

PRESIDENTIAL POWER TO SECURE THE BORDER

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION INTEGRITY,
SECURITY, AND ENFORCEMENT

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

THURSDAY, MARCH 7, 2024

Serial No. 118-66

Printed for the use of the Committee on the Judiciary



Available via: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2024

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PRESIDENTIAL POWER TO SECURE THE BORDER

Thursday, March 7, 2024

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON IMMIGRATION INTEGRITY, SECURITY,
AND ENFORCEMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to notice, at 2:52 p.m., in Room 2141, Rayburn House Office Building, the Hon. Tom McClintock [Chair of the Subcommittee] presiding.

Members present: Representatives McClintock, Jordan, Biggs, Tiffany, Roy, Van Drew, Moore, Hunt, Jayapal, Nadler, Lofgren, Correa, Escobar, and Ross.

Mr. MCCLINTOCK. The Subcommittee will come to order.

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

I want to welcome you all to today's hearing on Presidential power to secure the border.

I want to thank all of you for your patience. We were delayed by votes. That's the bad news. The good news is we won't be interrupted by votes during the hearing.

I think I will begin by recognizing myself for five minutes.

During a trip to the Yuma sector last year, we met with a group of Border Patrol Agents. I said, "Look, Congress writes the laws. We can't enforce them. So, what laws do you need us to write?" To a person, these line agents all said, "We don't need new laws. We need to enforce the laws we already have."

At Eagle Pass in January, the head of the Border Patrol said,

I'm standing in front of an open fire hydrant with a bucket. I don't need more buckets. I need someone to turn off the hydrant.

Donald Trump did exactly that. He enforced our existing laws. He used Title 42 to stop millions of illegal crossings. He implemented the Remain in Mexico policy, requiring asylum claimants to remain in Mexico until their cases were heard. He enforced court-ordered deportations. It worked. Illegal border crossings fell to a 46-year low.

The laws didn't change, but the administration changed. On Biden's first day in office, he ended the Remain in Mexico policy.

He ordered ICE to stop enforcing court-ordered deportations, and he ordered all construction on the border wall to cease.

Since that day, he has deliberately released into the country more than 4.5 million illegal aliens and allowed an additional 1.8 million to evade apprehension by the Border Patrol, while it was overwhelmed by this influx. That is the combined population the size of the State of Missouri, our 18th largest State with eight Congressional Districts. I said the laws didn't change. The enforcement of those laws changed.

This crisis should be a surprise to no one. This is exactly what the Democrats promised to do. This is exactly what they have done, and this is exactly what they have defended every day for the last three years.

Today, we will hear from officials who served in the Trump Administration who will describe how the immigration laws were enforced with an eye toward border, interior, and national security. They will describe how enforcement has changed so radically under the Biden Administration.

Now, we can pass laws that make it harder to assert phony asylum claims; prevent future Presidents from flouting the law, as this one has done; finish the border wall that Border Patrol Agents tell us is a critical tool for them, and we can put teeth into laws protecting American workers from the flood of cheap illegal labor the Democrats have unleashed. In fact, the House did that; it did all of that by passing H.R. 2. Senate Democrats refused to take it up.

Instead, they support a bill that the Senate can't pass. That bill would make it impossible for a future President to secure the border by requiring release of 4,000 such claimants a day into the country before the President can take any action. Current law requires the detention of all such claimants. The Senate bill would require the release of all such claimants, while tapping American taxpayers for another \$1.6 billion on top of the billions we are already paying to support them, and to encourage millions more still to come.

Under the Senate bill, even when an administration can finally use the weak authority to shut down the border, the border is never really shut down, as the bill requires at least 1,400 illegal aliens a day to be processed into the country at points of entry—at a minimum.

The American people are coming to well understand the implications to the safety, security, and prosperity of our Nation. Our public schools are being overwhelmed by illegals requiring education. New York estimates the cost to be a billion dollars a year so far. Well, that's the same as a billion-dollar cut to the New York City schools for New Yorkers.

Our homeless shelters and social programs have been overwhelmed to the point that services are now being cut or denied for Americans. Fatal drugs, like fentanyl, are now flooding our streets. Entirely preventable and tragic violent crimes are reported daily. Violent criminal gangs and international crime cartels are now operating in our cities, and sanctuary policies protect these criminals from deportation, and in many cases even from detention.

Here's the fine point of the matter: The President has the authority to stop this. Trump did; Biden did not. Far worse, Biden's policies have actively aided and abetted this catastrophe.

Congress can't fix this by laws that won't be passed—or by bills that won't be passed or laws that won't be enforced when they are passed. Ultimately, this crisis can only be fixed by replacing this administration with one that is determined to secure our borders, protect our people, and uphold the rule of law. That can only be done by the American people at the ballot box.

Today, our witnesses include some of the architects of the successful Trump Administration immigration policies, and I would urge my colleagues to listen attentively to what these experts have to say.

The policies they helped put in place worked to reduce illegal immigration and to secure the border. President Biden's policies do the exact opposite, and we can see that so clearly today.

With that, I will yield back, and now recognize the Ranking Member, Ms. Jayapal, for an opening statement.

Ms. JAYAPAL. Thank you, Mr. Chair.

I welcome all our witnesses.

Mr. Chair, it feels like we've been stuck in a time loop since this Congress began. House Republicans struggle, and often fail, to do the most basic aspects of governing, while this Committee continues to hold the same hearings on the border. Today seems no different.

Today's hearing appears to be an attempt by my Republican colleagues to justify their inability and lack of desire to act in a bipartisan fashion to address the border and fix the broken immigration system.

I think it is important for us to take a step back and remember how we got here. Earlier in this Congress, Republicans passed their cruel, inhumane, and unworkable border bill, H.R. 2, through the House. After its passage, all we heard from our colleagues was that H.R. 2 could secure the border. That bill has since failed twice to pass the U.S. Senate, rejected on a bipartisan basis.

Then, after insisting for months that the only way to address the border was through harsh border security legislation, former President Trump instructed Republicans to dismiss out of hand a bipartisan border bill that Minority Leader Mitch McConnell calls, "the strongest and toughest border bill in 30 years," and that was written by the second most conservative Senator in the U.S. Senates, James Lankford.

Immediately, Speaker Johnson and others began to claim the President doesn't need this legislation; President Biden can secure the border through Executive actions; there's no bills needed at all.

Let us be clear. The American people are not stupid. They know that Republicans do not actually want to solve or address the situation at the border because Republicans have said that. Donald Trump has said that over and over again: Let's not do anything to solve the problem at the border. Let's keep it out there as an issue for the election. As we have heard from multiple Republicans, including on this Subcommittee, they would rather weaponize the border as a political issue for this election year.

Today's hearing will not bring my colleagues the answers that they are looking for because the reality is, no, the President cannot, quote, "close the border."

Speaker Johnson and others have said that all the President needs to do is to use Section 212(f) of the Immigration and Nationality Act to, quote, "shut down the border to all border crossers." However, what they seem to forget is that President Trump tried to do exactly that in November 2018, and he was stopped by our courts. Even the Supreme Court refused to intervene and lift the lower court injunction.

Whether the President can technically close the border or not actually misses the point. The reality is attempts to use cruel and inhumane deterrence and enforcement alone, which is what President Trump and other administrations have tried to do, simply does not work.

Let's think back. When President Trump implemented the Remain in Mexico program early in 2019, did people stop crossing the border? No. No, they did not. In fact, that summer we saw some of the highest levels of immigration of the entire Trump Administration.

We saw the same thing with the use of Title 42. When President Trump used Title 42 to turn back all border crossers, encounters between the ports of entry shot up, not down. They went up.

Remember, Title 42 was also a boost to cartels. Knowing that they would be turned away under Title 42, migrants were forced to rely on cartels to try to get smuggled into the country between points of entry. Cartels actually offered packages for migrants to make multiple attempts at crossing. One migrant was apprehended over 40 times—just one alone. Human smugglers told reporters that Title 42 saved them money—with some going as far as to say, quote, "It's great for us." This is the cartels we're talking about.

Let me be very clear that the vast majority of these people that are coming across the border, migrants, do not want to engage with cartels. They want to follow a legal process, and they do follow a legal process when we provide workable ways for people to seek entry and refuge.

I have said to all Congress, the best way to help secure the border is to expand lawful pathways and adequately fund the immigration system. We have not updated the legal immigration system in this country in over 30 years. The more broken the legal immigration system is, the more people will try to come to the border as the only means of entry.

We should be having hearings on this Committee about how we can expand lawful immigration to the United States and how it benefits the United States. Just last month, the Congressional Budget Office said that,

Because of the recent increase in immigration, over the next 10 years, the economy is going to grow by \$7 trillion and revenues will increase by a trillion dollars.

This was further backed up by another new government study by the Department of Health and Human Services, which shows that refugees and asylees have a net positive impact of \$124 billion over 10 years.

I ask for unanimous consent, Mr. Chair, to enter those studies into the record.

Mr. MCCLINTOCK. Without objection.

Ms. JAYAPAL. Unfortunately, the Republicans have time and time again blocked additional funding and seem to oppose more legal immigration. They are not interested in real solutions, and that is extremely unfortunate for the American people, for all of us across the country who want to get to a real solution.

I look forward to hearing from all our witnesses and the perspectives they bring on this issue.

I yield back the balance of my time.

Mr. MCCLINTOCK. Thank you very much.

I will next recognize the Ranking Member of the House Judiciary Committee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Chair, no President has ever had the ability to fully stop unlawful crossings. The notion that the President has all the authority, not to mention the resources, that he needs to solve all the issues at the border with the stroke of his pen is a fantasy.

It has been dreamed up by a Republican Party desperate to justify their rejection of a bipartisan Senate deal to address border security. They are embarrassed to admit that the real reason they abandoned the deal was because Donald Trump told them to.

At the behest of Donald Trump, Republicans cannot take yes for an answer. They are tying themselves in knots, not willing to do anything to actually address the border or to fix our immigration system, because they want to keep immigration alive as a campaign issue.

So now, they have changed course. Despite spending the last year claiming that the only solution to the border crisis was their absurd, unworkable messaging bill, H.R. 2, a bill that got only 32 votes in the Senate last week, House Republicans now tell us that the President has had the authority to fix the border all along; he just won't use it. What a joke. What pure hogwash.

Let's take a trip down memory lane. We have not meaningfully updated our immigration system in 30 years. Congress has tried multiple times to enact comprehensive immigration reform. The Senate last tried in 2013. House Republicans have stood in the way of progress at every turn.

House Republicans have also refused to provide additional resources and personnel for the border. In 2021, all but six House Republicans voted against the bipartisan infrastructure deal, which provided additional funding to points of entry to combat smuggling of people and drugs.

By the way, we know that most fentanyl, almost all the fentanyl comes in hidden in trucks that pass through points of entry. The way to stop the importation of fentanyl and the poisoning of our people is not to worry about individual migrants; it is to increase the inspection facilities at the points of entry, but Republicans don't want to do that.

All but two current House Republicans voted against providing robust funding for border security operations in the Fiscal Year 2023 appropriations omnibus legislation. That bill provided more than \$17 billion to Customs and Border Protection, including fund-

ing for an additional 300 Border Patrol Agents. The omnibus also included \$16 million to hire 125 CBP officers and \$70 million for nonintrusive inspection technology to detect narcotics, like fentanyl, and firearms at points of entry.

Then, in October 2023, President Biden asked Congress for additional funding to support CBP in security our points of entry from drugs, to create a more orderly process at our border, and to hire more asylum officers and judges, so cases could be heard in weeks, not years.

He also proposed providing the support that Ukraine and other allies around the world desperately need—support, I might add, that does not just go abroad, but that runs through manufacturing towns across America. Again, at Donald Trump’s direction, Republicans said no.

Instead, they made what they thought would be an impossible demand: That they would not provide aid to Ukraine or fund the President’s border request unless policy measures to secure the border were attached. Then, to their surprise and horror, Democrats actually reached across the aisle to work with them toward a bipartisan solution, throwing a wrench into their plans.

Republicans want to believe that Democrats are the characters they paint us as on Fox and Newsmax. What they fail to understand is that all we want is a government that works for the people. That is why we fight for a humane immigration system, an expanded social safety net, and protections for women, people of color, and the LGBTQIA+ people.

Most importantly, they fail to understand that we govern responsibly. We don’t allow ourselves to fall into chaos that does nothing but weaken us on the world stage. So, House Republicans were caught flatfooted when Senate Democrats worked with the minority, with the Republicans, to craft a bill to meet their border demands—a bill that Minority Leader Mitch McConnell called, “the strongest border bill in 30 years,” and that Senators Thune and Graham said, “contains measures that could never be passed in the Republican-led Senate.”

Even this bill, which contained provisions that I and many of my colleagues on this side of the aisle found deeply troubling, was not enough for House Republicans. They bowed to the demands of Donald Trump that they preserve the immigration issue for his campaign, and they killed the bill before it even got off the ground. As ever, they could not bring themselves to take yes for an answer.

So now, in a desperate attempt to save face, they are switching tactics. Despite the months they spent saying that H.R. 2 was the silver bullet, and that legislation was absolutely necessary to fix the border, now they say that the system had a magic silver bullet in it all along. Speaker Johnson and the chaos caucus are insisting that the President can simply use Section 212(f) of the Immigration and Nationality Act to prevent immigrants from crossing the border.

If this sounds like a familiar argument to you, it should. That is because President Trump tried to do exactly that in 2018, and he was immediately shot down by the courts.

The President does not have the authority to unilaterally shut down the border. Neither our laws, nor our democracy, allow such a power. To pretend otherwise is absurd.

Congress must work together to provide the legal tools and the resources necessary to address the border crisis. I know that there are Democrats willing to put in the hard work, but, so far, House Republicans have proven that Democrats have no partner in this effort.

So, while I look forward to hearing from our witnesses, we already know the answer to the questions the majority is posing today. More importantly, we know exactly why they are opposing it. MAGA Republicans want to talk about the border, but they don't want to do anything about it—for the most partisan, cynical reasons.

I yield back.

Mr. MCCLINTOCK. The gentleman yields back.

The Chair is now pleased to recognize the Chair of the House Judiciary Committee, Mr. Jordan.

Chair JORDAN. I thank the Chair. I won't make a statement. I want to get on with the testimony here from these fine witnesses. I want to mostly thank the Chair for putting this hearing together on this critical subject that the American people care deeply about.

With that, I would yield back.

Mr. MCCLINTOCK. Thank you.

Well, then, we will now go to our panel of witnesses. I want to again thank them for their patience for the delay.

The witnesses we have today are Mr. Art Arthur. He is the resident fellow in law and policy for the Center for Immigration Studies. Prior to that, Mr. Arthur served in the Immigration and Naturalization Service General Counsel's Office; as a Counsel in the House Judiciary Committee; as an Immigration Judge, and Staff Director for the National Security Subcommittee for the House Committee on Oversight and Government Reform. He earned a JD from George Washington School of Law and a bachelor's at the University of Virginia.

Mr. Tom Homan is the former Acting Director of U.S. Immigration and Customs Enforcement during the Trump Administration; serving in senior roles at ICE during several administrations. He has 34 years of experience in Federal immigration enforcement, and he currently serves as a visiting fellow at the Heritage Foundation.

Next, Mr. Aaron Reichlin-Melnick. Mr. Reichlin-Melnick is currently the Policy Director at the American Immigration Council, where he has also served as the policy counsel and a staff attorney. Prior to that, he was justice fellow on the Immigrant Justice Corps and the Legal Aid Society in New York. He earned a JD at Georgetown University Law Center and a bachelor's at Brandeis University. He is here at the invitation of the minority.

Finally, we have Mr. Gene Hamilton. Mr. Hamilton serves as the Vice President and General Counsel of American First Legal. Prior to that, Mr. Hamilton served as Counselor to the Attorney General at the Department of Justice during the Trump Administration. He previously served as Senior Counselor to the Secretary of Homeland Security and as General Counsel to the Senator on the Senate

Judiciary Committee. Mr. Hamilton earned his JD from the Washington and Lee School of Law and his bachelor's from the University of Georgia.

I would like to welcome these witnesses today; thank them again for appearing.

We will 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're about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record show the witnesses have answered in the affirmative.

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

We will begin with Mr. Arthur.

STATEMENT OF ANDREW R. ARTHUR

Mr. ARTHUR. Thank you, Mr. Chair.

I don't want to correct the Chair, but I never actually served in the Trump Administration. I served from the George H.W. Bush Administration through Barack Obama, President Barack Obama.

Chair McClintock, Ranking Member Jayapal, and the Members of the Subcommittee, thank you for inviting me here today.

The topic is timely, as we are in the midst of an unprecedented border crisis. Every month, tens of thousands are apprehended at the Southwest border, even while more than 43,000 others without visas schedule appointments at the border ports. The majority are released, which, as a Federal judge found last March, is driving the border crisis. That doesn't count tens of thousands who evade agents monthly, so-called gotaways.

Their entries are imposing billions in fiscal costs on States and localities for housing, healthcare, education, and other expenses. As the 2024 DHS Homeland Security Threat Assessment has explained, this crisis has created a vulnerability, quote, "terrorists and criminal actors may exploit."

The Constitution and the Immigration and Nationality Act provide the President with numerous and sufficient authorities to bring security to the border, which I discuss at length in my written testimony.

Key, however, is detention, which has been mandated for aliens at the ports since 1903, and for unlawful entrants since 1996. Unlike preceding administrations, the current one has largely failed to comply with those statutory mandates; instead, ending family detention entirely, while asking Congress for fewer detention beds in succeeding budgets and claiming they'll be sufficient to comply with DHS's statutory mandates. They're not.

The DHS Secretary, under 8 United States Code Section 1368(b), is supposed to tell this Committee every six months how many beds the Department needs to meet those requirements. If it has sent you those semiannual reports, it's news to me.

Congress must fund that detention and the resources needed to adjudicate those aliens' cases and removals. That will be costly at first, but those costs will quickly drop as entries drop.

As long as illegal entrants know they'll be released to live and work here indefinitely pending the adjudication of their asylum claims, they'll continue to come.

Detention also allows DHS to screen out those with valid asylum claims and remove the rest, as importantly, it would shift the cost of caring for those migrants from the cities and States to the Federal Government, where it belongs. Such detention must be humane and provide those held sustenance, medical care, and education. As a judge, I had jurisdiction over a family center that exceeded all those standards.

A 2015 District Court order in *Flores v. Lynch*, however, prevents DHS from housing families for more than 20 days. I respectfully disagree with the conclusions therein.

In 2019, a Federal bipartisan panel concluded that the children in those families were traumatized by the illegal journey here and that parents and children alike are particularly vulnerable to criminal predation. The panel found that Flores had exacerbated the pull factors drawing those migrants to this country and called on Congress to reverse it by legislation.

Failing that, it asked DHS to issue regulations replacing that order and allowing for family migrant detention. The last administration did so, only to have those regulations enjoined.

The incoming Biden Administration failed to seek Supreme Court review. It has also failed to issue regulations of its own.

More than 1.8 million family aliens have been apprehended at the Southwest border since February 2021.

The administration could also use diplomacy to encourage its regional partners to secure their own borders, which would deter new arrivals from abroad. The U.S. accounts for 25 percent of global GDP and it is Mexico's most important trading partner. Reports suggest that the Biden Administration has used its diplomatic power to encourage greater enforcement in that country, but more can be done.

Last, the administration did attempt to restrict asylum for aliens entering illegally, and until recently, was fighting court challenges against it. Last month, however, DOJ asked the courts to pause those cases, pending settlement negotiations. I commend you the February 21 order in one of those cases, *East Bay Sanctuary Covenant v. Biden*, and, in particular, the dissent by Judge Lawrence VanDyke.

I take no position on the claims that Judge VanDyke makes, but, in any event, it's incumbent on DOJ and DHS to coordinate any administrative actions securing the border to ensure challenges will be litigated forcefully and to a conclusion.

In September 1994, Barbara Jordan, former Member of this Committee and Chair of the U.S. Committee on Immigration and Reform, appeared before this Subcommittee and warned that, quote,

If we cannot control illegal immigration, we cannot sustain our national interest in legal immigration.

Look at the polling; talk to your constituents, and you'll see that's what's happening today. That's bad because America needs immigration, albeit on the terms Congress has established.

The administration and this Congress can and must do more to secure the border; the stakes are too high not to.
Thank you, and I look forward to your questions.
[The prepared statement of Mr. Arthur follows.]

11

Testimony of Andrew R. Arthur
Resident Fellow in Law and Policy
Center for Immigration Studies

To the Subcommittee on Immigration Integrity, Security, and Enforcement of the
Committee on the Judiciary
United States House of Representatives

For A Hearing Titled:
“Presidential Power to Secure the Border”
March 7, 2024
2:00 p.m.
Room 2141, Rayburn House Office Building
Washington, D.C. 20515

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

Congress' Plenary Authority Over Immigration

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

Article I, sec. 8 of the U.S. Constitution¹ states, in pertinent part: "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization [and t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers".

"Naturalization"² is the process by which a foreign national in the United States—defined as an "alien" in section 101(a)(3) of the Immigration and Nationality Act (INA)³—becomes a "citizen" (as defined by reference therein and in section 101(a)(22) of the INA⁴). Inherent in and essential to Congress' constitutional authority "to establish a uniform Rule of Naturalization", therefore, is its ability and power to regulate immigration.

As the Congressional Research Service (CRS)⁵ has explained: "Long-standing Supreme Court precedent recognizes Congress as having plenary power⁶ over immigration, *giving it almost complete authority to decide whether foreign nationals* (aliens, under governing statutes and case law) *may enter or remain in the United States*" (emphasis added). Two brief Supreme Court holdings illustrate the point.

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

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

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

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

³ See sec. 101(a)(3) of the INA (2023) ("The term 'alien' means any person not a citizen or national of the United States."). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁴ See section 101(a)(22) of the INA (2023) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

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

⁶ See "plenary power". LEGAL INFORMATION INSTITUTE (undated) ("Complete power over a particular area with no limitations."). Source: https://www.law.cornell.edu/wex/plenary_power. See generally, Feere, Jon. *Plenary Power: Should Judges Control U.S. Immigration Policy?* CENTER FOR IMMIGRATION STUDIES (Feb. 25, 2009). Source: <https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy>.

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

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

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

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

Section 212(a) of the INA⁹ lists the various categories of aliens whom Congress has determined the executive should bar from admission to the United States (known collectively as the “grounds of inadmissibility”).

The most fundamental of those grounds, and the one that Congress uses to control the flow of new immigrants into the United States, is section 212(a)(7)(A)(i) of the INA¹⁰, which bars the admission of any alien “who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document”.

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

To guide the executive in implementing its “policies pertaining to the entry of aliens”, Congress has created a protocol in section 235 of the INA¹¹ for U.S. Customs and Border Protection (CBP) to follow in considering whether to admit alien “applicants for admission”¹².

That statutory term, “applicant for admission”, applies to both aliens seeking admission at the ports of entry and migrants apprehended crossing the land and coastal borders between those ports¹³-- a fact that is essential to understanding what is occurring at the Southwest border now.

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

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

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

¹⁰ *Id.* at cl. (a)(7)(A)(i).

¹¹ Sec. 235 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

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

¹³ *See id.*

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

Prior to that amendment, officers in the then-Immigration and Naturalization Service (INS)¹⁵ — the precursor to CBP and U.S. Immigration and Customs Enforcement (ICE) in immigration enforcement — were required to apply a factual and legal analysis known as the “entry doctrine”¹⁶ when they encountered aliens at the borders and the ports.

As its name suggests, the focus of the entry doctrine was on whether an alien had physically “entered” the United States¹⁷, and the circumstances surrounding that entry.

Under that doctrine, aliens who had not made an entry into the United States were placed into exclusion proceedings under then-section 236 of the INA¹⁸ and afforded few constitutional protections.¹⁹ Aliens who had deliberately entered the country — even illegally — “free from actual and constructive restraint”²⁰ were placed into deportation proceedings under then-section 242 of the INA²¹, in which they received greater rights and procedural benefits.

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

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

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

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

¹⁷ *Id.* at 1.

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

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

²⁰ *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973). Source: https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf.

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

²² See fn. 19 (*Shaughnessy*).

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

In its IIRIRA amendments to section 235 of the INA, Congress dispensed with this confusion by treating all “arriving aliens” — those at the ports and those apprehended entering illegally between them — as applicants for admission²⁵, subject to what is now post-IIRIRA called “inadmissibility” under section 212 of the INA.

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

²³ See *Matter of G-*, 20 I&N Dec. 764 (BIA 1993) (“The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States. In the case of the *Golden Venture*, an alien will be found to have been ‘free from official restraint’ if he establishes that he was among the first of the ship’s occupants to reach the shore, that he landed on a deserted beach, or that he managed to flee into a neighboring community. In contrast, an alien who was escorted off the *Golden Venture*, pulled from the water by rescue personnel, or who landed in the cordoned-off area of the beach after it was secured will not be found to have been ‘free from official restraint,’ as his movements were restricted to the immediate vicinity of the beach that was cordoned-off and controlled by the enforcement officers of the various governmental organizations present at the site to prevent the ship’s occupants from absconding. In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. Where there is no evidence that an alien, who arrives at other than the nearest inspection point, deliberately surrenders himself to the authorities for immigration processing, or that, once ashore, he seeks them out, voluntarily awaits their arrival, or otherwise acts consistently with a desire to submit himself for immigration inspection, actual and intentional evasion of inspection at the nearest inspection point may be found.”). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3215.pdf>.

²⁴ See *id.*

²⁵ See Sec. 235(a)(1) of the INA (2023) (“Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²⁶ See Sec. 240(a)(1) of the INA (2023) (“Removal proceedings. (a) Proceeding (1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>. See also *Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011) (“IIRIRA eliminated the bright-line distinction between exclusion and deportation, merging the two into proceedings for ‘removal’ and replacing the definition of ‘entry’ with that for ‘admission’. . . . After IIRIRA, both aliens arriving at the border and aliens already present in the United States without inspection are deemed ‘applicants for admission,’ . . . who must ‘be inspected by immigration officers’ to determine their admissibility If, upon such inspection, an alien is not ‘clearly and beyond a doubt’ admissible, he must be placed in removal proceedings.”) (citations omitted). Source: <https://casetext.com/case/cruz-miguel-v-holder>.

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA²⁷, which mandates that all applicants for admission be “inspected by immigration officers” to determine whether they’re inadmissible under any of the grounds in section 212(a) of the INA.

Consequently (and critically), under the inspection protocol in section 235 of the INA, the term “immigration officer” applies equally to both agents in the U.S. Border Patrol (“USBP”, a CBP component) and CBP officers in the agency’s Office of Field Operations (OFO)²⁸, the latter of which has authority over the ports of entry.

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

If, following that inspection mandated by Congress in section 235(a)(3) of the INA, an immigration officer determines that an applicant for admission lacks proper entry documents and is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via misrepresentation or fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA²⁹, that officer has a choice.

Section 235(b)(1)(A)(i) of the INA³⁰ allows the officer to “order the alien removed from the United States without further hearing or review” -- and without obtaining a removal order from an immigration judge, which is the general rule in cases involving removable aliens³¹-- “unless the alien indicates either an intention to apply for asylum ... or a fear of persecution”. This process is known as “expedited removal”.

If an alien subject to expedited removal requests asylum or claims a fear of harm if returned, the CBP immigration officer must “refer the alien for an interview by an asylum officer” from U.S.

²⁷ Sec. 235(a)(3) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

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

²⁹ See Sec. 212(a)(6)(C)(i) of the INA (2024) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible”; *id.* at subcl. (ii)(I) (“In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

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

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

Citizenship and Immigration Services (USCIS), pursuant to section 235(b)(1)(A)(ii) of the INA³², to determine whether that alien has a “credible fear of persecution”.

The term “credible fear of persecution” is defined in section 235(b)(1)(B)(v) of the INA³³ as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under” section 208 of the INA. Thus, it is a screening standard, to determine whether the alien *may* be eligible for asylum.

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA³⁴, that aliens “*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed”, and is equally clear in section 235(b)(1)(B)(ii) of the INA³⁵ that if an asylum officer “determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*” (emphasis added).

The detention of aliens subject to expedited removal is critical to the credibility of this process because the credible fear process is simply intended to screen asylum claims—not resolve them—and, as I will explain below, asylum is particularly susceptible to fraud.

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

With only extremely limited exceptions³⁶, the “consideration of the application for asylum” made by an alien who had been subject to expedited removal under section 235(b)(1) of the INA is performed by an immigration judge in removal proceedings under section 240 of the INA³⁷.

The other choice that the immigration officer during the inspection protocol in section 235 of the INA —again, either an OFO CBP officer at the ports or a Border Patrol agent between them—has in the case of an “applicant for admission” who is inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat that applicant like any other inadmissible

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

³³ Sec. 235(b)(1)(B)(v) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

³⁴ Sec. 235(b)(1)(B)(iii)(V) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

³⁵ Sec. 235(b)(1)(B)(ii) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

³⁶ Arthur, Andrew. *Biden Administration to ‘Pause’ Radical Asylum Officer Rule*. CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2023). Source: <https://cis.org/Arthur/Biden-Administration-Pause-Radical-Asylum-Officer-Rule>.

³⁷ See sec. 240 of the INA (2023) (“Removal proceedings”); see also *id.* at para. (a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *id.* at para. (c)(4) (“Applications for relief from removal”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>; *id.* at para. (c)(4) (“

alien, and to place the alien directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA³⁸.

Parole

Although section 235(b) of the INA requires DHS to detain inadmissible applicants for admission, Congress has given DHS extremely limited authority in section 212(d)(5)(A) of the INA³⁹ to “parole” individual aliens into the United States in exceptional or emergent circumstances.

That provision⁴⁰ states, in pertinent part, that the DHS secretary:

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

The congressional limitations on DHS’s parole authority are apparent from the statutory language highlighted above, but they bear analysis, nonetheless.

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

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

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

³⁸ See section 235(b)(2)(A) of the INA (2023) (“in the case of an alien who is an applicant for admission, if the examining immigration officer *determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted*, the alien shall be detained for a” removal proceeding under section 240 of the INA) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

³⁹ Sec. 212(d)(5)(A)(1) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See “*ultra vires*”. LEGAL INFORMATION INSTITUTE (undated) (“Latin, meaning “beyond the powers.” Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.”). Source: https://www.law.cornell.edu/wex/ultra_vires.

Consequently, an alien apprehended entering illegally without proper documents (as nearly all are, because if they had proper admission documents, they wouldn't have to enter illegally) or who has been deemed inadmissible at a port of entry under section 212(a)(7)(A)(i) of the INA, and who has been paroled, remains amenable to expedited removal once “the purposes of such parole . . . have been served” and parole is revoked.

Congress provided the executive branch with parole authority when it initially enacted the INA in 1952⁴⁴, with the original language in the parole statute reading as follows:

The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. [Emphasis added.]

The secretary of Homeland Security, both *de facto* and *de jure*, succeeded the attorney general as the executive-branch officer given the statutory authority to grant parole under the Homeland Security Act of 2002 (HSA)⁴⁵, even though the current text continues to grant that authority to the attorney general.

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

As my colleague, George Fishman, has explained⁴⁶, Congress has more rigidly cabined the parole authority since 1952 because various administrations have abused parole to ignore Congress' plenary power over immigration and exceed the limits it has set on the annual admission of immigrants.

⁴⁴ Sec. 212(d)(5) of the Immigration and Nationality Act of 1952, Pub. L. 88-414, 66 Stat. 188 (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

⁴⁵ Homeland Security Act of 2002, Pub. L. 107-206 (2002). Source: <https://www.congress.gov/bill/107th-congress/house-bill/5005/text>; see also *id.* at sec. 471(a) (“Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.”).

⁴⁶ Fishman, George. *The Pernicious Perversion of Parole, A 70-year battle between Congress and the president*. CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2022). Source: <https://cis.org/Report/Pernicious-Perversion-Parole>.

You don't have to trust Mr. Fishman about Congress' intentions, however. The current language of the parole statute was included in IIRIRA⁴⁷, under the title "Limitation on the Use of Parole"⁴⁸.

In its 2011 opinion in *Cruz-Miguel v. Holder*⁴⁹, the Second Circuit described how Congress in IIRIRA had amended the parole statute and explained why it had constrained the executive's parole power therein:

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

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

Fortunately, the then-INS explained in detail what their predecessor phrases-- "emergent reasons" and "reasons deemed strictly in the public interest" -- meant in promulgating⁵⁰ the first parole regulation in 1982:

The legislative history of the parole provision shows a Congressional intent that parole be used in a restrictive manner. The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. . . . In 1965, a Congressional committee stated that the parole provisions "were designed to allow the Attorney General to act only in emergent, individual, and isolated situations, such as in the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law."

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

⁴⁷ Tit. VI, sec. 602 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009-689 (1996). Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

⁴⁸ *Id.*

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

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

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

I note, however, that the current iteration of the parole regulation, 8 CFR § 212.5⁵¹, states:

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

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

That seemingly broad regulatory catch-all parole authority, however, actually derives from the aforementioned 1982 regulatory amendment, when that provision⁵² read as follows:

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

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

As I have explained elsewhere⁵³ that 1982 regulation was rushed through in a two-week period to comply with a district-court order in *Louis v. Nelson*.⁵⁴ Even when the predecessor provision to 8 CFR § 212.5(b)(5) was published, it failed to track the then-extant limitations on parole in section 212(d)(5)(A) of the INA (1982).

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

The only reading of that language that would not render it *ultra vires* would be as a reiteration of the existing bases for granting parole, that is, for emergency medical treatment or appearance at U.S. criminal proceedings, or for some analogous purpose. If it were expanded beyond such an

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

⁵² See 8 CFR § 212.5(2) (1982) as amended by *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul.9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

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

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

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

Border Security Prior to the Biden Administration, and President Authorities

When President Biden took office, he inherited what his first Border Patrol chief, Rodney Scott, described in a September 2021 letter to Senate leadership as “arguably the most effective border security in” U.S. history.⁵⁵ The new administration, Chief Scott complained, quickly allowed that security to “disintegrate” as “inexperienced political appointees” ignored “common sense border security recommendations from experienced career professionals.”⁵⁶

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

Detention

With the exception of cross-border returns pending removal proceedings under section 235(b)(2)(C)⁵⁷, DHS is required by statute⁵⁸ to detain inadmissible applicants for admission.

The administration contends⁵⁹ that various “push factors”—external issues abroad that drive migrants from their homes like “corruption, violence, trafficking, and poverty”—exacerbated by the “COVID-19 pandemic and extreme weather conditions” are to blame for the current migrant surge.

In his March 8, 2023, opinion⁶⁰ in *Florida v. U.S.*—a challenge to the administration’s border-release policies—Judge T. Kent Wetherell II of the of the U.S. District Court for the Northern District of Florida concluded, however that while:

There were undoubtedly geopolitical and other factors that contributed to the surge of aliens at the Southwest Border, but [DHS’s] position that the crisis at the border is not largely of their own making because of their more lenient detention policies is divorced from reality and belied by the evidence. Indeed, the more persuasive evidence establishes that [DHS] effectively incentivized what they call “irregular migration” that has been ongoing since early 2021 by establishing policies and practices that all-but-guaranteed that the vast majority of aliens arriving at the Southwest Border who were not excluded under the Title 42 Order would not be detained and would instead be quickly released into the country

⁵⁵ Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

⁵⁶ *Id.*

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

⁵⁸ See pp. 7-8, *supra*.

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

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

where they would be allowed to stay (often for five years or more) while their asylum claims were processed or their removal proceedings ran their course—assuming, of course, that the aliens do not simply abscond before even being placed in removal proceedings, as many thousands have done.⁶¹

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

The Department of Justice (DOJ) submitted the following chart to the Supreme Court in *Biden v. Texas*⁶² on June 6, 2022⁶³, as an appendix to a letter from the solicitor general to the clerk of the court. DOJ filed that letter to correct factual errors the department had inadvertently included in prior filings:

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

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

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

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

⁶¹ *Id.* at 21-22.

⁶² See *Biden v. Texas*, 142 S.Ct. 2528 (2022). Source: https://scholar.google.com/scholar_case?case=289845634240383977&hl=en&as_sdt=6&as_vis=1&oi=scholar.

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

Excluded from the encounter figures during the fiscal years above are unaccompanied alien children (UACs) encountered by CBP at the Southwest border, who by law⁶⁴ are not subject to DHS detention.

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

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

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

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

In its 2013 opinion in *Rodriguez v. Robbins*⁶⁵ and its progeny⁶⁶, the Ninth Circuit affirmed a district court order finding that aliens subject to mandatory detention under section 235(b) of the INA were entitled to periodic bond redetermination hearings at which they would be considered for release.

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

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

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

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

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

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

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

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

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

“*Flores Fix*”

Unlike the Ninth Circuit’s opinion in *Rodriguez* and the BIA’s decision in *Matter of X-K*, however, the third legal impediment to compliance with the mandatory detention provisions in section 235(b) of the INA remains unresolved—though the executive branch could “fix” it (in the words of a bipartisan panel⁷⁰) through regulation.

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

In 1985, organizations sued⁷² the former INS on behalf of alien children being detained by the agency. The suit was brought to challenge INS’s procedures regarding the detention, treatment, and release of such children.

That case went through a number of levels of judicial review⁷³, including by the Supreme Court (in March 1993)⁷⁴ on the question of whether a regulation⁷⁵ limiting the release of UACs violated the Due Process Clause.

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

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

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

⁶⁹ *Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019). Source: <https://www.justice.gov/eoir/file/1154747/download>.

⁷⁰ See fn. 104 *infra*.

⁷¹ *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). Source: <https://cite.case.law/f-supp-3d/212/907/>.

⁷² See *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991). Source:

<https://casetext.com/case/flores-by-galvez-maldonado-v-meese-3>.

⁷³ See *id.*

⁷⁴ *Reno v. Flores*, 507 U.S. 292 (1993). Source: <https://supreme.justia.com/cases/federal/us/507/292/>.

⁷⁵ See 8 CFR § 242.24 (1996). Source: <https://www.govinfo.gov/content/pkg/CFR-1997-title8-vol1/pdf/CFR-1997-title8-vol1-sec242-24.pdf>.

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

The matter was remanded to the U.S. District Court for the Central District of California, where, in January 1997, the Clinton DOJ and the *Flores* plaintiffs entered into a stipulated settlement agreement⁷⁷ known as “the *Flores* settlement agreement”, or “FSA”.

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

By FY 2014, however, CBP was experiencing a much larger surge in UACs and FMUs at the Southwest border. That fiscal year, Border Patrol apprehended more than 68,500 UACs⁷⁹ and an additional 68,445 aliens in FMUs⁸⁰ — a 77 percent increase in UACs and a 360 percent rise in FMUs from the year before.

The Obama administration responded⁸¹ to that 2014 surge by opening shelters known as “Family Residential Centers” (FRCs) in Karnes City and Dilley, Tex., and Artesia, N.M., to detain FMUs (Artesia was closed shortly thereafter).

As detention rose, the number of UAC⁸² and FMU⁸³ apprehensions at the Southwest border each dropped to just below 40,000, respectively, in FY 2015.

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

⁷⁶ *Flores*, 507 U.S. at 295.

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

⁷⁸ *Flores*, 507 U.S. at 295.

⁷⁹ *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*, U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf

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

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

⁸² *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*. U.S. BORDER PATROL (undated). Source: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf

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

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

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

On August 21, 2015, Judge Gee issued an order requiring DHS to release aliens in FMUs within 20 days of encounter. The Obama administration appealed that decision to the Ninth Circuit, which issued an order⁸⁴ in July 2016, largely affirming the district court but holding that DHS could detain adults in FMUs—but not children.

To avoid family separation, however, the Obama administration opted to release both the adults and the children in FMUs. Likely consequently, by the end of FY 2016⁸⁵, Border Patrol apprehensions of families at the Southwest border swelled again, exceeding 77,000.

Overall Southwest border apprehensions cratered in FY 2017⁸⁶, the first partial fiscal year of the Trump administration, but FMU apprehensions continued apace, with more than 75,000 aliens⁸⁷ in family units being apprehended after entering illegally—nearly a quarter of all apprehensions that year.

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

Some migrants have admitted they brought their children not only to remove them from danger in such places as Central America and Africa, but because they believed it would cause the authorities to release them from custody sooner.

*Others have admitted to posing falsely with children who are not their own, and Border Patrol officials say that such instances of fraud are increasing.*⁸⁸

⁸⁴ *Flores v. Lynch*, 828 F.3d 898 (2016). Source:

https://scholar.google.com/scholar_case?case=12780774456837741811&hl=en&as_sdt=6&as_vis=1&oi=scholar.

⁸⁵ *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source:

<https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf>.

⁸⁶ *See Total Encounters By Fiscal Year*. U.S. BORDER PATROL (undated) (303,916 Southwest border apprehensions in FY 2017, down from 408,870 in FY 2016). Source:

<https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF>.

⁸⁷ *Total Family Unit Apprehensions By Month*. U.S. BORDER PATROL (undated). Source:

<https://www.cbp.gov/sites/default/files/assets/documents/2023-Nov/u.s.border-patrol-total-monthly-family-unit-encounters-by-sector-fy-2013-fy-2020.pdf>.

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

That FMU surge continued into FY 2018, as agents at the Southwest border apprehended more than 107,000⁸⁹ aliens in family units—27 percent of that year’s total of alien apprehensions.

In response to this burgeoning population of FMU migrants, Attorney General Jeff Sessions in April 2018⁹⁰ called for “zero tolerance” with respect to prosecutions of illicit entrants— illegal entry being both a civil offense⁹¹ rendering the offender removable and also a federal crime⁹², punishable as a misdemeanor for a first offense and a felony for repeated offenses.⁹³

That policy applied to all adults, including adults in FMUs, and in practice it meant those adults had to be sent for at least brief periods to U.S. Marshals Service custody, leaving some of their children — under DHS’s interpretation of the law⁹⁴ — “unaccompanied”.

By statute⁹⁵, DHS was therefore required to send those children to shelters run by the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) for placement with “sponsors” in the United States.

Logically, following the brief period that those FMU adults were in Marshals Service custody for prosecution, they would have been quickly reunited with their children, but according to the HHS⁹⁶, DHS⁹⁷, and DOJ⁹⁸ inspectors general, that did not happen, almost solely due to poor planning and incompetence.

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

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

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

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

⁹³ *See id.*

⁹⁴ *But see* 6 U.S.C. § 279(g)(2) (2024) (“(2) the term “unaccompanied alien child” means a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”) (emphasis added.). Source:

<https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim>.

⁹⁵ 6 U.S.C. § 279 (2024). Source:

<https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4/partE&edition=prelim>.

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

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

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

The policy spurred a media backlash⁹⁹, and in response, on June 20, 2018, President Trump issued Executive Order (EO) 13841¹⁰⁰, directing an end to family separations. EO 13841 also ordered Attorney General Sessions to seek to modify the FSA to permit the department to detain FMUs through criminal and immigration proceedings.

Apprehensions of FMUs at the Southwest border rose sharply thereafter, exceeding 473,000 in FY 2019.¹⁰¹ That fiscal year¹⁰², nearly 56 percent of all aliens apprehended at the Southwest border after entering illegally were in family units.

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

Security at the Southwest border degraded to such an extent that then-DHS Secretary Kirstjen Nielsen was forced to declare a “border emergency” in March 2019.¹⁰³

As she explained at the time:

*Today I report to the American people that we face a cascading crisis at our southern border. **The system is in freefall.** DHS is doing everything possible to respond to a growing humanitarian catastrophe while also securing our borders, but we have reached peak capacity and are now forced to pull from other missions to respond to the emergency.*

Let me be clear: the volume of ‘vulnerable populations’ arriving is without precedent. This makes it far more difficult to care for them and to prioritize individuals legitimately fleeing persecution. In the past, the majority of migration flows were single adults who could move through our immigration system quickly and be returned to their home countries if they had no legal right to stay. Now we are seeing a flood of families and unaccompanied children, who—because of outdated laws and misguided court decisions—cannot receive efficient adjudication and, in most cases, will never be removed from the United States even if they are here unlawfully. The result is a massive ‘pull factor’ to our country.

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

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

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

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

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

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

Secretary Nielsen's concerns were echoed in a report¹⁰⁵ issued a month later by a bipartisan federal panel¹⁰⁶ tasked with examining the surge in family entries in FY 2018 and FY 2019¹⁰⁷. The panelists found:

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

....

Criminal migrant smuggling organizations are preying upon these desperate populations, encouraging their migration to the border despite the dangers, especially in remote places designed to overwhelm existing [U.S. Border Patrol] infrastructure, and extorting migrants along the way, thereby reaping millions of

¹⁰⁴ *Id.*

¹⁰⁵ See *Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019). Source:

https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹⁰⁶ See Arthur, Andrew. *2019 Bipartisan Border Plan Would Solve Today's Migrant Crisis, Tell Biden, Mayorkas, and Congress: 'Read the damn report!'*. CENTER FOR IMMIGRATION STUDIES (Mar. 16, 2021) ("Karen Tandy, the chairwoman, was originally appointed to that position by Jeh Johnson, the last DHS secretary under the Obama/Biden administration. Jim Jones, chairman of Monarch Global Strategies, was initially appointed to the panel by the first Obama/Biden DHS Secretary Janet Napolitano. And Leon Fresco was a principal advisor to Sen. Chuck Schumer (D-N.Y.) when Schumer was chairman of the Senate Judiciary Subcommittee on Immigration. After that, he was deputy assistant attorney general for the Office of Immigration Litigation. In that role, he was the Obama/Biden administration's immigration lawyer at the Justice Department."). Source: <https://cis.org/Arthur/2019-Bipartisan-Border-Plan-Would-Solve-Todays-Migrant-Crisis>.

¹⁰⁷ *Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP'T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019), at 6. Source: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

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

With respect to the kids, the panel report explained: “In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States. . . .”¹⁰⁸

According to the panel:

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

That report called on DHS to:

Establish and staff 3 to 4 Regional Processing Centers (RPCs) along the border, scalable and with sufficient capacity to shelter all FMUs apprehended at the border and, among other things, provide safe and sanitary shelter, to include medical screening and care, credible fear examinations, vetting for identity and familial relationship, and evaluations for public health and safety, national security and flight risk.

Resource and require transport from USBP stations and POEs of all FMUs to an RPC, within 24 hours or less of apprehension.¹¹⁰

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

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

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

¹⁰⁸ *Id.* at 1.

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 10.

[A] "Flores Fix" -- Roll back the Flores Decision by exempting children accompanied by a parent or relative, who is acting as the guardian of the child. DHS also should be given discretion to detain a close relative with a non-parent family member when this is in the best interest of the child.

Amend[ments to the asylum provision in] Section 208 of the Immigration Nationality Acts (INA) to require that border crossers make asylum claims at POEs. . . .

Amend[ments to] the Trafficking Victims Protection Reauthorization Act (TVPRA) to permit repatriation of any child when the custodial parent residing in the country of origin requests reunification and return of the child. Currently, this is not permitted by the statute.¹¹²

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

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

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

In response, on August 23, 2019, DHS and HHS issued a final rule¹¹⁵, captioned “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children”, that promulgated regulations implementing the FSA, as well as other provisions that related to UACs, in the TVPRA¹¹⁶ and the HSA¹¹⁷.

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

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

¹¹² *Id.* at 2-3.

¹¹³ *Id.* at 3.

¹¹⁴ *The “Flores Settlement” and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*. CONG. RESEARCH SERV. (updated Sept. 17, 2018), at 7 n. 52. Source: <https://sgp.fas.org/crs/homesecc/R45297.pdf>.

¹¹⁵ *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (Aug. 23, 2019). Source: <https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>.

¹¹⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (2008). Source: <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf>.

¹¹⁷ Homeland Security Act of 2002, Pub. L. 107–296 (2002). Source: <https://www.congress.gov/107/plaws/publ296/PLAW-107publ296.pdf>.

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

....

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

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

....

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

....

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

Those regulations were to take effect on October 22, 2019, but three days after the final rule was published, the attorney general of California along with other state attorneys general filed suit¹¹⁹ to block their implementation.

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

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

On September 27, 2019, Judge Gee issued an order¹²⁰ blocking the termination of the FSA and enjoining the new regulations, finding that they were inconsistent with the *Flores* settlement agreement.

The government appealed that order to the Ninth Circuit, and on December 20, 2020, the circuit court issued an opinion¹²¹ largely affirming the regulations in the final rules issued by HHS and reversing the district court's injunction with respect to them.

The court concluded that “the DHS regulations applicable to the care and custody of accompanied minors, by design, depart significantly from the” FSA¹²², and that the FSA “flatly precludes” DHS's preferred option of detaining accompanied minors with their parents or guardians¹²³.

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

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

Likely not coincidentally, Border Patrol Southwest border apprehensions of FMUs rose from just over 451,000 in FY 2021 to nearly 483,000, and then to more than 621,000 in FY 2023.¹²⁵ In the first four months of FY 2024 alone, Border Patrol apprehensions of FMUs exceeded 308,000 at the U.S.-Mexico line.

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

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

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

¹²⁰ *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019). Source: <https://casetext.com/case/flores-v-barr-12>.

¹²¹ *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=15013088245236846968&hl=en&as_sdt=6&as_vis=1&oi=scholar.

¹²² *Id.* at 730.

¹²³ *Id.* at 742.

¹²⁴ Kight, Stef W. *Scoop: Biden to stop holding undocumented families in detention centers*. AXIOS (Dec. 15, 2021). Source: <https://www.axios.com/2021/12/16/biden-ends-migrant-family-detention-border-immigration>.

¹²⁵ *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified Feb. 13, 2024). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

¹²⁶ *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392 (Aug. 23, 2019). Source: <https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>.

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

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

Then-DHS Secretary Nielsen first implemented MPP in January 2019¹²⁸, and it allowed DHS to return certain “other than Mexican” (OTM) migrants caught entering illegally or without proper documentation at the Southwest border back to Mexico to await removal hearings.¹²⁹

Remain in Mexico was premised on DHS’s authority in section 235(b)(2)(C) of the INA¹³⁰ to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings.

Aliens subject to MPP were paroled in custody into the United States to apply for asylum at port courts¹³¹, while the Mexican government had agreed to provide them with protection for the duration of their stays in that country.¹³²

¹²⁷ See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019). Source: [https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20\(MPP,of%20their%20immigration%20proceedings%2C%20where](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20(MPP,of%20their%20immigration%20proceedings%2C%20where).

¹²⁸ *Id.*

¹²⁹ Arthur, Andrew. *Why Trump’s Border Security Didn’t Last, Part 3*. CENTER FOR IMMIGRATION STUDIES (Jul. 17, 2023). Source: <https://cis.org/Arthur/Why-Trumps-Border-Security-Didnt-Last-Part-3>.

¹³⁰ See section 235(b)(2)(C) of the INA (“Treatment of aliens arriving from contiguous territory. In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section” 240 of the INA. Source:

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

¹³¹ Arthur, Andrew. *Tent Courts Aren’t Tents — and Provide Due Process. Inside the Laredo MPP hearing facility, and then the view from the other side*. CENTER FOR IMMIGRATION STUDIES (Feb. 4, 2020). Source:

<https://cis.org/Arthur/Tent-Courts-Arent-Tents-and-Provide-Due-Process>.

¹³² See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019) (“While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them.”). Source: [https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20\(MPP,of%20their%20immigration%20proceedings%2C%20where](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20(MPP,of%20their%20immigration%20proceedings%2C%20where)

The program was expanded from a pilot site in San Ysidro, Calif.¹³³ in late January 2019, to Calexico, Calif.¹³⁴, and El Paso, Tex.¹³⁵ in March of that year, and then in July 2019¹³⁶ to Laredo and Brownsville (both in Texas) before finally being expanded to the Arizona border town of Nogales¹³⁷ in the late fall.

When it was fully implemented, fewer than 70,000 migrants¹³⁸ were returned to Mexico to await their removal hearings under MPP. As I have explained elsewhere¹³⁹, however:

It didn't take many MPP returns to drive the encounter numbers back down. [The DHS Office of Homeland Security Statistics] reports that fewer than 31,250 aliens encountered at the Southwest border were sent back across the border under MPP between June and September 2019 — 84 percent of them aliens in FMUs.

In May of that year, CBP encountered about 144,000 aliens at the Southwest border, 65 percent of whom (nearly 88,600) were in FMUs — at the time, monthly records in both categories.

As MPP got revved up and news of returns to Mexico spread, that figure dropped to fewer than 52,500 CBP Southwest border encounters in September — some 22,000 of whom (less than 42 percent) were in FMUs.

By February 2020, the month before Title 42 was implemented and once MPP was in full swing, CBP Southwest border encounters dropped to fewer than 37,000, and just over 7,100 of those aliens (19.3 percent) were in FMUs.

¹³³ Averbuch, Maya and Sieff, Kevin. *Asylum seeker is sent back to Mexico as Trump administration rolls out new policy*. WASHINGTON POST (Jan. 29, 2019). Source: https://www.washingtonpost.com/world/the_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084_story.html.

¹³⁴ Rose, Joel. *'Remain In Mexico' Immigration Policy Expands, But Slowly*. NPR (Mar. 12, 2019). Source: <https://www.npr.org/2019/03/12/702597006/-remain-in-mexico-immigration-policy-expands-but-slowly>.

¹³⁵ Montes, Aaron. *El Paso begins Trump policy that sends migrant asylum seekers back to Mexico*. EL PASO TIMES (Mar. 16, 2019). Source: <https://www.elpasotimes.com/story/news/immigration/2019/03/16/trump-immigration-metering-policy-migrant-protection-protocols-implemented-el-paso-juarez/3177682002/>.

¹³⁶ Roldan, Riane. *Asylum seekers will appear before judges via teleconferencing in tents as "Remain in Mexico" program expands to Laredo*. TEXAS TRIBUNE (Jul. 9, 2019). Source: <https://www.texastribune.org/2019/07/09/remain-mexico-program-expands-laredo-texas/>.

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

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

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

In its October 2019 assessment¹⁴⁰ of the program, DHS found that MPP was “an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system”, particularly as related to alien families. Asylum cases were expedited under the program, and MPP removed incentives for aliens to make weak or bogus claims when apprehended.¹⁴¹

That’s because many if not most of those aliens requesting asylum at the border aren’t seeking protection so much as they are coming to live and work here for the time (usually years¹⁴²) that it takes for their claims to be heard. Remain in Mexico denied them the opportunity to do so.

Or, as DHS then¹⁴³ put it:

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

Returning those migrants to Mexico also enabled the Trump administration to comply with Congress’ detention directives in section 235(b) of the INA¹⁴⁴.

Detering adult migrants from bringing children with them when entering the United States illegally not only advances border security, but it also protects the migrants themselves, as the excerpts from the Homeland Security Advisory Council’s CBP Families and Children Care Panel’s April 2019 report¹⁴⁵ I referenced above reveal.

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

¹⁴⁰ *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP’T OF HOMELAND SECURITY (October 28, 2019).

Source:

https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

¹⁴¹ *See id.*

¹⁴² *See Immigration Court Asylum Backlog*. TRAC IMMIGRATION (undated) (“average days pending since court filing to asylum hearing” in immigration court was 1,424 days as of the end of December). Source:

<https://trac.syr.edu/phptools/immigration/asylumb/>.

¹⁴³ *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP’T OF HOMELAND SECURITY (October 28, 2019), at 3.

Source:

https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

¹⁴⁴ *See* secs. 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV), and 235(b)(2)(A) of the INA (2023). Source:

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

¹⁴⁵ *See Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP’T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019). Source:

https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹⁴⁶ *Innovation Law Lab. v. Nielsen*, 366 F.Supp.3d 1110 (2019). Source:

https://scholar.google.com/scholar_case?case=3275760696436107849&hl=en&as_sdt=6&as_vis=1&oi=scholar.

The Trump DOJ filed an emergency motion¹⁴⁷ with the Ninth Circuit to stay that order pending appeal, which a three-judge circuit panel granted on May 7, 2019.¹⁴⁸

A separate three-judge Ninth Circuit panel considering the government's appeal from the district court's decision affirmed¹⁴⁹ the injunction of MPP in late February 2020, but stayed that injunction temporarily for aliens apprehended outside of California and Arizona, to allow the government to seek Supreme Court review.

Shortly thereafter, in early March 2020, the Supreme Court stayed that injunction¹⁵⁰ pending the government's filing of, and the Court's ruling on, a petition for certiorari on the injunction.

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

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

I have explained elsewhere¹⁵³ in-depth why I have concluded that the circuit court's analysis is in error, but briefly, two provisions in the inspection protocol in section 235 of the INA¹⁵⁴ were key to the court's analysis.

First is the expedited provision at section 235(b)(1) of the INA¹⁵⁵, which applies solely¹⁵⁶ to two classes of aliens.

¹⁴⁷ *Innovation Law Lab v. Nielsen*, No. 19-15716, Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal (9th Cir. Apr. 11, 2019). Source:

<https://cdn.ca9.uscourts.gov/datastore/general/2019/04/13/Emergency%20Motion.pdf>.

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

¹⁴⁹ *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). Source:

https://scholar.google.com/scholar_case?case=12716474571221783570&hl=en&as_sdt=6&as_vis=1&oi=scholar.

¹⁵⁰ *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). Source:

https://www.supremecourt.gov/orders/courtorders/031120zr_19m2.pdf.

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

¹⁵² *Mayorkas v. Innovation Law Lab*, No. 19-1212, Docket (Jun. 21, 2021). Source:

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1212.html>.

¹⁵³ Arthur, Andrew. *Ninth Circuit Blocks 'Remain in Mexico' — Sort Of, Misinterpreting the INA and Ignoring Contrary Evidence, While the Clock is Ticking*. CENTER FOR IMMIGRATION STUDIES (Mar. 2, 2020). Source:

<https://cis.org/Arthur/Ninth-Circuit-Blocks-Remain-Mexico-Sort>.

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

¹⁵⁵ *Id.* at para. (b)(1).

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

The first class consists of aliens seeking admission deemed inadmissible under section 212(a)(6)(C) of the INA¹⁵⁷ because they “by fraud or willfully misrepresenting a material fact, seek[] . . . admission into the United States or other benefit provided under” the INA.

The second class consists of aliens seeking admission under section 212(a)(7) of the INA¹⁵⁸ who lack proper admission documents.

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

The Ninth Circuit, in essence, determined¹⁶⁰ that MPP does not apply to those aliens removable under the grounds of inadmissibility listed in the expedited removal provision, because the return clause does not allow the return of aliens to whom expedited removal applies. There are two flaws in this logic.

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

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

Second, and more saliently, the circuit court entirely ignored section 212(a)(6)(A)(i) of the INA¹⁶², which states: “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”

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

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

¹⁵⁷ Section 212(a)(6)(C) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁵⁸ Section 212(a)(7) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁵⁹ See section 235(b)(2)(C) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁶⁰ See *Innovation Law Lab*, 951 F. 3d at 1083-87.

¹⁶¹ *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3716.pdf>.

¹⁶² Section 212(a)(6)(A)(i) of the INA (2024). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

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

That opinion notwithstanding, I also note that in an October 29, 2021, memo¹⁶³ explaining why the Biden administration had decided to terminate Remain in Mexico, DHS cited the dangers migrants face on the other side of the border as a key reason for ending the program.

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

Respectfully, the current migrant surge at the border and throughout the United States is already resulting in “the expenditure of significant government resources”, not only at the federal level (where those costs should be borne), but also at the state¹⁶⁵ and local¹⁶⁶ levels.

In April 2022¹⁶⁷, I suggested the administration could enter into an agreement with the Mexican government to allow returned migrants to be sent to a place on the other side of the border like Monterrey, Nuevo Leon, Mexico’s 11th largest city. I explained that the city:

is relatively safe, safer than my erstwhile hometown of Baltimore, and such migrant destinations as Los Angeles, Houston, and Chicago.

And while there is some level of violent crime in parts of the city, providing the necessary security required to address any concerns is simply a matter of money.

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

¹⁶⁴ *Id.*

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

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

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

Taking into account the needs of aliens' lawyers and U.S. government officials, Monterrey benefits from proximity to the U.S. border. It is a three-hour drive to Hidalgo, Texas, in the heart of the Rio Grande Valley (RGV), and two hours and 45 minutes to Laredo, Texas, where DHS under Trump erected a port court. And a roundtrip bus ticket from McAllen, Texas, to Monterrey is \$43.

Plus, two airports service the city, one of which — Monterrey International Airport — is the nation's fourth busiest and the busiest in northern Mexico.

The governor of Nuevo Leon, Samuel Alejandro Garcia Sepulveda, has already shown a willingness to work with his Texas counterpart, Governor Greg Abbott (R) on cross-border issues. . . and Sepulveda would also definitely welcome the sort of money that would flow to his state if DHS were to erect and run migrant housing there.¹⁶⁸

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

PACR and HARP

To speed the review of credible fear claims by illegal entrants, the Trump administration implemented two separate border programs¹⁷⁰: Prompt Asylum Case Review (PACR¹⁷¹), for aliens from Central America; and Humanitarian Asylum Review Program (HARP), for Mexican nationals. Under PACR and HARP, credible fear claims were conducted while illegal entrants were in CBP custody.

The Government Accountability Office (GAO) has explained¹⁷² that PACR was launched as a pilot program in El Paso in October 2019, with Border Patrol leadership expanding it to the component's Rio Grande Valley (Tex.) sector in December 2019 and its Yuma (Ariz.) sector in January 2020.¹⁷³ Those sectors were chosen because they had temporary structures at which aliens subject to that process could be housed.

¹⁶⁸ *Id.*

¹⁶⁹ See p. 40 *infra*.

¹⁷⁰ Misra, Tanvi and DeChalus, Camila. *DHS expands programs that fast-track asylum process*. THE HILL (Feb. 26, 2020). Source: <https://rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>.

¹⁷¹ Montoya-Galvez, Camilo. *Program to expedite deportations of asylum-seekers at border expands*. CBS NEWS (Dec. 31, 2019). Source: <https://www.cbsnews.com/news/immigration-program-expediting-deportations-of-asylum-seekers-at-border-expands/>.

¹⁷² *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry*. GOV'T ACCOUNTABILITY OFFICE (Jan. 2021). Source: <https://www.gao.gov/assets/720/711974.pdf>.

¹⁷³ *Id.*

HARP, on the other hand, started out¹⁷⁴ under the auspices of OFO at the border ports in October 2019, before being expanded to Border Patrol in January 2020.¹⁷⁵ At that point, inadmissible aliens encountered by OFO were sent to Border Patrol for HARP processing.¹⁷⁶

All told, according to GAO, nearly 5,300 aliens¹⁷⁷ encountered by CBP at the Southwest border were subject to PACR and HARP through September 2020. Of that total, 1,210 received positive credible fear determinations and were sent to immigration court, while more than 3,700 were removed.¹⁷⁸

While those numbers are relatively small, by ensuring inadmissible applicants for admission could have their credible fear claims decided quickly while they were in custody, PACR and HARP preserved ICE detention resources while allowing CBP to employ Congress' expedited removal process¹⁷⁹

And because many of those aliens were removed before ICE had to release them, it lessened the likelihood that inadmissible aliens without asylum claims could exploit the system.

The Biden administration ended PACR and HARP by executive order on February 2, 2021¹⁸⁰, but the administration could always reimplement a version of those programs to speed review of asylum claims for these classes of inadmissible aliens.

Regulatory Asylum Reforms

Asylum is the biggest statutory exception in the INA to the strict limitations¹⁸¹ Congress has placed on immigration to the United States. And it is likely the most abused.

As the Supreme Court has held:

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

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* ("DHS data indicate that CBP identified approximately 5,290 individuals who were eligible for screening under the pilot programs.")

¹⁷⁸ *Id.*

¹⁷⁹ *See sec. 235(b)(1) of the INA (2023).* Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. *See also supra.*

¹⁸⁰ *Executive Order 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021). Source: <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regionalframework-to-address-the-causes-of-migration-to-manage-migration>.

¹⁸¹ *See Tit. II, chap. 1 of the INA, sections 201 through 210.* Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8&saved=%7CZ3JhbnVsZWlkaWVQy1wcmVsaW0tdGI0bGU4LXNlY3Rpb24xMjMx%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>.

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

According to DOJ statistics¹⁸³, USCIS asylum officers found that 81 percent of the aliens subject to expedited removal between FY 2008 and Q4 of FY 2019 who claimed a fear of harm or requested asylum had a credible fear of persecution or torture,¹⁸⁴ and 2 additional percent were determined to have a credible fear by immigration judges on review¹⁸⁵-- 83 percent in total.

Of those aliens subject to expedited removal who received positive credible fear determinations during that period, fewer than 17 percent¹⁸⁶ (14 percent of the total of aliens who had requested asylum or claimed a fear of harm) were ultimately granted asylum.

By contrast, 32.5 percent of the aliens who received positive credible fear determinations from asylum officers were ordered removed *in absentia* when they failed to appear in court¹⁸⁷.

With respect to fraud, evidence presented at a 2014 congressional hearing¹⁸⁸ revealed that USCIS had determined that “only 30 percent of asylum cases from a random sample were confirmed to be fraud-free”.¹⁸⁹

One of the reasons why asylum is susceptible to fraud relates directly to the terms of the asylum statute itself, section 208 of the INA¹⁹⁰. Clause (b)(1)(B)(ii)¹⁹¹ therein, which governs the alien’s burden in proving eligibility for that protection, states that:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the

¹⁸² *DHS v. Thuraissigiam*, 591 U.S. ___, slip op. at 1 (2020). Source: https://www.supremecourt.gov/opinions/19pdf/19-161_g314.pdf.

¹⁸³ *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

¹⁸⁴ See sec. 235(b)(1)(B)(v) of the INA (2023) (defining “credible fear of persecution”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁸⁵ See sec. 235(b)(1)(B)(iii)(III) of the INA (2023) (“Review of determination. The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁸⁶ *Credible Fear and Asylum Process, Fiscal Year (FY) 2008 – FY 2019*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (generated Oct. 23, 2019). Source: <https://www.justice.gov/eoir/file/1216991/download>.

¹⁸⁷ *Id.*

¹⁸⁸ See Vaughan, Jessica. *House Hearing on Asylum Reveals Rampant Fraud, More Abuse of Executive Discretion*. CENTER FOR IMMIGRATION STUDIES (Feb. 11, 2014). Source: <https://cis.org/Vaughan/House-Hearing-Asylum-Reveals-Rampant-Fraud-More-Abuse-Executive-Discretion>.

¹⁸⁹ *Id.* at cl. (b)(1)(B)(ii).

¹⁹⁰ Sec. 208 of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

¹⁹¹ *Id.* at cl. (b)(1)(B)(ii).

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

Thus, and logically (because persecutors are unlikely to provide corroborating evidence), no extrinsic or documentary evidence is necessarily required for an asylum applicant to establish his or her claim.

That doesn't mean that the presentation of extrinsic evidence in this context is optional, though, because that clause¹⁹² also makes clear that: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

There are few restrictions¹⁹³ barring aliens in the United States from applying for asylum. Notably, section 208(a)(1) of the INA¹⁹⁴ states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival...), irrespective of such alien's status, may apply for asylum."

The executive can implement immigration policy changes either through procedural rulemaking or by through binding precedential decisions¹⁹⁵ issued by the attorney general, whose determinations, under the INA, control "all questions of law"¹⁹⁶. With respect to asylum, the Trump administration used both policy pathways.

¹⁹² *Id.*

¹⁹³ See section 208(a)(2) of the INA (2023) ("Exceptions. (A) Safe third country. Paragraph [208(a)(1) of the INA] shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States. (B) Time limit. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. (C) Previous asylum applications. Subject to subparagraph [208(a)(2)(D) of the INA], paragraph [208(a)(1) of the INA] shall not apply to an alien if the alien has previously applied for asylum and had such application denied. (D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph [208(a)(2)(B) of the INA] . . ."). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

¹⁹⁴ Sec. 208(a)(1) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

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

¹⁹⁶ See sec. 103(a)(1) of the INA ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President,

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

In his June 2018 decision in *Matter of A-B*¹⁹⁷, then-Attorney General Sessions provided bright-line rules for adjudicators (including immigration judges and asylum officers) to follow when considering asylum claims by aliens who assert they fear “persecution” at the hands of non-state criminal actors — in most cases, gangs, or spousal abusers.

That December, however, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia permanently enjoined¹⁹⁸ Sessions’ decision in *Matter of A-B*— as it applied to credible fear claims.

By statute¹⁹⁹, reviews of expedited removal procedures are within the sole jurisdiction of that court, but notably, Sessions’ decision in *Matter of A-B*— did not directly involve an asylum claim by a border alien.

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

Thereafter, current Attorney General Merrick Garland vacated Attorney General Session’s opinion in *Matter of A-B*— in its entirety on June 16, 2021.²⁰¹

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

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

Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim>.

¹⁹⁷ *Matter of A-B*-, 27 I&N Dec. 316 (A.G. 2018). Source: <https://www.justice.gov/eoir/page/file/1070866/download>. Vacated, *Matter of A-B*-, 28 I&N Dec. 307 (A.G. 2021). Source: <https://www.justice.gov/eoir/page/file/1404796/download>.

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

¹⁹⁹ Sec. 242(e)(3)(A) of the INA (2023). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

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

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

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

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

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

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

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

The same day that interim final rule and PP were issued, a nonprofit organization filed a complaint²⁰⁵ in the U.S. District Court for the Northern District of California, a case entitled *East Bay Sanctuary Covenant v. Trump*.

The complaint alleged, *inter alia*, that the interim final rule violated the INA, and on November 19, 2018, the judge assigned to *East Bay*, Judge Jon S. Tigar, agreed, issuing a nationwide temporary restraining order²⁰⁶ (TRO) of that rule.

The Trump administration sought a stay of that TRO, which was denied by a divided panel of the Ninth Circuit in December 2018.²⁰⁷ The third judge on that panel, Judge Edward Leavy, explained: “I dissent from the denial of the motion to stay because the President, Attorney General, and Secretary of Homeland Security have adopted legal methods to cope with the current problems rampant at the southern border.”²⁰⁸

Twelve days later, Judge Tigar granted a preliminary injunction²⁰⁹ in *East Bay*, blocking the administration from implementing the Port of Entry rule.

²⁰³ *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018). Source: <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>.

²⁰⁴ *Id.*

²⁰⁵ *East Bay Sanctuary Covenant v. Trump, Complaint for Declaratory and Injunctive Relief*, No. 3:18-cv-06810-JST (N.D. Cal. Nov. 9, 2018). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.1.0.pdf>.

²⁰⁶ *East Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST, Order Granting Temporary Restraining Order; Order to Show Cause Re Preliminary Injunction (N.D. Cal. Nov. 19, 2018). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.43.0.pdf>.

²⁰⁷ *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018). Source:

<https://casetext.com/case/covenant-v-trump-1>.

²⁰⁸ *Id.* at 780.

²⁰⁹ *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018). Source:

<https://casetext.com/case/covenant-v-trump-2>.

The Trump administration appealed that decision, and in a February 2020 opinion²¹⁰, a three-judge panel of the Ninth Circuit affirmed Judge Tigar's orders. I will delve more deeply into that decision in discussing the president's authority under section 212(f), below.

The administration sought *en banc* review of that circuit-court decision, but it wasn't until March 2021—after Trump had left office-- that the circuit court issued an amended version of its February 2020 opinion and an order²¹¹ denying rehearing *en banc*.

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

We are not "Platonic Guardians" of our nation's public policies. . . . As judges, we have no business standing athwart the choices of the political branches no matter how misguided we believe them to be. That fundamental limitation on our role is even more pronounced in the immigration context, where it is long settled that "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." . . . The Supreme Court has repeatedly warned us we overstepped our bounds when we tried to curtail immigration policies in the recent past. . . . Unfortunately, we have not learned from our mistakes. Today, we once again second-guess the Executive's immigration policies.

This time, we enjoin an immigration regulation temporarily limiting asylum eligibility to those who enter the country at a port of entry, deeming the policy "absurd." . . . To get there, we disregard two central precepts of the judicial role. First, we ignore constitutional limits on our jurisdiction by stretching organizational standing doctrine beyond Article III's reach. Second, we re-write the asylum statute to add a prohibition on the Executive's authority not found anywhere in the legislative text.²¹² [Citations omitted.]

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

The Biden administration didn't seek review of that decision from the Supreme Court, but in EO 14010²¹³, the president called upon the attorney general and the DHS secretary to "promptly review and determine whether to rescind" the Proclamation IFR.

²¹⁰ *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=14752063426311246949&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²¹¹ *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 654 (9th Cir. 2020). Source: https://scholar.google.com/scholar_case?case=529120526880469874&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²¹² *Id.* at 687-688.

²¹³ *Executive Order 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 5, 2021). Source: <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>.

In any event, in July 2019, the Trump administration published a “safe-third country” rule²¹⁴ (also referred to as the “third-country transit rule” or “TCT”) that would have required illegal entrants and other aliens without proper documents at the Southwest border to apply for asylum in a third country through which those aliens passed before seeking that protection in the United States.

Given that every country in the Western Hemisphere — save Cuba (an island) and Guyana (an isolated and largely coastal enclave) — grants some form of asylum protection²¹⁵, it is not unreasonable to conclude that foreign nationals should seek humanitarian protection in any of the ones they pass through before they are allowed to apply for asylum in the United States.

Nonetheless, Judge Tigar quickly enjoined²¹⁶ the TCT, as well, in a separate case captioned *East Bay Sanctuary Covenant v. Barr*. The Trump administration sought a stay of that order from the Ninth Circuit, which denied²¹⁷ the request on August 16, 2019.

Trump’s DOJ then sought a stay of Judge Tigar’s order from the Supreme Court, which granted that request on September 11, 2019²¹⁸ “pending disposition of the Government’s appeal in the” Ninth Circuit “and disposition of the Government’s petition for a writ of certiorari, if such writ is sought”. Justice Ginsburg joined Justice Sotomayor in opposing that stay.

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

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

²¹⁴ *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (Jul. 16, 2019). Source:

<https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

²¹⁵ *World: State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol - As of September 2012*. UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Sep. 11, 2012). Source:

<https://reliefweb.int/map/world/world-state-parties-1951-convention-relating-status-refugees-and-or-its-1967-protocol>.

²¹⁶ *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. 2019). Source:

https://scholar.google.com/scholar_case?case=15492460766902773338&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²¹⁷ *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019). Source:

https://scholar.google.com/scholar_case?case=16336190408097552256&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²¹⁸ *Barr v. East Bay Sanctuary Covenant*, 588 U. S. ____ (2019). Source:

https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf.

²¹⁹ *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). Source:

https://scholar.google.com/scholar_case?case=717263077632091124&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²²⁰ *East Bay Sanctuary Covenant v. Garland* (9th Cir. 2021) (Nos. 19-16487 and 19-16773) (slip op. at 12). Source:

<https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/08/19-16487.pdf>.

On December 11, 2020 —after Trump had lost reelection — the administration published a final rule²²¹ captioned “Asylum Eligibility and Procedural Modifications” that would have raised the burden of proof for credible fear claims. It was enjoined²²² less than a month later by a different judge in the U.S. District Court for the Northern District of California.

Finally, on December 17, 2020, DHS and DOJ published a final rule²²³ (the “TCT Bar Final Rule” or “entry bar”) responding to litigation surrounding and comments received concerning the TCT, also captioned “Asylum Eligibility and Procedural Modifications”.

On February 16, 2021, Judge Tigar granted a preliminary injunction²²⁴, blocking the departments from implementing that rule, as well.

In EO 14010²²⁵, President Biden also called on the attorney general and the DHS to “promptly review and determine whether to rescind” that rule.

All the while, the *East Bay* litigation remained pending. In June 2022, for example, the parties jointly filed a case management statement²²⁶ in both *East Bay Sanctuary Covenant v. Trump* and *East Bay Sanctuary Covenant v. Barr*, which stated:

The government presently continues to pursue rulemaking with respect to the two rules at issue in these cases, an interim final rule, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 Fed. Reg. 55,934 (November 9, 2018) (“entry” rule), and the final rule titled “Asylum Eligibility and Procedural Modifications,” 85 Fed. Reg. 82,260 (December 17, 2020) (“transit” rule) . . .

Given this ongoing review of the entry and transit rules and the likelihood those rules will be modified or rescinded in the future, the parties respectfully request that the Court continue to hold these cases in abeyance pending the conclusion of the Departments’ review of the rules.

²²¹ *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*. 85 Fed. Reg. 80274 (Dec. 11, 2020). Source: <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>.

²²² *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). Source: <https://casetext.com/case/pangea-legal-servs-v-us-dept-of-homeland-sec-1>.

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

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

²²⁵ *Executive Order 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 5, 2021). Source: <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>.

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

The Biden administration finally began to act on those rules with the expiration of Title 42 imminent, when, in a January 5, 2023, fact sheet²²⁷, the White House announced:

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

I have referred²²⁸ to that port processing plan as the “CBP One app interview scheme” and will note that although the White House claimed illegal aliens would be using the CBP One app to make appointments “to initiate a protection claim”, CBP was quick to note it “does not adjudicate asylum claims”²²⁹.

Already, by the end of April 2023, CBP reported that more than 79,000 inadmissible aliens had used CBP One to schedule interviews at the Southwest border ports.²³⁰ Just over two weeks later, the CBP One app interview scheme was officially implemented and expanded in a final rule²³¹ formally captioned “Circumvention of Lawful Pathways” (the “Pathways rule”).

The CBP One app interview scheme was just one part of that rule. As a DHS fact sheet²³² for the Pathways rule explains, pursuant to that rule:

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

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

²²⁷ FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions. THE WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

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

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

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

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

²³² *Fact Sheet: Circumvention of Lawful Pathways Final Rule*. U.S. Dep’t of Homeland Security (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule>.

- *They used the CBP One app to schedule a time and place to present at a port of entry, or they presented at a port of entry without using the CBP One app and established that it was not possible to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or*
- *They applied for and were denied asylum in a third country en route to the United States.*

Migrants entering illegally can rebut the presumption of ineligibility in the Pathways rule by showing they have an acute medical emergency, “faced an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture, or murder”, or were victims of severe forms of trafficking.²³³

On June 23, 2023, a group of migrants and advocates filed suit²³⁴ in the U.S. District Court for the District of Columbia, challenging implementation of the Pathways rule as it related to those who, in lieu of using the CBP One app to schedule interview appointments at the ports, entered illegally.

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

In September, the plaintiffs in *M.A.* filed a motion for summary judgment²³⁶, and Biden’s DOJ followed up with its own cross motion for summary judgment²³⁷ in October.

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

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

²³³ *See id.*

²³⁴ *M.A. v. Mayorkas, Complaint for Declaratory and Injunctive Relief*, No. 1:23-cv-01843 (D.D.C. Jun. 23, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.1.0.pdf>.

²³⁵ *MA v. Mayorkas*. National Immigrant Justice Center (Sept. 20, 2023). Source: https://immigrantjustice.org/court_cases/ma-v-mayorkas.

²³⁶ *M.A. v. Mayorkas, Plaintiffs’ Motion for Summary Judgment and Memorandum of Law in Support* (D.D.C. Sept. 28, 2023) (No. 1:23-cv-01843). Source: <https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.37.0.pdf>.

²³⁷ *M.A. v. Mayorkas*, No. 1:23-cv-01843, Cross Motion for Summary Judgment and Opposition to Motion for Summary Judgment (D.D.C. Oct. 27, 2023). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.53.0.pdf>.

²³⁸ *M.A. v. Mayorkas*. Joint Motion to Hold Case in Abeyance (D.D.C. Feb. 5, 2024) (No. 1:23-cv-01843). Source: <https://storage.courtlistener.com/recap/gov.uscourts.dcd.256826/gov.uscourts.dcd.256826.66.0.pdf>.

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

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

On May 8, 2023, the parties in *East Bay Sanctuary Covenant v. Trump* filed an amended complaint²³⁹ in that matter, by now captioned *East Bay Sanctuary Covenant v. Biden*.

Judge Tigar issued an order²⁴⁰ on July 25, 2023, vacating and remanding the Pathways rule, but staying that order for two weeks to allow the Biden administration to seek further review from the Ninth Circuit.

In an order²⁴¹ issued on August 3, 2023, the Ninth Circuit agreed to stay the judge's order and expedite its consideration of the case, but its decision was not unanimous.

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

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

Indeed, one or both of my colleagues in today's majority were directly involved in eliminating at least four different Trump administration immigration rules. . . . It's

²³⁹ *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, Amended and Supplemental Complaint for Declaratory and Injunctive Relief (N.D. Cal. May 18, 2023). Source:

<https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.164.0.pdf>.

²⁴⁰ *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, slip op. at 35 (N.D. Cal. Jul. 25, 2023) Source:

https://storage.courtlistener.com/recap/gov.uscourts.cand.334557/gov.uscourts.cand.334557.187.0_3.pdf.

²⁴¹ *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, slip op. at 1 (9th Cir. Aug. 3, 2023) Source:

<https://assets.law360news.com/1707000/1707605/9th.pdf>.

not an exaggeration to say that, whenever the Trump administration sought to make any meaningful adjustment to our nation's immigration rules, the Northern District of California—and ultimately our court—systematically killed each of those changes.

The Biden administration's "Pathways Rule" before us in this appeal is not meaningfully different from the prior administration's rules that were backhanded by my two colleagues. This new rule looks like the Trump administration's Port of Entry Rule and Transit Rule got together, had a baby, and then dolled it up in a stylish modern outfit, complete with a phone app.²⁴² [Citations omitted; emphasis added.]

Notwithstanding this apparent victory in the circuit court, however, DOJ also joined the plaintiffs in *East Bay* in filing a motion to hold the government's appeal in abeyance pending settlement negotiations in that case and *M.A.*, which the same Ninth Circuit panel — again on a divided two to one vote — granted on February 21.²⁴³

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

After the plaintiffs brought this case to enjoin and vacate the rule, the federal government spent the better part of a year vigorously defending the rule's critical necessity before the district court and in this court — all because, in the government's words, "any interruption in the rule's implementation will result in another surge in migration that will significantly disrupt and tax DHS operations."

....

Taking the government at its word about the pressing need for this crucial rule to remain in effect and be enforced, our court granted a stay of the district court's decision enjoining the government's rule. We heard oral argument and are now poised to render our decision. Then suddenly, out of the blue, the parties come to us hand-in-hand, jointly asking us to hold off making a decision while they "engage in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation." For months, the rule was so important that "any interruption" in its implementation, even for a short period of time, would incapacitate the executive's border response. This panel made decisions based on those representations. Now, the government implies the rule isn't so important after all. Indeed, the government is now "engaged in discussions" that could result in the rule going away. What?

²⁴² *Id.* at 2-3.

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

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

Judge VanDyke continued:

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

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

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

Diplomatic Efforts

Using his foreign-policy power, President Trump negotiated safe third country “Asylum Cooperative Agreements” (ACAs or “safe-third country agreements”) with El Salvador, Guatemala, and Honduras²⁴⁵.

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

²⁴⁴ *Id.* at 6-7.

²⁴⁵ *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador.* U.S. DEP’T OF HOMELAND SECURITY (undated). Source: https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.

While the ACAs with El Salvador and Honduras weren't implemented before the Covid-19 pandemic was announced in March 2020 (they came into force in December²⁴⁶ of that year), the United States was able to send more than 900 third-country nationals to Guatemala²⁴⁷ prior to the pandemic, most of them from El Salvador and Honduras.

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

President Biden's secretary of State, Anthony Blinken, announced²⁴⁸ on February 6, 2021, however that — “In line with the President's vision” — the administration was suspending and terminating the ACAs.

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

As AP explained in December 2019²⁴⁹, Trump “threatened crippling tariffs on all Mexican goods unless Mexico stepped up efforts to curb the flow of migrants. Mexico responded by deploying thousands of members of its newly formed National Guard along migration routes.”

Illegal migrants cannot cross the Southwest border if they cannot get there, and as a result of the enforcement efforts the Mexican government imposed within its own country, many could not.

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

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

²⁴⁶ DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement, U.S. DEP'T OF HOMELAND SECURITY (Dec. 29, 2020). Source: <https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation>.

²⁴⁷ Sieff, Kevin and Sheridan, Mary Beth. *The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says*, WASHINGTON POST (Jan. 16, 2021). Source: https://www.washingtonpost.com/world/the_americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html.

²⁴⁸ Blinken, Anthony J. *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras*. U.S. DEP'T OF STATE (Feb. 6, 2021). Source: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.

²⁴⁹ *What crackdown? Migrant smuggling business adapts, thrives*. ASSOCIATED PRESS (Dec. 19, 2019). Source: <https://apnews.com/article/us-news-ap-top-news-international-news-az-state-wire-immigration-202a751ac3873a802b5da8c04c69f2fd>.

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

He reported:

Mexican law enforcement officials are rounding up immigrants in the country's north and shipping them by bus and airplane to southern cities like Tapachula in Chiapas State and Villahermosa in Tabasco State. They are all expected to go home or stay put alongside those continuing to enter from Guatemala. They'll be held back to wait for a molasses-slow bureaucracy to approve individual travel papers.

....

To eliminate another obvious draw, Mexican authorities have emptied and then bulldozed at least one longstanding migrant camp, the sprawling one in Matamoros across the Rio Grande from Brownsville and dug deep anti-pedestrian trenches to deny further easy access to popular crossings there. It was done "under U.S. pressure," one Mexican newspaper said.

Perhaps one of Mexico's most impactful slow-down measures is that, finally, it is doing something about "La Bestia," the system of cargo trains that have super-powered the Biden border crisis for three years running by transporting hundreds of thousands of migrants from deep southern Mexico to its northern border cities.²⁵¹

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

Border Infrastructure

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

As a senator, Obama — like then-Sen. Joe Biden (D-Del.) — voted in favor²⁵³ of the Secure Fence Act of 2006 (SFA)²⁵⁴. The SFA both authorized and mandated the construction of portions

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

²⁵¹ *Id.*

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

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

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

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

Most of the work—at least 500 miles²⁵⁵-- authorized by the SFA was completed under the George W. Bush administration, but still, the Obama administration completed more than 130 additional miles²⁵⁶ of that border wall system.

Few would dispute that President Trump was a major proponent of the border wall system, and in fact, a December 2018 demand²⁵⁷ from his administration for \$5 billion in construction funding led to a weeks-long government shutdown.

In the end, on February 15, 2019²⁵⁸, Trump agreed to \$1.375 billion for border-barrier funding, and the impasse ended. Shortly thereafter, however, he also issued a proclamation²⁵⁹ declaring a national emergency at the Southwest border and directing the Department of Defense (DoD) to assist in securing that border.

Ten days later²⁶⁰, DHS asked DoD for assistance in constructing “fences[,] roads, and lighting” within 11 specified project areas, “to block drug-smuggling corridors across the international boundary between the United States and Mexico”. That construction was in addition to the \$1.375 billion that Congress had appropriated for border-wall funding.

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

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

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

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

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

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

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

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

Congress included additional funding of \$1.375 billion “for the construction of [a] barrier system along the southwest border” in both the appropriations bills for FY 2020²⁶² and FY 2021²⁶³.

By December 31, 2019, DHS had used that funding to build or replace more than 112 miles of border wall, a portion of the 452-plus miles²⁶⁴ of border barriers built or replaced under the Trump administration.

One of President Biden’s first acts²⁶⁵, however, was to issue a proclamation that placed a “pause” on further construction on the system.

Then-candidate Joe Biden argued on his 2020 campaign website²⁶⁶ that Trump’s “obsession with building a wall does nothing to address security challenges while costing taxpayers billions of dollars”. He continued: “Building a wall will do little to deter criminals and cartels seeking to exploit our borders.”²⁶⁷

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

Alejandro N. Mayorkas, the Homeland Security secretary, says Mr. Biden is building up to 20 miles of border wall because he has to.

The administration said that it was bound to build this section of new wall because Congress already appropriated the funding to do so in 2019. It had been unsuccessful in convincing Congress to rescind the funding, Mr. Mayorkas said.

“From Day 1, this administration has made clear that a border wall is not the answer,” Mr. Mayorkas said on Thursday in Mexico City, after a member of the Mexican news media asked about the apparent reversal. “That remains our position, and our position has never wavered.”²⁶⁹

²⁶² Section 209(a)(1) of the Consolidated Appropriations Act, 2020, Pub. L. 116-93 (2019). Source: <https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.pdf>.

²⁶³ Section 210 of the Consolidated Appropriations Act of 2021, Pub. L. 116-260 (2020). Source: <https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf>.

²⁶⁴ Giles, Christopher. *Trump’s wall: How much has been built during his term?* BBC (Jan. 12, 2021). Source: <https://www.bbc.com/news/world-us-canada-46748492>.

²⁶⁵ *Proclamation 10142, Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, WHITE HOUSE (Jan. 20, 2021). Source: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/>.

²⁶⁶ *The Biden Plan for Securing Our Values As a Nation of Immigrants*, BIDEN-HARRIS (undated). Source: <https://web.archive.org/web/20201107002051/https://joebiden.com/immigration/#>.

²⁶⁷ *Id.*

²⁶⁸ Sullivan, Eileen and Edmonds, Colbi. *Biden, the Border, and Why a New Wall Is Going Up*. NEW YORK TIMES (Oct. 6, 2023). Source: <https://www.nytimes.com/2023/10/06/us/border-wall-biden.html>.

²⁶⁹ *Id.*

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

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

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

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

More importantly, however, the roads, lights, cameras, and sensors in the border wall system—and especially the fencing -- are a “force multiplier” for overwhelmed agents as they attempt to apprehend aliens evading encounter, identified in statute²⁷² as “got aways”.

The Congressional Budget Office (CBO) recently estimated²⁷³ that there were 860,000 such got aways in FY 2023, while a House Resolution²⁷⁴ passed in January stated that, “during the Biden administration, more than 1.7 million known illegal alien ‘gotaways’ have successfully evaded U.S. Border Patrol along the southwest border”.

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

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

²⁷² See 6 USC § 223(a)(3) (2024) (“The term ‘got away’ means an unlawful border crosser who—(A) is directly or indirectly observed making an unlawful entry into the United States; (B) is not apprehended; and (C) is not a turn back.”). Source:

<https://uscode.house.gov/view.xhtml?path=/prelim@title6/chapter1/subchapter4&edition=prelim>.

²⁷³ *The Demographic Outlook: 2024 to 2054*, CONG. BUDGET OFF. (Jan. 2024). Source:

<https://www.cbo.gov/system/files/2024-01/59697-Demographic-Outlook.pdf#page=9>.

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

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

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

Section 212(f)

Section 212(f) of the INA²⁷⁵ states, in pertinent part:

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

Compare that authority to the power given bon Congress to the Centers for Disease Control (CDC) in 42 U.S.C. § 265²⁷⁶, the public-health provision on which the so-called “Title 42” border-expulsion orders²⁷⁷ were based:

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

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

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

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

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

That said, as the Supreme Court held²⁷⁸ in 2018, section 212(f) of the INA:

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

Some critics of the Biden administration’s border policies²⁷⁹—including Speaker Mike Johnson (R-La.)²⁸⁰—have called on President Biden to use his authority under section 212(f) to bar illegal migrants from entering the country, and published reports²⁸¹ have suggested he may do so.

As CNN²⁸² has explained, however:

In 2018, Trump tried to use 212f, which gives the president broad authority to implement immigration restrictions to restrict border crossings. But ultimately, a federal appeals court ruled that the authority conflicts with asylum law and the 212f authority doesn’t override it.

*The case – known as **East Bay Sanctuary Covenant v. Trump** – served as an example of why the president is limited in his ability to shut down the border. It’s*

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

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

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

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

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

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

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

Both the presidential proclamation in that matter²⁸³ and the Port of Entry rule²⁸⁴ on which it relied were premised on section 212(f). As the proclamation clearly states:

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

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

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

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

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

²⁸⁴ *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018). Source: <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>.

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

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

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

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

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

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

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

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

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

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

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

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

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

to set the procedures to be followed in determining whether an alien should be admitted. . . .

This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are “treated” for due process purposes “as if stopped at the border.”

The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an “applicant for admission,” . . . and an alien who is detained shortly after unlawful entry cannot be said to have “effected an entry,” . . . Like an alien detained after arriving at a port of entry, an alien like respondent is “on the threshold.” The rule advocated by respondent and adopted by the Ninth Circuit would undermine the “sovereign prerogative” of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location.²⁹¹

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

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

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

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

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

²⁹¹ *Id.* at 35-36.

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

As noted above, section 208(a)(1) of the INA²⁹³ allows any alien physically present in this country to *apply* for asylum, but section 208(b)(2) of the INA²⁹⁴, commonly known as the “asylum bars”, bars certain aliens from being *granted* asylum.

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

Critically, however, and in addition to those enumerated bars, section 208(b)(2)(C) of the INA²⁹⁵ also provides: “The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum . . .”

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

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

The circuit court tersely rejected DOJ’s contentions about that “split” in section 208, holding:

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

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

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

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

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

<https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>.

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

²⁹⁸ *Id.*

“Absurd” or not, section 208 *explicitly*, in separate subsections, provides different rules to govern aliens’ eligibility to apply for asylum and their eligibility to receive it. For example, while an alien who has been convicted of an aggravated felony²⁹⁹ can file an asylum application³⁰⁰, that application must be denied³⁰¹.

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

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

The Pathways rule promulgated by DOJ and DHS under the Biden administration—currently at issue in *East Bay*—expressly did not mention the president’s section 212(f) authority³⁰³.

But as Judge VanDyke’s latest dissent referenced above explains³⁰⁴, “If this case gets before the Supreme Court, the safe bet is that it would overrule” the earlier precedents in *East Bay* (which as noted above he termed “erroneous”) expressly limiting that 212(f) authority.

²⁹⁹ See section 101(a)(43) of the INA (2024) (defining “aggravated felony”). Source:

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

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

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

³⁰² *East Bay Sanctuary Covenant v. Biden*, 993 F.3d at 696. Source:

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

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

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

My colleague, George Fishman, has explained³⁰⁵ that:

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

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

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

Expedited Removal

Finally, the executive possesses the expedited removal authority Congress has given it in section 235(b)(1) of the INA³⁰⁶ to quickly deport aliens who have entered the United States illegally.

Of the nearly four million aliens³⁰⁷ agents apprehended at the Southwest border and processed for removal under the INA between February 2021 and February 2024, just fewer than 458,000³⁰⁸ were subject to expedited removal—roughly 11.5 percent of the total.

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

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

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

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

By contrast, the aforementioned House Resolution³⁰⁹ passed in January stated that, “the Biden administration has released at least 3.3 million. . . illegal aliens [encountered by CBP at the Southwest border] into the interior of the United States”.

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

Under the new enforcement measures announced today, the Biden-Harris Administration will:

Impose New Consequences for Individuals who Attempt to Enter Unlawfully

To facilitate a return to the processing of all noncitizens under Title 8 authorities when Title 42 eventually lifts, the Department of Homeland Security (DHS) is:

Increasing the Use of Expedited Removal. Effective immediately, individuals who attempt to enter the United States without permission, do not have a legal basis to remain, and cannot be expelled pursuant to Title 42 will be increasingly subject to expedited removal to their country of origin and subject to a five-year ban on reentry.³¹¹ [Emphasis added.]

Similarly, at a White House press conference³¹² on May 11, 2023 (the day Title 42 expired), DHS Secretary Mayorkas asserted that: “The vast majority of individuals [encountered at the Southwest border] will indeed be placed in expedited removal, and if they do not qualify, will be removed in a matter of days, if not weeks, from the United States.”

Unfortunately, while expedited removals have ticked up slightly since then, still, only a minority of illegal entrants have been subject to that process of late. For example, of the 124,220 aliens apprehended by Border Patrol at the Southwest border in January, just 23,750 of them were subject to expedited removal³¹³-- less than 20 percent of the total.

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

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

³¹⁰ *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. White House (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

³¹¹ *Id.*

³¹² *Secretary Mayorkas Remarks at a White House Press Briefing Ahead of the Lifting of the Title 42 Public Health Order*. U.S. DEP'T OF HOMELAND SECURITY (May 11, 2023). Source: <https://www.dhs.gov/news/2023/05/11/secretary-mayorkas-remarks-white-house-press-briefing-ahead-lifting-title-42-public>.

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

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

Below is a chart that included in its October 28, 2019, assessment of the Migrant Protection Protocols³¹⁴, showing the number of aliens subject to expedited removal between FY 2006 and FY 2018 and the number making credible fear claims:

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

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

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

CBP can and should fully utilize expedited removal for all illegal entrants. Not all are “asylum seekers” and DHS should quickly remove those who are not, as DHS Secretary Mayorkas promised³¹⁵ his department would do.

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

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

³¹⁵ See fn. 308.

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

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

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

Conclusion

In his 1995 State of the Union Address³¹⁶, then-President Clinton explained:

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

More than 26 years later, during a September 28, 2021, interview³¹⁷ with ABC's "Good Morning America", former President Obama explained the dilemma that faces the United States when it comes to securing the border:

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

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

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

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

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

*If we cannot control illegal immigration, we cannot sustain our national interest in legal immigration. Those who come here illegally, and those who hire them, will destroy the credibility of our immigration policies and their implementation. In the course of that, I fear, they will destroy our commitment to immigration itself.*³¹⁸

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

The latest Gallup polling³¹⁹ shows that 28 percent of Americans believe that “immigration” is the “most important problem facing the country”, up from just 20 percent in January and the leading issue out of 15 surveyed.

Worse, 55 percent of those polled deemed “illegal immigration” to be a “critical threat” to the United States, a new high for an issue that Gallup has surveyed since 2004.³²⁰

A 2023 Gallup poll³²¹ from July 2023 showed that a majority of Americans, 68 percent, believe that “on the whole”, immigration is a “good thing” for the country. That said, 27 percent deemed it to be a “bad thing”, up from 19 percent four years prior, while the number of Americans who concluded that immigration is an overall good has declined from 77 percent in May 2020.

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

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

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

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

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

³²⁰ *Id.*

³²¹ Saad, Lydia. *Americans Still Value Immigration, but Have Concerns.* GALLUP (Jul. 13, 2023). Source: <https://news.gallup.com/poll/508520/americans-value-immigration-concerns.aspx>.

Mr. McCLINTOCK. Great. Thank you very much for your testimony.

Next, I'm pleased to welcome Mr. Tom Homan back before this Committee.

STATEMENT OF THOMAS D. HOMAN

Mr. HOMAN. All right. You have my written statement. I don't—I'm not going to read an oral statement. I'm just going to talk.

I started as a Border Patrol Agent in 1984. I became a Special Agent and climbed the ranks to become the first ICE Director that actually came up through the ranks. I worked for six Presidents, starting with Ronald Reagan. I've seen a lot of policies come and go. I see policies that worked, policies that didn't.

Every President I ever worked for took border security seriously. Clinton and Obama took it seriously. They took steps to secure the border because they understood, like every other President, you can't have strong national security if you don't have strong border security.

Understand this: President Biden is the first President in the history of this Nation who came into office and unsecured the border on purpose by signing over 90 Executive Orders abolishing everything we did that were successful policies.

The result of that is: Over 1,700 aliens have died entering this country—a historic record.

Three hundred and forty known and suspected terrorists off the Terrorist Watch List have been arrested at the Southern border, almost twice as many at the Northern Border—a historic record.

A hundred and 14 thousand people have died from fentanyl overdoses that's coming across an open border—an historic record.

Sex trafficking in women and children, a 600 percent increase—a historic record.

Over 450,000 children have crossed this border that used the cartels. This administration has lost track of almost 100,000 of them. We know where they are. We found some in forced labor. We found some in sex trafficking. We found some in debt bondage.

On top of that, we've got 1.9 million known gotaways—not a guess: Known gotaways, 1.9.

Border Patrol has arrested people from 181 different countries. Some of these countries are sponsors of terror. They've arrested 340 on the Southern border. How many of that 1.9 came from countries sponsoring terror? If you think it's zero, you're wrong.

At the same time, he destroyed the border, he abolished ICE. I said for a long time they're never going to abolish ICE; they'll never abolish a Federal agency. Well, they didn't abolish the agency; they abolished their mission.

The latest victim of that, her name is Laken Riley, a young woman who was murdered by an illegal alien in Georgia; a young lady who tried to call 911 because she was about to enter hell. Because she was being attacked by somebody, she was living in terror for the last few minutes. She got taken away. This young lady died, a horrific murder death. She tried to get help. She fought for her life, and she died.

She's one out of so many. I've met hundreds of angel moms and dads through my career—hundreds. How did this administration fail Lake Riley?

First, the perpetrator should never have been in the country. He shouldn't have been in New York. He shouldn't have been in Georgia. He should be in Mexico in the Remain in Mexico program that this administration abolished.

Even if they didn't have the Remain in Mexico program, he should have been detained when he entered the country illegally without proper documentation. The law says you "shall be detained." Not maybe; shall. He was released.

In New York City, he was arrested for a crime. If you read the newspaper, they say, well, New York City's at fault because they're a sanctuary city. Well, that's part of the story, but the other part of the story: Let's say they didn't release him.

Based on this memorandum by Secretary Mayorkas on ICE priorities, ICE wouldn't have dropped a detainer on him anyways because he wasn't a bad enough criminal for ICE to drop a detainer on him. Even though the law says there is no prerequisite to commit a crime after you commit the crime of illegal entry to be a target for enforcement, but Secretary Mayorkas has taken a lot of criminal aliens off the table for ICE.

How do I know that? By sheer numbers. A 57 percent decrease in arrested criminal aliens under this administration; a 68 percent decrease in at-large arrests of criminal aliens; a 44 percent decrease in detainer requests for criminal aliens; a 67 percent decrease in deportations of criminal aliens; a 55 percent decrease in immigration-related criminal convictions.

Laken Riley was just released—was just the latest victim. There will be another one next week. As a matter of fact, there's been two since her.

When we leave here today, nothing's going to change. If this administration wanted to secure the border, they've had three years to take action. Why do they wait until now? Well, there must be an election coming up.

Then, they come up with a bill in the Senate that they know will never pass the House. So, they can say, well, now it's the Republicans' fault, and they want to blame President Trump for his actions.

People will say President Trump is inhumane; Tom Homan is inhumane; we're racist. When Trump had immigration at a 40–45-year low, how many women didn't get raped; how many children weren't lost; how many women and children weren't sex trafficked; and how many pounds of fentanyl didn't get into the country to kill Americans?

President Trump's policies saved lives. The bottom line: The data shows it. This administration has destroyed the most secure border I've seen in my lifetime and 34 years doing this job. That's just a stone-cold fact.

Thank you.

[The prepared statement of Mr. Homan follows:]

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Statement Summary
of

Thomas D Homan

Retired Director: United States Immigration and Customs Enforcement (ICE)

before the

Subcommittee on Immigration Integrity, Security, and Enforcement

March 7, 2024

Hearing Titled

“Presidential Power to Secure the Border”

Chairman Jordan, Chair McClintock, Ranking Member Jayapal Members of the Subcommittee, good morning.

I have worked for six different Presidents since I started as a Border Patrol Agent to include Ronald Reagan, George HW Bush, Bill Clinton, George W Bush, Barrack Obama and Donald Trump. I started my federal law enforcement career in 1984 as a Border Agent, then Special Agent. I rose through the ranks the next three decades to become the first Director of ICE that came up through the ranks. Border security and our nation’s national security has been my entire professional world for 34 years. Since my official retirement I have been a visiting fellow at several distinguished organizations where I continue my work consulting on border security and immigration enforcement.

While working for six different Presidents, Border Security and Immigration Enforcement policies would change from one administration to another. However, every President I worked for took some steps to secure the border because they all understood that you can’t obtain strong national security if you don’t have strong border security.

President Biden is the first President to ever un-secure a border on purpose. He was handed the most secure border in our nation's history with a 40-45 low on illegal immigration. It is a critical fact that border security is national security. Hard stop, it's a fact.

During my more than 34 years serving this great nation, I have been honored to participate in the creation and implementation of numerous policies that helped us to go from an uncontrolled chaotic border to a border that was the most secure I have seen throughout my career. I have seen many policies fail and other policies succeed, but the proven policies that we implemented during the Trump administration proved to be most effective, based on real data and not opinion. However, those successful policies were abolished within weeks of the new administration and here we are, back to a chaotic uncontrolled border that has resulted in many historical records, none of them good. The current administration's failure to enforce and uphold the laws as written by Congress are not just matters of legal debate but have led to unimaginable suffering and death for Americans and migrants alike.

Since the Biden administration started, an historic number of illegal aliens have died on US soil, over 1700 at last count. The number of senseless deaths shattered every record. Nothing even close has ever occurred. His policies have pulled thousands of Border Patrol agents off the frontline mission of securing the border. As a result, the criminal cartels have taken advantage, smuggling record numbers of illegal aliens and deadly drugs across while agents are overwhelmed or distracted. American families and communities are suffering as a result. More Americans are dying from fentanyl poisoning than ever as the drug is pushed across the Southwest border. Over 112,000 fentanyl overdose deaths of our citizens, another historic record. It is not a coincidence that in the past three years of an overwhelmed Border Patrol, that historic amounts of this dangerous poison are entering our country.

Aliens arrested by the Border Patrol that appeared on the Terrorist Screening Data Set is currently at approximately 340, in just three years. We had 11 in four years under Trump. Not only is this another historic record, but it is also the one that should concern you the most.

A record number of unaccompanied children have also crossed our border illegally through criminal cartel operations.

More than 440,000 children have been placed in the hands of criminal cartels to be smuggled across our border since Biden has taken office. This is another disturbing historic record. Most damning is that this administration has lost track of nearly 100,000 of these children and have no idea where these children are, who these children are with, or if these children are safe. We already know thousands of these children have been subjected to sex slavery, forced labor and debt bondage. So much for this administration claiming that they are “upholding our values as a nation”. To be blunt, this systematic destruction of border security and the predictable consequences scare the hell out of me. It should scare you too.

For three years, this Administration has directed and overseen the implementation of an open-borders agenda that has resulted in a national security, humanitarian, public health and public safety catastrophe unlike any we have ever witnessed at America’s borders. To put this into context, all one must do is look at CBP’s own data that shows total enforcement actions in FY20 was approximately 646,000. The next full year under Biden we tripled that number to 1.9 million followed the next year with 2.7 million and then in FY23, 3.2 million. When you have those kinds of encounters, it overwhelms the Border Patrol to the point where they have pulled up to 100% of agents off patrol to come in and process these large groups, which leaves hundreds of miles of border with no security and not a single agent on watch. That is why we are just shy of 2 million known “got aways”. Who are these “got aways”? Where are they from? Where are they now? For what purpose did they choose to escape rather than surrender themselves to the Border Patrol?

My biggest concern about this historic self-inflicted tragedy of the Biden open border is that it has become the biggest national security failure I have seen since 9-11. The Border Patrol has arrested people from 181 different countries. Some of these countries are sponsors of terror. The Border Patrol arrested over 340 people on the watch list. So, how many of the almost 2 million known “got aways” come from a country that are sponsors of terrorism? How many of these “got aways” carried fentanyl? How many of them were criminals or gang members. How many of them were sex trafficking women and children? Biden’s border crisis has turned every city and state in this country into a border city and border state. The chaos unleashed by their policies has spread throughout the country, whether in the form of the fentanyl crisis, rising crime, or massive strain on schools and other community services.

The only conclusion to draw at this point is that this crisis was intentional.

For three years this Administration has refused to enforce the laws passed by Congress and misled the American people about the crisis **and how their systematic destruction of Trump policies caused it**. The Biden administration policies, or lack of, have actively encouraged record numbers of people to make the dangerous journey to our borders. Additionally, they have released millions of illegal aliens into our communities in a flagrant abuse of immigration laws passed by Congress governing the parole, detention, and removal of inadmissible aliens.

Hundreds of criminal illegal aliens are being released into our communities, and cities and states are spending billions of dollars not on their own citizens, but on illegal aliens arriving every day. A recent in-depth study by the Center of Immigration Studies on ICE arrests was shocking. It shows that the Biden administration is responsible for the following when comparing FYs 2017, 2018, and 2019 to FYs 2021, 2022, and 2023, a 57 percent decrease in arrests of criminal aliens, a 68 percent decrease in at-large arrests of criminal aliens, a 44 percent decrease in detainer requests issued on criminal aliens, a 67 percent decrease in deportations of criminal aliens and a 55 percent decrease in immigration-related criminal convictions. Overall, deportation removals by ICE stand at historic lows despite historic high illegal immigration. Although Secretary Mayorkas said ICE would concentrate on public safety threats and criminals he did nothing about sanctuary cities. How can you prioritize criminal aliens and be locked out of every major city and county jail in the country and not be allowed to work with your local and state law enforcement agencies?

In FY22, ICE conducted a mere 72,177 removals and 59,011 in FY21. By comparison, in FY20, during the COVID-19 pandemic, ICE removed 185,884 illegal aliens, while in FY19, these exceeded 267,000. ICE recorded only 142,580 removals in FY23, still below the Trump-era low in FY20, during a year when CBP recorded more than 3.2 million total encounters. The number of removals of illegal alien gang members has decreased under his leadership. In FY19, ICE removed 5,497 known or suspected gang members, but just 3,406 in FY23. Again, this is not mismanagement or incompetence. It is all by design.

Then there is the blatant misuse of parole authority by this administration. Under section 212 of the Immigration and Nationality Act (INA), parole may only be granted on a case-by-case and temporary basis, for urgent humanitarian reason or significant public benefit.

From Jan. 20, 2021–November 2023, DHS recorded at least 1.5 million paroles due to the southwest border crisis—more people than the population of New Hampshire.

In its 2021 ruling in *Texas v. Biden*, the Fifth Circuit Court of Appeals wrote that Mayorkas’ mass-parole of illegal aliens “is the opposite of the ‘case-by-case basis’ determinations required by law” and that Mayorkas violated “Congress’s statutory commands” in the parole statute. Mayorkas created/oversaw a host of mass-parole programs—paroles at the border via Parole ATD, Parole with Conditions, etc.; nationality-based parole programs like CHNV; and more. Mayorkas claimed multiple times before the House Judiciary Committee in July 2023 that his use of mass parole was consistent with the law and past precedent. However, mass parole under Mayorkas’ leadership, at this scale, is unprecedented in my 34 career. Despite the ruling in the 5th District, they continue to abuse the authority at record levels.

Encounters of inadmissible aliens at official ports of entry are also overwhelming the system, not just illegal crossings along the Southwest border. In FY20, nationwide encounters at ports of entry totaled 241,763, an average of about 20,146 per month. In FY23, total encounters at the ports exceeded 1.1 million, more than 94,000 encounters per month—a 370% increase—with more than 235,000 just in the first two months of FY24. This is partly due to mass-parole schemes Mayorkas has devised to release into the interior individuals who would otherwise have no lawful basis to enter the country—including improper use of the CBP One mobile app. In October 2023, after months of resistance from DHS and a subpoena threat, the Committee obtained documents that show 278,431 appointments were scheduled via the app from Jan.12–Sept. 30, 2023, and that roughly 96% of these (266,000+) resulted in parole into the United States with a court date via a Notice to Appear (NTA). By November, the number of appointments had grown to roughly 360,000.

The statutory responsibility to detain inadmissible aliens as articulated in section 235 of the INA is clear and comprehensive. According to federal judge Kent Wetherell in his ruling striking down Mayorkas’ Parole + ATD policy, “The evidence establishes that in late January or early February of 2021, DHS made a discrete change in detention policy from ‘release only if there is a compelling reason to’ to ‘release unless there is a compelling reason not to.’” The numbers reflect the poor policy. When factoring in releases via parole, NTAs, and Notices to Report (NTRs), Mayorkas oversaw the release of well over three million inadmissible aliens into the United States, along with more than 1.8 million known got aways that have evaded short-staffed agents on the line unable to apprehend and detain them.

Mass release is a major incentive for illegal aliens to come. The cartels sell the fact that one can cross the border illegally, turn yourself over to a Border Patrol Agent, get processed quickly, get a free airline ticket to the city of the alien's choice, get put up in a hotel, get three meals a day, free medical care, and a work permit. This giveaway program is causing much of the current crisis. The lack of enforcement and the lack of consequences is at the heart of this unprecedented surge. It's not global warming, it's not seasonal and it is not typical as this Administration claims.

The results of the historic border surge are that law enforcement officers within DHS are overwhelmed. Many of these career law enforcement officers have been taken off priority duties such as criminal investigations, arrests of criminal aliens and southbound operations to interdict guns being smuggled south to Mexico. I agree that the smuggling of firearms to Mexico needs to be prioritized and enhanced but the fact is that many officers and special agents have been reassigned to processing duties and care and feeding duties of the massive flow of aliens claiming asylum at our southern borders to include our port of entries where many southbound operations are implemented. Additionally, the actions of this Administration have financially benefitted the criminal cartels in Mexico. These cartels are making record profits from alien smuggling, human trafficking, and drug smuggling. They have more operational funding now than ever before. They are not only buying massive amounts of firearms but now have access to military grade weapons such as grenade launchers and IEDs. The rise in violence in Mexico can be tied directly to the historic amounts of money they are now making which is causing factions of different cartels to fight one another over control of the plazas. This violence has now entered this country and these cartels are now in every major city in this country.

Mr. MCCLINTOCK. Thank you very much.
We will next hear from Mr. Reichlin-Melnick.

STATEMENT OF AARON REICHLIN-MELNICK

Mr. REICHLIN-MELNICK. Chair Jordan, Chair McClintock, Ranking Member Jayapal, and distinguished Members of the Committee—of the Subcommittee, my name is Aaron Reichlin-Melnick. I am the 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.

There should be no doubt that we need new laws and more resources to respond to the current situation at the border. The last time Congress made any major changes to the asylum process was 1996, when the Macarena was still a hit dance craze, and the main concern at the border was Mexican laborers seeking work.

Our asylum system was designed in a largely pre-digital age before the rise of social media, smart phones, translation apps, and a world that has become smaller than ever.

Over the last decade, Presidential authority to address the border has been stretched as far as it can go and often taken beyond what the law allows. Every president over the last 20 years, from Bush through Biden, has called for changes in the law and for more resources.

Even President Trump previously said in 2018 that, “the only long-term solution was for Congress to act.” Despite decades of bipartisan agreement that Congress needs to legislate, with of course stark disagreements as to how, in recent months, an unusual theory has taken hold, that the President can shut the U.S.-Mexico border to migrants with a stroke of a pen and no help from Congress.

This theory is fundamentally wrong. No such authority exists, not even Section 212(f) of the Immigration and Nationality Act, which in 2018 President Trump tried and failed to use to shut the border.

Even if there were some overlooked law on the books which authorized the President turn away everyone, operational and diplomatic limitations prevent any President from simply shutting the border overnight.

First, U.S. and international law still require a screening for anyone who expresses a fear of persecution before deportation, even if asylum itself is banned. Without enough asylum officers to carry out those screenings, even a policy which bars asylum to all migrants can only be applied at the border to a limited number of people.

This is not theoretical. In May, the Biden Administration restricted asylum for nearly all migrants crossing the border outside ports of entry. Even though DHS is currently setting new records for credible fear interviews, nearly double the number of credible fear interviews done under the Trump Administration, lack of asylum officers means that most people crossing can't have this restriction applied until years later in court in front of an immigration judge.

Other issues exist too. Many migrants arriving at the border today cannot be deported at all because there is no country that is willing to take them. For example, Venezuela, a country which we have subject to intense sanctions, has for years retaliated by barring direct U.S. deportation flights.

Fewer than 3,000 Venezuelans have been deported by commercial airlines in the last decade. When the Biden Administration briefly got Venezuela to restart deportation flights, they ended in a matter of months because once again the Maduro regime cracked down on elections and stopped the planes.

So, how do we fix this? Well, hiring more immigration judges and asylum officers is an easy first step. A robust infusion of resources over time will eliminate bottlenecks and allows us to carry out basic screenings and decide asylum cases in months, not years.

We also need innovative thinking about restructuring the system for modern challenges that we face today. For example, migrants must wait years for their cases to be heard in a system that is backlogged as it. Back in 1996, we made it illegal for asylum seekers to work and support themselves in the months after they arrive.

If asylum seekers could work, they wouldn't have to sit around in shelters all day, and they could support themselves. If the Federal Government played a leading role in coordinating arrivals, cities could work together and tap Federal resources to get people on their feet as they go through the process with a limited impact on local budget and improvement of the process for everyone.

Beyond providing sufficient resources to reestablish a functioning asylum system, Congress must also pay attention to our legal immigration system, which is plagued with backlogs and rising costs. Not only are we driving away the world's best and brightest, but our broken legal immigration system helps unscrupulous actors sell migrants on the idea that the asylum system is their only way to seek the American dream.

Over the last decade, we have seen Presidents trying more and more aggressive crackdowns and ramped-up enforcement. It has not worked. So today, Congress has a choice. Do we kick the can down the road yet again, or do we do the one thing that we haven't tried and rebuild our broken asylum system, hiring more asylum officers, cutting backlogs, and giving people a fair shot?

I urge legislators to address this issue with the seriousness it deserves and not to fall for a myth that can be solved overnight. Thank you, and I look forward to your questions.

[The statement of Mr. Reichlin-Melnick follows:]



U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Immigration Integrity, Security, and Enforcement
“Presidential Power to Secure the Border”

March 7, 2024

Testimony of Aaron Reichlin-Melnick¹
Policy Director
American Immigration Council

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 that strives to strengthen the United States by shaping immigration policies and practices through innovative programs, cutting-edge research, and strategic legal and advocacy efforts grounded in evidence, compassion, justice and fairness. 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.² 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.”³ 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 and against U.S. Citizenship and Immigration Services for delays in processing applications for provisional waivers of unlawful presence.⁴ Our

¹ Portions of this written testimony have been submitted during previous hearings, including a September 20, 2023 House Homeland Security Committee hearing entitled “The Financial Costs of Mayorkas’ Open Border,” a June 7, 2023 House Judiciary Subcommittee hearing entitled “The Border Crisis: Is the Law Being Faithfully Executed,” and an April 6, 2022 House Homeland Security Subcommittee hearing entitled “Examining Title 42 and the Need to Restore Asylum at the Border.”

² American Immigration Council, “Challenging Unconstitutional Conditions in CBP Detention Facilities,” .

³ American Immigration Council, “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers,” <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>.

⁴ American Immigration Council, “Challenging the Government’s Barriers to Access to Counsel in Immigration Detention Centers,” <https://www.americanimmigrationcouncil.org/litigation/challenging-government-barriers-access-counsel-immigration-detention-centers>.

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experience over the last decade has given us important insight into the powers—and limits—of presidential authority to “secure the border.”

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.

Our immigration system is in crisis. As legal immigration has become increasingly inaccessible, and our asylum system increasingly backlogged, people around the world are getting the message that the only realistic way they will ever be able to come to the United States is through the southern border. Yet despite this challenge, policymakers continue to focus only on the U.S.-Mexico border itself, rather than addressing the broader problems with plague both our legal immigration system and our humanitarian protection systems. Policymakers of both parties have focused the majority of their attention on finding news way to crack down at the border, rather than making the broader fixes necessary to avoid yet another failed crackdown that may temporarily reduce arrivals but fail to solve the underlying problems. The last time Congress made any major changes to the asylum process was in 1996. The last time Congress made any major changes to our legal immigration system was in 1990. As I emphasized the last time I was here, we are facing 21st century challenges with a firmly 20th century system.

There’s no doubt that we need new laws. Today, Congress faces a choice: Do we do the one thing we haven’t tried and rebuild our broken asylum system, or do we kick the can down the road yet again? More asylum officers and more judges will help reduce backlogs, with the ultimate goal of delivering decisions (whether positive or negative) within a reasonable timeframe.

But we also need innovative thinking about restructuring the system for the modern challenges we face today. Our outdated humanitarian protection systems act as a barrier to migrant self-sufficiency while they go through the asylum process, leading to unnecessary and counterproductive fiscal strains on local governments. If migrants going through a multi-year court process could find jobs legally, many of them wouldn’t be forced to remain in shelters at high costs to local governments. And if the federal government played a leading role in coordinating migrant arrivals, cities could work together to share the temporary burden of helping migrants get on their feet while they go through the asylum process.

All of this requires more than just executive action. In 1977, President Carter delivered a message to Congress, explaining that border crossings had risen above an estimated 2.6 million per year and calling on Congress to provide new legal authority to address the border.⁵ Over the 47 years since, presidents of both parties have made similar speeches. In 2006, President Bush addressed the nation and asked for “additional funding and legal authority” to “end ‘catch and release’ at the southern border once and for all.”⁶ In 2014, the Obama White House emphasized that “Congress’s failure to act will undercut our ability to continue to effectively and efficiently address the situation at the border.”⁷ In 2018, President Trump

⁵ President Jimmy Carter, *Undocumented Aliens: Remarks on Transmitting a Message to the Congress*, August 4, 1977, <https://www.presidency.ucsb.edu/documents/undocumented-aliens-remarks-transmitting-message-the-congress>.

⁶ President George W. Bush, *President Bush Addresses the Nation on Immigration Reform*, May 15, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html>.

⁷ The White House, Office of the Press Secretary, “The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border,” August 1, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->

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remarked that “The only long-term solution to the crisis . . . is for Congress” to act.⁸ And just last week, President Biden called on Congress to pass “a comprehensive plan to fix the broken immigration system and to secure the border.”⁹

Despite nearly half a century of bipartisan agreement among presidents that Congress needs to legislate (with stark disagreements as to how), in recent months an unusual theory has taken root; that each of these presidents was wrong and all it requires is a stroke of the pen to “secure the border.” All President Biden must do, these commenters say, is to invoke a 1952 law, section 212(f) of the Immigration and Nationality Act (INA), (8 U.S.C. § 1182(f), to “suspend the entry” of migrants at the border—after which, the theory goes, the border will be secured.

These arguments are fundamentally mistaken. They reflect a core misunderstanding of both the authority provided to the president under INA 212(f), and of the operational limitations that currently prevent *any* administration from applying a blanket asylum ban at the border. As the Supreme Court said in 1993, INA 212(f) cannot be used to take an action that is “clearly prohibit[ed]” by the UN Convention on Refugees.¹⁰ And more recently, in 2018 the Supreme Court made clear that section 212(f) “does not allow the President to expressly override particular provisions of the INA.”¹¹

Among the provisions that INA 212(f) cannot expressly override is the right to seek and apply for asylum. This limitation is not theoretical, either. On November 9, 2018, President Trump himself invoked INA 212(f) in an effort to ban asylum to all those crossing the southern border irregularly. The end result was a series of significant losses in court and a toothless “suspension of entry” that remained on the books for the rest of his term.

But even if invoking INA 212(f) to ban asylum at the border did *not* conflict with the plain text of the INA, operational and diplomatic limitations would prevent any blanket asylum bans from being applied to all, or even most, migrants crossing today. Without sufficient asylum officers to carry out credible fear interviews, even a policy which bars asylum to all migrants can only be applied to a limited number of people each month, preventing the U.S. government from carrying out expedited removal processing. This is more than theoretical. In May 2023, the Biden administration’s “Circumvention of Lawful Pathways” regulation went into effect, imposing a “rebuttable presumption” against asylum eligibility to nearly all migrants who cross the border between ports of entry and for those who arrive at ports of entry without a CBP One appointment.¹² Despite this near-complete restriction on asylum for people who do not come through the CBP One scheduling system at ports of entry, operational limitations on the

⁸ President Donald J. Trump, “Remarks by President Trump on the Illegal Immigration Crisis and Border Security,” November 1, 2018, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

⁹ President Joseph R. Biden, “Remarks by President Biden After Operation Briefing | Brownsville, TX,” March 1, 2024, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/01/remarks-by-president-biden-after-operation-briefing-brownsville-tx/>.

¹⁰ 8 U.S.C. § 1182(f), *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 175 (1993). The Court engaged in an analysis of whether the proclamation ran afoul of treaty obligations and found that it did not.

¹¹ *Trump v. Hawaii*, 585 U.S. 667, 668 (2018).

¹² Dep’t of Homeland Security, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314 (May 16, 2023), available at <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

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credible fear process mean that the rule is only being applied through the expedited removal process to roughly 15 percent of migrants, with everyone else only subject to the rule years later in the immigration court process.¹³

Similarly, just as Cuban migrants were largely immune from deportation for generations before the Cuban government agreed to accept limited numbers of its citizens in 2016,¹⁴ without repatriation agreements in place with so-called “recalcitrant countries,” many migrants arriving at the border today simply cannot be deported because there is no country willing to take them.

Similar legal and operational constraints apply to every other executive authority currently possessed by the President. As the United States has learned over the past decade of rising migration, there are no silver bullets that will solve a global displacement crisis overnight. Even Title 42, under which the US government carried out 2.5 million expulsions, did not secure the border.

Section 212(f) of the INA Cannot be Converted into an Asylum Ban on Migrants Crossing Irregularly

In 1952, Congress granted the president the authority to “suspend the entry” of “all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate,” if the president finds their entry would be “detrimental to the interests of the United States.”¹⁵ Over the course of the last 70 years, the Supreme Court has emphasized that this is an “ample power”¹⁶ that “exudes deference to the President” and gives the president authority to decide “whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions.”¹⁷ At the same time, the Supreme Court has assumed that INA 212(f) “does not allow the President to expressly override particular provisions of the INA,”¹⁸ and that the president can only take action under INA 212(f) which “neither the Convention [on Refugees] nor the [Immigration and Nationality Act] clearly prohibits.”¹⁹ It is this latter restriction which in 2018 prevented the executive branch from using INA 212(f) to block people from seeking asylum at the southern border.

In November 2018, President Trump invoked INA 212(f) in an effort to ban asylum to migrants who crossed the U.S.-Mexico border improperly.²⁰ In Proclamation 9822, President Trump suspended “the entry of any alien into the United States across the international boundary between the United States and Mexico,” except for any alien who “enters the United States at a port of entry and properly presents for

¹³ Elliot Spagat, “US asylum measure aimed at curbing claims has limited impact given strained border budget,” *Associated Press*, February 28, 2024, <https://apnews.com/article/asylum-migrants-biden-border-budget-58e447ee0033a5ef23593ed5c02da02e>.

¹⁴ See, e.g., Lindsay Daniels, *The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal*, 122 *Dick. L. Rev.* 707, 718 (2018) (noting that “Cuban immigrants previously enjoyed de facto immunity from removal to Cuba”).

¹⁵ 8 U.S.C. § 1182(f).

¹⁶ *Sale*, 509 U.S. at 187.

¹⁷ *Hawaii*, 585 U.S. at 668.

¹⁸ *Ibid.* at 689, 692.

¹⁹ *Sale*, 509 U.S. at 187.

²⁰ President Donald J. Trump, Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018).

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inspection,” or who held lawful permanent resident status.²¹ In short, the order “suspended the entry” of any individual crossing the border unlawfully.

On its face, Proclamation 9822 did not impact asylum or any other humanitarian protections. The order mentions asylum only in the preamble and not in any substantive provisions. And the Proclamation further makes clear that “nothing in this proclamation shall limit an alien ... from being considered for withholding of removal [] or protection ... [under] the Convention Against Torture... , or limit the statutory processes afforded to unaccompanied alien children.” As a result, Proclamation 9822 by itself did not provide any new authorities to DHS under the INA nor permit DHS officials to take actions that they had not previously been able to take.

Because Proclamation 9822 did not facially impact asylum processing, the Trump administration combined it with a second measure. Simultaneously, the Department of Justice (DOJ) and DHS published an interim final rule entitled “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims.”²² This rule aimed to leverage Proclamation 9822 and convert it into an asylum ban. Under the rule, “if [an] alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) ... and the alien enters the United States after the effective date of the proclamation,” then the person “shall be ineligible for asylum.”²³ Like the proclamation, the regulation made clear that any person banned from asylum under the rule “remain[ed] eligible for statutory withholding of removal ... or for protections under [the Convention Against Torture].”²⁴

Taken together, the Proclamation and the implementing asylum ban regulation worked to ban asylum to any person who crossed the border between ports of entry, with no exceptions. The ACLU quickly sued to block the regulation but did *not* bring a challenge to Proclamation 9822. Ten days later on November 19, 2018, a judge in the Northern District of California issued a temporary restraining order blocking the regulation from going into effect.²⁵ The Court emphasized that “Congress has clearly commanded that immigrants be eligible for asylum regardless of where they enter.”²⁶ In response to the Trump administration’s argument that a restriction on asylum *grants* did not violate a statutory right to *apply* for asylum, the Court noted that “To say that one may apply for something that one has no right to receive is to render the right to apply a dead letter.”²⁷

After the rule was blocked, the Trump administration appealed to the 9th Circuit. On December 7, 2018, the 9th Circuit unanimously denied the request for an emergency stay, emphasizing that “It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived

²¹ *Ibid.* at 57663.

²² U.S. Citizenship and Immigration Services, Department of Homeland Security, Executive Office for Immigration Review, Department of Justice, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

²³ *Ibid.* at 55952.

²⁴ *Ibid.* at 55936.

²⁵ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018).

²⁶ *Ibid.* at 856.

²⁷ *Ibid.*

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through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact.²⁸ The Trump administration then went to the Supreme Court to request another emergency stay, which was denied.²⁹

Following the Supreme Court’s order declining to grant a stay, the Trump administration nevertheless renewed the 212(f) proclamation in February 2019, and then indefinitely renewed the proclamation in May 2019.³⁰ This proclamation remained in full effect until February 2, 2021, when it was revoked by President Biden.³¹ The initial injunction was later upheld by the 9th Circuit on a regular appeals posture, holding that the rule was “effectively a categorical [asylum] ban on migrants who use a method of entry explicitly authorized by Congress.”³²

The lessons of the asylum ban litigation provide a clear rule that no administration may categorically bar asylum to individuals who cross the border between ports of entry—even where a 212(f) proclamation is directly involved. In addition, the fact that the Proclamation itself remained on the books throughout 2019 and 2020, and yet had no operative impact on border processing, shows the clear limitations of INA 212(f) in addressing migration at the southern border.

Fundamental Limitations Prevent the Executive from Applying Asylum Bans at the Border to All Crossers

Should President Biden seek to follow the failed attempt of President Trump to invoke INA 212(f) to suspend asylum at the border, such a policy would likely fail not only as a matter of law, but also as a matter of deterrence. The Trump administration’s 2018 ban operated within the existing statutory frameworks of expedited removal under 8 U.S.C. § 1225 and regular removal under 8 U.S.C. § 1229a.

Any future ban would likely operate within those same two frameworks. It would not create a third framework separate and apart from those two—in other words, it would not create a new expulsion process similar to what occurred during the three years under which the Director of the Centers for Disease Control and Prevention invoked section 265 of Title 42 to authorize immigration officials to expel individuals arriving from Mexico without regard to immigration law.

Asylum restrictions, regardless of the statutory authority they are based on, are applied to recent entrants placed into the credible fear interview process under section 235 of the INA.³³ For those who cannot be put through the credible fear process—for example, if there are not enough asylum officers available to

²⁸ *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018).

²⁹ Robert Barnes, “Supreme Court denies Trump administration request to immediately enforce new asylum rules,” *Washington Post*, December 21, 2018, https://www.washingtonpost.com/politics/courts-law/supreme-court-denies-trump-administration-request-to-immediately-enforce-new-asylum-rules/2018/12/21/e9cdf32-03c8-11e9-b6a9-0aa5c2fcc9e4_story.html.

³⁰ President Donald J. Trump, Proclamation 9880, *Addressing Mass Migration Through the Southern Border of the United States*, 84 Fed. Reg. 21229 (May 8, 2019).

³¹ President Joseph R. Biden, Executive Order 14010, *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021).

³² See *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669-670 (9th Cir. 2020).

³³ *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. at 55952.

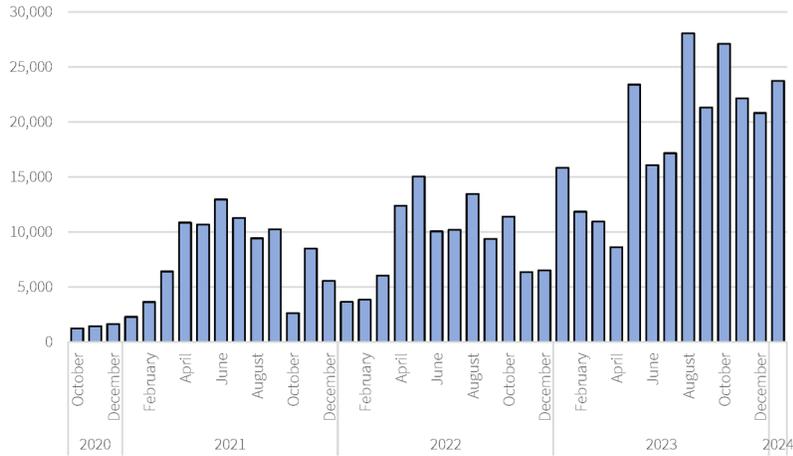
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carry them out—asylum bans can only be applied at the immigration court stage or the affirmative asylum process, potentially years later.

This fundamental resource constraint has limited the Biden administration’s ability to apply expedited removal to all asylum seekers crossing the border, just as it did during the Trump administration.³⁴ Following the end of Title 42, the Biden administration has significantly increased the use of expedited removal.

As illustrated by Figure 1, the Biden administration has placed more than 20,000 people a month through the expedited removal process in every month since August 2023. Throughout the first four months of FY 2024, the Biden administration is on pace to place over 280,000 people through the expedited removal process in total, the highest level in years.³⁵

Figure 1: Monthly SW Border Use of Expedited Removal, Fiscal Year 2021 to present



Source: U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

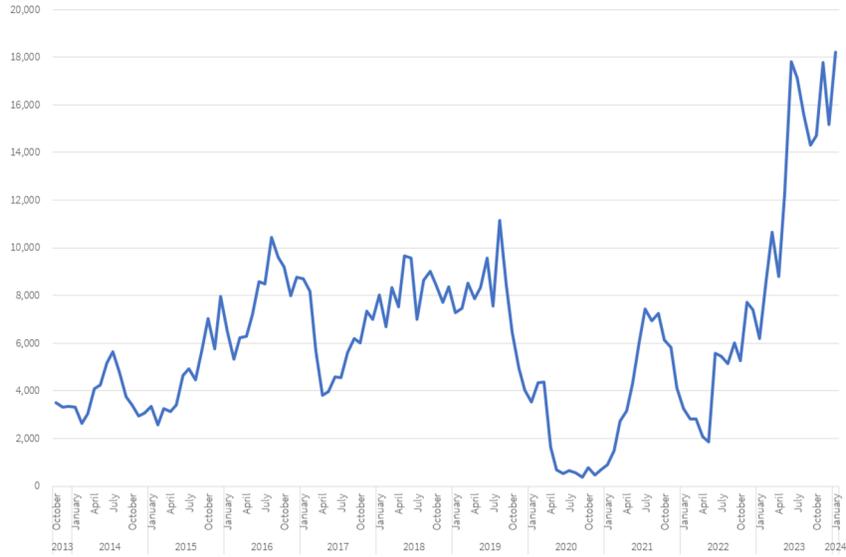
The Biden administration has also significantly increased the number of credible fear interviews carried out each month. The administration is currently on track to nearly double the previous record level of credible fear completions set under the Trump administration in 2019 (see Figure 2).

³⁴ Elliot Spagat, “Asylum seekers find it’s catch and can’t release fast enough,” *Associated Press*, January 8, 2019, <https://apnews.com/article/07b2d4beac9c84b089aef48525c12c3ee>.

³⁵ U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

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Figure 2: Monthly Credible Fear Completions, Fiscal Year 2014 to Present.



Source: Office of Homeland Security Statistics, “Immigration Enforcement and Legal Processes Monthly Tables,” <https://www.dhs.gov/ohss/topics/immigration/enforcement-and-legal-processes-monthly-tables>.

Despite new record levels of credible fear processing, the majority of migrants continue to be released with notices to appear.³⁶ This is because there are simply too many migrants arriving to place each of them through expedited removal due in large part to the lack of asylum officers to conduct credible fear interviews, resource limitations on repatriations, and diplomatic issues relating to so-called “recalcitrant countries.”

As Table 1 illustrates, every executive authority to turn away migrants has legal and operational restraints on their uses. Some programs, like Title 42, which in theory permit a complete border shutdown, do not work in practice due to diplomatic and resource constraints. Others, like INA 212(f), simply do not provide the authority to shut the border in the first place.

³⁶ U.S. Customs and Border Protection, *Custody and Transfer Statistics*, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

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Table 1: Operational and Legal Restraints on Executive Authorities to Turn Away Migrants

Program Name	Statutory Authority	Legal Restraints	Operational Restraints
Remain in Mexico / "Migrant Protection Protocols"	INA 235(b)(2)(C)	<ul style="list-style-type: none"> - The legality of the program remains highly uncertain.³⁷ - Even if the program is lawful, some aspects of it may not be.³⁸ - Everyone returned to Mexico must be given a hearing. - DHS must provide <i>nonrefoulement</i> interviews individuals who express a fear of persecution in Mexico and exempt any person who demonstrates a fear. - Cannot be used on unaccompanied children. 	<ul style="list-style-type: none"> - Requires consent of the Mexican government, which has always set limitations on the use of the program. - Requires continuous and intensive diplomatic engagement with Mexico. - Requires building and maintaining infrastructure for thousands of court hearings and <i>nonrefoulement</i> interviews, all at great monetary expense. - Disrupts immigration court cases scheduled inside the U.S. - Providing hearing notices to migrants in shelters and tent camps in Northern Mexico is difficult and often impossible.
Proclamations suspending entry	INA 212(f)	<ul style="list-style-type: none"> - Supreme Court has said in dicta that INA 212(f) "does not allow the President to expressly override particular provisions of the INA"³⁹ and that a president may not use 212(f) to take any action that the INA or the UN Convention on Refugees "clearly prohibits."⁴⁰ - Does not independently ban asylum or supersede existing removal procedures. 	<ul style="list-style-type: none"> - Asylum restrictions implemented under 212(f) can only be applied in the credible fear context by asylum officers, or the regular removal context by immigration judges. - Removals to recalcitrant countries may not be possible.
Safe Third Country agreements	INA 208(b)	<ul style="list-style-type: none"> - Requires a bilateral agreement with a third country which must provide access to a "full and fair procedure" for asylum and must 	<ul style="list-style-type: none"> - Require removals by plane, which imposes significant operational limitations. - Requires continuous and

³⁷ See, e.g., *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated and remanded sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), and *vacated as moot sub nom. Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021).

³⁸ *Doe v. McAleenan*, 415 F. Supp. 3d 971 (S.D. Cal. 2019).

³⁹ *Hawaii*, 585 U.S. at 689.

⁴⁰ *Sale*, 509 U.S. at 187.

		<p>be a country where the person would not face persecution on account of a protected ground.</p> <ul style="list-style-type: none"> - DHS must provide <i>nonrefoulement</i> interviews to individuals who express a fear of persecution in the third country, and exempt any person who demonstrates a fear. 	<p>intensive diplomatic engagement with the third country.</p> <ul style="list-style-type: none"> - Requires detention space and staffing for <i>nonrefoulement</i> interviews and detention prior to removal.
Title 42	42 U.S.C. § 265	<ul style="list-style-type: none"> - Requires the CDC Director to determine that there is a “serious danger” of the “introduction” of a communicable disease into the United States. - Carries no formal legal consequences for the individual that is being expelled. - Subject to standard repatriation agreements. 	<ul style="list-style-type: none"> - Requires consent of the Mexican government to expel non-Mexicans by land. - Require expulsion by plane, which imposes significant operational limitations. - Expulsions to recalcitrant countries may not be possible. - Requires continuous and intensive diplomatic engagement.
Expedited Removal	INA 235(a)	<ul style="list-style-type: none"> - Mandates credible fear screenings for anyone who expresses a fear of persecution or torture or asks for asylum. - Mandates immigration judge review of any credible fear denial that requests review. - Mandates CAT screenings and reasonable fear screenings in reinstatement proceedings. - Subject to standard repatriation agreements. 	<ul style="list-style-type: none"> - Removals to recalcitrant countries may not be possible. - Requires removals by plane, which imposes significant operational limitations. - Requires sufficient asylum officers to carry out credible fear interviews
Voluntary Return	Inherent authority	<ul style="list-style-type: none"> - Carries no formal legal consequences for the individual that is being permitted to voluntarily return to Mexico. - Subject to standard repatriation agreements. 	<ul style="list-style-type: none"> - Requires consent of the Mexican government to expel non-Mexicans by land.

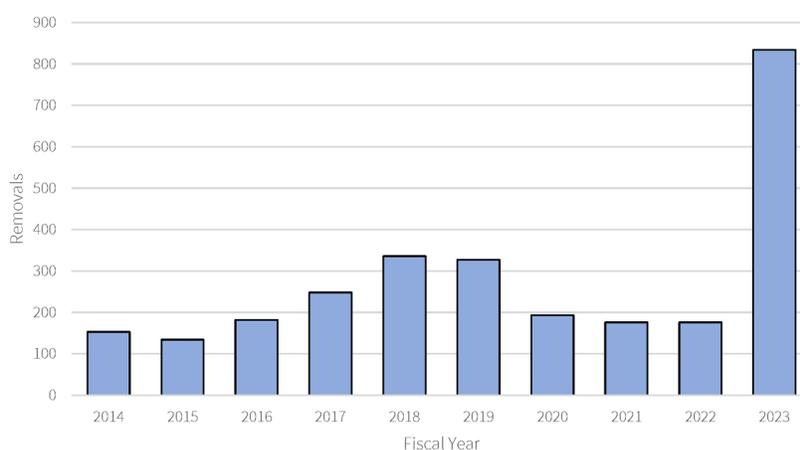
A perfect example of the limitations of these programs has been the situation faced by Venezuelan migrants. For years, Venezuela refused direct repatriation flights from the United States, limiting ICE’s ability to remove Venezuelan nationals to only people who can be removed through commercial flights.⁴¹

⁴¹ Damià Bonmatí and Belisa Morillo, “Venezuelans say deportations Biden denounced under Trump still taking place,” *NBC News*, updated February 1, 2022, <https://www.nbcnews.com/news/latino/venezuelans-say-deportations-biden-denounced-trump-still-taking-place-rcna13947>.

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As a result, the United States has been largely unable to remove more than a few hundred Venezuelans each year. Over a ten-year span from FY 2014 to FY 2023, immigration judges issued 14,189 removal orders to Venezuelans whose cases began during that period. Yet as illustrated by Figure 3, over that same time period ICE removed just 2,759 Venezuelans in total. With Venezuelans now making up the largest nationality of new immigration court cases, this imbalance will grow increasingly dramatic in the future, emphasizing the need to address migration from Venezuela on a regional and comprehensive basis beyond the narrow lens of the U.S.-Mexico border alone.

Figure 3: Removals to Venezuela by Fiscal Year, FY 2014 to FY 2023



Source: Annual ICE Enforcement and Removal Operations End-of-Year Reports, Fiscal Years 2014-2023.

When Venezuelans began arriving at the U.S.-Mexico border in large numbers in 2021, Mexico did not permit the United States to expel Venezuelans to Mexico under Title 42. It was not until October 2022 that Mexico permitted such expulsions.⁴² And even then, expulsions were generally limited to 1,000 per day across the entire border and 200 per day at five specific ports of entry. These limitations caused widespread releases of Venezuelan migrants to resume in late 2022 when more than that total began crossing on a daily basis, limiting the U.S.’s ability to expel them under Title 42.⁴³ These challenges have continued even after Title 42 ended. While the Biden administration was able to briefly restart direct

⁴² Dep’t of Homeland Security, *DHS Announces New Migration Enforcement Process for Venezuelans*, October 12, 2022, <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

⁴³ Cindy Ramirez, “‘Nobody can keep up with that,’ city leader says of ongoing migrant influx,” *El Paso Matters*, December 8, 2022, <https://elpasomatters.org/2022/12/08/el-paso-migrant-street-releases-surge-as-biden-sends-title-42-back-to-court/>.

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deportations to Venezuela in October 2023,⁴⁴ these flights have ceased in recent weeks following a breakdown in diplomatic relations between the two countries.⁴⁵

Ultimately, it is only Congress that can fundamentally change how individuals are processed at the border. Over the last 30 years, the United States has poured billions of dollars into immigration enforcement while systematically neglecting our immigration adjudication systems.

As we explain in our recent report *Beyond a Border Solution*, in response to rising migration at the southern border, “past presidential administrations have attempted over and over again to use aggressive enforcement- and deterrence-based policies in hopes of reducing the number of people who are permitted to apply, rather than making a sustained investment into building a better system.”⁴⁶

This failed approach has diverted significant resources away from positive reform without achieving the primary goal of reduction. For example, the previous administration spent roughly \$15 billion on building 450 miles of border wall,⁴⁷ all of which had little to no impact on overall migration.

These funding mismatches have existed for decades and are the direct cause of many of the longstanding backlogs throughout our humanitarian protection systems. Over the last 20 years, the immigration court budget has risen from \$191 million in FY 2003 to \$856 million in FY 2023, an increase of \$665 million (see Figure 4). Over the same time, the Border Patrol’s budget rose from \$1.52 billion to \$5.47 billion, an increase of \$3.95 billion.

In 2003, for every \$1 spent on the immigration courts, Congress spent \$7.95 on the Border Patrol. A significant gap persists today, although increased funding to the immigration courts has narrowed it slightly. In the FY 2023 budget, for every \$1 spent on the immigration courts, Congress spent \$6.4 dollars on the Border Patrol. Sadly, in FY 2024, this mismatch seems likely to have gotten worse, as Congress cut the immigration court budget by \$16 million despite the staggering size of the backlog.

⁴⁴ Kristina Cooke and Mica Rosenberg, “US restarting direct deportations to Venezuela, security secretary says,” *Reuters*, October 5, 2023, <https://www.reuters.com/world/us/us-restarting-direct-deportations-venezuela-senior-official-2023-10-05/>.

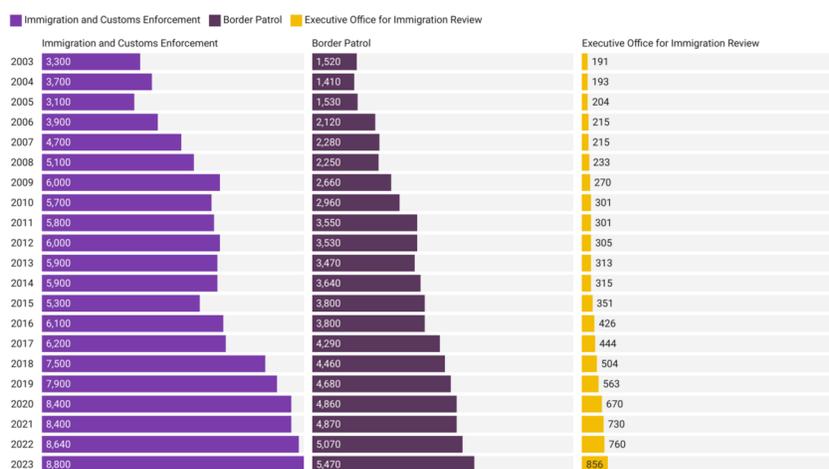
⁴⁵ Kejal Vyas and Santiago Pérez, “Venezuela Halts Flights of Deported Migrants From U.S. and Mexico,” *Wall Street Journal*, February 22, 2024, <https://www.wsj.com/world/americas/venezuela-halts-flights-of-deported-migrants-from-u-s-and-mexico-962f6149>.

⁴⁶ American Immigration Council, *Beyond a Border Solution: How to Build a Humanitarian Protection System That Won’t Break*, May 3, 2023, <https://www.americanimmigrationcouncil.org/research/beyond-border-solutions>.

⁴⁷ Christopher Giles, “Trump’s wall: How much has been built during his term?,” *BBC News*, January 12, 2021, <https://www.bbc.com/news/world-us-canada-46748492>.

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Figure 4: Annual budgets of ICE, Border Patrol, and EOIR, in millions of dollars



Source: Congressional Research Service, Appropriations Status Tables, <https://crsreports.congress.gov/AppropriationsStatusTable>.

Neither “Remain in Mexico” Nor Asylum Cooperative Agreements Can Shut the Border

Within a short period after President Biden took office, his administration terminated two programs put in place by the previous administration to much fanfare: the so-called Migrant Protection Protocols (“Remain in Mexico”), and three Safe Third Country agreements (“asylum cooperative agreements” or “ACAs”) signed with Guatemala, Honduras, and El Salvador. Both programs were largely suspended at the time President Biden took office, and thus their termination had little immediate impact on border operations.

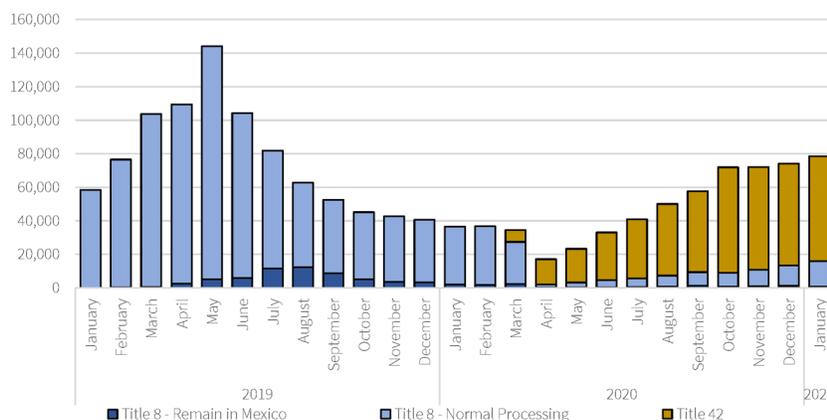
Discussion of restarting Remain in Mexico must also not ignore that it caused immense harm to the people placed into the programs. Migrants were routinely kidnapped and tortured for ransom.⁴⁸ Migrants had to brave kidnapers to arrive at ports of entry before dawn for court hearings, with virtually no access to lawyers and an almost certain denial at the end of the process. Despite the Orwellian “Migrant Protection Protocols” name, there was no protection at all for those placed into the program. Restarting it a third time would betray fundamental values of justice and due process

⁴⁸ See This American Life, “The Out Crowd,” November 15, 2019, <https://www.thisamericanlife.org/688/the-out-crowd>.

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In addition, impact of these programs during the brief period that they operated has been significantly overstated. Remain in Mexico was applied to fewer than 65,000 people⁴⁹ prior to the implementation of Title 42 when the COVID-19 pandemic hit. Just 945 people were ever subject to one of the ACAs.⁵⁰ During the nine months prior to President Biden taking office, less than 1.5 percent of individuals apprehended at the border were placed into the Remain in Mexico program (see Figure 5), and no one was subject to an ACA.

Figure 5: Use of Remain in Mexico Compared to Title 42, January 2019 to January 2021



Source: U.S. Customs and Border Protection, U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2020), <https://shorturl.at/irCK8>, U.S. Customs and Border Protection, “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2020,” <https://shorturl.at/alHMN>; TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

As the Migration Policy Institute noted in 2021, “[W]hile Remain in Mexico may have contributed to a perception that it would be harder to cross the border, it is not clear that the program was an effective deterrent on its own.”⁵¹ In the first four months of the Remain in Mexico program, as it expanded from San

⁴⁹ TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

⁵⁰ Committee on Foreign Relations, Democratic Minority, “Cruelty, Coercion, and Legal Contortions: The Trump Administration’s Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador,” January 18, 2021, <https://www.foreign.senate.gov/imo/media/doc/Cruelty,%20Coercion,%20and%20Legal%20Contortions%20-%20SFRF%20Democratic%20Staff%20Report.pdf>.

⁵¹ Muzaffar Chishti and Jessica Bolter, “Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges,” *Migration Policy Institute*, December 2, 2021, <https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico>.

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Diego to the El Paso, Yuma, and El Centro Sectors, migrant arrivals continued to increase. Only after the Trump administration convinced Mexico to deploy its national guard in early June 2019 did migrant arrivals begin to drop—*before* any significant increase in the use of Remain in Mexico.⁵²

Thus, a lack of correlation between fluctuations in border encounters in 2019 and the deployment timeline of Remain in Mexico throws significant doubt on the claim that the program itself was the cause of the drop in border encounters in summer 2019, and instead points to external factors. In the last week of May 2019, Border Patrol reported nearly 33,000 migrant apprehensions.⁵³ Following the increase in Mexican enforcement, by the first week of July border apprehensions had dropped nearly 50 percent.⁵⁴ This occurred even though Remain in Mexico had still not been expanded to south Texas and its use had gone up less than 15 percent from May to June. This throws significant doubt on the claim that the program itself was the cause of the drop in border encounters in early June 2019 and supports the theory that it was primarily Mexico’s crackdown which caused the significant drop in arrivals in summer 2019.

That was neither the first, nor last time that a significant increase in Mexican enforcement caused a sudden, but temporary, drop in migrant arrivals. In 2014, within weeks after the Obama administration announced the beginning of family detention, a crackdown on migrant routes in Mexico caused a similar temporary drop in arrivals.⁵⁵ In January 2022, and just two months ago, another sweeping crackdown on freight trains, combined with checkpoints and escalated “decompression” of migrants on the Mexican border led to a dramatic drop in migrant arrivals.⁵⁶

In each case, Mexican crackdowns caused a sharp drop in arrivals, followed by a steady rise over the next months as migratory patterns adjusted to the new norm, exposing the significant limitations of any efforts to rely on Mexico alone for enforcement. There is also little evidence that restoring Remain in Mexico would have a significant impact on border crossings. At its peak under the Trump administration in July and August 2019, fewer than 12,500 people were placed into the program each month.⁵⁷ Today, more people than that are currently returned to Mexico each month through voluntary return alone. After three years of Title 42, migrant smuggling patterns have adapted to the prospect of Return to Mexico, blunting much of the deterrent effect that people ascribe to the program in 2019 and 2020.

Similarly, the Asylum Cooperative Agreements had little impact on migrant arrivals. Only the Guatemalan ACA was ever put into effect, and even then, it was applied to a very small number of people. From November 2019 through March 2020, fewer than 200 migrants per month were sent to Guatemala—less than one percent of the eligible migrants who crossed the border during that period. And in March 2020,

⁵² *Ibid.*

⁵³ Data on file with author.

⁵⁴ Data on file with author.

⁵⁵ Dara Lind, “The 2014 Central American migrant crisis,” *Vox*, October 10, 2014, <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration>.

⁵⁶ Rebecca Santana and Elliot Spagat, “Illegal border crossings from Mexico plunge after a record-high December, with fewer from Venezuela,” *Associated Press*, February 13, 2024, <https://apnews.com/article/immigration-border-security-migrants-homeland-security-1c6e9f612dff721191c0254f980947a5>.

⁵⁷ TRAC, “MPP (Remain in Mexico) Deportation Proceedings—All Cases,” November 2022, <https://trac.syr.edu/phptools/immigration/mpp/>.

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Guatemala suspended the ACA due to COVID-19 and refused to resume the program throughout the rest of the Trump administration.

Nevertheless, many people have called for restarting these programs, claiming that they would “secure the border.” These arguments are incorrect. As an initial matter, Mexico has refused to restart the Remain in Mexico program a second time.⁵⁸ Under both the Trump and the Biden administrations, Mexico set limitations on the use of Remain in Mexico. For the first year of its use under the Trump administration, Mexico accepted only the return of individuals who came from Spanish-speaking countries.⁵⁹ At no point has Mexico ever permitted the United States to return unaccompanied children, nor individuals from outside the Western Hemisphere. As a result, there is no evidence that the program could even be used on many of the people crossing today.

Similarly, even if the Biden administration *could* restart the ACAs, the same resource problems that exist across the system today would severely restrict its use: a limited number of asylum officers to carry out *nonrefoulement* screenings, a limited number of planes and pilots, and the limited receiving capacity of third countries.

Congress needs to do more

Restoring our humanitarian protection systems and breaking the cycle of crises and crackdowns is not only possible, but within reach. To do so, we need a major shift in thinking and policymaking. Politicians 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. Therefore, short-term action must focus on establishing a viable path towards a better system. In the long term, with significant investment, we can create a flexible, orderly, and safe asylum process which offers significant financial savings over the current system.

Initially, Congress needs to provide a significant infusion of resources into the asylum process. Without enough asylum officers, there is no quick way to distinguish between those seeking asylum and those who simply are here for a better life. And with 3 million cases in the immigration court backlogs, only a massive investment in resources can cut down on a multi-year waiting time for adjudication that has itself become a draw for some migrants considering whether to come to the United States. So long as we focus purely on ramping up enforcement, without focusing resources on adjudication, both enforcement and adjudication will suffer.

Congress also needs to address the ongoing problems with the legal immigration system, plagued as it is by backlogs on backlogs on backlogs. According to a recent estimate by the Bipartisan Policy Center, there are 7.6 million people who have been approved for an immigrant visa but are waiting for the visa to

⁵⁸ Armando Garcia and Quinn Owen, “Mexico rejects any effort to reinstate ‘remain in Mexico’ policy for asylum-seekers,” *ABC News*, February 7, 2023, <https://abcnews.go.com/Politics/mexico-rejects-effort-reinstate-remain-mexico-policy-asylum/story?id=96939554>.

⁵⁹ Camilo Montoya-Galvez, “U.S. to require Brazilian asylum-seekers to wait in Mexico for court hearings,” *CBS News*, January 29, 2020, <https://www.cbsnews.com/news/remain-in-mexico-expansion-us-to-require-brazilian-asylum-seekers-to-wait-in-mexico-for-hearings/>.

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become available.⁶⁰ USCIS now routinely receives over 1,000,000 applications per month, and there are more than 4,000,000 applications currently pending that are outside of target processing times.⁶¹

Given these extensive delays, many people around the world increasingly view the United States as inaccessible by legal immigration. And that has driven many people as a last resort into the hands of smugglers, who swindle them on coming to the border as the only way they will ever be able to live in the United States. As one smuggler in India recently indicated to the *Washington Post*, until U.S. visas are more available “the demand-and-supply chain will remain, like a mother and father. Those that want to go will find any way to reach. It doesn’t matter which route you show them.”⁶² Adding more resources to this system will also help resolve some of the challenges caused by high levels of migration; asylum officers are funded by fees paid for by immigration petitioners and beneficiaries. More resources mean quicker work authorization and quicker adjudication for all.

Beyond changes to the legal immigration process, Congress also needs to help state and local governments. We believe that the federal government should establish a Center for Migrant Coordination.⁶³ As we envision it, the Center for Migrant Coordination would serve both as a centralized information and coordination hub between the federal government and state and local stakeholders, and as an active participant in coordinating migrant arrivals between different locations. This would allow communities around the country to work together to share both the challenges *and* the opportunities created by migration. And with Congressional support, the United States could adopt programs similar to those which have proven successful in other countries, such as post-arrival integration assistance in the form of language classes, job assistance, and self-help resources for the asylum process.

A greater federal role in the migration process will also significantly reduce the fiscal impact of migration on state and local governments. A recent study found that refugees who enter the United States through the federally-funded U.S. Refugee Admissions Program “have no statistically significant impact on local or state finances in the short- or long-term.”⁶⁴ One key reason for this is that “refugees receive support primarily from the federal government, resettlement agencies, and religious and secular community organizations rather than local funds.”⁶⁵ Federal support would also be more fiscally efficient than a

⁶⁰ Jack Malde, Theresa Cardinal Brown, and Ben Gitis, “Green Light to Growth: The Economic Benefits of Clearing Green Card Backlogs,” *Bipartisan Policy Center*, November 2023, https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/11/WFB_BPC_Immigration-Green-Light-to-Growth_R01.pdf.

⁶¹ U.S. Citizenship and Immigration Services, “Completing an Unprecedented 10 Million Immigration Cases in Fiscal Year 2023, USCIS Reduced Its Backlog for the First Time in Over a Decade,” February 9, 2024, <https://www.uscis.gov/EOY2023>.

⁶² Karishma Mehrotra, “Ever more undocumented Indian migrants follow ‘donkey’ route to America,” *Washington Post*, March 3, 2024, <https://www.washingtonpost.com/world/2024/03/03/india-undocumented-immigrants/>.

⁶³ See *Beyond a Border Solution*, Recommendation 3; Aaron Reichlin-Melnick, “Federal coordination can help migrants and communities that support them,” *Dallas Morning News*, July 12, 2023, <https://www.dallasnews.com/opinion/commentary/2023/07/12/federal-coordination-can-help-migrants-and-communities-that-support-them/>.

⁶⁴ Reva Dhingra, Mitchell Kilborn, and Olivia Woldemikael, “Does Refugee Resettlement Impact State and Local Finances? The Fiscal Effects of the Refugee Resettlement Program,” U.S. Immigration Policy Center, September 2021, <https://usipc.ucsd.edu/publications/usipc-fiscal-impact-refugee-resettlement.pdf>.

⁶⁵ *Ibid.*

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patchwork of local programs, because agencies could sign competitively-bid long-term contracts with established service providers, rather than relying on emergency contracting at significantly increased costs. For similar reasons, we suggest the creation of an emergency migration fund to limit unexpected impacts on appropriations.⁶⁶

Congress can also limit any fiscal costs associated with migration through the creation of semi-custodial regional processing centers, where migrants would go through initial screenings at the border in purpose-built facilities designed for humanitarian migration.⁶⁷ Congress should also provide emergency backlog reduction funding to U.S. Citizenship and Immigration Services for adjudication of asylum applications, parole applications, TPS applications and employment authorization applications.⁶⁸

A key point that state and local governments have made in recent years is that the federal government should be doing more. We agree. A broader federal role in migration management, combined with a revitalized humanitarian protection system would reduce fiscal impacts on local governments, promote due process, uphold American values, and unlock the energy and talents of new arrivals.

The best way to restore the United States humanitarian protection system, reduce state and local burdens caused by the need to provide basic humanitarian needs for new arrivals, and to lower migration at the border is for Congress to create alternate legal pathways for entry (either temporary guest worker programs or through increased immigrant visas) and provide sufficient resources to reestablish a functioning system of humanitarian protection screenings. As Congress continues to debate this critically complex issue, we urge legislators to address the issue with the seriousness it deserves, rather than falling for a myth that immigration can be solved with the stroke of a pen.

Thank you for your time.

Aaron Reichlin-Melnick
Policy Director
American Immigration Council

⁶⁶ See *Beyond a Border Solution*, Recommendation 10.

⁶⁷ See *Beyond a Border Solution*, Recommendation 7.

⁶⁸ See *Beyond a Border Solution*, Recommendation 4.

Mr. McCLINTOCK. Finally, we will hear from Mr. Hamilton.

STATEMENT OF GENE P. HAMILTON

Mr. HAMILTON. Thank you. Chair McClintock, Ranking Member Jayapal, other the Members of the Committee, I appreciate the opportunity to testify before you today about this important issue.

Laken Riley, Kayla Hamilton, Kate Steinle, Lizbeth Medina, and Melissa Powell and her son, Riordan. These are just a few of the Americans who have been killed by illegal aliens who should not have been in the United States.

These are tragically just a few victims, not to mention the countless victims of assault, sexual assault, human trafficking, smuggling, and other crimes affecting American communities across the United States, as my colleague Mr. Homan articulated.

Congress has provided the President and the Executive Branch with significant, powerful tools that can secure the border. Unfortunately, the situation we see today, the chaos, the crime, the overwhelmed cities and States, and the tearing apart of the very fabric of our Nation is the result of deliberate, intentional policy decisions made throughout the Biden Administration since January 20, 2021.

President Biden himself bears responsibility for the situation today. The Biden Administration has abandoned reason, common sense, and fidelity to the law when it comes to our immigration system.

They have opted to end effective immigration enforcement policies employed by prior administrations of both political parties and knowingly adopted policies that facilitate the entry of millions of illegal aliens into the United States.

No society can thrive, much less sustain itself, under the pressures and damage caused by these decisions. As a country defined by our commitment to the rule of law, and given our exceptional position in recorded human history, we must acknowledge some fundamental principles when it comes to border security in our immigration system.

Every country has a sovereign right and responsibility to control its borders, and the United States is no different. The United States is the greatest country in the world, and hundreds of millions, if not billions, of people worldwide would come here if they could. We cannot accommodate even a fraction of those people.

Most illegal aliens are not asylum seekers. Deporting illegal aliens from the United States advances our national sovereignty and is an essential component of our immigration system. Further, doing so accords due respect for the individuals who obey our laws and come through the legal, established visa programs.

For those individuals who do not intend to use our visa system, but want to come to the United States anyways, only one thing matters—getting released into the interior of the United States. Of course then, releasing illegal aliens into the interior of the United States fundamentally results in more illegal aliens trying to come to the United States.

The Biden Administration's publicly available data demonstrate that Southwest border encounters are at record highs. The overwhelming majority of illegal aliens encountered at the Southwest border are released into the interior of the United States.

The Biden Administration is adding millions, millions of illegal aliens into the population who are already here. They know that using tools like migrant protection protocols, asylum cooperative agreements, expedited removal, visa sanctions on countries that refuse to take back their nationals, detention of aliens who are apprehended at the border pending the outcome of their immigration court proceedings, and other effective uses of law would end the crisis at the border relatively quickly.

They don't actually want an end to this crisis.

I am happy to answer your questions and thank you for your attention to this matter.

[The statement of Mr. Hamilton follows:]

**Written Testimony of Gene P. Hamilton
Executive Director, Executive Vice President, and General Counsel
America First Legal Foundation
Submitted to the House Committee on the Judiciary
Subcommittee on Immigration Integrity, Security, and Enforcement
“Presidential Power to Secure the Border”
March 7, 2024**

Thank you, Chairman McClintock, Ranking Member Jayapal, and all Members of the Subcommittee for having this critical hearing.

Congress has provided the President and the Executive Branch with significant, powerful tools that—if used and used effectively—can reduce illegal immigration to a trickle at the border. There are indeed some problems with some portions of the existing legal regime that Congress has provided and some problematic court decisions that *frustrate* the Department of Homeland Security’s ability to enforce the law, particularly with respect to certain demographic groups of aliens. But those flaws with the enforcement regime have little to do with the unprecedented crisis we see at the southern border today.

The situation we see—the chaos, the crime, the overwhelmed cities and states, the very fabric of our nation being torn apart—is the result of deliberate, intentional policy decisions made throughout the Biden Administration since January 20, 2021. Ultimately, President Biden himself bears responsibility for the situation today.

For reasons we can all speculate upon, the Biden Administration has abandoned any modicum of reason, common sense, and fidelity to the law when it comes to our immigration system. They have instead elected to end effective enforcement policies employed by prior administrations of both political parties and, in their place, knowingly adopt policies that facilitate the entry of millions of illegal aliens into the United States.

No society can thrive, much less sustain itself, under the pressures and damage caused by these decisions.

As I have testified before, we must—as a country defined by its commitment to the rule of law and in light of our exceptional position in recorded human history—acknowledge the following fundamental principles. They are principles the American people understand. They are principles the Trump Administration understood. They are principles that most in Congress once embraced, as reflected in the laws they passed.

- Every country has the sovereign right and responsibility to control its borders, and the United States is no different.
- The United States is the greatest country in the world and hundreds of millions—if not billions—of people worldwide would come here if they could. We cannot accommodate even a fraction of everyone who wants to come here.
- Most illegal aliens are not “asylum seekers.”
- Deporting illegal aliens from the United States advances our national sovereignty and is an essential component of our immigration system. Further, doing so accords due respect for those individuals who obey our laws and come through established visa programs.
- For those individuals who do not intend to use our visa system but want to come to the United States anyway, only one thing matters: getting into the interior of the United States.
- Releasing illegal aliens into the interior of the United States results in more illegal aliens attempting to come to the United States.

Those fundamental principles are the antithesis of the fundamental tenets of the Biden Administration’s principles when it comes to immigration and border security, which I can best summarize from observation as follows:

- Anyone who wants to come to the United States should be able to do so, regardless of merit or adherence to our laws or ideals, especially if they have a family member or friend already here.
- The United States is the only place in the world where people can be free from generalized crime and persecution.
- It is better for humanity for the citizens of all countries—particularly in the Western hemisphere—to come to do manual labor and similar jobs in the United States than for those same individuals to build up their own countries.
- The United States can adequately screen and vet the hundreds of thousands of illegal aliens coming across the border every month for crime and national security risks or anti-American ideology.
- Deporting illegal aliens is cruel and should never be done except in the most extreme circumstances.

These principles have led to disastrous consequences for our immigration system. The Biden Administration’s publicly available data demonstrate:

- **Southwest border encounters are at record highs.** Monthly encounters with illegal aliens at the southwest border have not dropped below 100,000 since the Biden Administration’s first full month in office and have risen to as

high as 301,983 in December 2023.¹ There were 1,734,686 encounters in FY2021, 2,378,944 in FY2022, 2,475,669 in FY2023, and already 961,537 in the first four months of FY2024.²

- In total, since February 2021, there have been more than 7.2 million encounters at the southwest border.³
- **The overwhelming majority of illegal aliens encountered at the southwest border are released into the interior of the United States.** Rather than detaining and deporting illegal aliens or using lawful processes like the Migrant Protection Protocols (MPP),⁴ the Biden Administration is releasing the overwhelming majority of the illegal aliens it encounters at the southwest border into the interior of the United States. Indeed, a recent report from this Committee determined that as of March 2023, there were at least 2,464,424 illegal aliens that the Biden Administration released still in the United States.⁵
 - As an example, in December 2023 when there were 301,983 total encounters at the southwest border, CBP released at least 237,896 illegal aliens into the United States.⁶
- **Nationwide encounters are at record highs.** The statistics above only tell part of the story, as the Biden Administration’s decimation of our borders also includes the northern border and our interior ports of entry.⁷ Total nationwide encounters have increased from 1,956,519 in FY2021, to 2,766,582 in FY2022, to 3,201,144 in FY2023, and already 1,231,213 in the first four months of FY2024.⁸
 - In total, there have been roughly 8.78 million nationwide encounters since February of 2021.⁹

¹ *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://tinyurl.com/4u3cfprm> (last modified Feb. 5, 2024).

² *Id.*

³ *Id.*

⁴ 8 U.S.C. § 1225(b)(2)(C).

⁵ STAFF OF H. COMM. ON THE JUD., SUBCOMM. ON IMMIG. INTEGRITY, SEC., AND ENF’T, 118TH CONG., INTERIM STAFF REPORT: THE BIDEN BORDER CRISIS: NEW DATA AND TESTIMONY SHOW HOW THE BIDEN ADMIN. OPENED THE S. BORDER AND ABANDONED INTERIOR ENF’T (2023), bit.ly/41ce3a9 [hereinafter HOUSE JUDICIARY COMMITTEE INTERIM STAFF REPORT]; STAFF OF H. COMM. ON HOMELAND SEC., 118TH CONG., INTERIM STAFF REPORT, CAUSES, COSTS, AND CONSEQUENCES: WHY SEC. MAYORKAS MUST BE INVESTIGATED FOR HIS BORDER CRISIS 11, 13 (2023), <https://bit.ly/40V8qNa>.

⁶ *Custody and Transfer Statistics*, U.S. CUSTOMS AND BORDER PROT., <https://tinyurl.com/5xjpu2hk>, (click “U.S. Border Patrol Dispositions and Transfers” and “Office of Field Operations – Dispositions and Transfers” to expand those sections) (last modified Feb. 14, 2024).

⁷ *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://tinyurl.com/28js28swp> (last modified Feb. 5, 2024).

⁸ *Id.*

⁹ *Id.*

- Increased encounters at the northern border partially explain this total number, but most significantly, the number includes the Biden Administration’s abuse of the parole power in 8 U.S.C. § 1182(d)(5)(A) through programs like the so-called “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans,” which paroles approximately 30,000 aliens into the interior of the United States every month.¹⁰
- **Deportations are statistically non-existent.** At the same time that U.S. Customs and Border Protection (CBP) is releasing millions of illegal aliens into the United States, enforcement actions by U.S. Immigration and Customs Enforcement (ICE) are statistically non-existent. In short, there is no credible threat of deportation for the millions of aliens that the Biden Administration is releasing into the United States.
 - According to ICE’s FY2021 report, ICE removed a minuscule 59,011 aliens from the United States.¹¹
 - In FY2022, ICE removed 72,177 aliens from the United States.¹²
 - In FY2023, ICE removed 142,580 aliens from the United States.¹³
- **The Biden Administration is adding millions of illegal aliens to the population already in the United States.**
 - As described above, according to this Committee’s report, of the more than 5 million illegal alien encounters since the start of the Biden Administration, 2,464,424 illegal aliens remained in the United States as of March 31, 2023.¹⁴ As DHS provides additional information to this Committee as time goes on, that number will undoubtedly grow exponentially.

In my opinion, these numbers constitute an unconstitutional abdication of the Executive’s duty to “take care that the laws be faithfully executed”¹⁵—laws that Congress has passed and that previous Presidents signed.

¹⁰ *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://tinyurl.com/2bmk5br8> (last updated Sep. 20, 2023).

¹¹ U.S. IMMIGR. AND CUSTOMS ENFT, ICE ANNUAL REPORT FISCAL YEAR 2021 (Mar. 11, 2022), <https://tinyurl.com/5739mvp7>.

¹² U.S. IMMIGR. AND CUSTOMS ENFT, ICE ANNUAL REPORT FISCAL YEAR 2022 (Dec. 30, 2022), <https://tinyurl.com/53y83dsx>.

¹³ U.S. IMMIGR. AND CUSTOMS ENFT, ICE ANNUAL REPORT FISCAL YEAR 2023 (Dec. 29, 2023), <https://tinyurl.com/mw5ff822>.

¹⁴ HOUSE JUDICIARY COMMITTEE INTERIM STAFF REPORT at 4.

¹⁵ U.S. Const. art. II, § 3

The Biden Administration knows that using tools like MPP, Asylum Cooperative Agreements,¹⁶ Expedited Removal,¹⁷ visa sanctions on countries that refuse to take back their nationals,¹⁸ detention of aliens apprehended at the border while they await the outcome of their immigration court proceedings,¹⁹ and other effective uses of the tools that Congress has provided would end the crisis at the border relatively quickly. But the Biden Administration does not desire an end to this self-created crisis, as doing so would not only discredit the radical ideological worldview of some of its most committed political appointees and outside allies, but it would also prematurely end the pressure campaign it has been attempting to use to force this Congress to pass yet another amnesty—or to radically reshape our laws to cement their open-borders ideology for generations to come.

¹⁶ 8 U.S.C. § 1158(a)(2)(A).

¹⁷ 8 U.S.C. § 1225(a)–(b).

¹⁸ 8 U.S.C. § 1253(d).

¹⁹ 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV).

Mr. MCCLINTOCK. All right, thank you very much for your testimony. We will now move to questions from the Committee's Members, and we will begin with Mr. Tiffany.

Mr. TIFFANY. Thank you, Mr. Chair.

So, Mr. Hamilton, I would like to add a story from Northern Wisconsin in my district. Steven Nasholm is dead. He is dead today, just died a month ago when a second-time DWI offender who was here illegally in America got his first DWI a little over a year ago, allowed to skate, not detained.

Now, a father of three daughters in Northern Wisconsin is dead as a result of what is going on down at the Southern border.

So, I think I will start with you, Mr. Arthur. We heard from Mr. Reichlin-Melnick that we could be employing all these people that are here illegally in America. It seems like the most robust wage growth that happened for those people in the lower socio-economic scale four years ago happened during the previous administration in like 20 or 30 years. Is that accurate?

Mr. ARTHUR. It is, Mr. Tiffany. Wages among Hispanic Americans, African Americans increased during that period of time.

Mr. TIFFANY. We heard about these backlogs of people that want to come into our country legally. Does all of this, what ten million people at this point, help alleviate the backlogs that we have here?

Mr. ARTHUR. Respectfully, I would disagree with Mr. Reichlin-Melnick. The pull factors it creates encourage people to, even greater numbers of people, to come here illegally.

In addition, this is a problem that we are going to be facing for years to come right now, it creates smuggling networks that other nationals from countries far away from the United States' traditional sending countries can then use to come to this country.

Mr. TIFFANY. Mr. Homan, we heard that enforcement has not worked. Administration after administration, enforcement has not worked. Is that your experience?

Mr. HOMAN. Absolutely not. There has to be a consequence. Look, you can't demand I have the right to claim asylum, I got a right to see a judge. You get the order removed, and we don't execute the order. If that is the case, shut down the immigration courts, take the border patrol off the border. There has to be a consequence.

Entering this country illegally is a crime. It is not OK. So, we have to execute final orders removal. That is why lately there has been a lot of hate on, well, Trump said he is "going to run the biggest deportation operation in history."

Well, he is going to have to, because we just went through the largest historic illegal immigration crisis we have ever seen. Ninety percent of these people lose their case and get order removal. They need to be removed.

Mr. TIFFANY. Mr. Hamilton, I was recently down on the Southern border and stopped at Casa Alitas, one of the links in the chain for illegal immigration here in America, the NGO's that are doing their work.

Just first I throw out to you generally, is it correct, my observation that NGO's, along with the cartels, the United Nations, and our U.S. Government, are a critical link in this chain at this point of bringing people into our country illegally?

Mr. HAMILTON. Absolutely. That is fundamentally true. There is absolutely no doubt about that, based on my personal experience, observations in the past, and what is happening today.

Mr. TIFFANY. Are you familiar with the story of the Red Cross passing out maps to illegal immigrants as they go through Central America and Mexico to show them their way here?

Mr. HAMILTON. I have heard of such things, yes.

Mr. TIFFANY. I would defer to the two gentlemen on the left. Isn't that accurate that this has happened?

Mr. HOMAN. Yes.

Mr. TIFFANY. Isn't it also accurate that organizations like the International Organization for Migration, which I think we fund 25 percent of the United Nations, don't we? Something like that. Isn't it also accurate that they are passing out prepaid debit cards?

Mr. HOMAN. That is correct.

Mr. TIFFANY. So, the NGO's are a critical chain in this, part of this whole chain for illegal immigration. What should we do in regard to those NGO's that are facilitating illegal immigration, that are a link in the chain? Go ahead.

Mr. HOMAN. Well, I think you need to stop funding them, first. Because you know, while there's thousands of empty ICE beds, at about \$117 a night sitting empty, we will pay an NGO to put them in a hotel room in New York City for 500 bucks a night, three meals a day, free medical care, and work authorization.

You are rewarding illegal behavior. So, when you are in ICE detention, the average length of stay is 35–40 days. When they get out, it will be years.

Mr. TIFFANY. Mr. Chair, I am going to yield back. It seems like the NGO's are profiting from this.

Mr. MCCLINTOCK. The gentleman's time has expired. Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chair.

I want to start by noting that one of our witnesses was one of the leading architects of the Trump Administration's cruel and horrific family separation policy.

I was the first Member of Congress to go and meet with separated moms detained in Federal prison. I heard firsthand how the Trump Administration imposed a zero-humanity policy to prosecute parents in mass court proceedings, resulting in the U.S. Government under Donald Trump tearing thousands of children from their moms and dads.

None of the mothers that I met with even got to say goodbye to their children. Some were put in rooms right next to their children, and they could hear their children sobbing for them, and they never got to say goodbye. I am still to this day haunted by the testimonials that I heard from parents and from children.

The Department of Justice Inspector General came out with a detailed report that says that Attorney General Sessions and his top aides, like our witness Mr. Hamilton, were the key drivers of that policy.

Mr. Chair, I ask unanimous consent to enter that report into the record.

Mr. MCCLINTOCK. Without objection.

Ms. JAYAPAL. We have memos that were leaked, filled with edits and comments from Mr. Hamilton where he clearly approves of a plan to begin “separating family units” and is even looking for ways to ensure that children who are separated from their families are removed as quickly as possible.

I ask unanimous consent that this be placed into the record as well.

Mr. MCCLINTOCK. Without objection.

Ms. JAYAPAL. Thanks to Democratic oversight efforts, we know the tragic results of Donald Trump’s cruel family separation policy today. As many as 2,000 children still remain separated from their parents.

We have testimony from child welfare experts that the best available evidence shows that Donald Trump’s policy of tearing children from their parents “entails very significant and potentially lifelong risks of psychological and physical harm.”

So, Mr. Hamilton, my question for you is simple: Do you regret the role that you played in the family separation policy, yes or no?

Mr. HAMILTON. I would refer you to the statement that I provided.

Ms. JAYAPAL. I asked for a yes-or-no answer.

Mr. HAMILTON. I am giving you an answer. I am not going to give you a yes or no. I would refer you to the statement that I provided the Inspector General about my assessment of their report and the accuracy thereof.

Ms. JAYAPAL. A 2021 DOJ Inspector General report determined that your office, after investigation, after talking to you, the Office of the Attorney General was the “driving force behind the family separation policy.”

The Deputy Attorney General, Rod Rosenstein, actually issued a statement of regret for his role. I assume that you have no such statement of regret to offer us today?

Mr. HAMILTON. I think if you read my statement and not just the hatchet job that the Inspector General’s Office issued, you would see my feelings about the matter.

Ms. JAYAPAL. The evidence clearly indicates that your zero-humanity policy was intended to permanently separate children from their parents. It is a fact that DOJ did not coordinate with HHS or even give HHS a heads up on the policy before rolling out the family separation policy.

As you know very well, children deemed or rendered unaccompanied are in HHS custody, and the DOJ Inspector General noted your own experience coordinating across multiple agencies to implement policy. You knew very well, Mr. Hamilton, exactly what you were doing.

Your former colleague, Attorney General Sessions’ Chief of Staff, Matt Whitaker, admitted to me under oath in this room that DOJ did not have a system in place at the outset of the family separation on the prosecution side to track separated parents and children.

No less than five of your own prosecutors raised concerns with you about what was to happen to separated kids in the days after you released the policy. Your boss’s response was we need to take away children.

I am deeply troubled that you can't even do what Deputy Attorney General Rod Rosenstein did and, actually say, that you regret your role in that absolute catastrophe.

Mr. Reichlin-Melnick, very quickly because I only have 18 seconds left, my colleagues claim that Section 212(f) of the Immigration and Nationality Act gives the President the ability to shut down the border. Can you please explain that is inaccurate, and what happened when former President Trump tried to rely on that so-called authority to shut down the border?

Mr. REICHLIN-MELNICK. Well, just as quickly as I can, you cannot override the Immigration and Nationality Act.

Chair JORDAN. Use your microphone.

Mr. REICHLIN-MELNICK. The Supreme Court itself said both in 2018 and—

Mr. MCCLINTOCK. Microphone.

Mr. REICHLIN-MELNICK. Just really quickly, but the Supreme Court said in both 1993 and in 2018 that 212(f) cannot override the core provisions of the Immigration and Nationality Act. One of those is the right to seek asylum, regardless of how a person enters the country. Therefore, you just cannot use it for this authority.

Mr. MCCLINTOCK. Thank you.

Mr. REICHLIN-MELNICK. It can be used to interdict people at sea, but that is different because they haven't arrived on U.S. soil. Migrants who have already crossed the border and are on U.S. soil cannot be turned away without authority.

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

Ms. JAYAPAL. I yield back.

Mr. MCCLINTOCK. Chair Jordan.

Chair JORDAN. Thank you, Mr. Chair.

Mr. Hamilton, did Joe Biden cause this problem?

Mr. HAMILTON. Yes.

Chair JORDAN. He not only caused the problem, but he told us he was going to cause the problem, didn't he?

Mr. HAMILTON. He absolutely did.

Chair JORDAN. In the Democrat debate in 2020, here is what then-candidate Joe Biden said quote, "migrants should immediately surge to the border." They took him up on his offer.

So, the idea that the Democrats say oh, no, no, it was Trump who caused the problem, it is Republicans who caused the problem, it is climate change that caused the problem is BS. Joe Biden caused it, and he told us he was going to do it.

What has that resulted in? Eight million migrants are coming into the country in three years and 47 days. Eight million, and we are on pace to get to 12 million. That is the magnitude of the problem.

Mr. Hamilton, has that magnitude of that, that volume of individuals coming to our country, has that put a strain on the United States, on communities and everything else?

Mr. HAMILTON. Absolutely. Anyone can look and talk to mayors, talk to local communities, talk to any governors, and see the results themselves for themselves.

Chair JORDAN. Does it put a strain on schools?

Mr. HAMILTON. Yes.

Chair JORDAN. Remember up in New York when they told parents your kids can't come to school today because we have to put migrants in the schools? They are going to have to learn remotely.

Mr. HAMILTON. Correct.

Chair JORDAN. Did it put a strain on hospitals?

Mr. HAMILTON. Yes.

Chair JORDAN. How about law enforcement?

Mr. HAMILTON. Yes.

Chair JORDAN. All kinds of law enforcement concerns, not just the attacks on law, but there's all kinds of other concerns, right?

Mr. HAMILTON. Right.

Chair JORDAN. Concern on safety in communities around our country, not just on the border, did it put a concern on safety?

How about municipal budgets, is there a concern there?

Mr. HAMILTON. Yes.

Chair JORDAN. Because of this problem that Joe Biden told us he was going to cause and actually caused it. Have migrants died in this journey coming here because Joe Biden told them to surge to our border and come into our country?

Mr. HAMILTON. Yes.

Chair JORDAN. Kids?

Mr. HAMILTON. Yes.

Chair JORDAN. Women, all kinds of terrible things happen to them.

Mr. HAMILTON. Absolutely.

Chair JORDAN. Then back to your opening statement. Have Americans died?

Mr. HAMILTON. Yes.

Chair JORDAN. Laken Riley, Kate Steinle, and others, right?

Mr. HAMILTON. Right.

Chair JORDAN. That is the magnitude of this problem. We are on pace, we are on pace to get to 12 million in the four-years of Joe Biden being President.

I tell people that is equivalent to the entire population of our State. We are a big State. We are the seventh largest State in this great country. Twelve million people.

So, here is where I think we are at. We know the cause of the problem; we know the magnitude of the problem. What is the solution? It seems to me we call time out. It seems to me we say no more. Let's not exacerbate the problem, let's just say time out.

I have advocated for a simple sentence that I want you guys to comment on. I have advocated for a sentence in an appropriation bill that says no money can be used to process any more or release into the country any new migrants.

What do you think about that, Mr. Hamilton?

Mr. HAMILTON. I think that would be a wonderful idea.

Chair JORDAN. Don't you think the American—I have never seen in my time, I have been in politics a few years now. I don't know if I have ever seen an issue with this intensity.

We got a time with record inflation. Take your family out to dinner in the Biden American economy, right now you can take your family out to dinner, it is 300 bucks just to take your family out for a nice meal in this Biden inflation world.

What is the No. 1 issue in polling across the board? It is the border. That is how intense this issue is with the American people. Maybe we should just say time out. Let's stop now.

What do you think, Mr. Homan, should we do that?

Mr. HOMAN. I think we need to secure the border and save lives. Bottom line is I understand one of the Congresswoman met with separated families' parents.

Did she meet Laken Riley's parents? How many of them have met with—we got angel moms and dads by the thousands who were separated from their families, but they buried their children because of the open border.

Chair JORDAN. I am all for securing the border. We passed good legislation a year ago that would do that. What I am saying is when the problem is this—when the magnitude of the problem is where it is now, the old line, when you are in a hole, quit digging, right?

Like, let's quit making it worse by allowing more and more people to come into the country. Maybe we should just say time out and then focus on securing the border of course. Just stop the influx that we see.

That is what I am asking you. Do you think that makes sense now?

Mr. HOMAN. We have to stop the influx.

Chair JORDAN. Yup. Mr. Arthur?

Mr. ARTHUR. Mr. Chair, it is clear that we have to stop the influx. This is unsustainable.

In fact, President Obama did an interview, former President Obama, did an interview on ABC on Good Morning America back in September 2021. He talked about the humanitarian concerns. We are a humanitarian people, and we have instincts for that.

He noted the fact that open borders are unsustainable. Mr. Chair, right now we are seeing the unsustainability of open borders. Cities and towns across the United States.

I live in North Carolina. We don't really have a whole lot of illegal immigrant problems. The people in North Carolina when they are polled say it is a huge issue. My neighbors, they tell me that is a huge issue because they are feeling it everywhere.

Chair JORDAN. Joe Biden caused the problem. He told us he was going to do it. The magnitude of the problem is so egregious it is the No. 1 issue on the minds of the American people.

The solution to the problem could be with Congress if we would just say we are not going to fund the processing and releasing of any more migrants into the country. That is what we could do.

Short of that, we are going to have to wait for an election. Hopefully have President Trump win so we can get back to a Chief Executive who actually will enforce the border.

With that, I yield back.

Mr. MCCLINTOCK. The gentleman yields back. Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Hamilton, you authored Chair Jordan's August 2023 amicus brief before Fifth Circuit in *Missouri v. Biden*, correct?

Mr. HAMILTON. That is correct.

Mr. NADLER. That brief cites heavily to transcripts from interviews taken by this Committee, correct?

Mr. HAMILTON. That is correct.

Mr. NADLER. Were you provided access to those transcripts?

Mr. HAMILTON. I was provided access to transcripts, yes.

Mr. NADLER. How were they made available to you?

Mr. HAMILTON. Well, I am not going to get into anything further, anything that would be protected by a privilege. So no, I am not going to answer that question.

Mr. NADLER. Wait a minute, how you got access to transcripts is not protected by privilege.

Mr. HAMILTON. Well, sure it is. My communications and the way that I talk with my client and the method in which I receive things from them is protected.

Mr. NADLER. OK, but you got the transcripts. Are you aware that these transcripts have not been released to the public?

Mr. HAMILTON. I have no awareness of anything. I have awareness of what my client tells me.

Mr. NADLER. That is an interesting admission. Are you aware that I sent Mr. Jordan a letter this past August explaining that the brief you wrote repeatedly misrepresented what witnesses actually said in those interviews?

Mr. HAMILTON. I have heard about a letter that was sent by you.

Mr. NADLER. Are you aware that it is sanctionable violation of Rule 11 of the Federal Rules of Civil Procedure to knowingly misrepresent facts before a tribunal?

Mr. HAMILTON. I am certainly aware of the rule. I am certainly aware that we did not violate the rule.

Mr. NADLER. If you believe that you correctly and honestly represented the facts brought out in those witness interviews, will join me in calling on Mr. Jordan to make all the transcripts public without delay?

Mr. HAMILTON. I will do no such thing at this point in time.

Mr. NADLER. Why not?

Mr. HAMILTON. I am not going to engage in a debate with you on something that I have with one of my clients in an open hearing.

Mr. NADLER. OK, so let me summarize. There is testimony before a closed hearing of this Committee, a transcribed interview before a closed hearing of this Committee. Those transcriptions, or transcriptions of those interviews are made available to you. You use them in a letter—you use them in a brief that you write.

Those transcripts have not been released to the public. Allegations have been made, including by me, in a long letter to Mr. Jordan that there were misrepresentations of those transcripts. You won't join me in asking that they be made public so we can see whether in fact I am correct in saying that your letter, or your brief rather, misrepresents those transcripts.

Mr. Chair, I ask unanimous consent to place my August 2023 letter to Mr. Jordan into the record.

Mr. MCCLINTOCK. Without objection.

Mr. NADLER. Thank you. Now, Mr. Reichlin-Melnick, my colleagues on the other side of the dais seem fixed on the idea that the President and the Executive Branch have the ability to exert total control over the border, even going so far as to force an impeachment of Secretary Mayorkas because he would not—he could

not adhere to the impossible “operational control” standards of the Secure Fence Act.

Has any President of any party ever been able to exert total operational control over the border in accordance with the standards for the Secure Fence Act?

Mr. REICHLIN-MELNICK. No, not all.

Mr. NADLER. Has any country in modern history been able to exert such control over their borders?

Mr. REICHLIN-MELNICK. No, no country in human history has been able to shut the border to 100 percent of crossers. In fact, every Presidential Administration, the last three have all released many people crossing the border.

Mr. NADLER. Thank you. When was the last time that Congress reformed the immigration system to expand lawful pathways, and have encounters at the border increased or decreased since that time?

Mr. REICHLIN-MELNICK. The last time Congress expanded lawful pathways was November 1990, one month before the first website went online. At the time, crossings were a little bit higher than they are today.

At the time, only about one in three people crossing was even detected. Today, 70–80 percent of people crossing are detected, given all the border security apparatus that has been built up since then.

Mr. NADLER. The numbers are about the same.

Mr. REICHLIN-MELNICK. About the same. It is hard to say because we don’t have data on unique encounters, but—

Mr. NADLER. OK.

Mr. REICHLIN-MELNICK. Not that different.

Mr. NADLER. In May 2023, last year, the American Immigration Council published a report entitled, “Beyond a Border Solution” outlining your recommendations for long-term fixes to the problems in our immigration system, rather than focusing on short-term patches.

In the time we have left, can you please discuss some of the solutions you proposed in that report and how they would be more effective than trying to unilaterally shut down the border?

Mr. REICHLIN-MELNICK. The first and most important thing Congress can do is just put resources in the system. You cannot adjudicate asylum claims at the border rapidly if you don’t have asylum officers to do it. You cannot have immigration cases heard rapidly if you don’t have the immigration judges to do it.

You need to get the system functioning again, and the only way to do that is if Congress steps in. Unfortunately, earlier this week, I think today Congress voted to actually cut the budget of the immigration court, cutting it by \$16 million. This is not the way forward. We need to increase that budget.

Mr. MCCLINTOCK. All right, thank you very much.

Mr. NADLER. Thank you very much, I yield back.

Mr. MCCLINTOCK. Mr. Roy.

Mr. ROY. Thank you, Chair. I thank the witnesses for being here and providing your testimony. Mr. Homan, a quick question. Would you characterize my engagement with the Trump Administration with respect to border security as strong, as supportive of what the Trump Administration was doing in working with you, maybe Mr.

Morgan and others, to try to accomplish the objectives of securing the border of the United States?

Mr. HOMAN. Yes, sir.

Mr. ROY. Would you characterize, based on your knowledge, that in some way, shape, or form I, though, bow down to the former President? Would you think that would be the common knowledge of people out in the world that somehow that is my position?

Mr. HOMAN. Not you.

Mr. ROY. Is it true that I endorsed an opponent of the former President in the primary?

Mr. HOMAN. Yes, sir.

Mr. ROY. Is it true that the former President called on a primary challenger for me in December?

Mr. HOMAN. Sir, I don't—

Mr. ROY. Did the former President call on a primary challenger for me in December?

Mr. HOMAN. Yes, sir.

Mr. ROY. So, the reason I bring that up is, are you also aware that I opposed fairly vigorously and loudly the Senate bill prior to the former President's commentary on the bill?

Mr. HOMAN. You and every expert I know that's worn the uniform and did the job.

Mr. ROY. Numerous Republicans that you know and work with that were concerned and seeking guidance on what we were hearing in terms of what the Senate bill was going to be and how it was produced expressed opposition to the bill prior to the former President commenting on the bill.

Mr. HOMAN. Yes, because we believe H.R. 2 was a fix.

Mr. ROY. Or the Senate bill, the Senate bill was a fix.

Mr. HOMAN. No, we believe H.R. 2.

Mr. ROY. You believe that H.R. 2 was the bill that would fix the problem. The Senate bill is a bill that was a big bill by our Democratic colleagues—

Mr. HOMAN. Right.

Mr. ROY. —to have something to hide behind.

Mr. HOMAN. The Senate bill would not solve the problem. H.R. 2 would have solved the problem because it's based on policies that we proved are effective.

Mr. ROY. So, this notion that our Democratic colleagues are putting forth for people to believe as we head into the State of the Union tonight that the Senate bill would actually solve the problem is false. The idea that somehow it is Republicans who were the problem because they put up a fake bill that wouldn't secure the bill, that would codify the mass releases that is somehow the actual reality, correct?

Mr. HOMAN. I think the Senate bill was an attempt to switch gears and put it on the Republicans' head. It will never pass the House.

Mr. ROY. To that point, I think it is critically important for Mr. Hamilton, you would have the opportunity to maybe respond to some of the accusations about the Trump Administration, about the policies. Do you have some thoughts on those?

Mr. HAMILTON. Well, I certainly do and thank you for the time. Look, our policies that we adopted across the Trump Administra-

tion and throughout the Trump Administration were about securing the border, about protecting the integrity of our immigration system, and reducing human suffering.

It is undoubted no one can deny the fact that there are countless people who are harmed on the journey up to the United States who were trafficked, who were enslaved here in the United States. If we want to talk about family separations, I would like to point out that this administration's policies have led to 500,000 children being separated by their parents coming to the United States by themselves and subjected to who knows what and lost by this Department, by this Department of Health and Human Services.

No one cares. No one cares where those kids are in this administration. No one is going out and looking for them. So, for all these crocodile tears that are shed about what happened in a prosecution policy during the Trump Administration, nobody cares about the 85,000 plus kids that this administration has lost and the 500,000 kids who have been trafficked here during this administration.

Mr. ROY. The children that have been lost by this administration, they don't even know where they are, right? They're ORR?

Mr. HAMILTON. They're gone.

Mr. ROY. Another issue here that I think merits consideration is the extent to which we—the allegation that you have got Members of the Republican conference who have expressed a belief that this administration could actually reverse a lot of the damage that it has done compared to our simultaneous belief that we need legislation to fix problems. Those two things can be true, correct?

The idea that we are talking about 212(f), which by the way has not been fully explored, but also the notion that parole has been abused for mass releases, which is precisely how the individual got into the United States that killed Laken Riley, by mass releases. Is that true, Mr. Hamilton?

Mr. HAMILTON. That's true.

Mr. ROY. Is that true, Mr. Homan?

Mr. HOMAN. Yes.

Mr. ROY. So, the idea that you don't also need legislation to deal with Flores, the catch and release, the issue they had previous rulings by courts that caused the family separation type issues is false. Of course we need legislation. We need legislation that works. H.R. 2 would work. The legislation would actually solve problems.

It would create an environment where it could enforce the law. It would hold the administration accountable, and it would give power for States to be able to hold it accountable. The idea you can't have that at the same time and saying that this President is responsible through mass parole to endangering American people is a fiction by our Democratic colleagues trying to obfuscate and cover up for the open border policies killing Americans. I yield back.

Mr. MCCLINTOCK. The gentleman yields back. Mr. Correa.

Mr. CORREA. Thank you, Mr. Chair. First, let me say that no Democrat, and I imagine no Republican, is for any kind of criminal activity. None of us condone any kind of criminal activity. I believe that any criminal that preys on our taxpayers should be prosecuted, and the United States is no place for a criminal.

Now, a few years I came home from work to police sirens, police activity, many police cars in my neighborhood. Later, I found out that a man had been caught in the middle of an act of raping a woman in a local laundry room, an apartment laundry room. Later, the local police chief told me that they had determined through investigation that this man was responsible for at least 20 rapes that had been reported. All the victims were undocumented, and the perpetrator was an American citizen. The perpetrator was an American system. There is no place in our society for these animals.

Mr. Melnick, I am going to ask you, what is a secure border?

Mr. REICHLIN-MELNICK. I mean, that's a hard question to answer because the definition depends on everybody. The border has had—is it a border that 100 percent—

Mr. CORREA. I am going to ask you again, have we ever had a secure border on any administration?

Mr. REICHLIN-MELNICK. No. No administration has ever 100 percent shut the border.

Mr. CORREA. Mr. Melnick, did President or President Biden cause the COVID epidemic?

Mr. REICHLIN-MELNICK. No.

Mr. CORREA. Is the border challenge right now that we have essentially a refugee crisis at our border, is that unique to the United States?

Mr. REICHLIN-MELNICK. No. Every country in the Western hemisphere is—

Mr. CORREA. Colombia has about 3–4 million refugees that they are dealing with. Costa Rica's Ambassador was screaming at us the other day. He's got a refugee challenge. Mexico, and this morning, I found out even Jordan has a major challenge with refugees. Of course, Germany and the rest of Europe.

So, my question to you is why are people coming? I found out that by the time women from Central America reach our border, about 80 percent of them, 80 percent of them are either raped or sexually abused. They prepare their bodies for that eventuality.

So, my question would be from me to you is why in God's name undertake that dangerous trip North? Is it because they are looking for a place to enjoy vacation or why would they come North?

Mr. REICHLIN-MELNICK. No one wants to leave home. They leave because they have no other options, or they feel that they have no other options. Because our legal immigration systems just don't allow people to come here in a way that we would want them to.

Again, because we have 7.6 million people waiting in green card backlogs, it is taking people 20 years to get visas to come here. That has allowed unscrupulous actors to sell this idea that coming to the Southern border is the only way. Of course, it's a mixed flow. We have people arriving at our border today who have slam dunk asylum claims. We have people who are just coming because the United States is the safest and most secure Nation in the region. We don't have a process—

Mr. CORREA. Is that something new or is that something that has been going on here for a couple hundred years?

Mr. REICHLIN-MELNICK. No, it's not new. What is new, is how far abroad people are coming from. Certainly, this idea of coming to

the United States this way is not new. People have been crossing our border for over a century.

Mr. CORREA. So, would you say right now the debate here in this country is confusing the refugee asylum challenge with immigration reform? It sounds like we are talking about the same issue, but we really have two different issues.

Today my guest at the State of the Union is a dreamer, who has been here almost all her life. She is studying medicine in my district. She can't find that line to that door we keep talking about. Her family can't either, yet they have been productive members of this society for 20–30 years. Are those two issues being kind of convoluted right now politically?

Mr. REICHLIN-MELNICK. Yes, for most people there is no line that they can get into. There is no process to get there.

Mr. CORREA. Because there's no door.

Mr. REICHLIN-MELNICK. There is no door. If we just have a myopic focus on just the U.S.-Mexico border, and we ignore everything else that is happening in the—

Mr. CORREA. Is Mexico helping us at the border? Are they being partners with us or are they not?

Mr. REICHLIN-MELNICK. Our relationship with Mexico is incredibly entangled on migration. They have been providing more and more assistance.

Mr. CORREA. Our guards in blue and green uniforms that told me they have never had better cooperation from Mexico at the border.

Mr. REICHLIN-MELNICK. It has been since the Programa Frontera Sur under President Obama in 2014 we have had increasing cooperation with the Mexican government. Of course, that has not been enough given the scale of migration and displacement in the Western Hemisphere over the last few years.

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

Mr. MCCLINTOCK. The gentleman's time has expired. Mr. Biggs.

Mr. BIGGS. Thank you. Mr. Homan, who controls the U.S. Southern border?

Mr. HOMAN. The criminal cartels in Mexico.

Mr. BIGGS. Who directs who is going to enter between the ports of entry?

Mr. HOMAN. The criminal cartels of Mexico control our Southern border. They decide who goes where, when, and how.

Mr. BIGGS. When was the last time you were at the border, Mr. Homan?

Mr. HOMAN. Ten weeks ago.

Mr. BIGGS. Mr. Arthur, my question for you is, you are aware of the Supreme Court's ruling in *Trump v. Hawaii*?

Mr. ARTHUR. I am, sir.

Mr. BIGGS. That dealt with Presidential authority regarding entry of non-U.S. citizens—excuse me, non-U.S. persons in the country. Can you explain to us what the holding was in that court, not dicta, but the holding?

Mr. ARTHUR. The holding in that case was that the travel restrictions that the Trump Administration had implemented, which were implemented under Section 212(f), the Immigration and Nationality Act, were valid.

The Supreme Court looked at 212(f), and they stated that it exudes deference to the Executive in every clause.

Mr. BIGGS. It exudes deference to the Executive Branch. So, Mr. Hamilton, does that mean that Congress needs to pass a new law immediately for this administration to try to grapple with the massive invasion from people coming across the border?

Mr. HAMILTON. I think that there are a number of tools that this administration has abandoned. There are number of tools that are available that have yet to be further explored and expanded on that Congress has already provided that could secure the border and begin securing the border tomorrow.

Mr. BIGGS. Give me an example of one of those tools.

Mr. HAMILTON. MPP.

Mr. BIGGS. Don't you need Mexico to cooperate to implement MPP?

Mr. HAMILTON. You need to overcome their will. It is a battle of wills, and Mexico is never going to want to accept it.

Mr. BIGGS. Mexico, indeed, did not want to accept it, right, Mr. Homan, when the previous administration under Donald Trump was trying to implement MPP?

Mr. HOMAN. Yes, I was kind of thinking backward from the last conversation that the relationships with Mexico had never been better. They were excellent under President Trump. They put military on their Southern border and Northern border. They entered into a Remain in Mexico program. They entered into Third Safe Country Agreement. I have never seen cooperation better than it was under President Trump.

Mr. MCCLINTOCK. Does the gentleman yield?

Mr. BIGGS. No Yes, so I find it really interesting, I mean, on the many times that I have been down at the border, I remember seeing the Mexican National Guard in Juarez. I remember seeing them in various other locations along the Southern border including in Agua Prieta and Naco. I saw them. I saw them. We actually had mild discourse with them. So, I find it very interesting.

Let's talk now about what else is happening. What other authorities are necessary? What does this President say? He's never really said what authority he thinks he lacks. Mr. Arthur, have you heard him say or identify any authority that he thinks he needs?

Mr. ARTHUR. The President usually references a comprehensive immigration bill that he introduced on his first day in office back in 2021, that is really just kind of a matrix for amnesty. It doesn't have any enforcement power.

Mr. BIGGS. Right. So, if we're going to bring this under control, I guess, Mr. Homan, what would you say the first step is to bring the border under control with the current authorities? You agree that Mr. Hamilton's MPPs are a great option. What else?

Mr. HOMAN. MPP was a game changer for the Trump Administration. It brought illegal immigration to a four-year low. We have got to stop catch and release. As my colleague Mr. Hamilton said before, the more you release, the more that comes. People around the world right now, you can cross the border illegally. You will be released in 24 hours. You will be flown to the city of your choice. You will begin work authorization. You get a free hotel room, three squares a day, and medical attention. The most vulnerable people

in the world have been putting themselves in the hands of criminal cartels to take advantage of that. We have got to end catch and release.

That is why the Remain in Mexico program worked. Because after it got going, in a few months they stopped. They realized they weren't being released in the United States.

Mr. BIGGS. So, I want to point out that the Yuma sector in 2021—do we know how many? How many encounters were at the Yuma sector for the entire year, the last year that Donald Trump was President, 2020? It was 8,600, 142 miles along that, 8,600. How many Yuma gets, about how long it takes them to get to 8,600, it is about nine days now. When I was recently down on the TO Reservation, San Miguel, there is nothing on the Mexican side for 45 miles. Caborca is the nearest village. They are seeing 600–1,000 people a day.

This administration has plenty of authority to bring this under control. I yield back.

Mr. MCCLINTOCK. The gentleman's time is expired. Ms. Escobar.

Ms. ESCOBAR. Thank you, Mr. Chair. It is always fascinating to me to hear folks talk about how often they have been to the border, or they parachute in to observe the border. I live on the U.S.-Mexico border. I represent a wonderful community on the border. I raised my kids on the border. I am a proud third-generation border resident. There is so much to fact check in the conversation that has gone on to this point, it is hard to pick.

Let me start with No. 1, this idea that the President alone can essentially change the status quo on immigration. If that were true, why would my Republican colleagues have put so much time and energy into filing their Immigration Bill, H.R. 2, which by the way relies almost completely on Mexico to accept nearly every migrant arriving at the Southern border. Something that has never happened. Something that will never happen.

Not only is it an interesting irony that they say the President can do it, but here is our great bill that will solve it, again, kind of incongruous. I would like to introduce a couple of articles into the record so I would ask unanimous consent.

The first from June 20, 2018, *Washington Post*, and the headline, "Trump Urges House GOP to Fix Immigration System."

The second article from January 1, 2019, *Politico*, the article where the President says current authorities are "woefully inaccurate to meet the scope of the problem," said President Trump, complaining about illegal—or gaps in U.S. law.

Mr. MCCLINTOCK. Without objection.

Ms. ESCOBAR. Thank you so much. Also, there is a letter that President Trump sent us January 4, 2019, a letter to Congress asking Congress to take action.

So, the whole premise of this hearing is that the President alone can do it. Donald Trump throughout his tenure was asking Congress to act.

The second falsehood that I would like to debunk one of our witnesses said, "Dems don't want an end to this crisis." I would like to refresh everyone's memory that there have been multiple efforts to address our broken immigration system where Democrats actually were willing to vote in a bipartisan manner, 2006, 2014, and

2018. Every single one of those bills included strong border security components along with legal pathways.

Who sabotaged the bills all those years? It was Republicans. Then this year, 2024, no longer were Democrats demanding legal pathways in exchange for border security, on the Senate side Republicans got everything they wanted in what was called the toughest border bill ever by Senate minority leader Mitch McConnell.

Before there was even any ink on paper, Republicans decided to abandon that effort because as a Member of this Committee, Mr. Nehls, said very transparently, “why would we fix the problem going into an election.” Former President Trump himself said, “I don’t want them to fix it. They can blame me.”

So, much more to debunk, but I would like to actually close by asking one of our experts, Mr. Reichlin-Melnick, thanks for the work that you do. The Republican colleagues frequently complain that the Democrats are open borders, which couldn’t be further from the truth. The only people going on TV consistently talking about open borders are Republicans.

Can you tell us what impact that makes, what message that sends to migrants to have Republicans constantly talking about open borders in America?

Mr. REICHLIN-MELNICK. Well, I think as we have seen over the last decade, misinformation shared with migrants has a very heavy driver of people coming to the border. To the extent that people say things like the U.S. border is open, I think it does send a message.

Of course, in 2018 when I was down talking to separated families, I saw—people telling me—I had one person tell me, President Trump opened the border to families, that is why I am here.

So, this misinformation is not new. It is not something that has just happening now in the last three years.

Ms. ESCOBAR. Unfortunately, there is plenty of misinformation coming from the other side of the dais and from some of our panelists. Thank you. I yield back.

Mr. MCCLINTOCK. The gentlelady’s time has expired. Mr. Van Drew.

Mr. VAN DREW. Thank you, Chair. I guess the other side is trying to say here we have never had a secure border, never had it. We know better. The American people know better. They feel it. They see it. They hear it. They see it in their neighborhoods. They are watching Americans get killed. Cities decay. Budgets explode in towns, cities, counties, and States.

The President, this President, President Biden changed that. Let’s just tell the real story of what happened. He ran on it. He spoke about it. He bragged about it. He let Title 42 lapse. He didn’t stop catch and release. He didn’t continue with the Remain in Mexico policy. He didn’t do his job.

I am not saying he can do every single thing, but what I am saying is what people know, what you all know, which everybody watching this knows, it has gotten much, much worse with this President on purpose.

Every hearing we have—and let me say another thing. We are all debating here with our nice suits and dresses in a comfortable building, but meanwhile people are getting hurt, people are dying,

including, because we are out of control on the border and the cartels control the border, including the illegal immigrants themselves. We didn't even talk about the drugs today.

By the actions of this President, we have increased—and it is true, I am not exaggerating—drug addiction in this country with fentanyl. Every hearing we have, every report we read, every statistic we see, paints the same picture. Our Southern border is in crisis now, and it wasn't before.

Under the Biden Administration more than eight million illegal entries have changed and come into our country and our global world looks at us as a laughingstock. Every day the administration refuses to act in a real way.

In this fiscal year, we have already seen a higher number of illegal entries than any year of President Trump's term. That is a fact. Let's tell the truth. I am fact checking, too. That is a fact. It has gotten so bad it makes you question exactly how an administration could even look Americans in the face like he will tonight and say this.

When they ignore every law they can and dismantle every policy they can, there can be only one conclusion, and it is to change the country. It is to change it in a way that you all can't deal with and you are not here tonight, but it is to change the Electoral College and to change Congressional redistricting. That is the real world.

This administration's policies have not only failed the law, they failed Americans. How many innocent Americans are they going to allow to be harmed or even murdered? We can't fix it with half-hearted attempts.

The Senate bill, a bill that doesn't build the wall. A bill that doesn't completely end catch and release. A bill that would pay hundreds of millions of dollars to NGO's that help illegals subvert our laws. It is a bad bill. The only thing worse than where are now is to pretend that you are doing something. I don't give a damn if you are a Republican or a Democrat. Don't pretend to do something and do nothing. That is what that bill was. It was a political tool.

Tom Homan, Mr. Homan, in your view, why have the numbers of illegal entries exploded since President Biden took office?

Mr. HOMAN. Because he abolished every policy that we proved effective in the Trump Administration.

Mr. VAN DREW. I know we know the answers to these questions. Mr. Hamilton, the Biden Administration claims it needs new laws to provide any help, any sources to fix the border. Is that true? Is it just resources?

Mr. HAMILTON. No. You cannot out resource your way out of this crisis. You have to have policy changes.

Mr. VAN DREW. Can you tell us, Mr. Hamilton, the most successful, really quickly, Trump era policies and what the impact of the Biden Administration ending them? I don't know what we are arguing about. He ended policies that were working. We were better then, than we are now. You can shape it any way you want. Never has it been a 100 percent secure border. It was a hell of a lot better.

When you try to say that it wasn't, people know that you are not being truthful with them because the just feel it all around them.

Anyhow, can you tell just really quickly a few of the most successful?

Mr. HAMILTON. Look, some of the most successful policies worked as a patchwork. They worked with each other, tongue and groove, to ensure that we would dry up the number of people who were coming to the United States illegally and that we would be able to adjudicate cases as quickly as we can in the United States and get people back home who don't qualify for anything. So, that includes MPP. That includes asylum cooperative agreements. That includes other asylum reforms. The list goes on and on.

Mr. VAN DREW. A quick last question, yes or no. Is the border worse off now than it was four years ago under President Trump? Mr. Arthur, I will start with you, right down the line. Is it better off now or was it better off then, yes or no period?

Mr. ARTHUR. It was better off then, sir.

Mr. VAN DREW. Mr. Homan?

Mr. HOMAN. It's historically worse now.

Mr. REICHLIN-MELNICK. Not that much better.

Mr. VAN DREW. Not that much better than. OK. So, you admit it's better and that's hard because you are—

Mr. HAMILTON. Mr. Hamilton—

Mr. VAN DREW. Yes, Mr. Hamilton and then, we're done.

Mr. MCCLINTOCK. The gentleman's—

Mr. REICHLIN-MELNICK. Better in some ways, worse than others.

Mr. HAMILTON. It was far better under President Trump.

Mr. VAN DREW. I yield back.

Mr. MCCLINTOCK. The gentleman's time has expired. Ms. Ross?

Ms. ROSS. Thank you, Mr. Chair. I would like to enter into the record an article by Hein de Haas entitled, "Border Crackdowns Won't Solve America's Immigration Crisis," that was published in *The Wall Street Journal* last week.

Mr. MCCLINTOCK. Without objection.

Ms. ROSS. In this article, which I commend to everyone who is here and anybody who is watching, de Haas highlights the economic drivers of immigration on our side of the border that are often too—are ignored in these policy discussions.

The reality is that our economy needs more workers. In this intense labor market, that drives immigration. I hear this from employers in my own district in the research triangle of North Carolina. They are begging for legal pathways to hire more workers. We have heard this for the last two days in Washington, DC, from the business roundtable.

Migrants accept the costs and risks of journeying to the United States because they understand that their labor is in demand here and that employment will be easy to come by. In fact, the House makes the point that immigration restrictions actually lead workers who might move to the U.S. temporarily for seasonal work to stay since their opportunities to come and go are severely limited.

Because of the militarization of the border, we no longer have the labor flow that we used to have. Instead, we have a population of migrant workers living in the United States year around, and we have perverse policies like deporting kids who have come here legally with their parents who age out of our immigration system be-

cause they simply cannot get a visa to stay because the lines are so long, more than 200,000 documented dreamers.

I have a bipartisan bill that has passed this House twice to give them at least the ability to stay here, contribute their talents and be with their families, not be deported to a place that they didn't know. They, Mr. Chair, came here legally.

If Republicans were serious about solving the border crisis, they would crackdown on the economic drivers of migration in this country.

Mr. Reichlin-Melnick, do we need to expand employment and family based immigration?

Mr. REICHLIN-MELNICK. Absolutely. We haven't touched those laws in 33 years.

Ms. ROSS. Can you discuss how the creation of additional legal pathways can impact the numbers we are seeing at the border?

Mr. REICHLIN-MELNICK. There are a lot of people who were coming today who would like to come here legally, but no pathways exist. I think the best example to demonstrate this is what the Biden Administration has done with Haitian migrants.

About no Haitian migrants, virtually none, are crossing the border illegally now and that is because the Biden Administration has expanded legal pathways through them for parole. Those pathways are narrow, not applicable to everybody, and fragile. Without Congress stepping in, that success could be reversed overnight.

Ms. ROSS. Especially what is going on with Haiti as we speak. What additional legal pathways should Congress think about creating?

Mr. REICHLIN-MELNICK. Not just temporary guesswork or programs that would let people but also ways for people to come here more permanently and be here with friends and families. People should not have to wait 80 years to get a visa. There are people today, India nationals in particular, who are. You see this, people who would normally have come here on visas, say the legal immigration system just is not available to me. The only thing I think I can do, people will sell me on, is coming to the border. That is not how the system should function.

Ms. ROSS. Would the expansion of legal pathways lead to a more orderly and safe process at the border and if so, why?

Mr. REICHLIN-MELNICK. Yes. By addressing this issue in a comprehensive way, we have to look beyond just the lens of what is happening exactly at the border. We have to look at what is happening in our legal immigration system, and we have to look at what is happening globally.

If all we do is pay attention to the border and don't think about all these other broken parts of our system, we are just going to find ourselves here again five years from now, 10 years from now, 20 years from now.

Ms. ROSS. Thank you. Mr. Chair, I just want to share with people, before I came back to Washington, I went to the annual farm breakfast that we have with our farming community in North Carolina. All across North Carolina they came.

The No. 1 issue was having more legal pathways for people who work in the agriculture business in North Carolina, which is the No. 1 industry in North Carolina. I represent the high tech, med-

ical industries. They want the skilled workers, the H-1B workers. The farm industry, No. 1 issue, immigration. Thank you, Mr. Chair, and I yield back.

Mr. McCLINTOCK. The gentlelady's time has expired. Mr. Moore.

Mr. MOORE. Mr. Hamilton, in 2020 we had 4,651 Mexican encounters, or U.S.-Mexico border encounters. That was in 2020. In 2021, it went to 1.7 million in a 12-month period. What changed? Why did it go from 4,000–1.7 million in a 12-month period? How is that possible?

Mr. HOMAN. Because President Biden abolished the Trump policies that were effective.

Mr. MOORE. What policies?

Mr. HOMAN. Remain in Mexico policy, the MPP, the Third Safe Country that we had with Central American countries, Guatemala, Honduras, and El Salvador, any catch and release, building the wall. The wall works. Every place they built a wall, immigration went down. Drugs went down. The wall more importantly saved lives because the women and children, who were the most vulnerable, couldn't get over that wall, would go to a place where there is not a wall. Guess who is waiting for them? The men and women of the Border Patrol would give them first aid and take care of their humanitarian needs.

Mr. MOORE. Mr. Homan, we went to the border, it's been years ago, a couple years ago now, with Congressman Biggs, and do you remember the little girls, the kids they threw over, you remember they brought the two children to the high place in the wall and tossed them over down to the concrete, right?

Mr. HOMAN. Yes.

Mr. MOORE. While they were doing that my understanding was that was just a decoy. They tossed that three-year-old and five-year-old child over the wall, so that others could come through in the opening up the road.

So, as the border agents were going to the rescue of those kids, in turn, the cartel were smuggling people into an opening down the road. So, we were talking about children and women. They talk about how cruel we are for separating the children from their parents. My understanding is we have lost 100,000 children. We don't know where they are at. Is that the number that you are hearing, since this administration took over, 100,000 children?

Mr. HOMAN. Approximately 100,000 and HSI ICE has numerous investigations for finding these children. For instance, cleaning up entrails in a meat packing plant, the midnight shift, being forced into debt servitude. These children have been trafficked.

I can't say every one, the 100,000, have been trafficked, but we know many have. I have done this for 34 years. I have conducted many trafficking investigations. A lot of these children are living a life of hell right now.

Mr. MOORE. In one specific case I remember, we had one sponsor that got 20 children. We shipped 20 children to this one location but did not do a background check. You can't work a nursery in a church without a background check. We sent 20 of these children to a place to one sponsor with no background check.

What is happening? When you say indentured servants, tell me what you mean by this indentured servitude that you mentioned when you are talking in your testimony? What does that look like?

Mr. HOMAN. That is how they pay their smuggling fees. They are smuggled into the United States, and they owe the cartel. The family owes the cartel smuggling fees, and they are forced to do labor to pay those smuggling fees.

Mr. MOORE. So, these moms and dads send their children, put them in the custody of this cartel and then they have a fee they have to pay back. Is that what is going on?

Mr. HOMAN. Approximately 450,000 children have been smuggled across the border into the hands of criminal cartels.

Mr. MOORE. They are making—they are servants, basically? They are indentured servants now to the cartel.

Mr. HOMAN. Many are.

Mr. MOORE. Unbelievable, unbelievable. Mr. Hamilton, what do you think—how did Trump utilize—how did his administration utilize the Section 212(f) to make the patchwork, is that what you call it? Is that how we did it? Did you all secure the border?

Sheriff Daniels came in, 40 years, four decades on the U.S. Southern border, he said in 2018 he had never seen it more secure than it was then. He has never seen it worse than it is today. What were you all able to do that worked?

Mr. HAMILTON. Look, again, without sounding like a broken record, MPP was a critical program. You have to dry up the flow. You can't just keep processing on the back end and allowing people to come into the United States. You have to dry up the flow of people who get caught and released into the United States because ultimately that is the only thing that matters.

Mr. MOORE. It is not just us talking about it on the news. It is them calling back home on the free cell phone saying, hey, we have a job, we have subsidies, or we have a place to stay, you all come join us.

When you talk about dried up, you talk about putting pressure on the border. When you open it up that way, once we get them in here, and they know, they are calling back home, and it just continues to flow. I tell everybody a closed border is a compassionate border. We are losing children. We are losing families. We are having family separated obviously, but also just the death, the people trying to make that trip, and the women get raped. The compassion is the closed border.

So, you are saying that just when they know they have got—once they get it—they get here, I was told they get a free cell phone and \$800 in Yuma, Arizona. That was the testimony that a sheriff gave me, under oath by the way. Then we just ship them wherever. So, that is the issue, right? Once they know if they come here, they have got an opportunity, and it is hard to stop it, isn't it?

Mr. HAMILTON. That's precisely right. It is the only thing that matters is release into the United States, and the ability to get work whether with or without authorization. That is precisely why the Senate bill is such a disaster. Because instead of stopping catch and release, what the Senate bill does is it mandates catch and release for a significant numbers of aliens coming to the United

States. So, instead of solving the problem, it is just going to exacerbate the problem and make things worse.

Mr. MOORE. My time is up, and with that, Chair, I yield back.

Mr. MCCLINTOCK. Thank you very much, Mr. Hunt.

Mr. HUNT. Thank you, Mr. Chair. I think my colleagues have laid out a pretty comprehensive case as to why the Biden Administration has the authority to fix this border crisis that he created. How did he create this border crisis? By rescinding President Trump's Executive Orders.

Instead, I want to talk about today, the deadly results of Biden's decision to open the border, and his decision to not act within his power to reverse this deadly course.

Right now, we are witnessing a historic and devastating wave of migrants taking the lives of one innocent American after another. This whole reality is treated as a conspiracy theory on the left. That's not true. Since President Biden won't protect the victims of migrant crime or even be bothered to say their names, I will use my five minutes to speak for the victims of migrant crime.

Look at the victims behind me. Their lives were taken from them because of Biden's decision to open our border so that violent criminals and gangs from other countries can terrorize and murder American citizens.

These victims of migrant crime cannot speak for themselves so I will speak for them. I want to specifically speak on behalf of several victims from my home State of Texas. Unfortunately, I don't have enough time to speak on behalf of all them.

Alex Wise, Jr., was a 10-year-old boy from Midland. He was walking home from school when an illegal immigrant ran him over with his car and killed Alex. This illegal immigrant, who took Alex's life, had previously been deported not once, not twice, not thrice, but four times, five times, and guess what? Under President Biden, he came right back.

Another victim is 16-year-old Lizbeth Medina, a high school cheerleader from Edna, Texas. When Lizbeth did not show up to the town's lighted Christmas parade where she was scheduled to perform with the rest of her cheer squad, her worried mom rushed home and found her daughter stabbed to death. Who killed her? An illegal immigrant.

Then there is the story of 11-year-old Maria Gonzalez. Maria was home alone while her father went to work. She told her dad that she was worried because someone was knocking on the door. When her father returned home from work, he found his daughter's body stuffed in a plastic trash bag beneath a bed. She had also been sexually assaulted. Her murderer, an illegal immigrant.

Now, as a father of two little girls, if I ever saw my children in that State, I am getting some real Samuel L. Jackson a "Time to Kill" vibes right now. Everyone should feel the exact same way. If you don't, there is something wrong with you.

Unfortunately, these stories are not isolated incidents. What I shared with you today is one tragic murder after murder weaving together a large tapestry of migrant crime.

Mr. Homan, thank you for being here, sir. Under President Trump you served as the Acting Director of ICE. In your profes-

sional opinion, sir, what is the best way to deal with this massive issue of migrant crime?

Mr. HOMAN. Get rid of sanctuary—you got to end sanctuary cities. Sanctuary cities provide a haven for—sanctuaries for criminals bottom, line, period. Sanctuary cities do not protect immigrant communities. When they release an illegal alien criminal back into the community, the very community in which he lives, he is going to revictimize the same victim, the same witnesses. The immigrant community don't want criminals in their neighborhoods either.

Mr. HUNT. Thank you, sir. Up until this point, President Biden and the White House have been unable to say Laken Riley's name to date or the other victims that I have mentioned here today. They have no problem with uttering no, with uttering no and no comment, when it comes to Laken Riley's murder.

Let me lay this out for everyone. For Biden's open border, Laken Riley would still be a Georgia college student; for Biden's open border, Alex Wise would still be able to go to middle school; for Biden's open border, Lizbeth Medina would still be cheering in Edna, Texas this fall; for Biden's open border, Maria Gonzalez's father would have been able to walk her down the aisle someday, instead of finding her stuffed in a trash bag under a bed.

Finally, but for Biden's open border, all the victims behind me would probably still be alive. Tell me I'm wrong. Don't believe what the media is telling you. President Biden's hands aren't tied. He has the power to close the border today like President Trump would do if he were in the office right now. All he has to do is reinstate the policies set forth by President Trump a few years ago. Mr. President, we are waiting. Enough Americans have already died.

With that, I yield back. Thank you, Mr. Homan, for being here. I thank you for your service.

Mr. MCCLINTOCK. Thank you. The gentleman yields back. We have discussed the importance of resuming the Remain in Mexico policy. We had it under Trump. Biden canceled it in his first day in office. So, obviously it can be done because it was done under the same laws that we have today.

The Border Patrol leadership told us at Eagle Pass that this alone would reduce the flow by about 70 percent.

Mr. Homan you mentioned the wall. It was nearing completion on Inauguration Day. Border Patrol tells us that is an absolutely necessary force multiplier for them. So, obviously, that could be done because that was being done under the same laws that we have today. Once again, Biden canceled that.

What else could be done under current law? If you were advising the President right now, what else—Remain in Mexico and what else?

Mr. HOMAN. The first thing I would is Remain in Mexico. That was a game changer. That moved illegal immigration down to a 40-year low. The highest courts in the land said it is legal. You can simply dust off the plans and put it back in action.

Third Safe Country Agreements, I don't know why any administration would destroy an agreement with the Central American countries. If you are really escaping fear and persecution from your homeland and government and you get to a free country, claim asylum there. So, if you are really escaping for your persecution, it is

all about getting to the United States. I have heard testimony today, they are coming for jobs. I get it. They are coming for a better life, I get it. That is not asylum. So, the asylum fraud abuse on the border for those that really do need across this world, there are thousands of people that need asylum, protection from their home government, they are sitting in the backseat because the system is overflowing with frauds and asylum claims.

So, the Remain in Mexico Program, the Third Safe Country Agreements, and catch and release and continue building the wall. Every place they built a barrier, illegal immigration went down. It is not the end all, be all. As I said earlier, the most important thing about the wall is the most vulnerable cannot get over the wall. They are going to go to a place where there is not a wall. Most of the time, Border Patrol will be waiting. The Border Patrol saved tens and thousands of lives on that border because they were put in a place where they had to cross and where there wasn't a wall and Border Patrol was waiting on them.

Mr. MCCLINTOCK. Mr. Arthur, what else? Any other thoughts on what could be done under current law under by this administration?

Mr. ARTHUR. No. I have to wholeheartedly concur with Mr. Homan. I am going to tell you another person who probably would concur with him as well.

In 2007, when he was running for President, then Senator Joe Biden appeared in Winterset, Iowa, and he talked about the importance of the wall. He talked about the value of a wall, to stop people from entering the United States and slowing down the transmission of drugs into the country.

Now, he didn't say—and, of course, there were caveats and things like that went along with it. I don't know if you have been to the border—

Mr. MCCLINTOCK. Five times. By the way, the Border Patrol tells me everything that you guys just did. That the wall is absolutely essential. That the Remain in the Mexico policy was working very well, and it all came to a halt on Inauguration Day.

Mr. ARTHUR. Absolutely. Again, it is not going to stop anybody from entering the United States, but it will slow them down. It makes it a force multiplier for the 17,000 plus Border Patrol agents that we have down there. It makes it so much harder for the drug cartels to move drugs into the United States.

Before they put the wall into Yuma, there were 2,500 drive throughs a year. Once they put in the wall, there were two, not 2,000, two. So, it is absolutely crucial. I would commend everyone here to go listen to then-Senator Biden's remarks in Winterset, Iowa, 2007.

Mr. MCCLINTOCK. Mr. Hamilton, what would you add?

Mr. HAMILTON. Without sounding like a broken record, again, some of those same things. One of the other things we have to do, is we have to take a look at the way that our immigration court system is being abused.

It is not necessarily the case that we need lots and lots more judges. We need a system that is not going to be abused by frivolous claims and unscrupulous attorneys. That is precisely—that is what happens every single day in the immigration world.

Mr. MCCLINTOCK. What percentage of asylum claims turn out to be phony and rejected by the courts.

Mr. HAMILTON. So, it depends on the demographic, and it depends on if we are talking about claims arising from the border or the interior, but we are talking about in the low teens as an average is the number or percent that are approved.

Now, if you think about that, that means that 85 percent are denied. What kind of a world—it doesn't make sense—

Mr. MCCLINTOCK. When they are denied, what normally happens? When the asylum claim is denied, are not most of them after being ordered to leave simply disappear?

Mr. HAMILTON. That is correct. They don't go anywhere. They stay here. There is over 1.3 something million active orders of removal today in the United States, people who had their due process, they had their day in court. They decided to stay here.

Mr. MCCLINTOCK. Final question very quickly, Mr. Homan. The Democrats have said this has been going on for over a century. There is nothing to see here, move along. That is just *Fox News* and Republicans fanning flames. Could you address that point?

Mr. HOMAN. All they got to do is look at the numbers under President Trump. We had the most secure border. It wasn't 100 percent secure. We had a little more work to do. We had more walls to finish, but it was the most secure border based on data, DHS's own data, than we have ever seen. We went from the most secure border to historic, never seen before illegal alien encounters. That's just a fact, 3.2 million encounters last year. The first year under President Biden historic records. Second year, he broke his own historic record. Third year, he broke both those two years' historic records. We have never seen anything like this.

Mr. MCCLINTOCK. Thank you very much. For unanimous consent request?

Ms. JAYAPAL. Thank you. I ask unanimous consent to enter into the record this article, "Where the Migrant Protection Protocols Stand Four Years After Going Into Effect," which show clearly that with a million apprehensions over two years under the Trump Administration, only 70,000 people were actually put into the MPP program.

Mr. MCCLINTOCK. Ms. Jayapal, you know that is a request. It is not a speech.

Ms. JAYAPAL. Thank you.

Mr. MCCLINTOCK. Without objection. That concludes today's hearing. I want to, again, thank our witnesses very much for appearing before the Committee today. This has been very helpful to us.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record. Without objection, this hearing is adjourned.

[Whereupon, at 4:45 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=116925>.