans, and Venezuelans allows up to 360,000 illegal aliens per year to fly into American communities and the separate unlawful program using the CBP One app near the southern border are not new, safe, lawful pathways but a diversion of illegal aliens from between ports of entry to the ports of entry. It is clear that these illegal categorical parole programs are designed to hide the optics of the border crisis from the American people.

What is more, this Administration's abuse of the parole authority isn't limited to the border. After the Biden Administration's disastrous withdrawal from Kabul DHS unlawfully paroled into the U.S. nearly 100,000 unvetted Afghans, most of whom were military-aged males.

You needn't take my word for it. Even the Inspectors General of both DHS and the Department of Defense have issued scathing reports on the national security vulnerabilities the homeland has been exposed to because of this reckless, senseless, dangerous, and of course unlawful decision.  

There are a number of instances where these Afghan parolees have committed heinous crimes, include rape.

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18 142 S. Ct. 2587, 2610 (2022) (cleaned up and alterations made).
19 Id. (cleaned up and alterations made).
By embarking on this nullification of immigration law by executive fiat, the Biden Administration is allowing into the U.S. millions of illegal aliens who do not qualify for a visa and thus creating a subclass of aliens who have no avenue for a legal immigration status and are in perpetual uncertainty and agony. That is not American leadership or humanity at its finest. Instead, this is just cynical, crass treatment by the current cadre of Executive Branch leadership and is the direct result of the Biden Administration’s circumventing our border security and immigration laws.

In conclusion, I would suggest that one of the most important duties as the DHS Secretary is to be transparent and honest with the American people about security issues affecting the homeland. It is very clear to me that the current administration is lying to the American people about the severity of the problem, while at the same time absurdly attempting to lay blame on the Trump Administration, on Congress, or some other entity for their failed strategy.

Here is the reality:

- The border is not secure, it is in fact open to illegal aliens by the hundreds of thousands.
- A historic number of illegal aliens – nearly 5.5 million – have been apprehended at the southern border during the Biden Administration with approximately 3 million allowed into American communities—a population larger than every major U.S. city except for New York City and Los Angeles.
- Another 1.5 million observed “gotaways” who bypassed Border Patrol and pose severe national security and public safety threats.
- More than 200 known or suspected terrorists apprehended at the southern border compared to just 11 during the Trump Administration—and these are just the ones caught because they didn’t realize we had them in the FBI database.
- The border is effectively controlled by Mexican cartels – who crave the predictability of these policies for their business model.
- More migrants have died during their journey than ever before.
- More Border Patrol agents have been assaulted by so-called asylum seekers than ever before.
- The Biden Administration has lost contact with more than 85,000 children after releasing them to sponsors, according to The New York Times.21

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The Biden Administration is aware of tens of thousands of children being subjected to abusive work conditions, according to The New York Times.22

And there is no operational control over large portions of the border. This is not just my assessment, but that of outgoing Border Patrol Chief Ruiz and other career U.S. Customs and Border Protection officials when questioned by Congress or in litigation challenging Biden Administration policies.

These are the results of a process the Biden Administration calls “safe, orderly, and humane.” But to whom exactly? Not to the migrants dying along the journey; not to the migrants abused, extorted or worse by the Mexican cartels; not to American communities that have been overrun by this influx of illegal aliens and lethal fentanyl; and not to Border Patrol officers who have been assaulted and have pleaded with political leadership to solve this crisis.

Instead, the process that has been created over the last two years can be more accurately described as dangerous, corrupt, and inhumane. After 9/11, DHS was created to secure the homeland and protect our Nation’s citizens. I was there to help get DHS up and running. Yet the actions of the Biden Administration have done the opposite of adhering to the DHS mission by eroding our institutions and diminishing the Rule of Law. This is a crisis by design.

Finally, a singular quote from Supreme Court Justice Louis Brandeis’ from almost a century ago still rings true today:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.23

23 277 U.S. 438, 485 (dissenting opinion) (emphases added).

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Unfortunately, this is a message lost on the Biden Administration. Anarchy, I regret to say, is what we see today with the strategic refusal to implement our border security laws. Unless we course-correct immediately, our Rule of Law is in somber danger of being lost forever into the oblivion of history. That is a message worth remembering, and re-committing ourselves to, if we are to remain a nation of laws. Or even a nation at all.

Thank you and I look forward to answering your questions.
Mr. McClintock. Thank you for your testimony. Next is Mr. Reichlin-Melnick.

STATEMENT OF AARON REICHLIN-MELNICK

Mr. Reichlin-Melnick. Chair McClintock, Ranking Member Jayapal, and distinguished Members of the Subcommittee. My name is Aaron Reichlin-Melnick, and I’m Policy Director at the American Immigration Council, a nonprofit organization dedicated to the belief that immigrants are part of our national fabric and to ensuring that the United States provides a fair process for all immigrants, including those seeking protection.

I’m grateful for the opportunity to be here today to help provide some perspective on the complicated reality of the application of immigration law at the border.

At the council, we have long brought attention through research, advocacy, and litigation to ways in which the Executive Branch carries out immigration enforcement. We are intimately familiar with the complex legal and practical considerations involved in the processing of migrants and have brought successful litigation against both Democratic and Republican Administrations to ensure that DHS is following the law.

The Constitution charges the President with faithfully executing the laws. Unfortunately, for the President, Congress often passes law which impose competing legal requirements on the Executive Branch. Some laws are easier to execute than others, especially in a world of limited resources. These challenges are readily apparent for immigration enforcement.

As Justice Kavanaugh noted at oral arguments in Texas v. U.S. last November, there are never enough resources to detain every person who should be detained, arrest every person who should be arrested, or prosecute every person who’s violated the law.

Because of this hard reality, immigration officials have always been imbued with broad legal authority and with broad discretion in carrying out immigration enforcement. None other than Justice Scalia said in 1999 that, at each stage of the removal process, the Executive has the discretion to abandon the endeavor.

At the border, these countervailing concerns are critical. CBP officers are charged with simultaneously carrying out enforcement laws and humanitarian laws such as asylum, and not every person can be treated the same. There is no one-size-fits-all legal process for migrants. For example, the options available for processing a single adult arriving from Mexico arriving alone are different than those available for processing an asylum seeker from Cuba arriving with a baby. Some people can be rapidly issued an order of removal and deported. Others may require a full asylum screening, which takes time and resources.

Beyond the law, Congressional appropriations are finite, so there are logistical limits that are just as important as legal mandates. The use of detention is a perfect example of this. Despite laws which on their face seemly mandate detention, Congress has never provided sufficient resources to detain every person who might be subject to mandatory detention. As a result, if there are 10 people who the law says should be detained and only five ICE detention beds available, CBP must by necessity release the other five. Thus,
immigration officials under Republican and Democratic Administrations alike have released some migrants, because, while a single law might suggest they be detained, the laws in total provide alternate options.

These limitations apply to all administrations. For example, data produced by the Department of Homeland Security revealed that over 1.1 million migrants were released under the Trump Administration in total, including over 500,000 released at the border by CBP. Like today, these releases do not represent a failure to execute the law; rather, they are a natural and lawful byproduct of competing legal and logistical considerations that all law enforcement agencies grapple with.

Faced with a growing global displacement crisis, the Biden Administration has undoubtedly struggled to manage with the resources they have. This struggle is not unique to the Biden Administration, nor is it a sign of administration undermining the law. Instead, it is a result of outdated laws and a funding model that is badly out of balance. There are two million cases in the immigration court backlog, yet today we spend $8 on immigration enforcement for every $1 we spend on immigration adjudication.

The last administration spent $15 billion on a border wall. That’s enough to pay for 17.5 years of the current immigration court budget. So, it’s not a surprise then that the system is not functioning as designed and that it takes years for the government to determine who qualifies for asylum and who does not.

Moving forward, I urge Congress to undertake the difficult challenge of updating our immigration laws and providing enough resources to our adjudication systems to ensure that chaos at the border becomes a thing of the past. Congress cannot tell the Executive Branch to do three things, give them enough money to do none of them adequately, and then blame the Executive if it doesn’t like the result.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Reichlin-Melnick follows:]
Chairman Jordan, Chairman McClintock, Ranking Member Jayapal, and distinguished members of the Subcommittee:

My name is Aaron Reichlin-Melnick, and I currently serve as the Policy Director for the American Immigration Council, a non-profit organization dedicated to the belief that immigrants are part of our national fabric and to ensuring that the United States provides a fair process for all immigrants, including those who are seeking protection at the border. The Council works to strengthen America by shaping how America thinks about and acts toward immigrants and immigration and by working toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring.

The Council has long brought attention through research, advocacy, and litigation to ways in which the Department of Homeland Security (“DHS”) has responded to migrants at the border and inside the United States. Under the Obama administration, we helped bring a successful lawsuit against the Border Patrol’s Tucson Sector challenging unconstitutional conditions of confinement for adults and children. Under the Obama and Trump administrations, we helped bring a successful lawsuit against U.S. Customs and Border Protection (“CBP”) for its unlawful policy of turning away asylum seekers at ports of entry, in part through a practice known as “metering.” And under the Biden administration, we helped bring a lawsuit against Immigration and Customs Enforcement (“ICE”) for adopting policies preventing people in immigration detention from accessing their attorneys.

I am grateful for the opportunity to be here today to help provide some perspective on the complicated reality of the application of immigration law at the southwest border.

Releases at the Border are Lawful and the Result of Longstanding Resource Limitations and Competing Legal Obligations

The Constitution charges the President with faithfully executing the laws. But Congress has passed laws which impose competing legal requirements on the Executive Branch, requiring federal agencies to navigate a complicated web of statutory and constitutional obligations. And some laws are easier to execute than others, especially in a world of limited resources.

Nowhere is this more true than in immigration law and enforcement. As Justice Kavanaugh said at oral arguments in *Texas v. United States* in November, “there are never enough resources or almost never enough resources to detain every person who should be detained, arrest every person who should be arrested, [or] prosecute every person who’s violated the law.”

Because of this fact, the Supreme Court and Congress have both empowered the Executive Branch with significant discretion to manage migration and migrants. As Justice Kennedy wrote in 2012, “A principal feature of the removal system is the broad discretion exercised by immigration officials.” Congress itself not only acknowledged this “principal feature,” but it has expressly approved of it. The Homeland Security Act of 2002 provides that a core function of the Secretary is to “establish[] national immigration enforcement policies and priorities.”

The discretion granted to immigration officials includes the decision whether to arrest a person who is removable, whether to initiate removal proceedings following an arrest, whether to detain someone, and even whether to let a person stay. Indeed, Justice Scalia himself wrote in 1999 that “at each stage of the removal process, the Executive has discretion to abandon the endeavor.”

At the border, this discretion is critical. DHS has the difficult job of satisfying the legal obligations imposed on it by Congress as well as it can, given finite resources. These legal obligations include both the obligation to carry out both immigration enforcement and humanitarian laws. Indeed, for nearly half a century, DHS has been legally required to provide individuals crossing the U.S.-Mexico border with the opportunity to seek asylum or similar humanitarian protections. This duty, arising from the United States accession to the 1967 United Nations Protocol on Refugees, was first codified into U.S. law in the Refugee Act of 1980. It is also a core component of the 1984 United Nations Convention Against Torture, which has also been signed and ratified by the United States.

As the Supreme Court has held, “deportation is a particularly severe ‘penalty,’” and Congress has long ensured that those facing deportation have rights that immigration officials must respect. The Constitution itself also applies key due process protections for individuals facing removal, including migrants arriving at the border. Thus, when processing a migrant for enforcement purposes, immigration officials are required to choose between different legal options available—some of which may not be

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possible to carry out due to factors outside of the official’s control. And where it is impossible to meet those obligations, or where the law makes multiple options available, discretion comes into play.

Detention is the classic example of this. Despite Congress’s passage of laws which would seem to mandate detention, in a world where there are 10 people who the law says should be sent to detention and only five detention beds available, border authorities must by necessity pick and choose which five people get locked up and which five must be set free. This does not represent a failure to execute the law. Rather, it is a natural byproduct of the competing legal and logistical concerns that all law enforcement agencies grapple with.

The question of who to detain and who to release is itself governed by competing legal restrictions and equities. For example, Congress has mandated the detention of certain individuals while providing DHS with statutory authority to release others. But even mandatory detention is not always mandatory, as here, too, questions of resources and humanitarian concerns may come into play.\(^{11}\)

If an immigration officer is deciding how to process two noncitizens subject to mandatory detention, one with a serious criminal history and one who has committed no crime, the officer may determine that it is in the public interest to allocate limited detention resources to detaining only the person with a conviction. This kind of decision is made by immigration enforcement officials every single day across the country; how to carry out their duties as best as they can in a world of limited resources. In addition, given the unique humanitarian and foreign affairs concerns implicated by immigration enforcement, over the last century the Executive Branch has always decided to pursue some cases more vigorously than others.

Crucially, at no point in history has Congress ever provided sufficient funds to detain every person who falls within the category of “mandatory detention,” let alone all migrants crossing the border. As a result, under Republican and Democratic presidential administrations dating back decades, immigration officers have been required to release some migrants instead of sending them to detention.

Over the last 20 years, the maximum number of average daily detention beds authorized by Congress was 45,274, in Fiscal Years (FY) 2019 and 2020 (see Figure 1). In FY 2019 alone, an average of 83,550 people were arrested by DHS each month, accounting for over a million arrests in total.\(^{12}\) The average length of stay for a person held in ICE detention that year was 34.3 days, meaning that the average detention bed


\(^{11}\) See American Immigration Council, “Council Files Amicus Brief Supporting the Release of Individuals from Immigration Detention During the COVID-19 Pandemic,” May 12, 2020, https://www.americanimmigrationcouncil.org/amicus_brief/council-files-amicus-brief-supporting-release-individuals-immigration-detention-during-


only became available 10.6 times that year. Thus, even in the year where ICE detention reached record capacity, it would still have been literally impossible to detain all migrants.

Indeed, data produced by the DHS Office of Immigration Statistics reveals that in each of the last three presidential administrations, tens of thousands of migrants encountered at the southwest border were released directly from CBP custody without ever being detained by ICE. In every year from FY 2013 to FY 2021, at least 33,000 people were directly released after crossing the southwest border (See Figure 2).

From FY 2017 through FY 2020, over 1.1 million people encountered at the U.S.-Mexico border were eventually released into the United States, including over 500,000 people who were never detained and over 600,000 people who were initially detained and then subsequently released.

15 Ibid. The latter figure includes unaccompanied children who were initially put in Office of Refugee Resettlement custody.
At the border, CBP officers are required to abide by more than just the laws relating to detention and removal. Multiple competing legal requirements and concerns apply, including legal obligations relating to the treatment of people in CBP custody. For example, DHS is required by law to transfer unaccompanied children to the care of the Office of Refugee Resettlement within 72 hours of taking them into custody. CBP agents are also bound by the 2015 National Standards on Transport, Escort, Detention, and Search (TEDS), which provide that “Detainees shall generally not be held for longer than 72 hours in CBP hold rooms or holding facilities.” TEDS also mandates certain other standards around medical care, food, hygiene, and basic needs, all of which create additional resource and staffing requirements that may impact other aspects of border processing.

The Constitution also sets minimum standards for treatment of migrants in CBP custody, including the right to basic hygiene, medical assessments, and bedding. As a result, there are hard limits to the number of migrants that the US government can detain in Border Patrol facilities before they become dangerously overcrowded and the government begins to violate its legal and constitutional obligations.

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When cells are overcrowded, the risk of people dying in custody increases significantly. This is not idle speculation; this is what has happened repeatedly in the past. In spring 2019, the DHS Office of Inspector General found multiple violations of government policy due to “dangerous overcrowding,” including people being held in “standing-room-only conditions for weeks.” That spring, multiple people died in Border Patrol custody, including several children. In circumstances such as those, DHS is well within its legal rights to release people from custody through parole or through another authority to alleviate the serious risk of death involved with overcrowding at the border. The recent tragic death of 8-year-old Anadith Banay Reyes Alvarez is a reminder that these concerns are very real and the health and safety of vulnerable children must not be taken lightly.

In addition, Border Patrol officials deciding how to process a migrant must take into consideration whether the person is seeking asylum. The asylum process provides extensive rights to individuals taken into custody at the border, which can’t simply be overridden at DHS’s whim. Limited resources play a role here as well, given that there are simply not enough asylum officers available to place every person seeking asylum through the credible fear process, requiring some people to be sent directly to court. As a result, it is no surprise that in times of high migration, Border Patrol officials often release migrants, either to alleviate overcrowding or because there are no other options available.

Congress itself has acknowledged the inevitability of releases and provided resources to respond to them. The “Alternatives to Detention” program has been congressionally authorized for decades and has been used for migrants apprehended inside the United States and at the border. Congressional funding for the program tripled from 2017 to 2020 under the Trump administration, coinciding with a significant increase in migrant encounters. And in 2019, Congress first authorized the provision of Federal Emergency Management Agency (FEMA) grant-based funding for migrants “released from the custody of the Department of Homeland Security.”

Ultimately, it is only Congress which can fundamentally change how individuals are processed at the border. The current funding model is out of balance. Congress has poured billions of dollars into the front-end enforcement apparatus while systematically neglecting the back-end adjudication systems. In the last four years alone, Congress has authorized $36.9 billion to Border Patrol and ICE’s Enforcement and Removal Operations, eight times more than the $3.5 billion authorized for the immigration court systems and for U.S. Citizenship and Immigration Services’ Refugee, Asylum, and International Operations Directorate (See Figure 3). The end result of this is skyrocketing immigration court backlogs, delayed asylum adjudications, and ever-growing delays due to resource limitations. Unsurprisingly, the choice to spend eight dollars on immigration enforcement for every one dollar spent on immigration adjudication has led to a system which does not function properly.

The end result of this spending mismatch is that instead of an orderly, humane, and consistent approach to humanitarian protection and border management, we have been left with a dysfunctional system that serves the needs of no one: not the government, border communities, or asylum seekers themselves. Thankfully, it won’t require a radical overhaul of U.S. immigration law to restore our humanitarian protection systems.

What’s needed most is a major shift in thinking and policymaking. We must abandon a fantasy of short-term solutionism and acknowledge that only sustained investment over a period of time can realistically address these 21st century challenges. Rather than focus reactively only on temporary reductions of the number of people crossing the border, we need to address the longstanding shortfalls of the system and make the fixes necessary to bring order to the system in the long term.

**Processing Pathways Available to CBP Officers Come with Constraints on Use**

Broadly speaking, CBP officers who have taken a migrant into custody at the border have five “processing pathways” available to them under the law. As indicated in Table 1 and described in detail below, each of these processing pathways come with significant constraints on their use, including logistical/resource-based constraints, diplomatic constraints, policy-based constraints, and humanitarian constraints. As this table demonstrates, executing the law at the border requires consideration of not just the bare words in the Immigration and Nationality Act, but also the reality of carrying out those words in a complex world.
Table 1: Processing Pathways Available to CBP Officers and Constraints on Their Use

<table>
<thead>
<tr>
<th>Pathway</th>
<th>Legal Authority</th>
<th>Constraints on use (Logistical, Diplomatic, Policy, Humanitarian-Based)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expedited Removal</td>
<td>8 U.S.C. § 1225(b)(1)</td>
<td>- Some countries may not accept the return of their nationals following the issuance of an order of expedited removal.</td>
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<td>- Individuals placed into expedited removal who express a fear of persecution must be provided a credible fear interview.</td>
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<td>- The credible fear process, including immigration judge review, is likely to extend beyond seven days. During that time, DHS</td>
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<td>generally must hold the person in custody, either CBP or ICE. Both agencies have limited detention space and cannot hold an</td>
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<tr>
<td></td>
<td></td>
<td>unlimited number of people for credible fear interviews.</td>
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<tr>
<td></td>
<td></td>
<td>- There are a limited number of asylum officers to carry out credible fear interviews and a limited number of immigration</td>
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<td></td>
<td></td>
<td>judges to carry out appeals.</td>
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<tr>
<td>Issuance of a Notice to Appear (NTA)</td>
<td>8 U.S.C. § 1229a, Matter of E-R-M- &amp; L-R-M- 25 I &amp; M Dec. 520 (BIA 2011)</td>
<td>- Logistical constraints include processing time (90 minutes),</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Eliminates the ability to use expedited removal.</td>
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<tr>
<td></td>
<td></td>
<td>- Issuing NTA puts people into lengthy court backlogs.</td>
</tr>
<tr>
<td>Parole</td>
<td>8 U.S.C. 1182(d)(5)</td>
<td>- May only be used on a &quot;case-by-case basis for urgent humanitarian reasons or significant public benefit,&quot; which has</td>
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<td>for decades included situations where officials determine that serious overcrowding represents an urgent humanitarian crisis.</td>
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<tr>
<td></td>
<td></td>
<td>- Eliminates the ability to use expedited removal.</td>
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<td></td>
<td></td>
<td>- Parole backloads the issuance of a notice to appear onto ICE after the person checks in with ICE, which may lead to logistical</td>
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<tr>
<td></td>
<td></td>
<td>problems at ICE due to limited capacity at ICE ERO.</td>
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<tr>
<td>Contiguous territory return (Remain in Mexico)</td>
<td>8 U.S.C. 1225(b)(2)(C)</td>
<td>- Requires the cooperation of a contiguous territory such as Mexico, which may impose its own numerical limitations.</td>
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<td></td>
<td></td>
<td>- Migrants expressing a fear of persecution must be provided a screening to avoid nonrefoulement, which requires both detention</td>
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<td>space to hold this screening and asylum officers to carry out the screenings.</td>
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<tr>
<td></td>
<td></td>
<td>- Providing court hearings to migrants in Mexico requires subsequent extensive and disruptive multi-agency collaboration to</td>
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<tr>
<td></td>
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<td>provide mandated court hearings.</td>
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<td></td>
<td>- Subject to extensive litigation risk when used on a programmatic basis.</td>
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<td></td>
<td></td>
<td>- Human rights concerns led to extensive internal pushback among asylum officers required to carry out screenings.</td>
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<tr>
<td>Release on order of recognizance/notice to</td>
<td>Inherent prosecutorial discretion authority. See Reno v. Am.-Arab Anti-Discrimination</td>
<td></td>
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<tr>
<td>report</td>
<td>Comm., 525 U.S. 471, 483 (1999).</td>
<td>- NTR issuance backloads the issuance of a notice to appear onto ICE after the person checks in with ICE, which may lead to</td>
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<td></td>
<td></td>
<td>logistical problems at ICE due to limited capacity at ICE ERO.</td>
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<tr>
<td></td>
<td></td>
<td>- Notices to report are likely to lead to increased failures to appear because they do not provide individuals with a clear</td>
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<td>process by which to reconnect with DHS.</td>
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</tbody>
</table>
Testimony For "The Border Crisis: Is the Law Being Faithfully Executed?"

First, CBP officers can put a person through the "expedited removal" process, which was created by Congress in 1996. Under expedited removal, an individual CBP officer can issue a removal order within hours. But expedited removal has its own significant limitations. By law, those who are subject to expedited removal who express a fear of persecution must be screened for asylum. Credible fear screenings generally take place in DHS custody, requiring an available bed to hold the person during the screening. DHS has never had sufficient detention space to hold all individuals who request asylum in detention for credible fear interviews.

Credible fear screenings also require an available asylum officer to carry out the interview and an available immigration judge to carry out any requested review of a denial. As with detention resources, in the last decade, DHS has consistently been unable to hire sufficient asylum officers to carry out credible fear interviews for every migrant crossing the border who wishes to seek asylum.

In addition, some individuals may come from countries which do not accept the return of their own nationals (so-called "recalcitrant countries"), making some orders of expedited removal difficult, if not impossible, to carry out. These factors, among others, significantly constrain the use of expedited removal at the border.

Second, CBP officers may choose instead to bypass the expedited removal process and instead issue a notice to appear in court. As the Board of Immigration Appeals held in 2011, the use of expedited removal is not mandatory, and DHS maintains the inherent authority to issue a notice to appear to individuals who are amenable to placement in expedited removal proceedings. Once a person is in removal proceedings, the individual is permitted to remain in the United States until the conclusion of their removal proceedings. The issuance of notices to appear to individuals seeking asylum at the border has occurred for decades, even before the creation of expedited removal. Individuals issued notices to appear at the border are generally released, as has repeatedly occurred in 2014, 2016, 2018, 2019, and since 2021.

The primary constraint on the use of NTAs is time. According to Biden administration officials, issuance of a notice to appear may take roughly 90 minutes for a CBP officer. Although this may not seem like a significant amount of time, in times of high migration when thousands of migrants are crossing the border and seeking asylum, there may be significant staffing challenges involved in issuing notices to appear to all individuals while simultaneously ensuring that CBP facilities do not become overcrowded.

Third, CBP officers may choose to issue humanitarian parole to individuals in custody. Parole is an authority that the Executive Branch has long held which allows some individuals to temporarily enter the United States for urgent humanitarian reasons or for significant public benefit. As the Supreme Court has noted, this authority may be used on individuals who would otherwise be subject to expedited

removal. Immigration officers have long considered the health and safety concerns raised by overcrowding as an urgent humanitarian reason authorizing the use of parole.

Since at least 1992, various administrations have authorized the use of parole for arriving asylum seekers in certain circumstances. The most extensive programmatic use of parole of the border occurred from 1995 to 2017, under the so-called “Wet Foot/Dry Foot” parole policy, which provided that nearly all Cuban nationals who managed to set foot on U.S. soil would be granted parole.

The use of parole is also subject to some constraints, including the limitation on the use of parole only to circumstances involving significant public benefit or urgent humanitarian reasons. In addition, those granted parole must eventually be placed into immigration court proceedings, requiring ICE to dedicate its own limited resources to the issuance of notices to appear to individuals paroled at the border. Delays in issuing notices to appear may also make it more difficult for asylum seekers to meet the one-year filing deadline or obtain work authorization as an asylum applicant.

Fourth, CBP officers have the statutory authority to return individuals to Mexico through the contiguous territory return authority in 8 U.S.C. § 1225(b)(2)(C). This discretionary authority was first exercised on a broad programmatic basis under the Trump administration through the controversial “Remain in Mexico” program. As the Supreme Court recently held, the use of the authority requires the affirmative consent of Mexico.

The Remain in Mexico program was subject to very high constraints throughout its use. Mexico strictly limited the number of individuals who could be returned to that country each day and limited the nationalities of those who could be returned. As a result, throughout the program’s first iteration, in no month were more than 20 percent of migrants crossing the border returned to Mexico. In addition, the program was subject to extensive litigation as to whether it was a valid exercise of the authority in 8 U.S.C. § 1225(b)(2)(C) and whether it provided sufficient protections for the vulnerable migrants put through it.

The program also significantly strained border immigration courts, with one Trump administration official telling Congress in June 2019 that the program had “broken the courts.” The program also required significant logistical support from USCIS asylum officers, who were required to carry out “nonrefoulement” screenings for individuals who expressed a fear of persecution or torture in Mexico. In addition, the

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38 See Jennings v. Rodriguez, 138 S. Ct. 630, 634 (2018) (“There is also a specific provision authorizing temporary parole from § 1225(b) detention: ‘for urgent humanitarian reasons or significant public benefit.’”).


41 See Biden v. Torres, 142 S. Ct. 2508, 2543 (2022) (“The Executive [...] cannot unilaterally return [...] migrants to Mexico.”).

human rights concerns caused by sending people back to dangerous border towns in Mexico led to extensive internal pushback within DHS and externally among human rights advocates.

Fifth, CBP officers may in some circumstances choose to directly release individuals without placing them in removal proceedings, expedited removal, or parole (although individuals placed through this pathway are still subject to security screenings). Notices to report are the fastest means by which CBP officers can process and release an individual at the border in times of dangerous overcrowding. Releases on orders of recognizance or through the *notice to report* process rely on the inherent discretionary authority acknowledged by Justice Scalia in 1999.51

As with releases on parole, the use of this authority at the border shifts the responsibility for issuance of a notice to appear onto ICE, which imposes its own significant logistical challenges. In addition, those who are released without an appointment to check in with ICE may not be aware of how to proceed with their case and may fall through the cracks.

While the majority of individuals released through the temporary use of the Notices to Report process in 2021 did eventually check in with ICE,52 the confusion caused by this program cautions against its use.

**Conclusion**

For generations, the United States has prided itself on being a beacon of safety and freedom for refugees around the world. In 1980, Congress passed the Refugee Act, codifying basic refugee protections into law and enshrining a global commitment to asylum which emerged from the tragedy of the Holocaust. Since that point, nearly 4 million people have been granted permanent status either through the U.S. Refugee Admissions Program or through our asylum system. These people have strengthened communities around the nation, contributed economically, and enriched our national fabric.

Today, a global displacement crisis is affecting nearly every country in the world. Over 100 million people are displaced worldwide, with more than 42 million outside their countries of origin. In the Western Hemisphere, authoritarianism, assassinations, natural disasters, powerful transnational criminal organizations, climate change, and the global socioeconomic shocks of the COVID-19 pandemic have caused millions of people to pick up and move to seek safety and better opportunities. The end result is humanitarian migration at levels far above what the 20th century system can handle.

Faced with a 21st century displacement crisis, the Biden administration has undoubtedly struggled to manage with the resources they have. But this struggle is the result of Congress’s consistent failure to provide the resources necessary to fund a functioning humanitarian protection system. Crucially, there is still hope. Rebuilding a functional system does not require a radical overhaul of U.S. immigration law. Nor

will it lead to open borders. Instead, creating and funding a flexible, orderly, and safe asylum system will reduce both irregular entries and unjust outcomes.34

Moving forward, I urge Congress to have a serious conversation about undertaking the difficult challenge of updating our immigration laws and providing sufficient resources to our adjudication systems to ensure that the chaotic situations we see at the border today are a thing of the past.

34 For more information, read the American Immigration Council’s report “Beyond a Border Solution: How to Build a Humanitarian Protection System That Won’t Break,” available at: https://www.americanimmigrationcouncil.org/research/beyond-border-solutions.
Mr. McClintock. Thank you very much. Next is Mr. Edlow.

STATEMENT OF JOSEPH EDLOW

Mr. Edlow. Thank you. Chair McClintock, Ranking Member Jayapal, and distinguished Members of this Subcommittee, thank you for the opportunity to present testimony regarding the ongoing crisis threatening the integrity of our immigration system.

As this Committee explores the underlying causes of the crisis, the question posed today can be answered only with a resounding no. The Biden Administration has seen fit to ignore the law, instead favoring poorly conceived and poorly executed policy decisions. Their actions, through Executive Orders, departmental memos, and rules, upend the INA and Congressional intent, have eroded our immigration system, and propelled the crisis to current levels.

Section 102 of the INA charges the Secretary of Homeland Security with administration and enforcement of the act and further vests in the Secretary the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. The massive number of encounters recorded by CBP, the small number of alien removals by ICE, and the ever-increasing USCIS backlog, however, suggests that this Secretary has failed to faithfully execute the laws entrusted to him.

The sharp rise in unlawful entries and attempts along the Southwest border provide a critical litmus test of the crisis’s scope, but it’s an outgrowth of the departmental actions. Additionally, media often focuses on the border to the detriment of the other actions and inaction by ICE and USCIS, which we must also focus on.

Since day one of the administration, the department has taken aggressive action to undermine immigration enforcement. Nowhere is that clearer than Secretary Mayorkis’ September 30, 2021, memorandum which outlined the appropriate instances in which DHS was authorized to take action against aliens either unlawfully present or lawfully present but removable.

Secretary Mayorkis outlined three main buckets for removal: Threats to national security, threats to public safety, and threats to border security. While in theory this would seem to encompass many aliens, in reality, the numerous carve-outs, loose definitions, and required factors for consideration made it nearly impossible for ICE to move forward with most enforcement actions. These poorly defined categories gave even some of the most serious of criminal aliens a free pass in the interest of equity.

This and other memos sought to redefine immigration enforcement by creating fictional priorities with no basis in law. Categorical prosecutorial discretion is not discretion at all. The department’s failure to enforce the full INA in the name of prioritization and discretion is a dereliction of duty.

So, too, the department’s regulatory agenda seeks to upend the credible fear process in the name of orderly processing. Starting with the presumption that every economic migrant is entitled to protection, in 2022, DHS issued an interim and final rule on credible fear screening. Under the new process, a positive credible fear
determination by an asylum officer will lead to a nonadversarial asylum interview before another DHS asylum officer. This impermissibly changes the process and undermines Congressional action by shifting adjudication authority from DOJ to DHS.

Even more concerning, written summary of the original credible fear interview doubles as an alien’s asylum application rendering the requirement that an alien file one moot. This shifts the burden and also provides a path for fraud and renders anti-asylum fraud measures moot.

A second final rule issued last month appears to be tough on illegal border crossers making them eligible for asylum. However, the number of exceptions and the easily rebuttable presumption belie its stated purpose. This rule will have the opposite effect as it will ultimately incentivize aliens to make the dangerous trek northward with families in tow.

I would be remiss to not mention parole abuse. Regardless of the plain language of the statute limiting parole to case-by-case matters, parole has become a favorite tool of this administration. While first used as an alternative to detention, parole programs have subsequently played a large role in artificially decreasing border numbers. The expanded categorical parole programs that we’re seeing now are wholly unlawful.

Last, vast number of pending matters presently before USCIS will only increase if border prioritization for adjudicators is not stopped. While the agency claims to want to reduce this number, actions speak louder than words. It was recently reported that USCIS adjudicators were being shifted from their assigned work to support operations along the Southwest border.

The Biden Administration has taken many measures in the past 2.5 years aimed at addressing the border crisis. However, it appears that no one thought to simply enforce the law as it is written. Instead, the department has, through its own actions, created the worst border crisis in American history.

A return to the rule of law is the only cure at this point, and it is incumbent on Congress to use its oversight and lawmaking authority to repair the damage done by the department.

Thank you. I looked forward to your question.

[The prepared statement of Mr. Edlow follows:]
Chairman Jordan, Ranking Member Nadler, Subcommittee Chairman McClintock, Ranking Member Jayapal, and distinguished members of this subcommittee, thank you for the opportunity to present testimony regarding the ongoing crisis threatening the integrity of our immigration system.

As this committee explores the underlying causes of the crisis, the question posed in this hearing’s title can be answered only with a resounding “No.” This Administration has seen fit to ignore the law, instead favoring poorly conceived and even more so poorly executed policy decisions. The actions through executive orders, departmental memos, and rules seemingly upend the Immigration and Nationality Act (INA) and congressional intent. These decisions, implemented at each immigration agency, have eroded this country’s immigration system and have propelled the crisis to its current levels.

The sharp rise in unlawful entries and attempted entries along the southwest border provides a critical litmus test of the crisis’ scope but is an outgrowth of Administration and Departmental actions. The focus on the overwhelming numbers does not, in and of itself, provide insight into the reasons for the crisis. Additionally, media often focuses on the border to the detriment of the other actions and inaction by Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS). Regardless of the specifics, it is plainly obvious that since President Biden was inaugurated in January 2021, this country has witnessed an unprecedented border crisis.

*Executive Order and Memos*

Beginning on Day 1 of the Biden Administration, the Department of Homeland Security’s (DHS) Acting Secretary, David Pekoske, halted all deportations for 100 days.¹ This was predicated on interim enforcement priorities that the Department wanted ICE to implement. In its view, the only way to

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sufficiently update priorities was to reset the entire system by halting all enforcement actions. This was followed up by ICE Acting Director Tae Johnson's memo of February 18, 2021. This memo was the first step to implement the priorities and included reporting requirements for enforcement actions and the need to justify any action to superiors through a pre-approval process.\(^2\)

At the White House, on February 2, 2021, President Biden issued his “Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.”\(^3\) The order required DHS, in conjunction with the Department of Justice and the Department of State to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers.”\(^4\) This was followed with an executive order that, among other things, created the battle cry of the Administration – removing barriers to immigration.

To that end, on September 30, 2021, Secretary Alejandro Mayorkas issued a memorandum entitled “Guidelines for the Enforcement of Civil Immigration Law” which outlined the appropriate instances in which DHS was authorized to take action against aliens either unlawfully present or lawfully present but removable.\(^5\)\(^6\) Specifically, Secretary Mayorkas outlined three main buckets for removal – 1) threats national security; 2) threats to public safety; 3) threats to border security. While, in theory, this would seem to encompass many aliens who should properly be targeted for enforcement actions by ICE, in reality, the numerous carve-outs, loose definitions, and required factors for consideration make it nearly impossible to move forward with most enforcement actions. These poorly defined categories could be seen to give even the most serious of criminal aliens a free pass in the interest of equity and “justice.”

On April 3, 2022, ICE’s Principal Legal Advisor, Kerry Doyle, issued a memo on prosecutorial discretion, aligning ICE action in immigration court with the Mayorkas Memo.\(^7\) The April Memo provided that ICE attorneys were to exercise

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\(^4\) *id.*


\(^6\) On June 10, 2022, the U.S. District Court for the Southern District of Texas vacated this memorandum.

prosecutorial discretion in cases that were not deemed priority cases. This could include dismissal as well as administrative closure (pausing the case indefinitely).

These memos all seek to redefine immigration enforcement by creating fictional priorities with no basis in law. Neither the INA’s section on inadmissibility nor its section on removability suggest a prioritization of grounds for enforcement. Instead, it enumerates a list of grounds of inadmissibility and removability that the Department of Homeland Security is required to enforce. Its failure to do so in the name of prosecutorial discretion is a dereliction of duty and cannot be permitted to continue.

The results of these memos speak for themselves. In Fiscal Year 2022, ICE recorded a little more than 72,000 alien removals from the United States.⁸ While that may appear to be large number, the Executive Office for Immigration Review (the immigration courts) reports that in just the first quarter of 2023, immigration judges have ordered almost 47,000 people removed and have affirmed credible or reasonable fear denials in more than 4,000 matters.⁹

During the period that these memos were in effect, and beyond, the number of encounters along the southwest border steadily climbed. In Fiscal Year 2022, U.S. Customs and Border Protection (CBP) recorded a staggering and unprecedented 2,378,944 encounters.¹⁰ Thus far in Fiscal Year 2023, CBP has already recorded 1,431,964 encounters as of the end of April.¹¹ These are just the known and reported numbers and do not account for the thousands of “got aways” who were able to elude Border Patrol agents.

The numbers simply do not add up and even with the bulk of the Mayorkas and Doyle memos not in effect, the result is still lopsided enforcement compared to the record number of aliens entering.

The Regulations

Under the guise of removing barriers, the Department, along with the Department of Justice, engaged in several rulemakings purportedly aimed at creating efficiency and expediency at the border.

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¹¹ Id.
Under section 235(b)(1) of the Immigration and Nationality Act (INA)\(^\text{12}\), aliens apprehended by CBP entering illegally along the border or without proper documents at the ports of entry are subject to “expedited removal”, meaning that they can be quickly removed without receiving removal orders from an immigration judge (IJ).

If an arriving alien claims to fear harm or asks for asylum, however, CBP must hand the alien over to an asylum officer (AO) in U.S. Citizenship and Immigration Services (USCIS) for a “credible fear” interview.\(^\text{13}\) Credible fear is a screening process to assess whether the alien may have an asylum claim, and thus proving credible fear is easier than establishing eligibility for asylum.\(^\text{14}\) If an AO finds that the alien does not have credible fear (makes a “negative credible fear determination”), the alien can ask for a review of that decision by an IJ.\(^\text{15}\) If the IJ upholds the negative credible fear determination, the alien is to be removed immediately.

When an AO or IJ makes a “positive credible fear determination”, on the other hand, the alien is placed into removal proceedings to apply for asylum before an IJ.\(^\text{16}\) Most aliens who have claimed a fear of return in the past received a positive credible fear assessment (83 percent between FY 2008 and FY 2019)\(^\text{17}\), but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.\(^\text{18}\)

In 2022, DHS issued an interim final rule entitled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.”\(^\text{19}\) Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview before another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory

\(^{18}\) Id.
withholding of removal\textsuperscript{[20]} or protection under the Convention Against Torture\textsuperscript{[21]}, must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

Even more concerning was that the written summary of the original credible fear interview doubles as an alien’s asylum application, rendering the requirement that an alien file an asylum application moot. This shifts the burden to present and prepare a meritorious claim for protection. Aliens may rely on first-made claims of their story, changing or including relevant details in advance of the asylum interview or court proceeding, but without having to affirmatively file an application. While this, in and of itself, does not ensure an asylum grant, it certainly provides a path for fraud. It also renders a key anti-asylum fraud measure moot.

In addition to the practical problems associated with this rule, it impermissibly shifts authorities from the Department of Justice to the Department of Homeland Security. As Congress was creating the new DHS, it specifically determined which functions would be enumerated. \textsuperscript{[22]} Regarding asylum officers, or USCIS in general, Congress specified which immigration functions would be transferred to the new created department. \textsuperscript{[23]} Section 451 of the HSA established the Bureau of Citizenship and Immigration Services and provided its function as transferred from the DOJ. \textsuperscript{[24]} By including a catchall provision for any functions that may have been missed in the paragraphs 1 through 4, it is apparent that the intent was to ensure that whatever adjudicative functions were being performed by INS

\textsuperscript{[20]} Statutory withholding of removal specifies that an alien may not be removed “to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social, or political opinion.” 8 U.S.C. § 1231(b)(3)(A).


\textsuperscript{[23]} Id.

\textsuperscript{[24]} Id. at §451(b), 116 Stat. 2135, 2196 (2002). ("(b) Transfer of Functions from the Commissioner.— In accordance with title XV (relating to transition provisions), there are transferred from the Commissioner of Immigration and Naturalization Services the following functions and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date specified in section 455:

\begin{itemize}
  \item (1) Adjudications of immigrant visa petitions.
  \item (2) Adjudications of naturalization petitions.
  \item (3) Adjudications of asylum and refugee applications.
  \item (4) Adjudications performed at service centers.
  \item (5) All other adjudications performed by the Immigration and Naturalization Service immediately before the effective date specified in section 455.
\end{itemize}"

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prior to the transfer, would be continued by USCIS subsequent to it. Nothing in the
provision suggests that any further functions be transferred.

As additional evidence that EOIR functions were not transferred, the HSA
affirmatively established EOIR within DOJ. This section, ultimately codified in
INA, states:

(1) In general. – The Attorney General shall have such authorities and
functions under this Act and all other laws relating to the
immigration and naturalization of aliens as were exercised by the
Executive Office for Immigration Review, on the day before the
effective date of the Immigration Reform, Accountability and
Security Enhancement Act of 2002. 25,26

This provision makes clear that the Attorney General retained the functions
of EOIR to include the authority to order deportation from the United States.
Nowhere in the HSA nor in the INA is there any reference to USCIS, exercising
authority to order removal. As the former INS did not exercise such authority, and
no such functions were specifically transferred to USCIS, the statute is not
ambiguous or silent on the matter. Congressional intent is clear that such quasi-
judicial functions would remain with EOIR where such functions have been
exercised exclusively since 1983.

Accordingly, DHS, through USCIS, now taking on additional authorities
aimed at processing in aliens faster and getting them full-fledged asylum interview,
in a non-adversarial manner, without the benefit of immigration court or ICE trial
attorney’s input. This is rulemaking run amok as it is contrary to statute, contrary
to long-existing policy, and directly encroaches on the Department of Justice.

Relevant to the border, a notice of proposed rulemaking was published on
February 23, 2023.27 Starting with the name, “Circumvention of Lawful Pathways,”
the proposed role is an ineffective measure and empty gesture. Despite its
perceived enforcement provisions, this rule, if implemented, would allow most
aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter
the U.S. or continue to utilize unlawful mass parole programs to accomplish the
same. As the Biden Administration continues to steadfastly grip to its executive

26 The Immigration Reform, Accountability and Security Enhancement Act of 2002 (S. 2444; 107th Cong.) was
introduced in May of 2002 but was never passed. This language was retained for the Homeland Security Act of
27 Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts
208 and 1208).
order on removing barriers to immigration, this rule, finalized on May 16, 2023 will do exactly that. 20

The rule may be framed as an enforcement tool to limit the number of aliens who will ultimately be able to receive asylum, however we are hard-pressed to find any examples of classes of aliens who will actually be kept out of the process under this rule.

The crux of the rule is the concept that a presumption of asylum ineligibility exists for any alien entering the United States who does not meet certain criteria. Specifically, the proposed rule requires that to be eligible for asylum one of three criteria must be met: (1) the alien must have appropriate documentation; (2) must present at a port of entry with a prescheduled appointment through the CBP ONE App; or (3) must have sought protection in a third country and received a final determination. The last criteria is akin to the Third Country Transit Rule, which likewise largely prohibited asylum eligibility for a non-contiguous alien who did not apply for protection in a country where such processes are available. 20

The similarities to the previous rule end there, however. While this appears to be a strong measure to control migration along the southern border, it becomes apparent that the exceptions swallow the rule. We are left with the question of to whom this rule will actually apply once implemented. Of the three criteria, the one that we presume will most often be utilized is the prescheduled appointments. It is not likely that many aliens will suddenly obtain legitimate documentation and, if they were able to do so, they likely would not be applying for asylum but would be entering on a type of visa. This is an important distinction because credible fear procedures would not apply to an admitted alien (i.e. one that actually has a valid authorization). The third criterion may be used more often than the first but it is unclear to the extent that an alien would avail themselves of protection in Mexico and other nations in Central and South America. Whether they are being smuggled to the United States or make the journey on their own, the lack of resources and familiarity with the law will also make this criterion rarely met.

The rule is clearly encouraging aliens to use the second criterion. A prescheduled appointment through the CBP ONE App is the most available option.
for aliens with access to smart phones or other technology allowing them to contact the system. However, even this criterion is waived if the alien can demonstrate that “it was not possible to access or use the...system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” In essence, everything must align perfectly for this criterion to be the basis for the presumption of ineligibility. Relying on technology is itself a risky proposition as factors such as bugs within the app or lack of available cellular service or a reliable internet connection could all hamper an alien’s ability to successfully schedule an appointment. Additionally, while we do not have statistics on literacy rates of migrants, it would be fairly common to find migrants without a strong grasp of the English language. If language and literacy are included as prerequisites, this will likely include a far larger population of migrants who would overcome the rule’s presumption. Lastly, the catchall of “other or ongoing and serious obstacle” is left undefined in the regulatory text. As asylum officers and immigration judges will be trained on identification of the presumption, leaving a catchall which will seemingly be within the discretion of the adjudicator will allow virtually any reason to pass muster. This will result in the presumption being raised against hardly any alien crossing into the United States.

For those few aliens against whom the presumption will be raised, the rule has fashioned it as a rebuttable presumption. Again, the exceptions and now the rebuttals swallow the rule itself. An alien may rebut the presumption when proving that the alien has a medical emergency, “faces an imminent and extreme threat to life or safety,” or meets the statutory definition of trafficking victims. Of the three, the most concerning is the threat to life or safety. It is well-established that the trek to the United States is dangerous with more migrants killed or kidnapped each year. The dangers of the journey are further exacerbated with the influence of cartels and other criminal organizations that view smuggling migrants as a for-profit business without regard to their safety. From FY17 through FY21, CBP has reported over 1,700 migrant deaths. FY21 had the most in a single year with 568 deaths. Additionally, in that same time period, Border Patrol rescued over 8,400 individuals. FY21 again saw the most rescues in a single year with

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32 Id.
34 Id.
35 Id.
3.423. These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

While the rule claims to disincentivize illegal border crossers, the Department’s provisions have instead created additional incentives to make the perilous journey either as unaccompanied children or with children in tow. In addition to the fact that the NPRM does not apply to unaccompanied children, the Department of Justice rule requires granting asylum despite ineligibility in an effort to preserve family unity. In a relevant portion, the Department of Justice’s regulation states that “[w]here a principal asylum applicant is eligible for withholding...and would be granted asylum but for the presumption...and where an accompanying spouse or child...does not independently qualify for asylum or other protections...the presumption shall be deemed rebutted.” Caselaw has long held that grantees of withholding of removal cannot receive derivative benefits for their spouses and children. This provision seeks to sidestep that issue by granting full asylum status to the principal and family even if the principal alien cannot otherwise rebut the presumption.

Parole Abuse

While the Department claims that a lack of available pathways has made the aforementioned rules necessary, that lack has not stopped the Department from abusing its parole authority. For a section of law meant to be used sparingly and in exceptional circumstances, the Department has relied heavily on its parole powers to permit aliens to enter the counter en masse, many without a notice to appear before an immigration judge. Section 212(d)(5) of the INA authorizes parole of aliens “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...” Additionally, the legislative history of parole authority, cited by the former INS in its initial regulation, makes clear that the

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36 Id.
intent was to exercise the authority in a narrow and restrictive manner. The original rule stated:

The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. H. Rep. No. 1365, 82nd Cong., 2d Sess. at 52 (1952). In 1965, a Congressional committee stated that the parole provisions ‘were designated to authorize the Attorney General to act on an emergent, individual, and isolated situation, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.’ 5 Rep. No. 748, 98th Cong., 1st Sess. at 17 (1965).\(^{10}\)

Regardless of the plain language of the statute and the legislative history, parole has become a favorite tool of the Biden Administration. While first used as an alternative to detention, parole programs have subsequently played a large role in artificially decreasing numbers along the border.

When reviewing the Border Patrol monthly disposition and transfer statistics, it becomes apparent that parole was the path of choice to quickly process and move aliens northward. Border Patrol monthly disposition and transfer statistics for fiscal years 2022 and 2023 demonstrate just how commonplace parole has become. While Border Patrol suggestions that the “processing disposition decision related to each apprehension is made on a case-by-case basis...”\(^{41}\) the raw numbers belie that disclaimer. In fiscal year 2022, parole numbers steadily rose to culminate in over 95,000 paroles granted in September 2022.\(^{42}\) That trend has continued in this fiscal year as Border Patrol recorded over 130,000 paroles in December 2022.\(^{43}\)

More so than individual aliens, the Department has gone farther astray as it has implemented parole programs, contrary to law, for nationals of certain countries. Beginning in October, 2022, the Department announced that it was

\(^{10}\) Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) [emphasis added].


utilizing new pathways to “create a more orderly and safe process for people fleeing the humanitarian and economic crisis in Venezuela.” This was augmented in January, 2023, when the Department announced expanded parole programs for nationals of Nicaragua, Cuba, and Haiti. The program permits nationals of those countries, and their immediate relatives, to seek parole when sponsored by someone with lawful status in the United States. It is worth noting that the sponsor need not be a relative of the beneficiary.

The result of these parole programs was a drop in border numbers and a marked decrease in parole utilized by Border Patrol. This is all smoke and mirrors however as it is supplanting one form of illegal entry for another. This is not to suggest that parole is akin to an illegal entry but a recognition that parole usage in this fashion, is unlawful.

The Legal Immigration Backlog

This committee is well aware of the vast number of pending matters presently before USCIS. As of December 31, 2022, USCIS reported a pending caseload of 8,841,132 matters. While the agency claims to want to reduce this number, actions speak louder than words. It was recently reported that USCIS adjudicators were being shifted from their assigned work in order to support operations along the southwest border.

While the extent of this shift is still relatively unknown, it is clear that any shift will have significant consequences for the adjudication of affirmative asylum cases as well as applications and petitions for immigration benefits. It is also important to remember that the latter group pays the fees that keep USCIS operational. Essentially, USCIS is taking resources away from the adjudications that fund the agency and thereby applicants for benefits are primarily funding, not their own adjudications, but the adjudication of credible fear matters along the border.

Conclusion

The Department of Homeland Security has taken many measures in the past two and a half years aimed at addressing the border crisis however it appears that no one thought to simply enforce the law as written. In an effort to remove barriers

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and to create a subjectively orderly system, the Department has conflated law and policy and ensured that when the two were in conflict, that policy won the day. The memos that undermine grounds of inadmissibility and removability, the rules that undermine congressional action and established authorities, and the parole programs that are simply incongruous with the law paint a clear picture. The Department has, through its own actions, created the worst border crisis in American history. A return to the rule of law is the only cure at this point and it is incumbent upon Congress to use its oversight authority, in addition to its legislative authority, to repair the damage done by the Department.
Mr. McClintock. Great. Thank you for your testimony. Finally, Mr. Bradbury.

STATEMENT OF STEVE BRADBURY

Mr. Bradbury. Thank you.

Chair McClintock, Ranking Member Jayapal, Mr. Nadler, and distinguished Members of the Committee. Far from faithfully carrying out its enforcement duties, the Biden Administration, with Secretary Mayorkis at the point, is flagrantly violating numerous provisions of our immigration laws, laws critical to the safety and security of the American people.

Here are some specific examples of the Secretary’s violations of law. The use of parole to release tens of thousands of inadmissible aliens en masse into the U.S. each month violates INA’s Section 212’s express restrictions on parole, and it unlawfully circumvents the established procedures for refugee admissions under Section 207.

Further, because of lax vetting at our ports and an overstretched border force, there’s no way to know how many of the millions allowed into the U.S. each month violate INA’s express restrictions on parole, and it unlawfully circumvents the established procedures for refugee admissions under Section 207.

Secretary Mayorkis has also ignored the mandatory detention and removal requirements of INA Section 235, and his directions to ICE not to take enforcement action against most deportable aliens defies Section 237. Under his watch, deportations have fallen to historic lows, while illegal immigration is at a record high.

In recent months, DHS has shifted to a new process equally unlawful of pre-registering aliens outside the U.S. for fast-track entry and release using the CBP One mobile app. This CBP One escort service is a shell game. It’s a device for funneling the flow of illegal immigration through our ports of entry instead of between them. Meanwhile, unlawful entry overall remains unabated.

The claim that illegal border crossings have fallen 70 percent is a manipulated, distorted figure. It’s a comparison to the highest week in the history of our country for illegal crossings, the week before the Title 41 program ended, when 10,000 illegals were encountered at the border. That’s the comparison that gets to the 70-percent figure. It’s false.

In sum, the Secretary is asserting power to overturn the laws Congress has enacted and replace them with new immigration pathways, as he calls them, of his own design, entirely new visa-like pipelines through which is streaming into our country an ever-rising flood of illegal immigration. This is a vast usurpation of law and of Congressional power by the Executive. These policies cannot be justified as an exercise of enforcement discretion.

Secretary Mayorkis’ own actions have caused the crisis, and he’s refused to employ the full scope of resources available to him, shuttering detention facilities, ending cooperation with border States, and abandoning the Remain in Mexico program. Not to be overlooked, he has also flouted his statutory duty as Secretary to protect the most vulnerable of migrant children from the scourge of human trafficking and abuse.
Together these violations of law have produced a colossal humanitarian disaster and a catastrophe for America. The victims include a sea of vulnerable migrants caught up in the horrendous grip of the cartels, the exploited children who are enslaved and abused within our own neighborhoods, and the everyday Americans across our land whose communities are ravaged by violence and crime, strained to the breaking point by unforeseen economic burdens, and infested with fentanyl. It’s a grim picture for sure but one the American people must see.

We should all be grateful to you, Mr. Chair, for shining a bright light on these violations of law.

Thank you.

[The prepared statement of Mr. Bradbury follows:]
Prepared Statement

For Hearing Entitled:

“The Border Crisis: Is the Law Being Faithfully Executed?”

Before the
Subcommittee on Immigration Integrity, Security, and Enforcement
of the
Committee on the Judiciary
U.S. House of Representatives

June 7, 2023

Steven G. Bradbury
Distinguished Fellow
The Heritage Foundation
Chairman McClintock, Ranking Member Jayapal, and distinguished Members of the Committee, my name is Steve Bradbury, and I am a Distinguished Fellow at The Heritage Foundation.

Before joining Heritage, I served in the Trump administration as the Senate-confirmed General Counsel of the U.S. Department of Transportation, as the Acting Deputy Secretary of Transportation, and briefly as the Acting Secretary of Transportation.

Previously, during the administration of George W. Bush, I served as the Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice. In my position at the Justice Department, I advised the president and heads of executive departments on the requirements of federal law, including laws relating to immigration and homeland security.

The views I express in this statement and in my testimony before the Committee are my own and should not be construed as representing any official position of The Heritage Foundation.

I am grateful to the Committee for the opportunity to speak with you today about the important legal issues raised by the border security and immigration enforcement policies of the Biden administration.

**Introduction**

Far from faithfully executing the laws they are charged with enforcing, Secretary Alejandro Mayorkas and the Biden administration have repeatedly violated and persist in violating numerous provisions of law central to the operation of our nation’s immigration system and critical to the safety and security of the American people. No adverse court decision seems able to put an effective stop to these violations.

Through their ultra vires policies, Secretary Mayorkas and the president have arrogated to themselves the power to overturn the laws enacted by Congress and replace them with new and wholly unauthorized immigration “pathways” through which is streaming into our country an ever-rising flood of illegal immigration. Together, these violations have produced a colossal humanitarian disaster at our southern border and a generational catastrophe for communities across America.
Not to be overlooked, on top of his sweeping violations of the immigration laws, Secretary Mayorkas has also flouted his statutory duty to protect the most vulnerable of migrant children from the scourge of human trafficking and exploitation.

**The Available Pathways and Requirements for Lawful Immigration Are Defined by Congress, Not by the Executive Branch.**

Under Article I, section 8 of our Constitution, it is for Congress, not the executive branch, to establish the legal requirements governing immigration. Through enactment of the immigration laws, primarily the Immigration and Nationality Act, or INA, as amended by later enactments, Congress has established and defined the available pathways for lawful immigration. The executive branch does not have authority to create new pathways for foreign migrants to enter the U.S. that have not been expressly authorized by Congress. Rather, it is the duty of the executive faithfully to enforce the requirements of the immigration laws enacted by Congress.¹

Congress has created various visa programs and defined other legal requirements for non-U.S. nationals to be allowed entry into the United States. Aliens seeking to enter the U.S. must have a visa or other proper documentation and must present themselves at a designated port of entry and be screened by officers of the Customs and Border Protection service, or CBP, of the Department of Homeland Security (DHS). Under sections 212 and 235 of the INA, if the alien does not have proper immigration documents or a legal basis for entry or if the alien attempts to cross the border illegally between ports of entry, the alien is inadmissible and must be turned away or removed from the United States.²

Under INA section 212(a), certain categories of aliens, including minors, who pose risks to the safety of Americans or to the security of the United States are inadmissible and, subject to very narrowly circumscribed waiver authorities, may not be granted entry even if they have proper immigration documents or a credible basis to claim asylum. These include, among others, persons with communicable diseases, violent criminals, gang members, repeat offenders, certain other categories of criminals, suspected terrorists, drug traffickers, smugglers, human traffickers, war

¹ See *Kleinman v. Mandel*, 408 U.S. 753, 766 (1972) (holding that Congress—not the president or executive branch officials—has the “complete and absolute power” over the subject of immigration and “plenary power” over the admission and exclusion of aliens).

criminals, those who have committed immigration fraud or previously violated the immigration laws, and those affiliated with a Communist or other totalitarian party.3

Regarding asylum, under INA section 235(b)(1), any alien at the border who seeks to enter the U.S. by applying for asylum or by otherwise claiming a fear of persecution in his home country must be interviewed by an asylum officer, and if the officer finds that the alien lacks a credible fear of persecution within the meaning of the INA, the alien must be removed from the United States without further hearing, unless the alien appeals the credible-fear determination to an immigration judge.4 Pending resolution of the alien’s asylum proceeding, the alien is subject to “mandatory detention”—specifically, section 235(b)(1)(B) declares that the alien “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”5

If the alien claiming asylum has arrived by land from a foreign territory contiguous to the U.S., such as Mexico, the Secretary “may return the alien to that territory” pending the resolution of the alien’s asylum proceeding.6 This provision is the source of authority for the Migrant Protection Protocols (MPP), or so-called “Remain in Mexico Program,” put in place by the Trump administration and now largely abandoned by the Biden administration.

In contrast, aliens who are not already within the United States or physically at the U.S. border are not eligible to claim asylum status as a basis for entering the U.S. Rather, non-U.S. nationals who are outside the United States and who wish to enter based on claims that they face a fear of persecution in their home countries must apply for admission as refugees. In other words, asylum applicants and refugee applicants must both prove a similar fear of persecution, but the procedures available to each are different.

To be admitted to the U.S. as a refugee, the alien who is outside the U.S. must satisfy the established protocols for refugee admissions authorized by Congress under section 207 of the INA.7 The U.S. Refugee Admissions Program (USRAP) is jointly administered by the Department of State and DHS, which work together with

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7 See 8 U.S.C. § 1157(c).
the United Nations High Commissioner for Refugees, at locations around the world to identify, interview, and adjudicate applications for refugee protection. Under the USRAP protocols, aliens applying for refugee protection are only allowed to travel to the U.S. and enter as refugees after they have been vetted by several law enforcement and intelligence agencies and DHS has granted their refugee applications. Generally, refugee admissions are subject to annual numerical limits, and, in addition to establishing the requisite fear of persecution, refugee applicants typically must show that they cannot secure safe haven in a third country.

Much has been made of the parole authority available to the Secretary of Homeland Security. Under INA section 212(d)(5)(A), the Secretary is given a very narrow authority to “parole” individual aliens into the United States for temporary periods but “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” The recognized grounds for parole include, for example, situations where a particular alien needs to come into the United States temporarily to receive critical medical care or is needed to testify in the U.S. as a witness in an important criminal trial. These are situations, typically, where the alien parolee does not have time to obtain a visa.

Section 212(d)(5)(B), moreover, expressly prohibits the Secretary from paroling into the U.S. any alien who is a refugee—that is, who claims a right to enter the U.S. based on a fear of persecution—unless the Secretary determines that “compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee.”

Finally, for aliens found within the interior of the country, INA section 237 governs removal and deportation. Section 237(a)(1) provides that any alien who is present in the U.S. in violation of the immigration laws or any alien found to have committed several types of crimes, terrorist activity, drug or human trafficking, or other misconduct “is deportable.” Immigration and Customs Enforcement, or ICE, is the component of DHS responsible for arresting such aliens and initiating removal or deportation proceedings. Under section 236, ICE is required to take certain cate-

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gories of deportable aliens into custody, including after they have served any sentence of incarceration, and is prohibited from releasing such aliens pending removal or deportation proceedings except in very narrow circumstances.12


Acting in pursuit of the President’s immigration policy agenda, Homeland Security Secretary Alejandro Mayorkas has purposefully violated and continues to violate every one of the INA provisions described above, including by purporting to create expansive new “pathways” for immigration that are illegal because they have never been approved by Congress and conflict with the express terms of the statutes Congress has enacted.

Violations of INA Section 212’s Restrictions on the Scope and Use of Parole

Let’s take parole first. Under Secretary Mayorkas’s supervision and at his direction, DHS has released and continues to release tens of thousands of aliens every month into the United States through mass parole in violation of the express requirements of INA section 212(d)(5)(A).

Among other questionable uses of categorical parole, Secretary Mayorkas created “Operation Allies Welcome” as a means of paroling 73,000 Afghan evacuees directly into the U.S. in the wake of the Biden administration’s chaotic abandonment of Afghanistan, rather than relocating them to a safe third country where they could apply for refugee protection through the USRAP process.13 Even if there were urgent humanitarian reasons and significant public benefits associated with the mass parole of Afghan evacuees, the Afghan parole program was not administered in a manner that would advance those interests. The DHS Inspector General reported that the Afghans were not adequately screened,14 despite Secretary Mayorkas’s contrary assurances to Congress and the American public, and that DHS failed to track Afghan parolees who were allowed to walk away from the military bases where they

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12 See 8 U.S.C. § 1226(c).
were initially housed. The Inspector General further reported that DHS did not attempt to locate all Afghans who left the bases to verify their compliance with parole conditions.

Following the flawed model used for the Afghan evacuees, Secretary Mayorkas created five additional nationality-based mass-parole programs to bring other large populations of aliens into the U.S. First, in April 2022, DHS announced the “Uniting for Ukraine” parole program, with a commitment to allow 100,000 Ukrainians entry into the U.S. Then, in October 2022, DHS created a “Parole Process for Venezuelans” for up to 24,000 beneficiaries, modeled on the Uniting for Ukraine parole process. Most recently, in January 2023, DHS established mass parole programs for Cubans, Haitians, and Nicaraguans, which, combined with the program for Venezuelans, was intended to bring to the U.S. up to 30,000 aliens per month from the four countries. Even apart from the January announcement, CBP reported that it was already paroling many tens of thousands of aliens into the U.S. each month (designated as “humanitarian release”), including more than 140,000 in December 2022 alone.

Secretary Mayorkas does not have authority to create what are effectively new visa programs for hundreds of thousands of aliens annually from Cuba, Haiti, Nicaragua, Venezuela, and elsewhere. Only Congress has such authority. These parole programs violate the law because they fail each of section 212(d)(5)(A)”s three required limiting factors: The parole decisions are not made for individual aliens on a case-by-case basis, they involve no real assessment of humanitarian need, let alone an urgent need, and they advance no significant public benefit. The purposes they

16 Ibid.
serve are inconsistent with section 212: Mayorkas created these new streamlined channels, unauthorized by Congress, for the purpose of quickly processing vastly increased numbers of inadmissible aliens into the U.S. in furtherance of the Biden administration’s policy goals.

In the course of an opinion addressing termination of the Remain in Mexico Program (a decision reversed on other grounds by the Supreme Court), the U.S. Court of Appeals for the Fifth Circuit condemned Secretary Mayorkas’s parole policies in December 2021, calling them “the opposite of case-by-case decision-making,” and concluding that they “ignore[e] the limitations Congress imposed on the parole power” and are best described as “misapplication, suspension of the INA, or both.”

Notwithstanding the Fifth Circuit’s strong condemnation, Secretary Mayorkas has continued to rely upon and, indeed, to expand his unlawful use of mass parole.

Texas and 20 other states have now filed suit challenging DHS’s mass parole programs for Haitians, Cubans, Venezuelans, and Nicaraguans. The 21 states are seeking to enjoin these programs as a violation of law, and the case is currently scheduled for a bench trial in federal district court at the end of the summer.

Violation of INA Section 212’s Restrictions on Parole of Refugees

Secretary Mayorkas is also mass-paroling aliens he himself characterizes as refugees or asylum seekers, in direct violation of section 212(d)(5)(B)’s prohibition on the parole of any refugee into the U.S. unless there are “compelling reasons” requiring that “that particular alien” be admitted by parole rather than going through the USRAP process for refugee admissions under INA section 207—a process Secretary Mayorkas is deliberately circumventing.

By treating the masses of aliens who illegally enter the U.S. as de facto refugees—calling them “asylum seekers” and “people fleeing humanitarian

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22 Ibid., pp. 105-06 (emphasis in original).
crises”\textsuperscript{24}—but without taking the steps necessary to establish that they actually qualify as refugees within the requirements of the INA, Secretary Mayorkas created the humanitarian disaster we have seen unfold at our southern border over the past two-plus years.

Publicly telegraphing that almost any alien coming to our border, particularly unaccompanied children,\textsuperscript{25} would be welcomed into the U.S. if they asserted a fear of returning to their home countries, he personally encouraged millions of men, women, and children, including hundreds of thousands of unaccompanied minors, to make the dangerous trek to and through Mexico, putting themselves at the mercy of drug cartels, smugglers, and human traffickers.

Just as bad, he has telegraphed to millions of aliens who may consider making this trek in the future that they can enter the U.S. “lawfully” if they claim a fear of returning to their home country, thereby encouraging asylum fraud.\textsuperscript{26} As the Secretary well knows, the overwhelming majority of the millions of illegal aliens encountered at our southern border due to the Biden administration’s policies\textsuperscript{27} have come to the U.S. for economic reasons, not from any fear of persecution.\textsuperscript{28}

Other countries have already offered and provided some of these same aliens safe haven, making them unlikely to qualify as refugees even if they had a true fear of persecution. For example, Ukrainians have been offered safe resettlement and

\textsuperscript{24} Secretary Alejandro Mayorkas, Remarks, “Secretary Mayorkas Delivers Remarks on DHS’s Continued Preparation for the End of Title 42 and Announcement of New Border Enforcement Measures and Additional Safe and Orderly Processes,” January 5, 2023, https://www.dhs.gov/news/2023/01/05/secretary-mayorkas-delivers-remarks-dhss-continued-preparation-end-title-42-and


\textsuperscript{26} Secretary Mayorkas stated that these parole programs “create additional safe and orderly processes for people fleeing humanitarian crises to lawfully come to the United States.” \textit{Ibid}


employment authorization in eastern European countries; 29 Chile and Brazil provided resettlement and documentation to Haitians for years. 30 Yet many Ukrainians bypassed eastern Europe for the U.S., and other aliens discarded their South and Central American resettlement documents after crossing our border to claim a fear of returning to their home countries, knowing that doing so was the way to enter and remain in the U.S. under Secretary Mayorkas’s policies.

And some of these parolees have undoubtedly come for malign and illicit reasons, including drug trafficking for the powerful Mexican and Latin drug cartels, human trafficking, or terrorist purposes, which would render them inadmissible regardless of any claim of persecution.

In short, an overwhelming percentage of the aliens who have entered the U.S. under Mayorkas’s parole programs neither qualify as refugees nor meet the strict standards for case-by-case parole into the U.S.

In deliberately paroling every month tens of thousands of illegal and inadmissible aliens he calls asylum seekers, Secretary Mayorkas is flagrantly violating section 212(d)(5)(B), and all decisions and actions taken to advance these mass-parole programs are unlawful.

Other Violations of INA Section 212

Because he is not conducting adequate individualized vetting of the huge volume of mass-released aliens, Secretary Mayorkas is also violating the provisions of INA section 212(a) that declare various categories of dangerous aliens “inadmissible.” There is simply no way of knowing how many of the millions of aliens Mayorkas has released into the U.S. (or of the estimated 2 million “got-aways” who have illegally crossed the southern border and evaded Border Patrol during Mayorkas’s tenure 31) fall into these categories of dangerous aliens that Congress has prohibited from entering the U.S.

For example, Secretary Mayorkas has repeatedly stated that unaccompanied alien minors will not be turned back from our border.32 These statements have encouraged historic numbers of illegal alien minors to cross unaccompanied,33 including teen-aged MS-13 gang members, who are then released into the U.S. One such 17-year-old gang member allowed into the country under Mayorkas’s policies was arrested for strangling 20-year-old Kayla Hamilton to death in July 2022, only months after being released into the U.S.34

In fiscal year (FY) 2022, the U.S. Border Patrol encountered 98 aliens on the Terrorist Screening Dataset (TSDS) between the ports of entry.35 In just the first seven months of FY2023, the Border Patrol has encountered 96 such aliens on the southern border and 2 on the northern border.36 In FY 2021, the Border Patrol encountered 16 aliens on the TSDS.37 By comparison, the Border Patrol had encountered only 3 in FY 2020.38 Mayorkas must know that his policies have allowed some number of suspected terrorists to come into America’s communities.

Similarly, in FY 2022, CBP arrested 40,359 individuals with criminal convictions or who were wanted by law enforcement,39 and in FY 2021, CBP made 28,213 such arrests.40 By comparison, CBP arrested 18,609 criminal aliens in FY

36 Ibid.
37 Ibid.
38 Ibid.
40 Ibid.
2020.\textsuperscript{41} Mayorkas knows or should know that he is allowing an increasing number of dangerous criminals to pass over the border and infiltrate cities and towns across our nation, putting America’s families at risk.

\textit{Violations of INA Section 235}

Secretary Mayorkas’s policy of treating illegal aliens encountered at our southern border as asylum seekers, while knowing most are not eligible for asylum under the law, and his policy of promptly releasing these same aliens into the U.S. without restraint\textsuperscript{42} defy the mandatory detention and removal requirements of section 235 and treat the statute with contempt.

The results of these policies are predictable. In just his first year in office, Secretary Mayorkas authorized the release of at least 47,000\textsuperscript{43} known illegal aliens who were required to be detained under the INA, and he did so with certain knowledge that not all detention resources were being used and that those released aliens would disappear into the United States and would not likely be removed. Objective observers can only conclude that that was his intention. As of early this year, CBP reported that it was paroling tens of thousands of aliens with alternatives to detention (ATD) each month, including over 95,000 in September 2022.\textsuperscript{44}

DHS itself has reported that illegal aliens who are continuously detained by DHS are highly likely (97\%) to be successfully removed from the U.S.,\textsuperscript{45} while the

\textsuperscript{41} Ibid.


vast majority (82%) of those who are not removed directly by CBP or continuously detained by ICE end up remaining in the U.S. for years.\textsuperscript{46} DHS has further reported that illegal aliens who are not removed within 12 months of being encountered are “rarely repatriated after that.”\textsuperscript{47}

In March of this year, in a suit brought by the state of Florida, the U.S. District Court for the Northern District of Florida invalidated DHS’s “Parole Plus Alternatives to Detention” policy, concluding that it was an unlawful attempt to evade the mandatory detention requirements of section 235.\textsuperscript{48}

In its opinion, the district court pointed out that even the witnesses for the Biden administration had acknowledged that “there is nothing inherently inhumane or cruel about detaining aliens pending completion of their immigration proceedings,” and the court found that detention “is the surest way”—in many cases, the only way—to guarantee that aliens “will not abscond” before the proceedings are finished.\textsuperscript{49}

The court determined that the immigration policies pursued by the Biden administration, including the mass release of aliens, “were akin to posting a flashing ‘Come In, We’re Open’ sign on the southern border.”\textsuperscript{50} This was an “appropriate analogy,” the court stated, “not only because it is a fair characterization of what the administration is doing, but also because DHS had argued at trial that it ‘could not simply hang a ‘Closed’ sign on the border’”—a claim the court found “disingenuous,” since federal law “specifically authorizes the President to ‘suspend the entry of all aliens’ whenever he finds that their entry would be ‘detrimental to the interests of the United States.’”\textsuperscript{51}

According to the court, the evidence showed that the “unprecedented ‘surge’ of aliens that started arriving … almost immediately after President Biden took office and that has continued unabated over the past two years is a predictable

\textsuperscript{46} Fiscal Year 2021 Enforcement Lifecycle Report, p. 3.
\textsuperscript{47} \textit{Ibid.}
\textsuperscript{49} \textit{Ibid.}, p. 8.
\textsuperscript{50} \textit{Ibid.}, p. 8.
\textsuperscript{51} \textit{Ibid.}, p. 18, footnote 12.
consequence of these actions.”52 As the chief of the Border Patrol had testified at trial, such surges in immigration occur “when there are no consequences” to illegal entry and when aliens know “they will be released into the country.”53 In this way, the court found, the Biden administration’s policies themselves had “incentivized” the mass influx of illegal migration to the U.S.54

DHS urged that the huge increase in the number of aliens being released was “attributable to something other than a change in policy (such as the post-pandemic increase in migration),” but the court found that claim “simply not credible” and “contrary to the weight of the evidence.”55

DHS also claimed that it was forced to release huge numbers of aliens because of a lack of sufficient detention capacity. This argument echoed Secretary Mayorkas’s own often-repeated refrain that our nation’s immigration system is “broken” because our laws, including section 235’s mandatory detention requirement, are outdated and were not designed to handle today’s immigration crisis. On that basis, Mayorkas and the Biden administration have asserted the ultra vires power to rewrite those laws.

But the district court in Florida found that, in contrast to the Trump administration, which had submitted budget requests for increased detention space, the Biden administration has been steadily closing detention facilities and reducing the appropriations requested for detention facilities. The court concluded that it was hard to take the claim of impossibility seriously when DHS had “elected not to use one of the tools provided by Congress” and had “continued to ask for less detention capacity.” As the court reasoned:

“The fact that DHS must make those ‘tough decisions’ does not mean that it has free rein to adopt policies that contravene the clear mandates in the INA or create ‘processing pathways’ that contort statutory language to effectuate its preferred policy of ‘alternatives to detention’ over actual detention.”56

52 Ibid., pp. 18-19.
53 Ibid., p. 19.
54 Ibid., p. 21.
55 Ibid., p. 38.
56 Ibid., p. 12.
DHS also assured the court that “it is screening arriving aliens ... to determine if they are a public safety threat,” but the court found that “the more persuasive evidence establishes that DHS cannot reliably make that determination.” “DHS has no way to determine if an alien has a criminal history in his home country,” the court found, “unless that country reports the information to the U.S. government or the alien self-reports.” So DHS was “mainly only screening aliens at the border to determine if they have previously committed a crime in the United States”—a question of little to no value, since “many of these aliens are coming to the United States for the first time.”57

Following the court’s order, DHS attempted to put a variation of the challenged policy, relabeled “Parole with Conditions,” back into place. Florida quickly challenged it, and the district court entered an injunction blocking the replacement policy based on the reasoning of the court’s earlier decision.58 DHS has now appealed both rulings to the Eleventh Circuit.

Creating Unlawful Immigration Pathways Using the CBP One Mobile App

In recent months, Secretary Mayorkas has shifted to an even more unlawful process of pre-registering aliens outside the U.S. for mass entry and release using the “CBP One” mobile app. Through this app, DHS has orchestrated the pre-registration of tens of thousands of these aliens, including with the assistance of non-governmental organizations (NGOs) and foreign governments.59 The aliens who have pre-registered using the app are then left to find their way to a U.S. point of entry, including along the southern border, in many cases presumably still with the assistance of drug cartels or smugglers.

Contrary to the Secretary’s misleading rhetoric, this new process is not an “enforcement measure.”60 Instead, it furthers and facilitates Mayorkas’s existing policies of non-enforcement. While it has allowed Mayorkas and the White House to claim an improvement in the crisis at the border and a lessening of the strain on Border Patrol agents between the ports, as a legal matter, the CBP One process has

57 Ibid., p. 35 (emphasis in original).
only institutionalized DHS’s violations of law by creating a new channel for attracting and enabling an ever-increasing stream of illegal immigration in violation of INA sections 212 and 235, which now must be handled by CBP inspectors at ports of entry.

Through this channel, tens of thousands of aliens from all over the world continue to flow into the U.S. each month without the procedures and individualized assessments required by law—albeit now they are coming via official ports of entry. And they continue to be released en masse into the interior, either by parole or as asylum applicants.61 Once released, most are still being transported surreptitiously by DHS or through the agency of NGOs to every part of our nation, with no consideration for the effects this dispersion is having on the safety and resources of local communities.

The illegal flow of aliens into the U.S. remains unabated and, in fact, is increasing,62 while the appearance of a more orderly processing system gives Mayorkas a greater ability to conceal his actions and the effect of his policies from the American people.63

It is clear that DHS will be applying this mass-release, pre-registration process to many more aliens than the four national groups (Cubans, Haitians, Nicaraguans, and Venezuelans) cited in the Department’s January 25 press release.64

In proposing its recent rule misleadingly entitled “Circumvention of Lawful Pathways,”65 DHS announced that it intended to apply a rebuttable presumption that an alien is ineligible for asylum in the U.S. if the alien had traveled through a third

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country on his way to the U.S. without seeking asylum protection unless one of several exceptions applies. Among the exceptions: the alien used the CBP One app to schedule an appointment for processing at a port of entry or the alien was unable to access the CBP One app because the app was not functioning properly or the alien had no mobile phone.

This rulemaking announcement confirms that DHS plans to rely on the CBP One channel as the main pipeline (or, as Mayorkas likes to say, “pathway”) through which it will unlawfully funnel into the U.S. the mass flow of aliens of any nationality that Mayorkas has described as “asylum seekers,” in addition to parolees.

For this reason, on May 23, 2023, the state of Texas filed a new lawsuit aimed at challenging the legality of DHS’s use of the CBP One app by challenging the “Circumvention of Lawful Pathways” rulemaking under the Administrative Procedure Act.\(^{60}\) Similarly, 18 other states have filed a parallel suit in the U.S. District Court for the District of North Dakota, also challenging the Circumvention rule because of its key reliance on parole and the CBP One app—the so-called “orderly pathways” of immigration that DHS claimed in proposing the rule “are authorized separate from this rulemaking.”\(^{67}\)

The indirect nature of the Texas and Indiana challenges to the CBP One process and the reliance on parole demonstrate how DHS under Secretary Mayorkas has persistently attempted to evade legal challenges to its immigration policies by not issuing those policies as formal agency actions that would be subject to immediate review in court. It is easy to see why: almost every time Mayorkas’s policies have been addressed in a court challenge, they have been rejected or condemned as unlawful. But through all his various judicial slap downs, Secretary Mayorkas remains a man on a mission, ever pushing forward the Biden administration’s open-border policies.

**Violations of INA Section 237**

Secretary Mayorkas has also restricted ICE personnel from initiating removal or deportation proceedings against most deportable aliens who are in the U.S. He

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issued a directive, the “Mayorkas Memorandum,” ostensibly based on “prosecutorial discretion,” taking the position that the fact that an alien is “removable” under the immigration laws “should not alone be the basis of an enforcement action against” the alien.\textsuperscript{68} And he authorized and encouraged ICE attorneys to misuse prosecutorial discretion to dismiss or administratively close cases to avoid pursuing deportations and removals.\textsuperscript{69} These actions have contradicted the plain terms of INA section 237(a)(1).

Mayorkas’s enforcement (or, rather, non-enforcement) directives had the intended effect: During Fiscal Year 2021, ICE carried out only 59,000 deportations,\textsuperscript{70} the lowest total since 1995, even though the number of illegal aliens apprehended reached high in FY 2021.

The U.S. District Court for the Southern District of Texas invalidated the Mayorkas Memorandum in relevant part in June 2022,\textsuperscript{71} but Mayorkas later replaced it with a new ICE “prosecutorial discretion” directive\textsuperscript{72} that appears, based on deportation numbers, to achieve much the same result, allowing most removable aliens to remain indefinitely in the U.S.

While the number of deportations in FY 2022 rose to 72,177 following the adverse court ruling,\textsuperscript{73} that number was still historically low. In FY 2020, for example, ICE deported 185,884 aliens, itself an unusually low number because of the COVID-19 pandemic.\textsuperscript{74} Despite Mayorkas’s claim that he prioritizes DHS

\textsuperscript{68} Mayorkas Memorandum, September 30, 2021.
\textsuperscript{71} Texas v. United States, No. 6:21-cv-0016 (S.D. Tex. 2022).
resources for the removal of the most serious criminal offenders, the number of removals of convicted felons dropped under his tenure from 36,000 in FY 2020 to 27,000 in FY 2021, and his law enforcement policies resulted in a 71% decline in removals of deportable aliens who came to ICE’s attention as a result of a local criminal arrest.

Secretary Mayorkas has championed all of these results publicly, touting that his policies have “fundamentally changed” interior immigration enforcement. Indeed, despite the court order vacating his underlying enforcement memorandum, Mayorkas has continued to encourage ICE attorneys to misuse prosecutorial discretion rather than prosecute cases, thereby ignoring Congress’s will in section 237 and the intent of the court order.

**De Facto Suspensions of the Laws**

Through these various policies, President Biden and Secretary Mayorkas have, in effect, arrogated to themselves a sweeping power to suspend key provisions of the immigration laws they are entrusted with faithfully enforcing. There is no justification for the Biden administration’s lawlessness.

The Department of Justice has tried to defend Mayorkas’s policies against challenge in court by arguing that he is acting within the scope of his enforcement discretion because of the extraordinary volume of illegal aliens attempting to enter the U.S., the humanitarian issues presented, and the Secretary’s need to allocate and manage limited resources in response. But, as the U.S. District Court for the Northern District of Florida held, these arguments are unavailing.

It is Secretary Mayorkas’s own actions that have attracted the record high number of inadmissible and deportable aliens to our border and that have enabled and facilitated the dispersion of this wave of illegal aliens into and throughout the U.S. Furthermore, he has closed down detention facilities and stopped cooperating with border states, thus making no effort to use the full scope of enforcement resources available to him. And, of course, the Biden administration’s decisions to

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76 Ibid.

terminate the Remain in Mexico Program and to stop construction on the southern border wall have contributed greatly to the huge volume of asylum seekers who are subject to mandatory detention under INA section 235.

In requiring executive officers to carry out their legal duties “faithfully,” our Founders rejected any notion that the president or the heads of executive departments like Secretary Mayorkas could ever claim such power to suspend the laws they are responsible for enforcing when those laws are perfectly constitutional.

**Violation of INA Section 103**

Secretary Mayorkas has also acted in contravention of section 103(g) of the INA, which states:

“The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of [the Homeland Security Act].”

Since before enactment of the Homeland Security Act in 2002, the Executive Office for Immigration Review within the Department of Justice has been the agency with jurisdiction to review asylum officers’ findings of credible fear. The Homeland Security Act retained that jurisdictional arrangement. Notwithstanding the clear requirements of section 103, Mayorkas approved the promulgation of an interim final rule asserting asylum officer jurisdiction over asylum officer’s findings of credible fear, removing immigration judges, ICE attorneys, and the adversarial process from credible fear asylum cases. In the interim final rule, Mayorkas generally adopted the discussion in his notice of proposed rulemaking, where he

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used his own policy-created border crisis and surge of asylum cases to justify a need to “streamline” the credible fear asylum process.\textsuperscript{80}

Without an adversarial process, the predictable outcome of this statutory and jurisdictional violation will be increased grants of asylum by DHS, which will encourage even more illegal aliens to submit fraudulent asylum claims.

**Secretary Mayorkas Has Violated Section 235 of the Trafficking Victims Protection Reauthorization Act of 2008.**

Finally, it is no stretch to conclude that Secretary Mayorkas has acted in contravention of section 235 (entitled “Enhancing Efforts to Combat the Trafficking of Children”) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (the TVPRA).\textsuperscript{81} Among other things, that provision commands the Secretary of Homeland Security, along with the Secretary of Health and Human Services (HHS), the Attorney General, and the Secretary of State, to “establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.”\textsuperscript{82}

Every time a child who has been brought into the country under his lax enforcement policies has become the victim of abuse and exploitation by sex traffickers or other criminals, Mayorkas has failed faithfully to carry out his obligations under the TVPRA.\textsuperscript{83}

Although he likes to label his policies “humane,” Mayorkas well knows (or has willfully blinded himself to the fact) that these policies have enticed an uncontrolled stream of illegal aliens to cross into the U.S., including a record number of unaccompanied children. In FY 2021, CBP encountered approximately 147,000

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unaccompanied children, and in FY 2022, more than 152,000. By comparison, CBP encountered just over 33,000 in FY 2020.\footnote{86}

It appears evident that there has been insufficient care exercised by DHS and HHS in the handling and placement of migrant children and little or no adequate follow up to ensure that those children who have been granted entry and placed with guardians in the U.S. are not becoming the victims of abuse in violation of the TVPRA. Quite distressingly, there is a growing body of evidence suggesting that many are.\footnote{87}

One whistleblower from HHS recently testified before this Committee that tens of thousands of migrant children “are being trafficked through a sophisticated network” that starts in their home countries and continues when they are smuggled to a DHS port of entry and then delivered by the Biden administration to sponsors in the U.S.—some of whom “are criminals and traffickers and members of Transnational Criminal Organizations” who “view children as commodities and assets to be used for earning income,” which is “why we are witnessing an explosion of labor trafficking.”\footnote{88} She concluded that the U.S. government seems to have “become the middleman in a large scale, multi-billion-dollar, child trafficking operation run by bad actors seeking to profit off the lives of children.”\footnote{89}

Regrettably, Secretary Mayorkas is only making this horrible problem worse. Under his leadership, CBP has now ended the practice, introduced by the Trump administration, of conducting DNA testing of migrant families at the border to

\footnote{85 Ibid.}
\footnote{86 Ibid.}
\footnote{89 Ibid.}
identify instances of family fraud. Without this testing, DHS will inevitably fail to catch cases—all too common—where child traffickers have paid or forced adult migrants to smuggle an unrelated child into the U.S. for abuse and exploitation.

**Conclusion**

The long string of clear violations of law laid out above add up to something far more egregious than a mere zealous effort to push the bounds of statutory discretion. Rather, the Biden administration, with Secretary Mayorkas at the point, is obviously committed to a much vaster and more activist enterprise.

They are working every switch and lever to explode the established controls on immigration enacted by Congress and to outrun the latest judicial decree. The purpose is to construct all-new channels of their own design (visa-like “pathways”), crafted to achieve the maximum unrestrained inflow of extra-legal immigration for the duration of the president’s term in office. It is nothing short of a usurpation of law and congressional power by the executive.

And there is no true humanitarian objective in these policies. The victims of the enterprise include a sea of vulnerable migrants caught up in the horrendous realities of human chaos and exploitation under the grip of the cartels, the migrant children who are enslaved and abused within our own neighborhoods, and the untold cost on the everyday citizens of America whose communities are ravaged by violence and crime, strained by unforeseen economic burdens, and infested with fentanyl.

The picture is grim and disturbing, but I want to thank you, Mr. Chairman, for shining a bright light on these issues.

That concludes my statement, and I am happy to respond to questions from the Committee.

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Mr. MCCLINTOCK. Thank you.
We'll now proceed to questions from the Members.
We'll begin under the five-minute rule with Mr. Biggs.
Mr. BIGGS. Thank you, Mr. Chair.
I have to go fast because I think there's just so much that Sec-
retary Mayorkis is responsible for and culpable for.
So, I will start with you, Mr. Bradbury. At the direction of Sec-
retary Mayorkis, DHS has released and continues to release tens
of thousands of aliens every month into the U.S. through mass pa-
role and now categorical parole.
Is this a violation of law?
Mr. BRADBURY. Yes, it violates INA Section 212(d)(5)(A).
Mr. BIGGS. Secretary Mayorkis is also mass paroling aliens he
himself characterizes as refugees or asylum seekers without dem-
onstrating that there are compelling reasons requiring that par-
ticular alien may be admitted by parole rather than going through
the USRAP process for refugee admissions.
Is that a violation of law?
Mr. BRADBURY. Yes.
Mr. BIGGS. What law?
Mr. BRADBURY. It's a violation of INA Section 212(d)(5)(B).
Mr. BIGGS. Because he's not conducting adequate individualized
vetting of the huge volume of mass-released aliens, there's simply
no way of knowing how many of the millions of aliens Mayorkis
has released into the U.S. fall into these categories of dangerous
aliens.
Is that a violation of law?
Mr. BRADBURY. Yes, of Section 212(a).
Mr. BIGGS. Secretary Mayorkis has instituted, as you've talked
about and all of you have mentioned as the CBP One,
preregistration, trying to funnel these illegal migrants to the U.S.
ports of entry along our southern border.
Is that a violation of law?
Mr. BRADBURY. Yes, of 212, of 235, and I would say of 207.
Mr. BIGGS. All right. So, what's happened here, of course, is that
just in this past week the U.S. Court of Appeals for the Eleventh
Circuit halted two DHS efforts to release massive members of ille-
gal migrants into the U.S. on parole.
So, this is what one of the judges said, this opinion right here,
that what—his violations of the law. Secretary Mayorkis' violations
of the law are, quote, akin to posting a flashing, "Come in, we're
open sign" on the southern border. The unprecedented surge of
aliens that have started arriving at the Southwest border almost
immediately after President Biden took office, that has continued
unabated over the past two years, was a predictable consequence
of these actions. Indeed former—and I'll say "former"—former Bor-
der Patrol Chief Raul Ortiz credibly testified based on his experi-
ence that, "there have been increases in migration when there are
no consequences and migrant populations believe they will be re-
leased into the country," close quote. I won't go into the additional
case as well.
I'm going to ask Mr. Wolf this question. We've established that
Secretary Mayorkis has engaged in conduct that violates his oath
of office and the law. My question for you is, do you believe Sec-
Secretary Mayorkis is violating the law intentionally, willfully, or is it just some oversight on his part?

Mr. Wolf. So, I'm going to have to guess. I think it's all the above. I think they know exactly what they're doing; "they" being the department. This construct that they have put in place is not by happenstance or by chance. It's by design, and I think it's been very clear over the last two years.

So, everything that's going on at the border and the crisis that we see unfolding there was completely predictable, and we had talked to the incoming administration about some of the challenges that we had in the Trump Administration and warned them that, if they did half of what was campaigned on during 2020, that they would see a crisis at the border. So, presumably they knew that; presumably they heard that. Yet, they still went for it.

Mr. Biggs. The Secretary of the new administration heard that, incoming Secretary, Right?

Mr. Wolf. Numerous briefings, again, mainly with transition staff.

Mr. Biggs. OK. Mr. Edlow, I wanted to ask you this question, and it's related to testimony we heard yesterday about what's going on at the border and the impact on Border Patrol agents and morale, et cetera.

What are you hearing about what's going on because of the arrangements of this Secretary?

Mr. Edlow. Sir, I've heard that morale is at an all-time low throughout Border Patrol and throughout other enforcement entities. I've spoken to some people who have been at the border recently. They've seen that exact same thing, that people are just very unhappy. They don't know whether they should be doing the job or whether they are supposed to be ignoring the law. A lot of it's being run by memos that are—just oral guidance being passed on.

Mr. Biggs. I'm going to ask you the same question that I asked, and this is with regards to Secretary Mayorkis, and that is, do you believe that what he's doing is intentional, willful, or is it just he's just an incompetent buffoon and can't learn his lessons?

Mr. Edlow. I don't think he's incompetent, Congressman. Looking at the memos, looking at the departmental actions, the regulatory actions, this is all part and parcel of an intentional action.

Mr. Biggs. Yes, I agree with that, and I think it's long past time for him to be impeached.

I yield back.

Mr. McClintock. The Chair recognizes the gentlelady from Washington State, Ms. Jayapal for five minutes.

Ms. Jayapal. Thank you. Thank you, Mr. Chair.

Clearly, there is an agenda here, and it is about impeaching Secretary Mayorkis.

I want to take a step back and just say that it is quite stunning to have some of the witnesses here today that have the audacity to come before this Subcommittee and attack the current Homeland Security Secretary.

Mr. Wolf, who was Chief of Staff to Secretary Kirstjen Nielsen, was a key architect of the universally panned by majorities of Americans across the political spectrum, that very cruel and un-
lawful family separation that was perpetuated by the Trump Administration. Further, according to a Federal judge and the Government Accountability Office, Mr. Wolf served unlawfully as the Acting Homeland Security Secretary.

Mr. Edlow, as Acting Director of U.S. Citizenship and Immigration Services, helped to run that agency into the ground, to the point that it almost had to furlough over 13,000 USCIS employees. On his watch, USCIS also ignored the Supreme Court’s decision in June 2020 stating that the Trump Administration’s attempt to rescind DACA was unlawful, holding new DACA applications at processing facilities even after the Supreme Court mandate was formally entered.

These are the witnesses that the majority brings to this Subcommittee to discuss if, quote, “the laws are being faithfully executed”? Forgive my skepticism or, more bluntly, give me a break.

Mr. Reichlin-Melnick, let me turn to you. I want to discuss mandatory detention. As discussed in your testimony, Section 235(b)(1)(B) of the Immigration and Nationality Act states that if an officer determines an individual has credible fear of persecution, that person, quote, “shall be detained for further consideration of the application for asylum.”

That makes it sound like asylum seekers must be detained. Can you explain why all asylum seekers are, in fact, not detained?

Mr. REICHLIN-MELNICK. Thank you, Congresswoman.

I think the main reason is resource based, though there’s both resource and legal authorities I should note. The biggest issue here is resources. For example, if 50,000 asylum seekers show up at the border in any given month and every one of them asks for protection, there are not 50,000 detention beds. Even in 2019 when detention was at its highest, there were 55,000 detention beds, and that year 891,000 were encountered by the Border Patrol. If even half of those were seeking asylum, it would not have been physically possible to detain all of them, which is why, under the Trump Administration, hundreds of thousands of asylum seekers were released straight to court without going through the credible fear process.

So, at the end of the day, it is a resource issue. I will also note it is a legal issue because there are always exceptions to mandatory detention because Congress, generally speaking, can’t enforce the Executive to enforce the law in certain circumstances where that is literally impossible.

Ms. JAYAPAL. Has any administration, Democratic, Republican, ever been able to detain every single individual as required by the section of the Immigration and Nationality Act?

Mr. REICHLIN-MELNICK. No. In fact, when Congress first passed that provision in 1996, there were actually fewer than 10,000 detention beds, and this is at a time when there were routinely 1.6–1.7 million Border Patrol apprehensions a year. So, it was not possible when Congress passed the law. It’s not been possible anytime over the last 27 years. It’s still not possible today.

Ms. JAYAPAL. It’s correct, isn’t it, that even at our highest levels of detention under the Trump Administration, it was never close?

Mr. REICHLIN-MELNICK. That’s right. In 2019, the Trump Administration maxed out detention beds, about 55,000 in August 2019.
That month, there were more than 55,000 people who arrived. We also have to note that the average time that a person spent in detention was over a month, so the average detention bed in ICE detention only turned over about 10.7 times a year. So, there was a max capacity that they could hold, even at 55,000 beds, of less than a half a million, and that year about 900,000 people showed up. So, that’s why the Trump Administration, in fact, released hundreds of thousands of people.

Ms. JAYAPAL. So, that’s a lot of numbers. Let me just ask you bluntly. Many of my colleagues on the other side of the aisle like to claim the Trump Administration ended what they call catch and release and detained all asylum seekers or sent them back to Mexico.

Let me just ask you again, is that accurate? Just a simple “yes” or “no” answer is fine. If not, you’ve already given us some of the reasons, but is that accurate?

Mr. REICHLIN-MELNICK. It’s not accurate. Even in 2020, after Title 42 went into effect, several thousand people were released according to data from DHS.

Ms. JAYAPAL. From your testimony, it appears there’s a detailed chart which shows that the Trump Administration released over 500,000 migrants at the border during his four years as President. Is that correct?

Mr. REICHLIN-MELNICK. That is correct. That’s directly from the border, and additional were released—were held in ICE detention and then released.

Ms. JAYAPAL. Thank you.
Mr. Chair, I yield back.
Mr. McClintock. The gentlelady’s time has expired.
Mr. Van Drew.
Mr. Van Drew. Thank you, Mr. Chair.
Thank you all for being here today.

There’s a very, very old saying of wisdom: You reap what you sow. God help us what we have reaped. It all started with the sanctuary cities, and they were wonderful. Everybody loved them. They were—not everybody, for God’s sake. All these big city mayors and other folks thought, yes, this is a great idea to have sanctuary cities. Not so much anymore. We don’t even know what to do in our big cities. From Portland, Maine, to San Francisco, California, the lack of leadership at having these sanctuary cities is now creating huge problems that even Democrats will recognize.

What else? What else is it that we’ve reaped? Well, we’ve done catch and release all throughout our Nation. Then the people who are listening here who are not in this room, but are around literally the country, they know that around the country there are people being released. We’re paying for transportation. We’re paying for healthcare. We’re paying for a great deal of things that we don’t even take care of our own people in the United States of America well enough.

Mr. Reichlin-Melnick, I respect you, but you said that immigration is part of the fabric of the United States of America. It is, legal immigration. I don’t understand what is so difficult to understand about the difference of legal and illegal. Illegal means it’s not true.
We talk about Mr. Mayorkis, and you could spend an hour and a half on his case. What I remember, I remember asking him when he was under oath—and behind him was almost like a green screen, one of these screens—and I said: “Is everything OK at the border? Is everything good? Do we have our borders intact?” He said: “Absolutely, Congressman.”

You looked at the pictures, you looked at the video, and you saw little kids being thrown over to try to get them into the United States, so that these adults would also be able to make their way in. You saw huge lines. You saw disease. You heard about fentanyl coming into our country, which it has. What are we doing to our country, man? Seriously. Sit down and think about this. What are we doing to the United States of America?

We used—no more, no more do we immediately expedite people back when you can. No more do we have Remain in Mexico. We misuse asylum for things it was never to be used for. Asylum doesn’t mean, gee, I don’t like where I live, and I don’t make as much money as I would like, and it’s a little bit tough going. I feel bad for those people. I feel bad for most of the world. If that’s going to be our standard, then let’s open every border everywhere in the United States of America and accept every human being who doesn’t like their country, if you really want to do it if you think that’s right.

We talked about impeaching Mayorkis. Well, you know what? He didn’t tell the truth under the oath. He committed perjury. That alone really truly means something. He should be impeached. You’re supposed to tell the truth or, for God’s sake, at least want to tell the truth, try to tell the truth.

No more Title 42, and we didn’t do a damn thing to try and save it, change it, or make it more applicable if it wasn’t good the way that it was. What’s happening to these children and babies, not only in our families, not only our children that are dying of fentanyl, the kids that are being brought across and now are beholden to the drug cartel forever, and the drug cartels establishing facilities, establishing a presence in the United States of America. This is all true. Nobody is making this up. The statistics show it. We know we have millions upon millions, upon millions. What is it? Five million-plus?

Just some articles I would like for the record: “Influx of migrants in Massachusetts Continues to Overwhelm State Resources,” Boston.com. “1,500 Miles from the Southern Border, Immigration Fight Disrupts Michigan Town.” “Portland Overwhelmed By Growing Number of Asylum Seekers” in the newscentermaine.com. “Chattanooga, TN, Overwhelmed By Migrant Surge from Texas.” California decides unannounced illegal immigrant arrivals aren’t so much fun, aren’t so easy, and maybe it’s not such a good idea to have sanctuary cities after all.

Come on. Everybody, let’s really look at this in the eye and see what we’ve got here. We are out of control. Yes, we should review our immigration laws, and we should make them better. Yes, we should do more work.

I want to ask Mr. Wolf a question, and I’m going to ask it really quickly—

Mr. McClintock. No.
Mr. VAN DREW. No, I'm not. Sorry.
Mr. MCCLINTOCK. The gentleman's time has expired.
Mr. VAN DREW. Man, I'm mad, and I'm tired of it. How about that? That's how I'm going to end.
Thank you, Mr. Chair.
Mr. MCCLINTOCK. The Chair recognizes the Ranking Member, Mr. Nadler.
Mr. NADLER. Thank you, Mr. Chair.
I want to followup on the Ranking Member's comment earlier and just note, not only did Mr. Wolf serve unlawfully as Acting Homeland Security Secretary and as the Chief Architect of the Unlawful Family Separation policy which literally kidnapped children from their parents, he also unlawfully defied a Congressional subpoena in September 2020 and refused to testify before the House Homeland Security Committee.
It is just shocking that my Republican colleagues who claim to believe so strongly in Congressional oversight would invite a witness who has so brazenly violated the law and so flagrantly violates our authority.
Mr. Reichlin-Melnick, I want to turn to you to discuss the issue of parole. Use of parole has become a big topic among my Republican colleagues. Can you discuss the history of parole and its bipartisan use over the last 70-plus years, and where's the authority for the Executive Branch to use parole?
Mr. REICHLIN-MELNICK. Parole has been part of the immigration law since 1952, so it has been around for decades. For many years, especially prior to the passage of the Refugee Act, parole was the primary way by which the U.S. admitted refugees. So, for example, from 1962–1969, more than 690,000 people came to the United States under parole from Cuba through various different parole programs.
Since then, Republican and Democratic Administrations alike have used parole to allow people to come to the United States in various categories that fit the national interest. These have been nearly every Presidential Administration, including the Bush Administration, the Obama Administration, and even under the Trump Administration, tens of thousands of people were admitted under various parole programs that were then extant when he took office.
Mr. NADLER. Some have criticized the Biden Administration for its use of parole saying it's not being done on a case-by-case basis.
Would you agree with that statement? If not, why not?
Mr. REICHLIN-MELNICK. I don't agree with that statement for the primary reason that they misunderstand what “case by case” means. A case-by-case adjudication just means taking every application on its own. It doesn't mean that you can only give it to a few people. In fact, in 1996 when Congress passed IRA, IRA which included the case-by-case requirement, the Congress actually rejected an amendment which would have made parole into a much more narrower program.
I think the best example of this is to sort of look at this as a metaphor. If I want to create a scholarship program, and I say this scholarship program is open to every child whose parents earn less than $100,000 who can show compelling need for it, that is case by
case because each student has to individually show that they have a compelling need whereas if it just said this program is open to every person who earns less than $100,000, that would be categorical. There would be no case by case involved.

Mr. NADLER. So, it appears that the administration is merely saying that certain categories of people are eligible to be considered for parole. Is that correct?

Mr. REICHLIN-MELNICK. That’s right. I think very similarly the wet-foot/dry-foot parole program that ran from 1995–2017, under which about 40,000 Cubans came in through the border, that was also a similar circumstance.

Mr. NADLER. They still undergo a case-by-case determination to see if parole is appropriate?

Mr. REICHLIN-MELNICK. That’s right. Every parole memo has required it to be case by case.

Mr. NADLER. Both Republican and Democratic Administrations have made use of categorical parole programs in the past?

Mr. REICHLIN-MELNICK. Well, I wouldn’t call them categorical, but I would say parole programs that were open to certain individuals based on, for example, their nationality or their job.

Mr. NADLER. Did the Trump Administration use parole?

Mr. REICHLIN-MELNICK. Yes. I think the most prominent one is the Military Families Parole in Place program which operated under the Trump Administration.

Mr. NADLER. Now, the Trump Administration continued the use of parole as part of the Cuban Family Reunification Parole program. That sounds like a categorical program that my colleagues on the other side of the aisle have complained about.

Mr. REICHLIN-MELNICK. Yes. Cuba has in particular had multiple parole programs in use for their nationals over the last 20 years.

Mr. NADLER. Is this parole program similar to other family reunification parole programs recently announced by the Biden Administration for Colombia, El Salvador, Guatemala, and Honduras?

Mr. REICHLIN-MELNICK. My understanding, per DHS’ announcements last week, is that the new parole programs will be virtually the same as the Cuban Family Reunification Parole program.

Mr. NADLER. Can you explain how those programs work? Who’s eligible? Are these still granted parole on a case-by-case basis as the law requires?

Mr. REICHLIN-MELNICK. Yes.

So, the family reunification parole programs are open to individuals from certain countries who have family members who have pending immigrant visa applications already. So, they have been approved for a visa, but they are just in a backlog.

So there, if those individuals are invited to apply for the program from the National Visa Center, then they have to submit an application. They have to go through a vetting process. Then it is the exercise of discretion of the United States to determine whether or not to admit the person through this parole program.

Mr. NADLER. Thank you. I yield back.

Mr. MCCLINTOCK. Mr. Tiffany.

Mr. TIFFANY. Mr. Reichlin-Melnick, so the expansion of parole is legal?

Mr. REICHLIN-MELNICK. In my opinion, yes.
Mr. TIFFANY. Mr. Wolf, it says you served unlawfully. You want to share with us whether you served this country unlawfully?

Mr. WOLF. So, I've spent seven and a half years with the Department of Homeland Security. I was there shortly after 9/11 when they stood it up. I was there all four years during the Trump Administration. I've held eight executive positions at the department, including an assistant secretary position, an undersecretary position confirmed by the U.S. Senate, a deputy chief of staff position, a chief of staff position, and an acting secretary position.

I've been to the border dozens and dozens and dozens of times. I've talked to the men and women of the Border Patrol, ICE agents, and USCIS personnel.

So, my expertise in this, whether you want to call me an acting secretary, you want to call me a dogcatcher, my expertise is what it is. I was also very proudly part of an administration that actually secured the border, put policies in place to bring back the rule of law and to secure the border.

Mr. TIFFANY. So, we just heard that the Trump Administration paroled people into this country.

Did you parole over a million people into this country during the Trump years?

Mr. WOLF. No, we did not.

Mr. TIFFANY. Mr. Bradbury, I believe we have the largest human trafficking operation perhaps in the history of the world that is going on at this point.

Do you think the American people are aware of the role of NGO’s driving these, running the pipeline to our border?

Mr. BRADBURY. No. I think that role has been sort of surreptitiously concealed by the way the administration has handled this. They are contracting with nongovernmental organizations to transport illegal aliens from the border to every district in the country.

Mr. TIFFANY. Do you think some people that donate to some of these sometimes faith-based organizations, NGO’s, do you think they're aware that their money is being used as an accessory for human exploitation and trafficking?

Mr. BRADBURY. I seriously doubt most people are aware. They should be.

Mr. TIFFANY. Yes. I urge people that contribute to faith-based organizations, you should ask them.

In fact, I would say to you, Mr. Chair, I think we should have the head of Catholic Charities come before this Committee and explain what they're doing down on the border to facilitate this illegal immigration that's going on in this country.

Great work has been done by many of these faith-based organizations. I think the American people should fully understand what's going on there.

Mr. Bradbury, recent Florida lawsuits against the Biden Administration have shed considerable light on DHS, but also the Office of Refugee Resettlement and what they're doing.

Can you briefly explain how the NGO’s and ORR are facilitating this unprecedented human trafficking, especially of migrant children?

Mr. BRADBURY. Well, of course, under the Trafficking Victim Protection Reauthorization Act there are special duties, that the Sec-
retary of Homeland Security has to ensure that migrant children who are brought into the country not from Mexico, but from other countries—are placed with guardians in a way through HHS that ensures that they’re not abused, they don’t become the victims of sex trafficking or forced labor. Unfortunately, we know that this is happening.

Mr. TIFFANY. Are you familiar with the—yes, it is happening. Are you familiar with the—let’s see here—the Third Presentment of the Twenty-First statewide Grand Jury in Florida where they talked about trafficking children?

Mr. BRADBURY. I'm not. I'm sorry.

Mr. TIFFANY. I'd like to enter this into the record, if we may, Mr. Chair.

Everyone should read this about the horrific human trafficking that’s going on that the State of Florida has identified.

Mr. TIFFANY. Have the court orders been followed by this Administration when they’ve been told they need to follow the law, Mr. Wolf?

Mr. WOLF. In several instances they have not.

Mr. TIFFANY. So, Mr. Chair, I would just close with this. We heard from the other side that these are just policy differences that we have between the two sides.

Tell that to Erin Rachwal from Pewaukee, Wisconsin, who was here a couple months ago. Remember her? Remember her son took, I think it was like a Percocet pill, something like that, Mr. Chair? Died in his dorm room.

Tell that to Kayla Hamilton’s mother. She was just here in the last month, wasn't she, Mr. Chair? Strangled to death, autistic young woman, by someone who was here illegally.

Tell that to all the angel families out there.

I urge everyone here—a Democrat candidate for President just was at the border in the last couple days in Yuma, Arizona, and stood with farmers and said this cannot go on.

I urge Democrats who are of good faith across the United States of America to join us in supporting the Secure the Border Act. You can do that. It turns out there actually is a Presidential candidate you can follow if this issue is important to you to secure the border.

You do have a candidate that will help us do it.

Yield back.

Mr. McClintock. The gentleman’s time has expired.

Ms. Jayapal. Mr. Chair?

Mr. McClintock. The Ranking Member has a unanimous consent request.

Ms. Jayapal. Thank you, Mr. Chair.

I ask unanimous consent to enter into the record two district court decisions and a decision from the U.S. Government Accountability Office stating that Mr. Wolf served unlawfully as Acting Secretary of Homeland Security.

Mr. McClintock. Well, you’ve lived down to all my expectations, my dear friend. Your ad hominem attacks have become quite common here. I will not—

Ms. Jayapal. Mr. Chair—

Mr. McClintock. I will not object.

Ms. Jayapal. Mr. Chair, since you—
Mr. MCCLINTOCK. There ain’t no objection.

Ms. JAYAPAL. Since you did reference my behavior, I would like to say that was a unanimous consent request to enter into the record factual documents. This is not a matter of opinion. This is a matter of fact.

Thank you, Mr. Chair.

Mr. MCCLINTOCK. Without objection, we will enter them into the record.

Mr. MCCLINTOCK. Ms. Lofgren.

Ms. LOFGREN. I think it looks to me that this hearing has been held to come up with some rationale for an impeachment of the Secretary for doing his job.

If the Congress—it’s never been the case that every single person who’s entered the United States without inspection is incarcerated. It’s never happened.

If that’s what the Congress wants to do, they ought to look in the mirror, because the estimate is it would cost $35.7 billion to do that, and the Trump Administration requests 3.1 billion for detention.

So, we have the Immigration and Nationality Act, which is a law, but the appropriations process, that yields a bill, that’s also the law. So, it is impossible to accomplish something, Congress needs to address that itself.

Getting back to the issue of parole, which I think is very interesting, that’s been a part of the law for a very long time. I was thinking about its use, and sometimes its use depends on what’s happening in the world.

I remember when Saigon fell, hundreds of thousands of Vietnamese fled communism. They had been our allies in the war. The bulk of them were admitted using parole authority. It was case by case, but it was a class of people who were escaping from communism.

Is that correct, Mr. Melnick?

Mr. REICHLIN-MELNICK. That’s right. I believe the ultimate total is about 360,000 Indochinese came following the fall of Vietnam.

Ms. LOFGREN. Thinking back on other uses—and again, it’s categories, that you look at each case within a broad category. We have tended, and I think appropriately so, to want to protect people who are fleeing from communism.

If you take a look at the Cuban Family Reunification Parole Program, those were people who had applications made for family members who were suffering under the yoke of communism. One by one, there was a determination on whether they should be given advanced parole to escape from that communist regime and join mainly American spouses.

Is that correct, Mr. Melnick?

Mr. REICHLIN-MELNICK. That’s right. Parole has often been in fact a response to Cuba, because of course with Cuba, they do not accept deportations. So, we have had very little option for when Cubans arrived at our borders but to parole them in. We have created multiple parole programs under the Clinton Administration, the Bush Administration, and prior administrations for Cubans in particular.
Ms. LOFGREN. We have individuals even today, we have totalitarian regimes in Central America, including communist regimes in El Salvador and in Venezuela, and people are fleeing from communist oppression.

Now, not every person who’s leaving that’s the reason. So, it has to be case by case. You would agree with me that what’s going on in Venezuela is a communist-like totalitarian regime, is it not?

Mr. REICHLIN-MELNICK. Venezuela and Nicaragua both, which I believe is what you were referring to, are both countries as well that do not accept, generally speaking, the returns of their nationals. One in four people have left Venezuela in the last decade.

Ms. LOFGREN. So, if we were looking at it on a case-by-case basis of people who were fleeing those regimes, it would really be in keeping with the proud tradition of this country of helping people who are fleeing from communist oppression. Wouldn’t that be correct?

Mr. REICHLIN-MELNICK. I believe so, yes.

Ms. LOFGREN. I just wanted to mention one other thing. There was parole in place for certain military families. As I recall, that was really stimulated by an American soldier who was killed in Afghanistan, and then his mother was going to be deported along with his wife. People, especially in the veteran’s community, became outraged at that, the mother of this soldier who died for our country would be removed, wouldn’t even be able to visit the grave of her son.

I think every recent administration, including the Trump Administration, has utilized the parole authority to take a look at the family members of American soldiers.

So, isn’t that case, that this has been the modern tradition?

Mr. REICHLIN-MELNICK. That’s right. Since 2010, the military family Parole in Place program has been in effect. Twenty thousand people under the Trump Administration were paroled in under that program—or, sorry, were granted parole in place under that program. Crucially, in 2020, in the National Defense Authorization Act, Congress said it was the sense of Congress that this program was valid and lawful.

Ms. LOFGREN. My time is up. I yield back.

Mr. ROY. I thank the Chair.

Mr. REICHLIN-MELNICK, let me ask you a question.

Is Joe Manchin, the Senator from West Virginia, is he is racist?

Mr. REICHLIN-MELNICK. I can’t comment on that.

Mr. ROY. OK. What about Mark Kelly from Arizona?

Mr. REICHLIN-MELNICK. Similarly, cannot comment on that.

Mr. ROY. Maggie Hassan, Senator from New Hampshire?

Mr. REICHLIN-MELNICK. Also, cannot comment.

Mr. ROY. OK. Can’t comment on their being a racist or not.
How about Senator Raphael Warnock from Georgia.
Mr. REICHLIN-MELNICK. Similarly, I’m not familiar.
Mr. ROY. OK. How about Catherine Cortez Masto from Nevada?
Mr. REICHLIN-MELNICK. Likewise, Mr. Roy.
Mr. ROY. OK. Can’t comment on whether they’re racist or not?
Mr. REICHLIN-MELNICK. I don’t have an opinion as to the matter.
Mr. ROY. OK. Because you called me a racist, and you called me a racist because I said that Title 42 should be enforced—something, by the way, that this administration did to the tune of over a million people.
Mr. REICHLIN-MELNICK. I believe it’s about 2.5 million people actually.
Mr. ROY. Right. So, this administration is racist?
Mr. REICHLIN-MELNICK. I believe this administration has made a number of failures on the racial justice front.
Mr. ROY. So, the Biden Administration is racist?
Mr. REICHLIN-MELNICK. I can’t comment as to the administration in general.
Mr. ROY. Interesting. Good to know. Good to know the Biden Administration is racist and get that on the record.
The fact is, people who want to enforce Title 42 believe that there was a reason that Title 42 was put in place, but they also recognize that Title 42 is, in fact, a band-aid on a very broken system where the laws were not being enforced otherwise. To throw around words like racist—let me ask you a question.
Is my friend Henry Cuellar, is he a racist?
Mr. REICHLIN-MELNICK. I can’t comment on that.
Mr. ROY. Right, because Henry Cuellar said the border community is very concerned about Title 42 being lifted. This message of lifting Title 42 is going straight to criminal organizations.
He stood up and said that Title 42 should be enforced. The administration stood up. The Senators I just listed said that Title 42 should have stayed in place.
Now, my personal view is that Title 42 wasn’t the thing that needed to stay in place, that what ought to be in place is an actual border security that secures the border.
Mr. Wolf, in your position at the head of the Department of Homeland Security, notwithstanding what my colleagues want to throw around with the ad hominem attacks, you were, in fact, charged with securing the homeland, right, that was actually your task securing the homeland at the Department of Homeland Security?
Mr. WOLF. Yes. That’s correct.
Mr. ROY. Right. Did you do that?
Mr. WOLF. Yes.
Mr. ROY. Right. Is the current administration securing the homeland?
Mr. WOLF. No.
Mr. ROY. No. In any measure, in any way, shape, or form, is the current Secretary of Homeland Security carrying out his duty faithfully under the Constitution to secure the homeland of the United States?
Mr. WOLF. He is not. As I’ve outlined in my written testimony and oral testimony, there’s numerous instances where he is not faithfully executing the law as written.

Mr. ROY. I thank you, Secretary Wolf.

What I would say is, if you go back to April 2022, in a Judiciary Committee hearing, I read word for word the statutory definition of operational control under the Secure Fence Act. I read it sitting right over here. There was a chart.

I put up the chart, I put up the text, and the text says,

“Operational control” means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

I asked Secretary Mayorkas, “Do you have operational control?”

His response was,

I do. And, Congressman, I think the Secretary of Homeland Security would have said the same thing in 2020 and 2019.

In March 2023, however, at a Senate hearing, Secretary Mayorkas said,

With respect to the definition of operational control, I do not use the definition that appears in the Secure Fence Act, and the Secure Fence Act provides statutorily that operational control is defined as preventing all unlawful entries to the United States. By that definition, no administration has ever had operational control.

Just two weeks prior, United States Border Patrol Chief Raul Ortiz answered, “No, sir,” when asked by Homeland Security Chair Mark Green, “Does DHS have operational control of the entire southwest border?”

So, the United States Border Patrol Chief Raul Ortiz says we do not have operational control of the border. He answered straight up truthfully, “No, sir.”

Why was it that the Secretary of Homeland Security, when I asked him that question, he said, “Yes, we have operational control”? He said, “I do,” to be more precise. Then in the Senate he comes back and says,

Oh, but no, I’m sorry, if you use that definition, you know the one in the statute, no, no one has ever had operational control.

What is your response to that, and how would you characterize having operational control of the border, as you would say in the previous administration, compared to current?

Mr. WOLF. Well, I would certainly talk about my time in the Trump Administration. If I were to get asked that question, whether we had operational control, the answer was, no, we did not. Neither was the border secure. I think words matter here. Those are very definitive statements.

I always talked about how we were making the border more secure, or it was the most secure in our lifetime. To say that you have complete operational control, to say that the border is closed, to say that it is secure, you’re hiding the ball from the American people. You’re not being transparent. It’s for a purpose, I think you can only guess a political purpose.

It also defies what the men and women of the Border Patrol and others are doing down there. When they see their political leadership make these sorts of statements, it’s so bad it’s hard to find
words. They don’t know what to think. Because they are on the line. They are on that border every single day, watching the hundreds of thousands of individuals walk past them that they have to process. They see that someone is saying that this border is secure. Or you see the 200 known or suspected terrorists that have come across this border in the last two years, that somehow that border is closed, it’s secure, I don’t understand it.

Mr. Roy. Yes. Kind of like accusing people of whipping migrants at the border.

I yield back.

Mr. McClintock. I’m sorry. Your time’s up.

Mr. Correa.

Mr. Correa. Thank you, Mr. Chair.

Mr. Melnick, is the Secretary doing his job, Mr. Mayorkas?

Before you answer that, let me just say that General Kelly, former Secretary of Homeland Security, heard him say a couple of times that border security does not end or begin at the border. Today, as you look at the world, it’s pretty safe to say, post-COVID, economies around the world are devastated. The only real game in town is the United States. Our economy, world record low unemployment rate, shortage of workers. Even China, I must say, is struggling to get back on their feet economically.

We have a worldwide refugee crisis.

[Chart.]

Mr. Correa. If you look at this chart behind me from the U.N. Refugee Agency, it shows the number of displaced people just in the Americas alone. You can see countries across the region struggling.

It’s not a U.S. problem, it’s a regional problem. Mexico is dealing with this problem. Canada is dealing with this problem. Guatemala is feeling the effects and, of course, Europe.

Further South, Colombia. If you look at this chart, Colombia is really struggling.

I must say, refugees are braving that trip North, perilous situation.

I want to show you the picture of a little girl struggling to continue North through the Darien Gap. This little girl lost her mother, and another refugee going North is trying to help her survive.

If refugees are willing to do this, you can imagine the challenges at home.

Let me say, Title 42, we all talk about Title 42, I have to remind folks here, Title 42, the party in charge in Congress today, House of Representatives, voted to end the COVID–19 pandemic, and by operation of law they lifted Title 42.

Let me repeat. Party in charge voted to lift Title 42. Let me say, I agree with them. Title 42 should not be an immigration tool, but a health issue.

The administration has taken steps to prepare for Title 42’s lifting. I was at the border numerous times before Title 42 was lifted. I would ask those officers in green and blue, “Are you ready?” They would tell me, “We’re as ready as can be.”

It wasn’t just CBP. It was DHS, State Department, and the administration who did a pretty good job in anticipation of the lifting of Title 42.
In fact, if you look at the next chart, these are the numbers reported publicly by Border Patrol Chief Raul Ortiz: Fifty percent drop, 50 percent drop in the encounters after 42 was lifted. Unexpected.

It’s not over, folks. The world is still suffering from major economic challenges, and these numbers may be temporary.

The fact of the matter is, we’ve got to focus on getting economies around the world back on their feet, and we also have to focus on the other issue, which is immigration reform.

Whether you like it or not, America is a massive draw, a big draw for workers from around the world. Fifty percent of our farm workers are undocumented. Every time one of those undocumented goes to a farm, to a ranch, they find a job.

We are also part of the problem, meaning we must pass immigration reform. Otherwise, we’ll continue to be in the same situation.

Mr. Melnick, I asked you earlier, is the Secretary doing the job? We hear about operational control of the border. Was does that mean?

Mr. REICHLIN-MELNICK. There’s a colloquial definition of operational control, which I think is—and then there’s a legal statutory definition under the Secure Fence Act of 2006. As Mr. Wolf just noted, it’s not anything that any administration has ever reached. In fact, the way Congress wrote the statute, it is physically impossible for any administration to ever get operational control.

Mr. CORREA. So, when we ask is there operational control at the border, the answer is there never has been operational control at the border.

Mr. REICHLIN-MELNICK. Statutorily, no. There are obviously opinions that some people may have as to their own views from a colloquial sense. Under the statutory definition, no, no administration has ever had it and none ever will.

Mr. CORREA. A political conclusion based on the times?

Mr. REICHLIN-MELNICK. Again, the reality is the job of DHS Secretary is extraordinarily complicated and difficult, especially today with more people arriving from countries further away, as you noted with Colombia and other migrants coming.

Under the Trump Administration, three out of every four migrants arriving came from four countries, Mexico, Guatemala, Honduras, and El Salvador. Today, in Fiscal Year 2023, less than half came from those countries. That is a hugely challenge for any Presidential administration, regardless of party.

Mr. CORREA. Thank you, Mr. Chair. I yield.

Mr. MOORE. Thank you, Mr. Chair.

I appreciate the witnesses being here today.

I’ve said it before, and I’ll say it again: A controlled border is a compassionate border. We had Sheriff Daniels actually testify here in this Committee, and he said in four decades, Mr. Wolf, that he had never seen the border as secure as it was in 2018 and never as broken as it is now.

So, tell me, in just a few months, 24–25 months, what changed dramatically, and what do you think the reason we’re having such an influx of encounters and others cross the border?
Mr. WOLF. Well, I think easy answer, Congressman, is everything. Everything changed. It started really from day one of this administration where they had a very successful border security regime in place that we had perfected over four years. We didn’t get everything right the first time. Over four years, we put a regime in place that held individuals accountable for illegally breaking the law, that got those who needed those asylum protections under U.S. law, we got them those protections quicker than they have ever gotten before.

This administration, for a variety of different reasons, said, “No, we don’t like it.” So, what did they do? They stopped border wall construction, which I should just mention, when you talk about operational control, that’s actually in the Secure Fence Act.

So, Congress back in 2006 thought that you would gain operational control by putting physical infrastructure along the border. Nevertheless.

You would also—they tore down MPP, or the Remain in Mexico Program, our asylum cooperative agreements, and the list goes on and on and on.

So, it doesn’t take a rocket scientist to figure out what happens when you tear down those programs. You had the former Chief of the Border Patrol telling the administration at the time: This is what’s going to happen when you tear down these programs and you don’t put other deterrent immigration border security programs in place. This is what’s going to happen.

Mr. MOORE. So, they gave them a heads-up, they said this is what’s going to happen if you undo policies in place?

Mr. WOLF. I think numerous individuals did, yes.

Mr. MOORE. I say if you’ve got a water leak, you don’t turn the pressure on to the house. It seems like in a lot of ways, we had some problems with immigration, and we have turned a tremendous amount of pressure on our border agents. Really now they’re concierge. They’re not really agents. They’re there, but they’re just processing people through, and they can’t keep up.

Mr. Bradbury, I’ve heard that people South of the border are paying the cartel from four to five, six thousand just South of the border. Syrians were 20,000. Russians were paying 19,000, and I think Chinese nationals were paying $80,000.

The administration, in my opinion, has basically created twofold for people coming across the border. That’s why I say it’s compassionate to have it controlled. Because you’re either a drug mule, you’re trafficking heroin, cocaine, or fentanyl. You’re wearing carpet shoes. That’s how you pay your passage into this country. Or you become an indentured servant, and you make installment payments.

Have you heard that as well?

Mr. BRADBURY. Yes, from some of the experts on immigration in the Heritage Center, of course, border security. What I understand is the cartels really effectively control our border at this point, certainly everything up to the border.

Mr. MOORE. So, the operational control is actually—the cartel has operational control. It’s not us.
Mr. BRADBURY. Yes, more likely that than our government. They are making as much or more money off human trafficking now than the drug trafficking.

Mr. MOORE. That's my understanding.

So, Mr. Edlow, I've got one question for you as well, sir.

Considering this administration, do you think they're using the prosecutorial discretion correctly?

Mr. EDLOW. I do not. My colleague up here talked about how Justice Scalia in an opinion talked about prosecutorial discretion and how that is something that is useful and that every prosecutor and every police agency has. That is true. However, it is done on a case-by-case basis. We're back to talking about case-by-case bases.

A prosecutorial discretion done as a categorical prosecutorial discretion is not actual discretion. That's categorically saying we're not going to go after a group of people. That's not a case-by-case determination. When Justice Scalia was talking about it, he was talking about at any stage in the process for an individual, not for a group of people.

Mr. MOORE. Mr. Melnick, does your organization plan on suing the Biden Administration?

Mr. REICHLIN-MELNICK. We have sued the Biden Administration, as we have sued every administration going back 30 years.

Mr. MOORE. Thank you.

With that, Mr. Chair, I yield back.

Mr. MCCLINTOCK. Ms. Escobar.

Ms. ESCOBAR. Thank you, Mr. Chair.

I'd like to inform the witnesses that I am the only Member of Congress on this Subcommittee that actually lives on the border. I represent El Paso, Texas. I'm a third-generation border resident. My children are fourth-generation border residents.

I don't live hundreds of miles from the border. I live on the border literally. Nobody wants an orderly immigration process more than those of us who have built our lives on the border.

I'll tell you one way we're not going to get there. It's with performative hearings such as these.

If we truly want to address our Nation's immigration challenge and opportunity, we would do it through reasonable legislation, through compromise, and through comprehensive immigration reform.

I'd like to invite all my colleagues on this Subcommittee to look at a bipartisan immigration bill, the Dignity Act, that my colleague Maria Elvira Salazar and I introduced. That would be a first—a good way to begin talking about this.

Instead, here we are engaging in what is my Republican colleagues' first step in impeaching Secretary Mayorkas, not because of any reason that they have laid out, but simply because this is Speaker McCarthy's gift to the extremists in his conference.

Let's look realistically at the numbers.

Mr. Reichlin-Melnick, thank you so much, because the American Immigration Council actually has produced this great chart. I've altered it a little bit.

[Chart.]
Ms. ESCOBAR. What I’d like for the public, for the American public and our panelists to note is that actually numbers started increasing long before President Biden took office, long before the election even. There was only one time when there was a precipitous drop in immigration, in apprehension, and that was right when COVID–19 hits. That’s when the border was shut down.

The chart that the American Immigration Council put together shows—and, Mr. Reichlin-Melnick, I believe you got these numbers directly from the Department of Homeland Security—and it demonstrates that not any of the deterrence measures that were put forth by the Trump Administration actually deterred immigration. COVID did, but shortly after the border was reopened those numbers started climbing right back up.

That would tell us that we should be acting together in a bipartisan way on reasonable solutions. Instead, again, here we are focused on performance.

Mr. Chair, I’d like unanimous consent to enter into the record a ProPublica article about family separation.

Mr. McClintock. Yes. Without objection.

Ms. ESCOBAR. I’d actually like to play the audio included in this article.

Mr. McClintock. You’re welcome to do with your time as you please.

Ms. ESCOBAR. OK. All right. Well, I’ll play it from my phone.

[Audio recording played.]

Ms. ESCOBAR. Mr. Wolf, do you recognize this audio?

Mr. WOLF. I recall that audio, yes.

Ms. ESCOBAR. You were working at DHS at the time that this audio was taken. Is that correct?

Mr. WOLF. I was at the department, yes.

Ms. ESCOBAR. This is audio from the horrific Trump Administration policy of separating children from their parents at the border, a policy that has caused immeasurable trauma on children.

Mr. Wolf, was Ms. Nielsen, when she was the Secretary and implemented this horrific policy, did the Republican Party attempt to impeach her?

Mr. WOLF. So, I would disagree with the premise of that question.

Ms. ESCOBAR. Is that yes or no? No?

Mr. WOLF. It’s not a policy.

Ms. ESCOBAR. So, I will reclaim my time.

No, the Republican Party never tried to impeach her, nor did they try to impeach you, despite the fact that you were an architect of this policy, despite the fact that you were in place when the insurrectionists took over our Capitol.

You resigned because of the illegitimacy of the acting secretary role that you were playing on behalf of the Trump Administration, yet no one tried to impeach you.

I yield back.

Mr. McClintock. The gentlelady’s time has expired. Since that was an ad hominem attack, I’ll give Mr. Wolf—

Mr. WOLF. Can I respond to that?

Mr. McClintock. Yes.
Mr. WOLF. So, I think it’s a useful conversation. So, let’s talk about children. Let’s talk about protecting children. Let’s talk about the 360,000 children that have come across this border in the last two years.

Mr. NADLER. Point of order. On whose time is he speaking?

Mr. MCCLINTOCK. She made an attack on him.

Mr. NADLER. Point of order. On whose time is Mr. Wolf speaking?

Mr. MCCLINTOCK. Ms. Escobar’s time.

Mr. NADLER. Ms. Escobar yielded back her time.

Ms. ESCOBAR. I yielded back.

Mr. NADLER. She yielded back her time.

Mr. MCCLINTOCK. She made an ad hominem attack on Mr. Wolf, and I thought it was important to give him an opportunity to respond.

Mr. NADLER. She yielded back her time. He can speak on someone else’s time.

Mr. MCCLINTOCK. I will recognize the gentleman’s point well taken and proceed to Mr. Nehls.

Mr. NADLER. Thank you.

Mr. NEHLS. Thank you, Mr. Chair.

I just want everybody in this room to know, everybody, every Member on this panel, this Committee, to know that I’m the only one, I’m the only one that has arrested an illegal alien, that has been deported six previous times, for killing one of my senior citizens when I was sheriff of Fort Bend County, Texas. I just want everybody to know that.

All right. I have several different things I would like to discuss in my five minutes.

Mr. Melnick, I’m paraphrasing some of your testimony. You said that in order to effectively execute our immigration laws Congress must provide additional resources. Is that correct?

Mr. REICHLIN-MELNICK. That’s right.

Mr. NEHLS. Today, I believe—I'll paraphrase again—I’m here to talk about the complicated reality of enforcing immigration laws at the border.

Mr. REICHLIN-MELNICK. That’s right.

Mr. NEHLS. Well, 212(f), in particular, is quite complicated because it cannot be applied to the border to turn away asylum seekers. The Trump Administration tried that in fall of 2018. That was struck down by a court in California, upheld by the Ninth Circuit, and the Supreme Court declined to over turn that decision.

Mr. NEHLS. We talk a lot about Title 42, and we talk about that Title 42 went away. It’s my understanding—anybody on the panel can pipe in if you would like—Title 42 dealt with the COVID, the pandemic, public health emergency. Is that right?

Mr. REICHLIN-MELNICK. That’s right. Title 42 was a CDC policy invoked in March 2020 when the pandemic hit.

Mr. NEHLS. Yes. When I look at 212(f)—and I guess I’m just a simple man—when I look at 212(f), it’s been around since, I guess,
1956. It's been used many, many times. Actually, 1952. Every President since 1981 has used it at least once. Trump used it. They beat up on Trump when he did his little travel ban, but the Supreme Court upheld that and said he can do that, and he did. It's been used by Trump. He used it in the first week of office. Obama used it 19 times, Bush used it six, Clinton used it 12, Bush before used it once, Reagan used it five times.

When you look at what that 212(f) is, this is it. Everybody takes a look at it. Let me read it. Section 212(f) of the INA:

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

It was used several times, 69 times in the past several years, dating back to 1980.

Mr. Wolf, how do you feel about 212(f)? Instead of providing all these resources and asking for more support, why can't we just say let's get 212(f), the Supreme Court has ruled that Trump used it when he had his travel ban, let's just shut down the border, use 212(f), until we can get some operational control?

Mr. Wolf. Well, Congressman, the Trump Administration, particularly when we talked about the travel restrictions, used 212(f) effectively to make sure that we got more information sharing than we ever got from basically every other country around the world.

Look, I think the conversation that I continue to hear is we need more resources, and we need Congress to fix this crisis, and that is just not correct.

This administration has all the authority and all the power that it needs to secure the border today. I know that because we did it during the Trump Administration.

It wasn't perfect. I'm not saying that it was. We did it effectively, and it became the most secure border in our lifetime.

So, they can talk about more resources. You can talk about how it's difficult and how it's hard and how we don't have enough resources. That does not mean that you exempt whole classes of individuals from law or you categorically parole individuals into the country.

If all these individuals that they are paroling in really need asylum protections, why aren't they bringing them in as asylees or refugees? They're bringing them in as parolees.

Mr. Nehls. Yes. I've gotten 10 seconds. Thank you, Mr. Wolf.

I will say this. Donald Trump has been the best President in my lifetime. When he comes back in 2024, 212(f) needs to be used. We need to shut down our southern border until we have operational control and save America.

I yield back.

Mr. McClintock. Ms. Jackson Lee.

Ms. Jackson-Lee. I thank the Chair.

I have a lot of friends in this room, and some are all on one side and many are on the other side. I have heard some shocking things in here that will literally take my breath away, adding to the Canadian fires, literally take my breath away.
Someone offered up the Catholic Charities. The Republicans are known to introduce legislation and try to pass legislation to penalize the Pope, Catholic Charities, and other nonprofits for simply doing what the scriptures in their faith tell them to do.

In addition, the kind of self-righteous testimony that I’ve heard—and it is not ad hominem of anybody, I’ve said it generically—is unbelievable. It is simply unbelievable.

I’ve been on Homeland Security since 9/11, helped create the Committee and the department. I could turn around and blame the victims who jumped out of the building. That’s how outrageous this testimony has been.

As it relates to Title 42, since it was lifted the number of unlawful crossings at the southwest border has dropped nearly 65 percent per the Biden Administration. The administration in the last two fiscal years, DHS has seized more fentanyl and arrested more criminals for committing crimes related to fentanyl and precursor chemicals than any previous five years combined. Fentanyl seizures are even higher in Fiscal Year 2023. I really don’t know what you’re talking about.

The administration has strategically placed more than 24,000 Border Patrol agents, officers, thousands of troops, and contractors, to the concern of many various positions, and over a thousand asylum officers along the border.

Let me be very clear. The Chair of this Committee said, as it relates to the impeachment of the Secretary, it’s not a matter of if, it’s a matter of when.

Someone tell me how we’re going to, in a bipartisan way, do the job that the American people want us to do. We are all concerned. The misrepresentation of what Border Patrol agents are saying, I don’t know what you all are hearing. When I go, they are both collegial, congenial, factual, compassionate, and reasonable. They love their job. They believe that a lot of work is being done by Congress to give them resources. Someone just said they need no resources.

When there are issues that need to be addressed, we do need to address them in a bipartisan way, as opposed to condemnation.

For every visit you’ve been to the border, I’ve probably doubled it. I’ve walked the streets and seen the despair. I’ve been in the nonprofits. Yes, I have seen the horrors of the Trump Administration snatching children away from their parents and the complete disconnect that the children got in only months of separation when they tried to reunite them and the children were looking in shock at the mother and would not even go to the parent. That’s how dysfunctional they had become.

I have a short time, Mr. Reichlin-Melnick. I know you have three names, but forgive me. Give me just a quick snippet of the fact that the world has changed with the amount of migration and people moving, i.e., Venezuela, and it is enormous. Just quickly, because I have another question quickly for you.

Mr. REICHLIN-MELNICK. Yes. This is the big difference between the Biden Administration and the Trump Administration, is who is coming.

The Trump Administration, it was mostly Mexicans and Central Americans. Now, we are seeing far greater flows from other parts
of the Western Hemisphere, in particular, Venezuela, Cuba, and Nicaragua, which pose very different challenges to processing.

Ms. JACKSON-LEE. For those who say we're doing nothing, I know that the American Immigration Council has done some work on this.

Can you discuss what you found as it relates to arrests by Customs and Border Protection of individuals trafficking fentanyl?

Can you quickly distinguish—there is something called human smuggling, which is what the bulk of activity is going on with the cartels and the smugglers. It is different from human trafficking. I am a champion against human trafficking.

Please explain the fentanyl issue that you've been able to determine and how smuggling and trafficking is different, and how it is human smuggling that is going on at the border, and that the administration has its hand on trafficking, yes, sir.

Let me say Reichlin-Melnick. Thank you.

Mr. REICHLIN-MELNICK. Yes, really quickly, smuggling is usually people pay a smuggler to smuggle themselves. Trafficking is people who are being trafficked involuntarily, against their own will.

When it comes to fentanyl, I think there I look to what the law enforcement agencies say. CBP, ICE, his, the DEA, and the FBI all say the overwhelming majority of hard drugs, such as fentanyl, come into the U.S. at ports of entry, smuggled usually in passenger cars and most often by U.S. citizens.

Ms. JACKSON-LEE. They're catching them?

Mr. REICHLIN-MELNICK. The fentanyl seizures have increased every year, and I believe the deployment of nonintrusive inspection technology increases year by year.

Mr. MCCLINTOCK. The gentlelady's time has expired.

Mr. Hunt.

Ms. JACKSON-LEE. Thank you. I yield back, Mr. Chair.

Mr. HUNT. We are a Nation of laws, or we are not a Nation at all. We already have laws on the books that can prevent the catastrophic border crisis that we are seeing every single day today.

We know they work. Do you know how we know they work? Because they worked under President Trump. They worked because he and his administration—and you, Mr. Wolf—chose to enforce those laws.

Now, is this merely a failure to act, or is this intentional?

President Biden and Mayorkas act as if their hands are tied, like nothing can be done to fix this border crisis. Interestingly enough, almost every policy this administration has attempted to implement has been roughly a failure. Biden's Afghan withdrawal, Biden's foreign policy, Biden's economic agendas, failures.

Except for the border crisis. The border crisis is their only success. I say that because they have successfully created a chaotic situation to carry out a radical agenda. Problem. Reaction. Solution.

The administration created this problem, listened to the reaction, and I suspect they will present a solution. That solution, ladies and gentlemen, in the future will be an attempt at mass amnesty. There, I said it.

The real solution would have been to prevent this crisis from happening in the first place. The Biden Administration could have
done just that if we'd have kept simple laws on the books and enforced the laws of this country. Simple as that.

Do you know that over 200 people on the terrorist watch list have been arrested at the border since President Biden took office? That should be terrifying for you to hear. That's just the ones that we know of. How many have escaped into the interior of the United States?

Now, I served my country in combat, and I was actually a West Point cadet when 9/11 happened. My classmates and I stood about 60 miles North, just up the Hudson River, New York City, and watched 3,000 innocent lives evaporate from our world in 90 minutes. My fear is that, with our porous border, another 9/11 is imminent, and it will happen because this administration won't fulfill its basic responsibility, which is to secure our homeland.

The Biden Administration is making a deliberate choice to not secure our border. Do you know how I know this is a fact? Because three years ago we weren't having this conversation.

My first question is for you, Mr. Wolf. What has changed between these administrations that has caused this crisis to explode to what we've seen lately?

Mr. Wolf. It's the intentional destruction of a lot of effective policies that were put in place during the Trump Administration. Happy to name those one by one by one.

We've heard a lot of talk about detention capability. What I will say is, yes, it's difficult, it's hard to detain individuals. If you actually want to remove individuals from this country, you need to detain them. Under the Biden Administration, they have removed the lowest number of individuals in, I would say, decades, 39,000 removals of criminal illegal aliens. That is a drop of over 62 percent from Fiscal Year 2020, which was during COVID.

So, there's a lot of different policies that they have decided to tear down, very effective policies, and they did that without any analysis. They did it because they didn't like it. They didn't like the President. They didn't like whoever at the time. Forget about whether they were actually protecting Americans or they were protecting American communities.

I think lost in this whole discussion is what is best for Americans on our border security policy, our immigration policy. It's not what is best for illegal aliens. It's what is best for Americans. That should be our first duty.

Mr. Hunt. Another question for you, sir. If you were running the Department of Homeland Security right now the same way that Secretary Mayorkas is doing right now, what do you think President Trump would have done to your job?

Mr. Wolf. I would no longer be there.

Mr. Hunt. I kind of tend to agree with you on that, sir.

I want people to understand this. We've had over six million people, illegal aliens, enter our country since Biden's taken office—six million. We have conceded our border to the cartels. Fentanyl has killed enough Americans—enough fentanyl has poured into this
country to kill every single American five times. We have sworn en-
emies on the terrorist watch list in the United States, and we don’t
even know where they are.
If President Biden does not secure this border, we’re going to
have another 9/11. That’s how serious this is. We must do our job
and protect the American citizens.
Thank you all for being here, and God bless you.
Mr. McCLINTOCK. Thank you.
Ms. Ross.
Ms. Ross. Thank you, Mr. Chair.
I just want to do a little reset here. To be very clear, President
Biden inherited a disaster of a border from former President
Trump. We all watched it on TV aghast. He did it in the middle
of a global pandemic.
Now, the Biden Administration is not perfect, and I’m not here
to defend every single thing that they’ve done. What they have
done is work to correct course, to tighten security, while also ex-
panding pathways to legal immigration.
These have been good faith attempts to enforce the law, which
former President Trump rarely tried to do in a way that helped our
immigration policy.
It was the Trump Administration that allowed unaccompanied
children to cruelly be held in detention far longer than allowed by
the law. It was his administration that designed and boasted about
family separation. It was his administration that wasted resources
illegally on inefficient enforcement mechanisms like the construc-
tion of the border wall.
Countless reports have demonstrated how the militarization of
border security increases the number of unauthorized immigrants
who remain in the United States because it disrupts historically
circular-flowing migration and results in a net undocumented in-
flow.
This hearing is yet another example of my Republican colleagues’
preference for partisan political hearings over engaging in good
faith discussions about solutions that could actually work. There
are bipartisan proposals for this on both the House and Senate
side, yet we’ve had zero hearings on those.
As we’ve heard in the days after Title 42 ended, Border Patrol
encounters have gone down. So, it is particularly ironic that we are
having this hearing now. Now is the time that we should be work-
ting together on solutions.
We need legislation that enhances border security. Several of us
recently visited the border, and we got lots of great suggestions
about how to do that from the people who deal with this every sin-
gle day.
We also need legislation that expands pathways to legal resi-
dency and citizenship and strengthens our economy.
You might have seen me step out briefly about a half an hour
ago to meet with the home builders from North Carolina. One of
their priorities for their legislative agenda is comprehensive immi-
grantation reform. Same priority for most of the businesses in my dis-
trict in North Carolina, same priority for the agricultural commu-
nity, same priority for the hospitality industry. Yet, we haven’t had
one hearing on doing that.
For two sessions of Congress, I’ve introduced bipartisan, bicameral legislation to help people who came to this country legally as dependents of visa holders. Because we have such a broken immigration system, they’re being forced to self-deport and leave their families and the only country that they know because this Congress does not have the will to take that bill up.

Now, to the credit of the last Congress, it passed the House in two different vehicles.

We have a broken immigration system on many levels. It is time to get about the business of having hearings on real legislation that will solve real problems and help real people.

Thank you, Mr. Chair, and I yield back.

Mr. McClintock. Thank you.

Mr. Wolf, when you were Acting DHS Secretary the border was secure, was it not, for all intents and purposes?

Mr. Wolf. We worked every day to secure it, every day, every week, every month.

Mr. McClintock. We had reached a very low number of illegal border crossings, had we not?

Mr. Wolf. I think by a number of different metrics, and that’s certainly one, the number of apprehensions fell.

Mr. McClintock. Since then, of course, we have seen a mass migration of unprecedented proportions, millions and millions flooding into the country.

Were there changes in law that occurred to account for this, or is it entirely a matter of not enforcing the law?

Mr. Wolf. There’s been no changes in law that I’m aware of.

Mr. McClintock. Mr. Edlow, there have been a lot of instances now when the administration’s been called out by the courts for failing to enforce the law. What’s been the administration’s response to these court orders?

Mr. Edlow. Well, with the exception of the September 30 memo, which was enjoined and vacated in June 2022, to the extent that the administration has been able to get around the court orders, they have.

Mr. McClintock. Has anybody challenged them on that in court?

Mr. Edlow. Some States have challenged them, yes.

Mr. McClintock. Has any court come back and issued a criminal contempt citation for failing to—

Mr. Edlow. Not that I’m aware.

Mr. McClintock. Are there any pending?

Mr. Edlow. I couldn’t answer that, sir.

Mr. McClintock. All right.

Mr. Wolf, any thoughts on that?

Mr. Bradbury?

Mr. Bradbury. I don’t believe there are any pending. Obviously, Mr. Chair, it is difficult for a court to impose contempt.

Mr. McClintock. Right. What I’m trying to do is determine the difference between simple maladministration and deliberate violation of law. I think that’s a very bright line that we need to define.

We spoke of detention. I think Mr. Reichlin-Melnick made a very good point. You’ve have ten illegal aliens, you have beds to detain five, what do you do with the other five?
Is that what's actually going on, Mr. Wolf?

Mr. WOLF. So, not only should you be detaining, but if you’re unable to detain, then you can certainly have them wait, such as what we did under MPP.

I think that’s an interesting point that was missed in this whole debate. We started talking about detention and how that’s never achievable. I’m not here saying that you can detain everyone, but there is another option that Congress in the INA tells you to do. So, if you can’t do that, then you can hold them in a third country, as we did under the Migrant Protection Protocols. Again, interesting that was not brought up.

So, there are other ways that you can enforce the law. This idea that if you can’t detain them, that simply they’re released into American communities, is not the law, and we shouldn’t pretend that it is. Yet, that is what is occurring, what’s been occurring for the last several years.

Mr. MCCINTOCH. Well, is this actually a violation of law or is it just a very poor decision?

Mr. WOLF. I would say it’s both.

Mr. MCCINTOCH. Mr. Edlow, I’m told that all the capacity that we have right now isn’t being used, and yet illegal aliens are being released into the country.

Mr. E DLOW. I don’t believe it is being used, Congressman. For the most part there are more interest right now in paroleing people, and now it’s giving notices to appear at the border and letting people go along their way. There is not an interest in detaining as far as I can see.

Mr. MCCINTOCH. Let’s talk about parole authority. Congress did tighten the criteria for paroles back in the mid-1990's precisely because it was being abused in the manner that Mr. Reichlin-Melnick outlined.

Is it true that 20,000 mass paroles were done under the Trump Administration, Mr. Wolf?

Mr. WOLF. So, there are a number of parole programs that we administered, obviously, that we began—or we continued to administer that was going on during the Obama Administration and the like. Again, the important point here is, are you trying to secure the border, and are you trying to hold people accountable, and are you trying to get them the protections they need?

So, as they parole people into the United States, there’s no asylum protections for them. They’re not in asylum proceedings. So, if they truly need asylum, why aren’t they being put into asylum proceedings? Instead, they’re simply paroling them into the country to, again, have this status for a year, perhaps even two years at a time. It doesn’t make any sense. It’s a little smoke and mirrors of what the administration is trying to do at the border.

Mr. MCCINTOCH. OK. Asylum hearings are designed to be adversarial in nature. They’re presided over by immigration judges bound by the law. How does that differ from the administration’s replacement of this process with USCIS asylum officers?

Mr. BRADBURY?

Mr. BRADBURY. Well, it’s completely different now because they’re reviewing their own appeals of their own decisions. It’s not an adversarial process.
Mr. MCCLINTOCK. Is there a provision of law that gives them this authority?

Mr. BRADBURY. No. It’s in violation of Section 103 of the INA. It’s the Attorney General and the immigration judges that have to hear those appeals.

Mr. MCCLINTOCK. Well, I see my time has expired.

I see Mr. Swalwell has arrived, so I recognize him for five minutes.

Mr. Swalwell. Why is this hearing happening within the same week that we just learned that the Department of Homeland Security announces the average daily unlawful border crossings are down sharply relative to the period before Title 42 ended? We’re seeing record number of fentanyl being seized by Border Patrol—seized, not getting passed them but successes because our law enforcement are doing their job and showing up every day. We don’t congratulate them. Instead, we use that as a political tool to try and hit the Biden Administration.

Why is this hearing happening? It’s because it’s a part of a corrupt bargain, a dirty deal that allows Speaker McCarthy to stay in power. He’s on an installment plan. He’s got to pay an installment every week. He’s got to give Tucker Carlson the January 6th sensitive police footage. He has to put Marjorie Taylor Greene on the Committee of Homeland Security, even though she said January 6th was a 1776 for our country and she goes and visits the terrorists of January 6th at the D.C. jail and dishonors the police officers. Another installment is we have to defund the effort to help Ukraine to satisfy the Putin bloc that is across the aisle.

This is an installment that Ms. Taylor Greene openly admitted when she said she’s voting for the crazy idea that we pay America’s bills to lift the debt ceiling because she’s going to get some dessert out of it. That’s what she said. She said: “I’m going to get some dessert out of this shit sandwich.”

Those are her words. This is her dessert. We all have to sit here for her dessert.

Mr. MCCLINTOCK. The gentleman will suspend for a moment.

The gentleman is warned not to use vulgarities in this Committee room, and the gentleman is warned to restrain from making attacks on the motivations of Members.

Ms. JAYAPAL. Mr. Chair, point of order.

Mr. MCCLINTOCK. The gentlemen will proceed in order.

Mr. Swalwell. Mr. Chair, I apologize for quoting your colleague.

Mr. MCCLINTOCK. Point of order. The gentlelady will State the point of order.

Mr. Swalwell. No, no, Chair. I apologize for quoting your colleague. I won’t quote her again if that’s offensive to you.

Mr. MCCLINTOCK. You will refrain from questioning the motives of Members.

Mr. Swalwell. So, we’re here because that was a promise that my colleague told the public was made, that we get to impeach Mayorkis. So, this is the predicate to bring impeachment proceedings against the Secretary of Homeland Security who just announced last week that daily unlawful border crossings are down sharply.
Look, Kevin McCarthy may have the title of Speaker, but it’s clear to me, because of this hearing today, he doesn’t have the job. The job is by the person who’s getting her dessert here today.

I also think, Chair, it’s quite rich that the title of today’s hearing is whether the law is being faithfully executed because your principal witness was declared to have been an unlawful Acting Secretary of Homeland Security and, on September 17, 2020, failed to honor his own subpoena, which puts him in good company because the Chair of our Committee is 400 days in to not honoring his own subpoena. We’re calling this hearing a question of whether the laws are being faithfully executed with a witness who didn’t honor a subpoena Chaired by a Committee Chair who did not honor his subpoena, very rich.

So my question, Mr. Reichlin-Melnick, is, considering that border crossings are down, we’re trying our best with a party that doesn’t want competence at the border—they want chaos; they want to declare there’s open borders to try and incite people to come to the United States—do you see grounds at all, any predicate that would summarize why an impeachment of Secretary Mayorkis would be justified?

Mr. REICHLIN-MELNICK. Congressman, I’m not an expert on impeachment, but what I do know is that it’s been 33 years since we last updated our illegal immigration laws and 27 years since we last updated our asylum laws.

We are operating a 20th century system, a system that in some cases came around before the worldwide web, and it’s not a surprise that in, a 21st century global displacement crisis, the United States is struggling very hard to keep up.

So, I think what this shows is that we need to fix and update our laws, give the system the resources it needs to work, and ensure that the DHS can actually carry out the laws in a way that today in many ways it struggles with.

Mr. SWALWELL. Thank you. I think the summary here is people want competence, they don’t want chaos, on immigration, on the debt ceiling, on anything else.

I yield back.

Mr. MCCLINTOCK. Thank you. I think they also would like civility.

This concludes today’s hearing. I want to thank all our witnesses for appearing before the Committee. I want to apologize on behalf of the Committee for the ad hominem attacks that were directed at several of our guests today.

Without objections, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record. I know I will have quite a few.

Without objection, the hearing is adjourned.

[Whereupon, at 4:04 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on Immigration Integrity, Security, and Enforcement can be found at the following links: https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=116066.