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To the  
Committee on the Judiciary  
United States House of Representatives  
Subcommittee on Oversight

For A Hearing Titled:  
“Examining Threats to ICE Operations”

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

To address the issues raised by the committee, I have structured my written testimony to first, explain the source of the immigration power; second, to delineate the inspection and admission process for aliens coming to the United States; third, to discuss the role of detention in immigration enforcement; fourth, to explain the Biden administration’s border policies and their impact on migrant releases; fifth, to describe immigration enforcement under the second Trump administration; and sixth, to analyze so-called “sanctuary” policies and their impacts.

## I. CONGRESS’ PLENARY AUTHORITY OVER IMMIGRATION

Key to understanding how our immigration laws work—or are supposed to work-- is recognizing where the immigration authority in this country rests.

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

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

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

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

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

<sup>3</sup> See sec. 101(a)(3) of the INA (2025) (“The term ‘alien’ means any person not a citizen or national of the United States.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

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

<sup>5</sup> *Constitution Annotated, Art. S8. C18.8.1 Overview of Congress's Immigration Powers*. CONGRESSIONAL RESEARCH SERV. (undated). Source: [https://constitution.congress.gov/browse/essay/art1-S8-C18-8-1/ALDE\\_00001255/](https://constitution.congress.gov/browse/essay/art1-S8-C18-8-1/ALDE_00001255/).

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

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

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

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

Section 212(a) of the INA<sup>8</sup> delineates the various classes of aliens Congress has determined should be barred from admission to the United States (known collectively as the “grounds of inadmissibility”).

The most basic of those grounds, and the one Congress created to control the flow of immigrants to the United States, is section 212(a)(7)(A)(i) of the INA<sup>9</sup>, which bars the admission of any alien “who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document”.

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

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

## II. THE INSPECTION AND ADMISSION PROCESS

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

To implement its “policies pertaining to the entry of aliens”, Congress created an inspection protocol in section 235 of the INA<sup>14</sup> that U.S. Customs and Border Protection (CBP) officers

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

<sup>8</sup> Sec. 212 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

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

<sup>10</sup> Sec. 237(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

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

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

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

<sup>14</sup> Sec. 235 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

(including Border Patrol agents) must follow when considering whether to admit an “applicant for admission”<sup>15</sup>.

That statutory term, “applicant for admission”, includes both aliens seeking entry at the ports of entry and migrants apprehended crossing the land and coastal borders between those ports<sup>16</sup>-- a fact essential to assessing the legality of what has happened at the Southwest border in recent years.

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

Section 302 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)<sup>17</sup>, the source of the current language in section 235 of the INA, eliminated prior legal precedents that had treated aliens entering illegally *between the ports* differently from those seeking admission *at the ports*.

Prior to that amendment, officers at the then-Immigration and Naturalization Service (INS)<sup>18</sup> — precursor to both CBP and U.S. Immigration and Customs Enforcement (ICE) in immigration enforcement — were required by case law to apply a factual and legal analysis known as the “entry doctrine”<sup>19</sup> when they encountered aliens at the borders and the ports.

As its name suggests, the focus of the entry doctrine was on whether an alien had physically “entered” the United States<sup>20</sup>, and on the circumstances surrounding that entry.

Under that doctrine, aliens who had not made an entry into the United States were placed into exclusion proceedings under then-section 236 of the INA<sup>21</sup> and received few constitutional protections.<sup>22</sup>

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<sup>15</sup> See *id.* at para. (a)(1) (“An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”).

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

<sup>17</sup> Tit. III, sec. 302 of the Illegal Immigration Reform and Immigrant Responsibility Act, Div. C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 (1996), 110 Stat. 3009–579 to 584. Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

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

<sup>19</sup> Wiegand III, Charles A. *Fundamentals of Immigration Law*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFC. FOR IMMIGRATION REVIEW (revised Oct. 2011). Source: [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals\\_of\\_Immigration\\_Law.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Fundamentals_of_Immigration_Law.pdf).

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

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

<sup>22</sup> See *generally Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure

Aliens who had entered the country — even illegally — and who did so “free from actual and constructive restraint”<sup>23</sup> were placed into deportation proceedings under then-section 242 of the INA<sup>24</sup>, in which they were accorded greater rights and procedural benefits.

Application of the entry doctrine was simple in the case of aliens stopped at ports seeking admission, because ports were treated as the de facto “threshold” of the United States, and while aliens were in the ports, they had not entered and could be excluded.<sup>25</sup>

Applying the entry doctrine was challenging, however, in cases involving aliens who had entered illegally.<sup>26</sup> Did the alien “actually and intentionally evade inspection”? Was the alien “free from official restraint”?<sup>27</sup> Application of the entry doctrine required a time- and resource-intensive analysis of often disputed facts.

In its IIRIRA amendments to section 235 of the INA, Congress dispensed with these questions by treating all “arriving aliens” — those at the ports and those apprehended entering illegally between them — as applicants for admission<sup>28</sup>, subject to what is now called “inadmissibility” under section 212 of the INA.

In place of exclusion and deportation proceedings, Congress created a single process in which the inadmissibility or deportability of every alien was determined and eligibility for relief assessed, known as “removal proceedings”.<sup>29</sup>

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authorized by Congress is, it is due process as far as an alien denied entry is concerned.”) (citations omitted). Source: <https://supreme.justia.com/cases/federal/us/345/206/>.

<sup>23</sup> *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973). Source:

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

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

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

<sup>26</sup> See *Matter of G-*, 20 I&N Dec. 764 (BIA 1993) (“The grounding of a vessel 100 or more yards off shore with its passengers facing a hazardous journey to land does not of itself constitute an entry into the United States. In the case of the *Golden Venture*, an alien will be found to have been ‘free from official restraint’ if he establishes that he was among the first of the ship’s occupants to reach the shore, that he landed on a deserted beach, or that he managed to flee into a neighboring community. In contrast, an alien who was escorted off the *Golden Venture*, pulled from the water by rescue personnel, or who landed in the cordoned-off area of the beach after it was secured will not be found to have been ‘free from official restraint,’ as his movements were restricted to the immediate vicinity of the beach that was cordoned-off and controlled by the enforcement officers of the various governmental organizations present at the site to prevent the ship’s occupants from absconding. In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. Where there is no evidence that an alien, who arrives at other than the nearest inspection point, deliberately surrenders himself to the authorities for immigration processing, or that, once ashore, he seeks them out, voluntarily awaits their arrival, or otherwise acts consistently with a desire to submit himself for immigration inspection, actual and intentional evasion of inspection at the nearest inspection point may be found.”). Source: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3215.pdf>.

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

<sup>28</sup> See Sec. 235(a)(1) of the INA (2025) (“Aliens treated as applicants for admission. An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>29</sup> See Sec. 240(a)(1) of the INA (2025) (“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

A key component of that post-IIRIRA inspection protocol is section 235(a)(3) of the INA<sup>30</sup>, which mandates that all applicants for admission be “inspected by immigration officers” to determine whether they are inadmissible under any of the grounds of inadmissibility in section 212(a) of the INA.

Consequently (and importantly), pursuant to the inspection protocol in section 235, the term “immigration officer” applies to both agents in U.S. Border Patrol and CBP officers within the agency’s Office of Field Operations (OFO)<sup>31</sup>, which has jurisdiction over the ports of entry.

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

If, following that inspection, an immigration officer determines that an applicant for admission is inadmissible under section 212(a)(7)(A)(i) of the INA or is seeking admission via fraud and is therefore inadmissible under section 212(a)(6)(C) of the INA<sup>32</sup>, that officer has two options.

Section 235(b)(1)(A)(i) of the INA<sup>33</sup> allows the officer to “order the alien removed from the United States without further hearing or review” -- and without obtaining a removal order from an immigration judge-- “unless the alien indicates either an intention to apply for asylum ... or a fear of persecution”. This process is known as “expedited removal”.

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

The term “credible fear of persecution” is defined in section 235(b)(1)(B)(v) of the INA<sup>34</sup> as “a significant possibility, taking into account the credibility of the statements made by the alien in

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deportation, merging the two into proceedings for ‘removal’ and replacing the definition of ‘entry’ with that for ‘admission’. . . . After IIRIRA, both aliens arriving at the border and aliens already present in the United States without inspection are deemed ‘applicants for admission,’ . . . who must ‘be inspected by immigration officers’ to determine their admissibility . . . . If, upon such inspection, an alien is not ‘clearly and beyond a doubt’ admissible, he must be placed in removal proceedings.” (citations omitted). Source: <https://casetext.com/case/cruz-miguel-v-holder>.

<sup>30</sup> Sec. 235(a)(3) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>31</sup> See *Office of Field Operations, What We Do*. U.S. CUSTOMS AND BORDER SECURITY (undated) (“U.S. Customs and Border Protection Officers are responsible for America’s border security at ports of entry, safeguarding our country and communities from terrorism, illegal activity, narcotics and human trafficking.”). Source: <https://www.cbp.gov/careers/fofo/what-we-do>.

<sup>32</sup> See sec. 212(a)(6)(C)(i) of the INA (2025) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible”); *id.* at subcl. (ii)(I) (“In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>33</sup> Sec. 235(b)(1)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>34</sup> Sec. 235(b)(1)(B)(v) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under” section 208 of the INA.

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

Congress is clear, however, in section 235(b)(1)(B)(iii)(V) of the INA<sup>35</sup>, that aliens “*shall be detained* pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed”, and is equally clear in section 235(b)(1)(B)(ii) of the INA<sup>36</sup> that if an asylum officer “determines at the time of the interview that an alien has a credible fear of persecution ... the alien *shall be detained for further consideration of the application for asylum*” (emphasis added).

Detention in this context is critical to the credibility of this process because the credible fear standard is low and because asylum is particularly susceptible to fraud. The release of aliens who pass credible fear incentivizes other alien applicants for admission to make weak or bogus claims to gain entry—a clear abuse of humanitarian relief.

With only extremely limited exceptions<sup>37</sup>, the “consideration of the application for asylum” in that context is performed by an immigration judge in removal proceedings under section 240 of the INA<sup>38</sup>.

The other choice immigration officers — again, OFO CBP officers at the ports or Border Patrol agents between them— have during the inspection protocol under section 235 of the INA in the case of “applicants for admission” who are inadmissible under sections 212(a)(7)(A)(i) or 212(a)(6)(C) of the INA is to treat them the same as aliens inadmissible under the remaining grounds in section 212(a)(2) of the INA, and to place them directly into section 240 removal proceedings, a procedure Congress provided for in section 235(b)(2)(A) of the INA<sup>39</sup>.

## B. “Parole”

Although section 235(b) of the INA requires the Department of Homeland Security (DHS) to detain inadmissible applicants for admission, Congress gave the DHS secretary extremely

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<sup>35</sup> Sec. 235(b)(1)(B)(iii)(V) of the INA (2025) (emphasis added). Source:

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

<sup>36</sup> Sec. 235(b)(1)(B)(ii) of the INA (2025) (emphasis added). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>37</sup> See Arthur, Andrew. *Biden Administration to ‘Pause’ Radical Asylum Officer Rule*. CENTER FOR IMMIGRATION STUDIES (Apr. 15, 2023). Source: <https://cis.org/Arthur/Biden-Administration-Pause-Radical-Asylum-Officer-Rule>.

<sup>38</sup> See sec. 240 of the INA (2025) (“Removal proceedings”); see also *id.* at para. (a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *id.* at para. (c)(4) (“Applications for relief from removal”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>; *id.* at para. (c)(4) (“

<sup>39</sup> See section 235(b)(2)(A) of the INA (2025) (“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>.

limited authority in section 212(d)(5)(A) of the INA<sup>40</sup> to “parole” individual aliens into the United States in exceptional or emergent circumstances.

That provision<sup>41</sup> states, in pertinent part, that the DHS secretary:

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

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

First, parole may only be granted “on a case-by-case basis”<sup>42</sup>, and thus may not be issued on a blanket basis to allow the entry of large numbers of aliens, or programmatically.

Second, DHS may only grant parole for either “urgent humanitarian reasons” or for “significant public benefit”<sup>43</sup>. Granting parole for any other purpose is thus *ultra vires*<sup>44</sup>, as it exceeds the statutory parole authority.

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

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

Congress first provided the executive branch with parole authority when it enacted the Immigration and Nationality Act in 1952<sup>45</sup>, in which the parole statute read as follows:

*The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe **for emergent reasons or for reasons deemed strictly in the public interest** any alien applying for*

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<sup>40</sup> Sec. 212(d)(5)(A)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

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

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

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

<sup>44</sup> See *ultra vires*. Legal Information Institute (undated) (“Latin, meaning ‘beyond the powers.’ Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.”). Source: [https://www.law.cornell.edu/wex/ultra\\_vires](https://www.law.cornell.edu/wex/ultra_vires).

<sup>45</sup> Sec. 212(d)(5) of the Immigration and Nationality Act of 1952, Pub. L. 88-414, 66 Stat. 188 (1952). Source: <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

*admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. [Emphasis added.]*

The secretary of Homeland Security, both *de facto* and *de jure*, succeeded the attorney general as the executive officer given the statutory authority to grant parole under the Homeland Security Act of 2002<sup>46</sup> and the Laken Riley Act<sup>47</sup>, but most importantly the highlighted text reveals the tighter restrictions Congress placed on the DHS secretary in granting parole in the intervening seven decades.

Congress rigidly cabined the parole authority in IIRIRA because various administrations abused parole to ignore Congress' plenary power over immigration and exceed the limits it set on the annual admission of immigrants<sup>48</sup>.

Note that when Congress amended the parole provision in IIRIRA<sup>49</sup>, it did so under the title "Limitation on the Use of Parole"<sup>50</sup>, clearly expressing its intent to restrain the parole authority.

In its 2011 opinion in *Cruz-Miguel v. Holder*<sup>51</sup>, the Second Circuit described how IIRIRA amended the parole statute and explained why Congress had constrained the executive's parole power therein:

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

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

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

<sup>47</sup> The Laken Riley Act, Pub. L. 119-1, sec. (d)(1) (2025) ("Certain Classes of Aliens.--Section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)) is amended-- (1) by striking "Attorney General" each place such term appears and inserting "Secretary of Homeland Security"). Source: <https://www.congress.gov/bill/119th-congress/senate-bill/5/text>.

<sup>48</sup> See Fishman, George. *The Pernicious Perversion of Parole, A 70-year battle between Congress and the president*. CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2022). Source: <https://cis.org/Report/Pernicious-Perversion-Parole>.

<sup>49</sup> Tit. VI, sec. 602 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009-689 (1996). Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> *Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011). Source: <https://casetext.com/case/cruz-miguel-v-holder>.

Fortunately, the then-INS explained in detail what their predecessor phrases-- “emergent reasons” and “reasons deemed strictly in the public interest” -- meant when it first promulgated<sup>52</sup> parole regulations in 1982:

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

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

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

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

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

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

That seemingly broad regulatory catch-all parole authority, however, actually derives from the aforementioned 1982 parole regulation, when that provision<sup>54</sup> read as follows:

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

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

<sup>53</sup> 8 CFR § 212.5 (2024). Source: <https://www.law.cornell.edu/cfr/text/8/212.5>.

<sup>54</sup> See 8 CFR § 212.5(2) (1982) as amended by *Detention and Parole of Inadmissible Aliens; Interim Rule with Request for Comments*, 47 Fed. Reg. 30044 (Jul.9, 1982). Source: <https://www.govinfo.gov/content/pkg/FR-1982-07-09/pdf/FR-1982-07-09.pdf#page=1>.

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

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

Finally, even if aliens are released on parole into the United States, the law treats them as if they are still awaiting admission. As the Fifth Circuit has explained:

*parole creates something of legal fiction; although a paroled alien is physically allowed to enter the country, the legal status of the alien is the same as if he or she were still being held at the border waiting for his or her application for admission to be granted or denied.<sup>55</sup>*

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

Which is to say, they don’t have many rights at all.<sup>56</sup> Moreover, as the parole statute<sup>57</sup> shows, the DHS secretary has broad discretion to revoke a grant of parole, at which point the paroled alien must be returned to custody for removal proceedings.

These points are all crucial to this analysis because every alien paroled into the United States is facially inadmissible, and therefore removable unless and until that alien is either admitted to this country or allowed to withdraw his or her application for admission and depart. I will discuss this further in my analysis of Biden administration parole releases, below.

### III. DETENTION UNDER THE IMMIGRATION AND NATIONALITY ACT

As explained *supra*, detention is mandatory under various provisions in section 235(b) of the INA for arriving aliens who are inadmissible applicants for admission. Those are not the only provisions in the INA that authorize DHS to detain aliens, nor even the only instance in which DHS is required to detain aliens pending removal.

#### A. Section 236(a) and Immigration Judge Release Authority

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<sup>55</sup> *Duarte v. Mayorkas*, 27 F.4th 1044, 1058 (5th Cir. 2022). Source: <https://casetext.com/case/duarte-v-mayorkas-12>.

<sup>56</sup> See, e.g., *Landon v. Plasencia*, 459 U. S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”). Source: <https://supreme.justia.com/cases/federal/us/459/21/>; *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). Source: <https://supreme.justia.com/cases/federal/us/338/537/>.

<sup>57</sup> See Sec. 212(d)(5)(A)(1) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim>.

Section 236(a) of the INA<sup>58</sup> authorizes DHS agents and officers to arrest and detain aliens on an administrative warrant “pending a decision on whether the alien is to be removed from the United States”.

In general, once those aliens are arrested and detained, section 236(a) of the INA permits DHS to continue to detain them or release them on a bond of not less than \$1,500 or on conditional parole (which is distinct<sup>59</sup> from parole under section 212(d)(5)(A) of the INA).

By regulation<sup>60</sup>, and with exceptions, aliens detained by DHS can request release on bond from immigration judges in bond proceedings, which are separate and apart from removal proceedings under section 240 of the INA.<sup>61</sup>

That said, neither section 236(a) of the Act nor the applicable regulations confer the right to release on bond on an alien.<sup>62</sup>

Rather, when an alien seeks a redetermination of his or her custody status under section 236(a), that alien “must establish to the satisfaction of the Immigration Judge . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”<sup>63</sup> DHS does not bear the burden of showing that the alien should be detained.<sup>64</sup>

#### B. Sections 236(c) and 242(a)(2) of the INA

In addition to the congressional restrictions on DHS’s authority to release applicants for admission under section 235(b) of the INA, other aliens are also not amenable to release by statute.

For example, section 241(a)(1) of the INA<sup>65</sup> directs DHS to remove all aliens under final orders of removal within 90 days, a period designated therein as the “removal period”.

Section 241(a)(2)<sup>66</sup> of the INA, in turn, directs the department to detain those aliens during the removal period, and further makes clear that “[u]nder no circumstance during the removal period shall” DHS “release an alien who has been found” removable under the criminal and national-security grounds of inadmissibility and deportability.

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<sup>58</sup> Sec. 236(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>59</sup> *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747 (BIA 2023).

<sup>60</sup> 8 CFR § 1003.19 (2025). Source: <https://www.law.cornell.edu/cfr/text/8/1003.19>.

<sup>61</sup> Sec. 240 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

<sup>62</sup> *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020). Source: <https://www.justice.gov/eoir/page/file/1258971/dl>.

<sup>63</sup> *Matter of Siniauskas*, 27 I&N Dec. 207, 207 (BIA 2018). Source: <https://www.justice.gov/eoir/page/file/1030706/dl>.

<sup>64</sup> See *Matter of Fatahi*, 26 I&N Dec. 791, 795 n.3 (BIA 2016) (“Although section 236(a) of the Act does not specifically address the burden of proof, it provides that the Attorney General has broad discretion to detain an alien “pending a decision on whether the alien is to be removed from the United States” and “may continue to detain” or “may release the alien” during that time. We have consistently held that aliens have the burden to establish eligibility for bond while proceedings are pending.”). Source: <https://www.justice.gov/eoir/file/881776/dl?inline=>.

<sup>65</sup> Sec. 241(a)(2) of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

<sup>66</sup> Sec. 241(a)(2) of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1231%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1231%20edition:prelim)).

Similarly, section 236(c) of the INA<sup>67</sup> requires DHS to “take into custody any alien who”: is inadmissible under the criminal grounds of inadmissibility in section 212(a)(2) of the INA<sup>68</sup>; is inadmissible or deportable under the “terrorist activities” grounds of inadmissibility and deportability in sections 212(a)(3)(B) of the INA<sup>69</sup> and 237(a)(4)(B) of the INA<sup>70</sup> (respectively); is deportable under certain grounds of deportability in section 237(a)(2) of the INA<sup>71</sup>; or “is charged with . . . arrested for, . . . convicted of” or “admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person”.

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

The detention mandate was added to section 236(c) by section 303 of IIRIRA.<sup>72</sup>

As Congress explained in a conference report<sup>73</sup> for an earlier iteration of that act, “A chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their deportation proceedings” – underscoring the crucial role of detention in immigration enforcement.

### C. Secretary Mayorkas’s “Guidelines for the Enforcement of Civil Immigration Law”

On September 30, 2021, then-DHS Secretary Alejandro Mayorkas issued a memo captioned “Guidelines for the Enforcement of Civil Immigration Law”<sup>74</sup> (Mayorkas memo).

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

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<sup>67</sup> Sec. 236(c) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>68</sup> Sec. 212(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>69</sup> Sec. 212(a)(3)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

<sup>70</sup> Sec. 237(a)(4)(B) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

<sup>71</sup> Sec. 237(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

<sup>72</sup> Tit. III, sec. 303 of the Illegal Immigration Reform and Immigrant Responsibility Act, Div. C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 (1996), 110 Stat. 3009–585 to 587. Source: <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

<sup>73</sup> See H. Rept. 104-469—Immigration in the National Interest Act of 1995 (104th Cong., 2d Sess.).

<sup>74</sup> *Guidelines for the Enforcement of Civil Immigration Law*. U.S. DEP’T OF HOMELAND SECURITY (Sept. 30, 2021). Source: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

Relying on what the memo described as DHS’s “prosecutorial discretion”, the Mayorkas memo directed ICE officers and attorneys to consider certain “aggravating” and “mitigating” factors before taking any enforcement action, with limited exceptions.<sup>75</sup>

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

The mitigating factors, on the other hand, were more individualized and subjective, having to do with the alien’s age, health, eligibility for relief from removal, and — interestingly — whether any of the alien’s family members were in the military or worked for the government

#### D. *Texas v. U.S.* and the Laken Riley Act

Because the Mayorkas guidelines facially contravened those detention mandates, the states of Texas and Louisiana filed an amended complaint<sup>76</sup> in a case then pending before the U.S. District Court for the Southern District of Texas captioned *State of Texas v. U.S.*<sup>77</sup>, in which they asked the district court to set the guidelines in the Mayorkas memo aside.

In June 2022, the judge assigned to *Texas* issued a Memorandum Opinion and Order enjoining the Mayorkas memo<sup>78</sup>. That injunction eventually made its way to the Supreme Court, where in June 2023 a majority of the justices held that the states lacked standing to bring the case.<sup>79</sup>

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

Justice Alito, in dissent, however, found:

*In order to reach this conclusion, the Court . . . holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress’s power to employ the weapons of inter-branch warfare— withholding funds, impeachment and removal, etc. I would not blaze this unfortunate trail.*<sup>80</sup>

In response to that decision, the Biden administration’s alien release policies, and the threat posed by certain criminal aliens who had not been detained by DHS in accordance with the INA, Congress in January 2025 passed and the president signed Pub. L. 119-1, the “Laken Riley Act”<sup>81</sup>.

Among other things, that act empowers state attorneys general to sue for injunctive relief to force DHS to detain: inadmissible aliens at the borders and ports subject to mandatory detention under

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<sup>75</sup> See *id.* at 3-4.

<sup>76</sup> *State of Texas v. U.S.*, Case No. 6:21-cv-00016, First Amended Complaint (S.D. Tex. Oct. 22, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.109.0.pdf>.

<sup>77</sup> *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Complaint (S.D. Tex. Apr. 6, 2021). Source:

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

<sup>78</sup> *State of Texas v. U.S.*, Case No. 6:21-cv-00016, Memorandum Opinion and Order (S.D. Tex. Jun. 10, 2022). Source: [https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.240.0\\_4.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.240.0_4.pdf).

<sup>79</sup> *U.S. v. Texas*, 599 U.S. 670 (2023). Source: [https://www.supremecourt.gov/opinions/22pdf/22-58\\_i425.pdf](https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf).

<sup>80</sup> *Id.* at \_\_\_\_\_. Slip op., dissent at 1.

<sup>81</sup> The Laken Riley Act, Pub. L. 119-1 (2025). Source: <https://www.congress.gov/bill/119th-congress/senate-bill/5/text>.

section 235(b) of the INA<sup>82</sup>; aliens inadmissible on criminal grounds and deportable aliens removable on specified criminal grounds in section 236(c) of the INA<sup>83</sup>; and aliens ordered removed pending deportation under section 241(a)(2) of the INA<sup>84</sup> (criminal aliens in particular).

In addition, it allows state attorneys general to sue the federal government for injunctive relief to force the secretary of State to “discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of” so-called “recalcitrant countries”<sup>85</sup> — governments that refuse to take back their nationals who have been ordered deported — as provided for in section 243(d) of the INA<sup>86</sup>.

Finally, it allows states to sue the federal government to prevent DHS from categorical releases of inadmissible aliens on parole, or on any grounds aside from “urgent humanitarian reasons” or “a significant public benefit”, restrictions—as noted-- that Congress has already included in the parole provision in section 212(d)(5)(A) of the INA.

#### E. Alternatives to Detention

As ICE explains<sup>87</sup>:

*ICE’s Alternatives to Detention (ATD) program exists to ensure compliance with release conditions and provides important case management services for non-detained aliens. ATD consists of the Intensive Supervision Appearance Program (ISAP). The ATD-ISAP program utilizes case management and technology tools to support aliens’ compliance with release conditions while on ICE’s non-detained docket. ATD-ISAP also increases court appearance rates.*

*ATD-ISAP enables aliens to remain in their communities — contributing to their families and community organizations and, as appropriate, concluding their affairs in the U.S. — as they move through immigration proceedings or prepare for departure.*

*ATD-ISAP has been in place since 2004 and the number of participants has increased over time. Through the end of October 2024, approximately 7.6 million aliens were being overseen on ICE’s non-detained docket. Of those, more than 179,000 participated in the ATD-ISAP program.*

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<sup>82</sup> Sec. 235(b) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>83</sup> Sec. 236(c) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>84</sup> Sec. 241(a)(2) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim>.

<sup>85</sup> *Immigration: “Recalcitrant” Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*. CONG. RESEARCH SERV. (updated July 10, 2020). Source: <https://www.congress.gov/crs-product/IF11025>.

<sup>86</sup> Sec. 243(d) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1253&num=0&edition=prelim>.

<sup>87</sup> *What are Alternatives to Detention?* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Feb. 27, 2025). Source: <https://www.ice.gov/features/atd>.

Those sanguine assessments of ATD aside, there are any number of issues with that program.

Notably, the agency contends: “The daily cost per ATD-ISAP participant is less than \$4.20 per day — a stark contrast from the cost of detention, which is around \$152 per day.”<sup>88</sup>

That would be a fair comparison if those two figures, and detention and ATD, were equivalent. Unfortunately, they are not.

According to statistics<sup>89</sup> published by the Executive Office for Immigration Review (EOIR) — the DOJ component with jurisdiction over the immigration courts and the Board of Immigration Appeals (BIA)— the median completion time for a removal proceeding in FY 2023 was 42 days, though as recently as FY 2014 it was 27 days, and in FY 2008, it was just 8 days.

According to the Transactional Records Access Clearinghouse (TRAC)<sup>90</sup>, the average processing time for an immigration court case in January 2023 was 1,016 days, though in immigration courts in Virginia it was 1,738 days.

In other words, the total average cost for detention in FY 2023 was \$6,384, whereas the average cost for ATD was \$4,267.20—a rather more modest savings of \$2,116.80 per case in favor of ATD.

Cost, of course, is not the only consideration. Every detained alien is required to appear at every immigration court hearing, unlike aliens who aren’t in detention, including those on ATD.

ICE statistics<sup>91</sup> reveal, however, that 463 of the 3,761 aliens on ATD and who had final court appearances in FY 2025 through the end of March failed to appear—a non-appearance rate of 12.3 percent.

That is better than the historic average non-appearance rate in immigration court of 34 percent<sup>92</sup>, but again it is 12.3 percent worse than the no-show rate in detained removal cases (0 percent).

The much more significant factor, though, is public safety. Aliens who are detained pose no risk to the community, a fact not guaranteed under ATD.

According to this committee<sup>93</sup>, nearly 8 million “illegal aliens” entered the United States under the Biden administration. Unlike lawfully admitted aliens, who must prove they have no serious

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<sup>88</sup> *Id.*

<sup>89</sup> *Median Completion Times for Detained Cases*. U.S. DEP’T OF JUSTICE, EXECUTIVE OFC. FOR IMMIGRATION REVIEW (generated Oct. 12, 2023). Source: <https://www.justice.gov/eoir/page/file/1163621/dl?inline=>.

<sup>90</sup> *Immigration Court Processing Time by Outcome*. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (through Jan. 2023). Source: [https://tracreports.org/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](https://tracreports.org/phptools/immigration/court_backlog/court_proctime_outcome.php).

<sup>91</sup> *Detention Management*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/detain/detention-management#stats>.

<sup>92</sup> *Immigration Courts: Actions Needed to Track and Report Noncitizens’ Hearing Appearances*. GAO-25-106867. GOV’T ACCOUNTABILITY OFC. (Dec. 2024). Source: <https://files.gao.gov/reports/GAO-25-106867/index.html>.

<sup>93</sup> *Quiet Amnesty: How the Biden-Harris Administration Uses the Nation’s Immigration Courts to Advance An Open-Borders Agenda*. H. Comm. on the Judiciary, 118<sup>th</sup> Cong. (Oct. 24, 2024). Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-10-24%20Quiet%20Amnesty%20-%20How%20the%20Biden-Harris%20Administration%20Uses%20the%20Nation%27s%20Immigration%20Courts%20to%20Advance%20an%20Open-Borders%20Agenda.pdf>.

criminal history before receiving a visa, none of those aliens were vetted before they arrived, and the vetting they received after arrival and before release was questionable, at best.

In that latter regard, as Rodney Scott, President Biden's first Border Patrol chief, explained to this committee<sup>94</sup> in September 2023:

*Every decision to allow a foreign national or a foreign product to enter our home must be an **informed and intentional decision**. If either of these criteria are missing, then we cannot honestly assert that our borders are secure. Many would argue that it is malfeasance, or at a minimum nonfeasance, for authorities to knowingly and willfully ignore threats and vulnerabilities. Unfortunately, this is exactly what is occurring.*

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*Most aliens, and most Americans for that matter, do not understand what criminal history and other information US law enforcement can access. Even more important for this discussion is the fact that most people do not seem to understand what US law enforcement can **NOT** access. **When law enforcement officers at any level in the US use a person's biographical and biometric information to run records checks, that freshly collected information is being compared to existing records in specific US agency databases. It is extremely rare for any information about criminal acts committed by a foreign national outside the US to be documented within these US criminal history databases.** When Secretary Mayorkas or any US official asserts that aliens are properly vetted, they are really telling you that they checked US databases to see if the alien had any known criminal history inside the US or if the alien had been identified and placed in the Terrorist Screening Database or Data Set.*

***To ensure there is no confusion here, running records checks on any alien that has not been arrested by US law enforcement in the past or is not currently known by US intelligence is like looking for something on an empty hard drive. There is simply no data to compare it with. The alien could be a saint, or he/she could be serial killer. There are a few ways to find out more about who the alien really is. One way is to request information from officials in the alien's home nation. At best, that is extremely time-consuming and requires US State Dept. support. In many cases this is not even an option due to a lack of diplomatic relations or a lack of capabilities in the other nation. [Emphasis added.]***

At best, ATD makes it more likely that an alien will appear in immigration court or that ICE can locate aliens released on ATD. It does nothing to ensure they won't commit crimes following release on ATD.

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<sup>94</sup> *Terrorist Entry Through the Southwest Border: Hearing Before the H. Comm. on the Judiciary, 118<sup>th</sup> Cong. (Sep. 2023)* (Testimony of Rodney Scott). Source: <https://judiciary.house.gov/committee-activity/hearings/terrorist-entry-through-southwest-border>.

There was not a lot of transparency into the criminal activities of aliens released on ATD under the Biden administration, with notable exceptions.

In April 2024, for example, the ICE Enforcement Removal Operations (ERO) office in Denver, Colo., issued a press release headlined “ERO Denver arrests 9 at-large noncitizens who violated conditions of Alternatives to Detention”.<sup>95</sup>

It detailed the results of a five-day ERO operation in the states of Colorado and Wyoming in which nine aliens who had violated the terms of their ATD releases were arrested. They included a Nicaraguan national who had been “was arrested in possession of a firearm and narcotics” and two different Mexican nationals who had been convicted for “driving while ability impaired”.

Similarly, a July 2024 press release<sup>96</sup> from ERO’s Miami office described a three-day operation in Southeast Florida during which 18 criminal aliens who had been released on ATD were taken into custody.

Those arrests included a Honduran national convicted for resisting an officer, trespassing, criminal mischief, assault, and burglary; a Chinese national convicted for conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, battery, weapons offense, drug possession and extortion; a different Honduran national arrested for battery and aggravated assault with a deadly weapon.; and a Guatemalan national arrested for battery and child abuse.

In addition, other facts about the dangers posed by (largely unvetted) aliens released on ATD have been revealed by sources outside of DHS.

An interim staff report issued by this committee<sup>97</sup> in October 2024, for example, discussed the case of Mohammad Kharwin, a national of Afghanistan who was apprehended by Border Patrol agents after he entered illegally near Imperial Beach, Calif., on March 10, 2023.

As that report explains, despite agents’ concerns that Kharwin was on the terror watchlist:

*DHS placed him on Alternatives to Detention (ATD) and instructed him to report to an ICE office in Sacramento, California. After Kharwin reported to the ICE field office just 16 days after his initial encounter, he was removed from ATD and “was able to apply for asylum and work authorization and fly domestically.” DHS told the Committee and Subcommittee that ICE removed Kharwin from ATD because there was no basis to maintain his elevated supervision.*

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<sup>95</sup> *ERO Denver arrests 9 at-large noncitizens who violated conditions of Alternatives to Detention.* U.S. DEP’T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 16, 2024). Source: <https://www.ice.gov/news/releases/ero-denver-arrests-9-large-noncitizens-who-violated-conditions-alternatives-detention>.

<sup>96</sup> *ERO Miami ATD program nabs 18 for various crimes.* U.S. DEP’T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jul. 22, 2024). Source: <https://www.ice.gov/news/releases/ero-miami-atd-program-nabs-18-various-crimes>.

<sup>97</sup> *Interim Staff Report, The Biden-Harris Border Crisis: At Least 1.7 Million Potential National Security Threats.* H. Comm. on the Judiciary, 118<sup>th</sup> Cong. (Oct. 3, 2024), at 7-8. Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-10-03%20The%20Biden-Harris%20Border%20Crisis%20-%20At%20Least%201.7%20Million%20Potential%20National%20Security%20Threats.pdf>.

In March testimony before the House Oversight and Accountability Committee’s Subcommittee on Cybersecurity, Information Technology, and Government Innovation<sup>98</sup>, Simon Hankinson of the Heritage Foundation referenced other instances in which aliens released on ATD committed criminal offenses in the United States:

*On January 29 and 30, 2025, Jefferson Ubilla-Delgado and Geiderwuin Bello Morales were arrested in Chicago and charged with the murder and robbery of 63-year-old George Levin.*

*At the time of the crime, Ubilla-Delgado was wearing an ICE GPS ankle monitor. Morales had been arrested earlier for attempting to lure a 12-year-old girl into his car. Both Ubilla-Delgado and Morales had been in Chicago for over a year, entering the United States illegally from Venezuela and Ecuador respectively at an unknown date and location.*

*On September 27, 2024, Estefania Primera, nicknamed “La Barbie,” was arrested outside Sacred Heart Church, a location known for serving arriving migrants, including illegal aliens. Primera was a member of the Tren de Aragua (TdA) gang accused of operating a sex-trafficking ring in El Paso, Texas. One sex-trafficking victim alleged Primera was the frontwoman and had drugged her. Primera crossed the border illegally near El Paso in August 2023 and was released into the U.S. with a notice to appear and an ICE-supervised ankle monitor, which she removed within weeks TdA has been caught operating trafficking and forced prostitution rings, such as this, throughout the U.S., in the states of California, Florida, Georgia, Illinois, Nevada, New Jersey, New York and Texas.*

Then, there are the cases of Johan Jose Rangel Martinez and Franklin Jose Pena Ramos, two nationals of Venezuela who entered the United States illegally in March and May 2024, respectively.<sup>99</sup>

The pair were indicted in September 2024 on capital murder charges in the June 2024 killing of 12-year-old Houston resident Jocelyn Nungaray.<sup>100</sup>

Last June, shortly after they were arrested, the local CBS affiliate in Houston detailed<sup>101</sup> facts in court records that alleged Rangel Martinez and Pena Ramos “lured Jocelyn under the bridge,

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<sup>98</sup> *Leveraging Technology to Strengthen Immigration Enforcement: Hearing Before the H. Comm. on Oversight and Accountability, Subcomm. on Cybersecurity, Information Technology, and Government Innovation, 119<sup>th</sup> Cong. (2025) (testimony of Simon Hankinson), at 7-8. Source: <https://oversight.house.gov/wp-content/uploads/2025/03/Hankinson-Written-Testimony.pdf>.*

<sup>99</sup> *Judge sets \$10M bond for second Venezuelan man accused of killing a 12-year-old Houston girl.* ASSOCIATED PRESS (Jun. 26, 2024). Source: <https://apnews.com/article/girl-murder-houston-undocumented-venezuelans-bond-22153232c69dbdb0ee62a5ffb19035e0>.

<sup>100</sup> Dorgan, Michael. *DA to seek death penalty against illegal immigrants accused in Nungaray murder case.* FOX NEWS (Dec. 13, 2024). Source: <https://www.foxnews.com/us/da-seek-death-penalty-against-illegal-immigrants-accused-nungaray-murder-case>.

<sup>101</sup> Homer, Michelle, Miles, Jason, and Galvan, Jaime E. *Men charged with killing 12-year-old Jocelyn Nungaray aren't eligible for death penalty but that could change.* KHOU 11 (updated Jun. 25, 2024). Source:

where they stayed for two hours. Court records say the men took off her pants, tied her up, killed her, and threw her body into the bayou.”

Both had been fitted with ATD ankle monitors after they were apprehended entering illegally.<sup>102</sup> Martinez-Rangel’s monitor was removed by DHS “after complying with mandatory check-ins for two months”, while Pena Ramos was still wearing his at the time of the crime for which he was charged, “only removing it himself a few days after his alleged involvement”.<sup>103</sup>

But, sadly and ironically, likely the highest-profile criminal absconder from ATD was Diego Ibarra, brother of Laken Riley’s murderer, Jose Ibarra. As my former colleague, Jon Feere, reported<sup>104</sup> in March 2024:

*Diego Ibarra reentered the U.S. unlawfully on April 30, 2023, near El Paso, Texas, and was arrested by the U.S. Border Patrol and enrolled by ERO into Alternatives to Detention (ATD) on May 11, 2023. On May 25, 2023, he was removed from ATD and listed as an absconder from the program after GPS abnormalities. He has several arrests in 2023 by the Athens-Clarke County Police Department where ICE detainees were not honored.*

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*But what happened after Diego Ibarra absconded from ATD? For the past nine months Diego has been running free, only arrested last week for possession of a fake green card. . . . All we know from ICE’s statement is that he eventually popped up on ICE’s radar only after being arrested by the Athens-Clarke County Police Department “several” times in 2023. It appears that it was the taking of fingerprints by this police department that alerted ICE to his location (the prints go into a national database that send a ping to ICE’s enforcement systems) — not the ATD program.*

According to a “Memorandum of Facts in Support of Government’s Motion for Detention”<sup>105</sup> (detention memo) filed in connection with his federal fake green card charges, that ATD “abnormality” occurred when Diego Ibarra cut off his ankle monitor, which was found by the side of a road in Littleton, Colo.

He thereafter moved to Athens, Ga., where his brother would join him and murder Laken Riley.

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<https://www.khou.com/article/news/local/12-year-old-jocelyn-nungaray-update-june-24-2024/285-9ba6c14f-06d2-4e20-b5c6-0a3405c6af55>.

<sup>102</sup> Lee, Michael. *Tracking program used by Jocelyn Nungaray murder suspects has expanded under Biden*. Fox News (Jun. 26, 2024). Source: <https://www.foxnews.com/politics/tracking-program-used-jocelyn-nungaray-murder-suspects-has-expanded-under-biden>.

<sup>103</sup> *Id.*

<sup>104</sup> Feere, Jon. *Georgia Murder Case Highlights Problems with ‘Alternatives to Detention’*. CENTER FOR IMMIGRATION STUDIES (Mar. 1, 2024). Source: <https://cis.org/Feere/Georgia-Murder-Case-Highlights-Problems-Alternatives-Detention>.

<sup>105</sup> *U.S. v. Ibarra*, Case No. 3:24-MJ-00005-CHW, Memorandum of Facts in Support of Government’s Motion for Detention, at 4 (M.D. Ga. Mar. 6, 2024). Source:

In Athens, according to the detention memo, Diego Ibarra was arrested on the night of September 24, 2023, by two officers from the Athens-Clarke County Police Department (ACCPD) for driving 80 miles per hour in a 40-mile zone.<sup>106</sup>

A search of the vehicle revealed an open can of beer, and while Diego Ibarra initially contended that he had only consumed a single beer, he eventually admitted to having had seven.

That was a curious admission, because according to the detention memo, when his subsequent blood sample was sent to the Georgia Bureau of Investigation (GBI), the lab concluded he didn't have any alcohol in his system at all — though he did test positive for methamphetamine and tetrahydrocannabinol “THC”, the main psychoactive element in marijuana.<sup>107</sup>

He was booked into the county jail, charged with (*inter alia*) driving under the influence (DUI), speeding, and driving without a license, and thereafter released.

He failed to appear at his subsequent court date and a warrant was thereafter issued for his arrest.

Two days after that DUI arrest, on September 26, the detention memo claims, ACCPD officers were called to an Athens apartment in response to a call from a woman identified only as “J.G.”<sup>108</sup>

J.G. told police that her boyfriend — Diego Ibarra — had taken her cell phone from her, and that she had bitten him in the chest to get it back. In response, she claimed, Ibarra slapped her in the face.

Just over a month later, on October 27, 2023, ACCPD officers were called to a shoplifting incident at an Athens-area Walmart involving two males. As the detention memo<sup>109</sup> explains:

*The two males were observed stuffing items into bookbags and boarding a bus near the Walmart. An off-duty officer was able to locate the two males, who were identified as Diego Ibarra and his brother, Jose Ibarra (“Jose”). Inside a bookbag in Jose’s possession, officers located items of food taken from the Walmart. Inside Ibarra’s bookbag, officers located stolen t-shirts, shorts, hoodies, and a jacket.*

The brothers were cited for shoplifting more than \$200 worth of merchandise, but an officer advised the duo about “a pre-arrest diversion program”, and they were released.<sup>110</sup>

On December 8, 2023, the detention memo alleges<sup>111</sup>, a loss-prevention officer spotted Diego Ibarra at the same Wal-Mart, loading two t-shirts into his bag and attempting to leave.

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

The cops were called again, and this time Ibarra was purportedly<sup>112</sup> placed under arrest for shoplifting and for skipping court for the DUI charge.

Nonetheless, he was apparently released again because he was free on February 23, 2024, when he was arrested<sup>113</sup> as a suspect in Riley’s killing. It was in the course of that arrest that he provided a responding officer, as a form of identification, the fraudulent Permanent Resident Card that formed the basis of his federal charges.

He was convicted of that offense and sentenced to 48 months’ imprisonment in March.<sup>114</sup>

As the U.S. Attorney’s Office stated in announcing that conviction, “Diego Ibarra is likely affiliated with the Venezuelan gang Tren de Aragua (TdA), based on evidence including his multiple TdA tattoos and photos of him on social media making the TdA gang signs and wearing TdA clothing”.

As an aside, according to that press release:

*while in the custody of the U.S. Marshals Service and housed in the Butts County Detention Center, Ibarra caused “severe water damage” inside the jail when he damaged the fire sprinkler system in a jail cell block. On June 25, 2024, jail officers found Ibarra in possession of two improvised weapons: a sharpened sprinkler head with a make-shift grip and a pen wrapped in saran wrap.<sup>115</sup>*

#### IV. Border Security Under the Biden Administration

When President Biden took office, he inherited what his first Border Patrol chief, Rodney Scott, described in a September 2021 letter to Senate leadership as “arguably the most effective border security in” U.S. history.<sup>116</sup>

##### A. Border Policies Under Trump I

The new administration, Scott complained, allowed border security to quickly “disintegrate” as “inexperienced political appointees” ignored “common sense border security recommendations from experienced career professionals.”<sup>117</sup>

The security Scott described was the direct result of a series of border-related policies that had been implemented by the Trump administration, which were quickly reversed by the then-incoming administration.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1-2.

<sup>114</sup> *Three Venezuelans Sentenced to Prison for Possessing Fake Green Cards*. U.S. DEP’T OF JUSTICE, U.S. ATTY’S OFC., M.D. GA. (Mar. 19, 2025). Source: <https://www.justice.gov/usao-mdga/pr/three-venezuelans-sentenced-prison-possessing-fake-green-cards#:~:text=Diego%20Jose%20Ibarra%2C%20aka%20%E2%80%9CGocho,document%20on%20July%2015%2C%202024..>

<sup>115</sup> *Id.*

<sup>116</sup> *Letter from Rodney S. Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman* (Sep. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Secuirty%20Concerns%20-%20Rodney%20Scott.pdf>.

<sup>117</sup> *Id.*

The most notable Trump border security program — and arguably the most effective — was the Migrant Protection Protocols (MPP)<sup>118</sup>, better known as “Remain in Mexico”.

MPP was first implemented by then-DHS Secretary Kirstjen Nielsen in January 2019<sup>119</sup>, and it allowed DHS to return certain “other than Mexican” (OTM) migrants who entered illegally or without proper documents at the Southwest border back to Mexico to await removal hearings.<sup>120</sup>

Remain in Mexico was premised on DHS’s authority in section 235(b)(2)(C) of the INA<sup>121</sup> to return inadmissible applicants for admission who had crossed a land border back pending removal proceedings. Aliens subject to MPP were thereafter paroled into the United States to apply for asylum at port courts<sup>122</sup>, while the Mexican government agreed to provide them with protection for the duration of their stays in that country.

MPP was expanded from a pilot site in San Ysidro, Calif.<sup>123</sup> in late January 2019, to Calexico, Calif.<sup>124</sup>, and El Paso, Tex.<sup>125</sup> in March of that year, and then in July 2019<sup>126</sup> to Laredo and Brownsville (both in Texas) before finally it was expanded to the Arizona border town of Nogales<sup>127</sup> in the late fall.

When it was fully implemented, nearly 70,000 migrants<sup>128</sup> were sent back across the Southwest border to await their removal hearings under MPP.

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<sup>118</sup> See *Migrant Protection Protocols*. U.S. DEP’T OF HOMELAND SECURITY (Jan. 24, 2019). Source: [https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20\(MPP,of%20their%20immigration%20proceedings%2C%20w here.](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols#:~:text=The%20Migrant%20Protection%20Protocols%20(MPP,of%20their%20immigration%20proceedings%2C%20w here.)

<sup>119</sup> *Id.*

<sup>120</sup> Arthur, Andrew. *Why Trump’s Border Security Didn’t Last, Part 3*. CENTER FOR IMMIGRATION STUDIES (Jul. 17, 2023). Source: <https://cis.org/Arthur/Why-Trumps-Border-Security-Didnt-Last-Part-3>.

<sup>121</sup> See section 235(b)(2)(C) of the INA (2024) (“Treatment of aliens arriving from contiguous territory. In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section” 240 of the INA. Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

<sup>122</sup> Arthur, Andrew. *Tent Courts Aren’t Tents — and Provide Due Process. Inside the Laredo MPP hearing facility, and then the view from the other side*. CENTER FOR IMMIGRATION STUDIES (Feb. 4, 2020). Source: <https://cis.org/Arthur/Tent-Courts-Arent-Tents-and-Provide-Due-Process>.

<sup>123</sup> Averbuch, Maya and Sieff, Kevin. *Asylum seeker is sent back to Mexico as Trump administration rolls out new policy*. WASHINGTON POST (Jan. 29, 2019). Source: [https://www.washingtonpost.com/world/the\\_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084\\_story.html](https://www.washingtonpost.com/world/the_americas/asylum-seekers-are-being-sent-back-to-mexico-as-trump-administration-rolls-out-new-policy/2019/01/29/a0a89e9c-233b-11e9-b5b4-1d18dfb7b084_story.html).

<sup>124</sup> Rose, Joel. *‘Remain In Mexico’ Immigration Policy Expands, But Slowly*. NPR (Mar. 12, 2019). Source: <https://www.npr.org/2019/03/12/702597006/-remain-in-mexico-immigration-policy-expands-but-slowly>.

<sup>125</sup> Montes, Aaron. *El Paso begins Trump policy that sends migrant asylum seekers back to Mexico*. EL PASO TIMES (Mar. 16, 2019). Source: <https://www.elpasotimes.com/story/news/immigration/2019/03/16/trump-immigration-metering-policy-migrant-protection-protocols-implemented-el-paso-juarez/3177682002/>.

<sup>126</sup> Roldan, Riane. *Asylum seekers will appear before judges via teleconferencing in tents as “Remain in Mexico” program expands to Laredo*. TEXAS TRIBUNE (Jul. 9, 2019). Source: <https://www.texastribune.org/2019/07/09/remain-mexico-program-expands-laredo-texas/>.

<sup>127</sup> Prendergast, Curt. *‘Remain in Mexico’ program begins in Nogales*. TUCSON.COM (Dec. 17, 2019). Source: [https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article\\_95f757ac-1851-11ea-b29e-47f1d679e3d8.html](https://tucson.com/news/local/remain-in-mexico-program-begins-in-nogales/article_95f757ac-1851-11ea-b29e-47f1d679e3d8.html).

<sup>128</sup> *Fact Sheet: The “Migrant Protection Protocols”*. AMERICAN IMMIGRATION COUNCIL (Jan. 7, 2022). Source: <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

In its October 2019 assessment<sup>129</sup> of the program, DHS lauded MPP as “an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system”, particularly as related to alien families. Asylum cases were expedited under the program, and MPP removed incentives for aliens to make weak or bogus protection claims when apprehended.<sup>130</sup>

DHS’s assessment of the program aside, the impact of MPP is clear from CBP’s own statistics. In May 2019<sup>131</sup>, before MPP was fully implemented, Border Patrol agents at the Southwest border apprehended nearly 133,000 illegal entrants, 63.6 percent of whom (nearly 84,500) were adult aliens travelling with children in family units<sup>132</sup> (FMUs).

Four months later, in September 2019, apprehensions dropped to less than 41,000, fewer than 40 percent (15,824) of them in FMUs<sup>133</sup>. That’s a four-month overall decline of just less than 70 percent, and an 81 percent decline in family apprehensions over that period.

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

As a bipartisan federal panel<sup>134</sup> tasked with examining a then-massive surge in family entries in FY 2018 and FY 2019<sup>135</sup> determined in an April 2019 report<sup>136</sup>:

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

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<sup>129</sup> *Assessment of the Migrant Protection Protocols (MPP)*. U.S. DEP’T OF HOMELAND SECURITY (October 28, 2019). Source: [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf).

<sup>130</sup> *See id.*

<sup>131</sup> *Southwest Border Migration FY 2019*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See Arthur, Andrew. *2019 Bipartisan Border Plan Would Solve Today's Migrant Crisis, Tell Biden, Mayorkas, and Congress: 'Read the damn report!'*. CENTER FOR IMMIGRATION STUDIES (Mar. 16, 2021) (“Karen Tandy, the chairwoman, was originally appointed to that position by Jeh Johnson, the last DHS secretary under the Obama/Biden administration. Jim Jones, chairman of Monarch Global Strategies, was initially appointed to the panel by the first Obama/Biden DHS Secretary Janet Napolitano. And Leon Fresco was a principal advisor to Sen. Chuck Schumer (D-N.Y.) when Schumer was chairman of the Senate Judiciary Subcommittee on Immigration. After that, he was deputy assistant attorney general for the Office of Immigration Litigation. In that role, he was the Obama/Biden administration’s immigration lawyer at the Justice Department.”). Source: <https://cis.org/Arthur/2019-Bipartisan-Border-Plan-Would-Solve-Todays-Migrant-Crisis>.

<sup>135</sup> See *Total Family Unit Apprehensions By Month - FY 2018* and *Total Family Unit Apprehensions By Month - FY 2019*. U.S. Border Patrol (undated) (107,212 FMU Border Patrol Southwest border apprehensions in FY 2018 and 473,682 FMU Border Patrol Southwest border apprehensions in FY 2019). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf).

<sup>136</sup> *Final Emergency Interim Report, CBP Families and Children Care Panel*. U.S. DEP’T OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY COUNCIL (Apr. 16, 2019), at 6. Source: [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf).

*that many migrants are robbed, and that they and their child are held hostage and extorted for money.*

.....

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

With respect to minors, the panel report explained: “In too many cases, children are being used as pawns by adult migrants and criminal smuggling organizations solely to gain entry into the United States. . . .”<sup>137</sup>

Apprehensions kept falling thereafter even prior to the implementation of Title 42 in March 2020<sup>138</sup>, to fewer than 30,000 in January 2020<sup>139</sup> (fewer than 5,200 in family units, 17.6 percent of the total), before rising slightly to just over 30,000 the next month (just 15.3 percent in FMUs).

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

Using his foreign policy power, Trump in his first term negotiated safe third country “Asylum Cooperative Agreements” (“ACAs”) with El Salvador, Guatemala, and Honduras<sup>140</sup>.

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

While the ACAs with El Salvador and Honduras weren’t implemented before the Covid-19 pandemic was announced in March 2020 (they came into force in December<sup>141</sup> of that year), the United States did send more than 900 third-country nationals to Guatemala<sup>142</sup> prior to the pandemic, most of them from El Salvador and Honduras.

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<sup>137</sup> *Id.* at 1.

<sup>138</sup> Arthur, Andrew. *SCOTUS Keeps Title 42 Going — For Now*. CENTER FOR IMMIGRATION STUDIES (Dec. 28, 2022). Source: <https://cis.org/Arthur/SCOTUS-Keeps-Title-42-Going-Now>.

<sup>139</sup> *Southwest Border Migration FY 2020*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sept. 19, 2023). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>.

<sup>140</sup> *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*. U.S. DEP’T OF HOMELAND SECURITY (undated). Source: [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).

<sup>141</sup> *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, U.S. Dep’t of Homeland Security (Dec. 29, 2020). Source: <https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation>.

<sup>142</sup> Sieff, Kevin and Sheridan, Mary Beth. *The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says*, WASHINGTON POST (Jan. 16, 2021). Source:

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

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

As AP explained in December 2019<sup>143</sup>, Trump “threatened crippling tariffs on all Mexican goods unless Mexico stepped up efforts to curb the flow of migrants. Mexico responded by deploying thousands of members of its newly formed National Guard along migration routes.” Illegal migrants can’t cross the Southwest border if they are unable to get there, and due to the pressure that the Mexican government imposed, many couldn’t.

## B. Biden Reverses the Trump Border Policies

Notably, while Joe Biden had campaigned on reversing Trump’s border policies (including and especially MPP), as president-elect he explained he would end those policies “at a slower pace than he initially promised, to avoid winding up with ‘2 million people on our border’, and only after “‘setting up the guardrails’ to find a solution to the immigration issue”.<sup>144</sup>

Despite that promise, once in office, Biden quickly ended nearly all the Trump policies that had created the border security that Scott described in the first place: Prompt Asylum Case Review (PACR<sup>145</sup>), for aliens from Central America; and Humanitarian Asylum Review Program (HARP), for Mexican nationals were ended by executive order on February 2, 2021<sup>146</sup>; the then-Secretary of State announced<sup>147</sup> — “[i]n line with the President’s vision” — that the Biden administration was suspending and terminating the ACAs four days later; and DHS suspended new enrollments in MPP hours after Biden’s inauguration<sup>148</sup>.

## C. The End of Deterrence as a Border Policy

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

<sup>143</sup> *What crackdown? Migrant smuggling business adapts, thrives*. ASSOCIATED PRESS (Dec. 19, 2019). Source: <https://apnews.com/article/us-news-ap-top-news-international-news-az-state-wire-immigration-202a751ac3873a802b5da8c04c69f2fd>.

<sup>144</sup> Miroff, Nick, and Sacchetti, Maria. *Biden says he’ll reverse Trump immigration policies but wants ‘guardrails’ first*. WASHINGTON POST (Dec. 22, 2020). Source: [https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16\\_story.html](https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html).

<sup>145</sup> Montoya-Galvez, Camilo. *Program to expedite deportations of asylum-seekers at border expands*. CBS News (Dec. 31, 2019). Source: <https://www.cbsnews.com/news/immigration-program-expediting-deportations-of-asylum-seekers-at-border-expands/>.

<sup>146</sup> *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. 86 Fed. Reg. 8267 (Feb. 2, 2021). Source: <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

<sup>147</sup> Blinken, Anthony J. *Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras*. U.S. DEP’T OF STATE (Feb. 6, 2021). Source: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.

<sup>148</sup> *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*. U.S. Dep’t of Homeland Security (Jan. 20, 2021). Source: <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

President Biden did not simply reverse Trump-era border security policies, however. In a break from every one of its predecessors, for most of the Biden administration, DHS largely rejected any action that would deter illegal entrants as a border policy.

Nowhere is this shift better demonstrated than in an exchange between DHS Secretary Alejandro Mayorkas and Bret Baier, on the May 1, 2022, edition of “Fox News Sunday”.<sup>149</sup> Baier asked Mayorkas: “Is it the objective of the Biden administration to reduce, sharply reduce, the total number of illegal immigrants coming across the southern border? Is that the objective?”<sup>150</sup>

To which Mayorkas replied: “It is the objective of the Biden administration to make sure that we have safe, legal, and legal pathways to individuals to be able to access our legal system.”<sup>151</sup>

By “access our legal system”, Mayorkas meant to “apply for asylum”, and in fact the Biden administration treated most illegal entrants as “asylum seekers”, regardless of the strength of their claims or even whether they come seeking asylum at all.<sup>152</sup>

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

Illegal entry is both a civil violation (subjecting the offender to removal) and a criminal offense, punishable as a misdemeanor carrying a sentence of up to six-months and a fine for the first offense and a felony subject to up to two years’ imprisonment and a fine for subsequent offenses under section 275 of the INA.<sup>153</sup>

Criminal prosecutions under this provision peaked in 2018 and 2019 under Trump and then plummeted with the onset of the Covid-19 pandemic, which reduced detention space.<sup>154</sup> Even as illegal entries surged under the Biden administration and pandemic-related restrictions on detention eased, however, the number of prosecutions for improper entry have remained low.<sup>155</sup>

According to DOJ’s Prosecuting Immigration Crimes Report (PICR)<sup>156</sup>, in the first nine months of FY 2024, 4,718 defendants were referred to federal magistrate courts and 2,667 were referred to federal district courts for prosecution under section 275 of the INA, 7,385 referrals in total.

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<sup>149</sup> *Sec. Mayorkas: 'I'm looking forward to testifying before the US Senate'*. Fox News (May 1, 2022). Source: <https://www.foxnews.com/video/6305481541112>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Arthur, Andrew. *Biden’s Plan to Enable Everyone in the World to Apply for Asylum in the U.S.* CENTER FOR IMMIGRATION STUDIES (May 11, 2022). Source: <https://cis.org/Arthur/Bidens-Plan-Enable-Everyone-World-Apply-Asylum-US>.

<sup>153</sup> Sec. 275(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1325&num=0&edition=prelim#:~:text=Any%20individual%20who%20knowingly%20establishes,%2C%20%A7275%2C%2066%20Stat.>

<sup>154</sup> *Major Swings in Immigration Criminal Prosecutions during Trump Administration*. TRAC IMMIGRATION (Dec. 18, 2020). Source: <https://trac.syr.edu/immigration/reports/633/>.

<sup>155</sup> *Criminal Immigration Referrals Up from the Border Patrol*. TRAC IMMIGRATION (Jul. 7, 2022). Source: <https://trac.syr.edu/immigration/reports/688/>.

<sup>156</sup> *Prosecuting Immigration Crimes Report (PICR)*. U.S. DEP’T OF JUSTICE (updated Jul. 9, 2024). Source: <https://www.justice.gov/usao/resources/PICReport>.

During that period, however, Border Patrol agents apprehended nearly 1.381 million illegal entrants<sup>157</sup>, meaning the referral rate for migrants who had improperly entered was just over .5 percent.

#### D. Southwest Border Releases Under the Biden Administration

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

Border Patrol agents at the Southwest border set new yearly records for migrant apprehensions the Biden-Harris administration, first in FY 2021, as agents apprehended nearly 1.66 million illegal migrants<sup>158</sup>, and again in FY 2022, as apprehensions exceeded 2.2 million.<sup>159</sup>

Despite that historically unprecedented surge in illegal migrants, however, the administration asked Congress to cut the number of funded beds DHS has available for immigration detainees, from 34,000 per day to 25,000 (a 26.5 percent reduction), in its FY 2024 budget request.<sup>160</sup>

While the administration’s FY 2025 budget request<sup>161</sup> left the number of daily ICE detention beds static at 34,000, there were still too few available to comply with congressional mandates.

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

The Center has conservatively estimated<sup>162</sup> that DHS under the Biden administration released roughly 88.5 percent of all inadmissible applicants for admission encountered by CBP through the end of November 2023 who weren’t expelled under Title 42.

It should be noted that this figure includes more than 400,000 unaccompanied alien children (UACs) from “non-contiguous countries” (that is, every foreign country except Mexico and Canada) apprehended by Border Patrol at the Southwest border since February 2021.<sup>163</sup>

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<sup>157</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

<sup>158</sup> Arthur, Andrew. *All-Time Record for Southwest Border Apprehensions in FY 2021*. CENTER FOR IMMIGRATION STUDIES (Oct. 22, 2021). Source: <https://cis.org/Arthur/AllTime-Record-Southwest-Border-Apprehensions-FY-2021>.

<sup>159</sup> ARTHUR, Andrew. *Late Night CBP ‘News Dump’ Reveals the Border’s in Freefall*. CENTER FOR IMMIGRATION STUDIES (Oct. 24, 2022). Source: <https://cis.org/Arthur/Late-Night-CBP-News-Dump-Reveals-Borders-Freefall>.

<sup>160</sup> See *U.S. Immigration and Customs Enforcement, Budget Overview*. U.S. DEP’T OF HOMELAND SECURITY (Mar. 2023), at 18 (“This program change reduces average daily population (ADP) by 9,000, from an ADP of 34,000 in the FY 2023 Enacted to an ADP of 25,000 (including 1,000 beds funded via fees).”). Source: [https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2023-03/U.S.%20IMMIGRATION%20AND%20CUSTOMS%20ENFORCEMENT_Remediated.pdf).

<sup>161</sup> *FY 2025, Budget in Brief*. U.S. DEP’T OF HOMELAND SECURITY (undated), at 3. Source: [https://www.dhs.gov/sites/default/files/2024-03/2024\\_0311\\_fy\\_2025\\_budget\\_in\\_brief.pdf](https://www.dhs.gov/sites/default/files/2024-03/2024_0311_fy_2025_budget_in_brief.pdf).

<sup>162</sup> *Have 70 Percent — or 85 Percent — of Illegal Migrants Been Released Under Biden? Likely more. DHS Secretary Mayorkas ‘knows the data’ — and so do the smugglers*. CENTER FOR IMMIGRATION STUDIES (Jan. 12, 2024). Source: <https://cis.org/Arthur/Have-70-Percent-or-85-Percent-Illegal-Migrants-Been-Released-Under-Biden>.

<sup>163</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

Under section 235 of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>164</sup>, DHS must transfer UACs from non-contiguous countries to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS) within 72 hours of encountering them, for placement with “sponsors” in the United States.

If those children were all in the same school district, it would be the third largest in the United States<sup>165</sup>, ahead of the Chicago school district--which has more than 378,000 students-- in terms of enrollment. And that figure does not include children who entered in “family units”.

On October 5, Reuters reported that more than 500,000 “school-age migrant children have arrived in the U.S. since 2022”, an ambiguous figure that does include children in FMUs.<sup>166</sup>

By my estimation<sup>167</sup>, between UACs and children in FMUs, somewhere between 700,000 and more than 1 million school-aged migrant children have entered illegally in the last three fiscal years and been released into the United States.

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

Initially, Border Patrol under the Biden administration released many of the aliens who were not expelled under Title 42 with “Notices to Report” (NTRs), documents directing those migrants to appear at an ICE office near their intended destinations in the United States within 60 days, at which time they would be served with a “Notice to Appear” (NTA), the charging document in removal proceedings.<sup>168</sup>

Not only were releases of illegal entrants without an NTA and a hearing date “unprecedented”<sup>169</sup>, releasing aliens on NTRs isn’t sanctioned by the INA. Not surprisingly, many of those migrants released with NTRs failed to later appear.<sup>170</sup> By October 2021, DHS had phased out NTR releases<sup>171</sup>, by which point<sup>172</sup> it had released 95,598 border migrants with Notices to Report.

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

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<sup>164</sup> Sec. 235, Pub. L. 110-457 (2008). Source: <https://www.congress.gov/bill/110th-congress/house-bill/7311/text>.

<sup>165</sup> *Top 10 Largest School Districts by Enrollment and Per Pupil Current Spending*. U.S. CENSUS BUREAU (revised Oct. 28, 2021). Source: <https://www.census.gov/library/visualizations/2019/comm/largest-school-districts.html>.

<sup>166</sup> Hesson, Ted, Cooke, Kristina, and Pell, M.B. *An American education: Classrooms reshaped by record migrant arrivals*. REUTERS (Oct. 5, 2024). Source: <https://www.reuters.com/investigations/an-american-education-classrooms-reshaped-by-record-migrant-arrivals-2024-10-05/>.

<sup>167</sup> Arthur, Andrew. *Reuters: 500K+ School-Age Migrant Children Have Arrived Since 2022, The real number is likely a few hundred thousand more, so expect your taxes to rise*. CENTER FOR IMMIGRATION STUDIES (Oct. 15, 2024). Source: <https://cis.org/Arthur/Reuters-500K-SchoolAge-Migrant-Children-Have-Arrived-2022>.

<sup>168</sup> Kight, Stef. *Scoop: 50,000 migrants released; few report to ICE*. AXIOS (Jul. 27, 2021). Source: <https://www.axios.com/2021/07/27/migrant-release-no-court-date-ice-dhs-immigration>.

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

<sup>170</sup> Arthur, Andrew. *Sen. Ron Johnson Releases Explosive Information on Migrant No-Shows*. CENTER FOR IMMIGRATION STUDIES (Jan. 12, 2022). Source: <https://cis.org/Arthur/Sen-Ron-Johnson-Releases-Explosive-Information-Migrant-NoShows>.

<sup>171</sup> Alvarez, Priscilla. *DHS stops releasing some migrants without providing immigration court dates*. CNN (Nov. 16, 2021). Source: <https://www.cnn.com/2021/11/16/politics/dhs-migrants-paperwork-ice-notice-to-appear/index.html>.

<sup>172</sup> *See Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

Starting in October 2021, the administration released border migrants encountered by CBP either on their own recognizance under section 236(a) of the INA<sup>173</sup> with “Notices to Appear”<sup>174</sup> (“NTAs”, the DHS charging documents placing aliens into removal proceedings)— a policy referred to as “NTA/OR” -- or alternatively on parole.

Agents began releasing illegal entrants at the Southwest border on NTA/OR on President Biden’s first day in office (January 20, 2021), and by the end of FY 2021, had released more than 154,000 of them in this manner.<sup>175</sup>

Border Patrol agents at the Southwest border only started releasing illegal entrants on parole in August 2021<sup>176</sup>, but had granted parole to more than 25,000 apprehended migrants there by the end of FY 2021.

In FY 2022, more than 378,000 illegal migrants apprehended by Border Patrol at the Southwest border were paroled into the United States, while nearly 311,000 others were released on NTA/OR.<sup>177</sup>

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<sup>173</sup> See sec. 236(a) of the INA (2025) (“Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—(1) may continue to detain the arrested alien; and (2) may release the alien on— (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole; but (3) may not provide the alien with work authorization (including an ‘employment authorized’ endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.”). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>174</sup> See sec. 239(a)(1) of the INA (2025) (“Initiation of removal proceedings. (a) Notice to appear. (1) In general. In removal proceedings under [section 240 of the INA], written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated. (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection [239(b)(2) of the INA]. (F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under [section 240 of the INA]. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien’s address or telephone number. (iii) The consequences under [section 240(b)(5) of the INA] of failure to provide address and telephone information pursuant to this subparagraph. (G)(i) The time and place at which the proceedings will be held. (ii) The consequences under [section 240(b)(5) of the INA] of the failure, except under exceptional circumstances, to appear at such proceedings.”). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1229%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1229%20edition:prelim)).

<sup>175</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>176</sup> See *Texas v. Biden*, No. 2:21-cv-00067-Z, Defendants’ Monthly Report for November 2021 Plus Reporting Data Beginning January 2021, Exhibit A (N.D. Tex. Dec. 15, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.119.0.pdf>.

<sup>177</sup> *Custody and Transfer Statistics FY2022, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2022). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>.

In FY 2023, Border Patrol agents paroled nearly 304,000 illegal migrants they apprehended at the Southwest border into the United States, and more than more than 793,000 others were released on their own recognizance with NTAs.<sup>178</sup>

While Border Patrol releases declined after DHS issued an interim final rule captioned “Securing the Border” on June 7, 2024<sup>179</sup>, agents still released more than 861,000 migrants apprehended at the Southwest border on NTA/OR in FY 2024<sup>180</sup>, a figure that does not include aliens transferred to ICE who were subsequently released by that agency.

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

Although CBP under the Biden administration released hundreds of thousands of inadmissible applicants for admission under section 236(a) of the INA<sup>181</sup>, that provision provides CBP no authority to release border migrants.

By its express terms, that section gives DHS officers authority to arrest aliens on warrants.<sup>182</sup> After arrest, as noted *supra*, DHS can continue to detain such aliens or to release them on bond or conditional parole.<sup>183</sup>

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

Congress gave Border Patrol agents the authority to make such warrantless arrests in section 287(a)(2) of the INA<sup>184</sup>. It states, in pertinent part:

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

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

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<sup>178</sup> *Custody and Transfer Statistics FY2023, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Dec. 19, 2023). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>179</sup> *Securing the Border*, 89 Fed. Reg. 48710-772 (Jun. 7, 2024). Source: <https://www.govinfo.gov/content/pkg/FR-2024-06-07/pdf/2024-12435.pdf>.

<sup>180</sup> *Custody and Transfer Statistics FY2024, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Aug. 16, 2024). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>181</sup> Sec. 236(a) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Sec. 287(a)(2) of the INA (2025). Source: [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1357%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1357%20edition:prelim)).

section 236(a) of the INA. Or, as one district court judge held<sup>185</sup> in March: “This sleight of hand — using an ‘arrest’ warrant as de facto ‘release’ warrant — is administrative sophistry at its worst.”

*Biden Administration’s Parole Releases at the Border*

Nor is there any authority for CBP to release hundreds of thousands of border migrants on parole<sup>186</sup>, either.

By way of background, the Biden administration implemented two separate formal programs under which Border Patrol agents were directed to parole illegal entrants: “Parole+ATD” (parole under section 212(d)(5)(A)(1) of the INA plus so-called “alternatives to detention”<sup>187</sup>); and “Parole with Conditions” (PWC).

Parole+ATD came to light in a suit<sup>188</sup> filed by the state of Florida in September 2021 captioned *Florida v. U.S. (Florida I)*. The state alleged<sup>189</sup> the administration was deliberately “ignoring” the congressional detention mandate in section 235(b) of the INA by releasing migrants whom agents had apprehended at the border, directly resulting in fiscal harm to the state.

More than a year of discovery uncovered a November 2, 2021, memo<sup>190</sup> from then-Border Patrol Chief Raul Ortiz formally adopting Parole+ATD releases (although, as the court eventually found, the record established that Border Patrol “started using ‘parole’ as a means of improving ‘processing efficiencies’” that July)<sup>191</sup>.

That November 2021 memo applied this parole policy only to aliens in family units, justifying its use on a “need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities”<sup>192</sup>. Parole+ATD then also only applied in the Border Patrol’s Rio Grande Valley and Del Rio sectors, but the memo noted it could be extended to reduce crowding in CBP facilities elsewhere.

The court in *Florida I* explained that the November memo “concluded by stating that ‘when COVID-19 conditions eventually improve, it is expected that there will no longer be a need for this alternative pathway’”.<sup>193</sup>

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<sup>185</sup> *Florida v. U.S.*, 3:21-cv-01066-TKW-ZCB, Opinion and Order, at 84 (N.D. Fla. Mar. 8, 2023) (Wetherell, J.). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf). See also “*Florida I*”, *supra*.

<sup>186</sup> See *infra*.

<sup>187</sup> See *Alternatives to Detention*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Jun. 24, 2024). Source: <https://www.ice.gov/features/atd>.

<sup>188</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Complaint for Declaratory and Injunctive Relief (N.D. Fla. Sep. 28, 2021). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.1.0.pdf>.

<sup>189</sup> See *id.* at 2.

<sup>190</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 25-26 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 28-29.

<sup>193</sup> *Id.*

Even though the administration announced in April 2022<sup>194</sup> it would be ending Covid-19-related Title 42 expulsion orders in late May 2022, the Parole+ATD “pathway” remained.<sup>195</sup> In fact, the policy “was effectively reauthorized in a July 18, 2022, memorandum jointly issued by CBP and ICE titled ‘Policy on the Use of Parole Plus Alternatives to Detention to Decompress Border Locations’”<sup>196</sup>.

There were a number of problems with Parole+ATD, not the least of that it created a massive backlog for ICE officers in locating paroled aliens and issuing NTAs to those released under that program and with NTRs.<sup>197</sup>

As NBC News reported in February 2023<sup>198</sup>:

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

How long would migrants have to wait for their NTAs? According to the New York Post<sup>199</sup>, by the middle of March 2023, the New York City ICE office was “fully booked” for migrant call-in appointments through October 2032.

U.S. District Court Judge T. Kent Wetherell II, assigned to hear the state’s claims in *Florida I*, concluded in his March 8, 2023, order<sup>200</sup> vacating Parole+ATD that this policy was “contrary to law in three ways”:

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

*Florida II*

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<sup>194</sup> See Arthur, Andrew. *Title 42 Reportedly to End May 23*. CENTER FOR IMMIGRATION STUDIES (Mar. 31, 2022). Source: <https://cis.org/Arthur/Title-42-Reportedly-End-May-23>.

<sup>195</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 29-30 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

<sup>196</sup> *Id.* at 30.

<sup>197</sup> See *id.* at 34 (“ICE officials estimated that it would take nearly 3 years (and \$25 million) to clear the ‘backlog’ and issue NTAs to these 110,000 aliens if the Parole+ATD policy was stopped at that point. For every 30 days that the policy continued in place, approximately an additional year and \$8 million were added to the time and cost of clearing the backlog.”).

<sup>198</sup> Ainsley, Julia. *Nearly 600,000 migrants who crossed the border since March 2021 were released in the U.S. with no immigration court dates*. NBC News (Feb. 3, 2023). Source: <https://www.nbcnews.com/politics/immigration/nearly-600000-migrants-crossed-border-released-inside-us-rcna68687>.

<sup>199</sup> Nelson, Steven. *NYC ICE office ‘fully booked’ for migrant appointments through late 2032: document*. New York Post (Mar. 13, 2023). Source: <https://nypost.com/2023/03/13/nyc-ice-office-fully-booked-for-migrant-appointments-through-late-2032/>.

<sup>200</sup> *Florida v. U.S.*, No. 3:21-cv-01066-TKW-EMT, Opinion and Order, at 88 (N.D. Fla. Mar. 8, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.157.0_1.pdf).

On these and other bases, Judge Wetherell vacated DHS’s Parole+ATD policy.<sup>201</sup>

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

That day, Chief Ortiz issued a memo<sup>202</sup> directing agents to implement a new policy, “Parole with Conditions” (PWC), purportedly to reduce overcrowding at Border Patrol processing facilities.

Under PWC, Border Patrol was again directed to release aliens in its custody on parole without issuing them NTAs and court dates, or as that memo put it “in advance of the issuance of an NTA”.<sup>203</sup>

That policy sent the state of Florida back to court on May 10, 2023, to halt PWC parole releases, in a case captioned *Florida v. Mayorkas*<sup>204</sup> (*Florida II*).

Based on what little information it had about that policy (the memo hadn’t been publicly released yet), the state argued in its complaint<sup>205</sup> that the latest policy “may violate” the court’s March 8 vacatur of Parole+ATD in *Florida I*.

The state of Florida continued<sup>206</sup>, however, noting: “But it is unquestionably cynical, in bad faith, and contrary to both the [INA] and the [Administrative Procedure Act, ‘APA’]. It is also, unfortunately, consistent with the game of whack-a-mole DHS has been playing with Florida and this court for almost two years.”

On these grounds, the state asked the district court for a temporary restraining order (TRO) to stop PWC releases.<sup>207</sup>

Judge Wetherell was also assigned *Florida II*, and he concluded on May 11, 2023, that a TRO was in order<sup>208</sup> given:

*the challenged policy appears to be materially indistinguishable from the Parole+ATD policy vacated in [Florida I] — both in its purpose (reducing overcrowding at border patrol facilities) and manner of operation (releasing aliens into the country without first issuing a charging document placing them in*

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<sup>201</sup> *Id.* at 108-109. See also Arthur, Andrew. *Federal Judge Vacates Biden’s ‘Parole+ATD’ Border Release Policy*. CENTER FOR IMMIGRATION STUDIES (Mar. 10, 2023). Source: <https://cis.org/Arthur/Federal-Judge-Vacates-Bidens-ParoleATD-Border-Release-Policy>.

<sup>202</sup> Taer, Jennie. *EXCLUSIVE: Here Are The Docs Instructing Border Patrol To Release Waves Of Migrants Into The Country*. Daily Caller (May 11, 2023). Source: <https://dailycaller.com/2023/05/11/border-patrol-docs-migrants-title-42/>.

<sup>203</sup> *Id.*

<sup>204</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Relief (N.D. Fla. May 10, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.1.0.pdf>.

<sup>205</sup> *Id.* at 1.

<sup>206</sup> *Id.* at 1-2.

<sup>207</sup> *Id.* at 7-8.

<sup>208</sup> *Florida v. Mayorkas*, No. 3:23-cv-09962-TKW-ZCB, Temporary Restraining Order, at 8 (N.D. Fla. May 10, 2023). Source: [https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flnd.464923/gov.uscourts.flnd.464923.10.0_2.pdf).

*immigration proceedings and simply directing the aliens to report to ICE within a specified period for further processing).*

The administration sought a stay of the orders in *Florida I* and *Florida II*, which was denied<sup>209</sup> by the U.S. Court of Appeals for the Eleventh Circuit on June 5, 2023.

On February 13, 2024, the circuit court remanded<sup>210</sup> those cases back to Judge Wetherell for limited further consideration of whether he had jurisdiction to consider the state's claims in light of the Supreme Court's decision in *U.S. v. Texas*<sup>211</sup>

A week later, Judge Wetherell issued an order<sup>212</sup> concluding jurisdiction was proper.

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

The Southwest border experienced the largest influx of irregular migration in the nation's history under the Biden administration.<sup>213</sup> CBP encountered more than 8.8 million inadmissible applicants for admission at the Southwest border between February 2021 and February 2025, 7.5 million-plus apprehended by Border Patrol agents after illegal entry and more than 1.32 million applicants for admission deemed inadmissible by CBP officers at the Southwest border ports.<sup>214</sup>

Fewer than 2.453 million of those encounters resulted in expulsion<sup>215</sup> under orders<sup>216</sup> issued by the Centers for Disease Control (CDC) pursuant to Title 42 of the U.S. Code<sup>217</sup> in response to the Covid-19 pandemic.

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<sup>209</sup> *Florida v. U.S.*, No. 23-11528, Order of the Court, (11<sup>th</sup> Cir. Jun. 5, 2023). Source:

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

<sup>210</sup> *Florida v. U.S.*, No. 23-11528, Order of the Court (11<sup>th</sup> Cir. Feb. 13, 2024). Source: <https://clearinghouse-umich-production.s3.amazonaws.com/media/doc/146127.pdf>.

<sup>211</sup> *U.S. v. Texas*, 599 U.S. 670 (2023). Source: <https://supreme.justia.com/cases/federal/us/599/22-58/>.

<sup>212</sup> *Florida v. U.S.*, Case 3:21-cv-01066-TKW-ZCB, Corrected Order Regarding Jurisdiction (N.D. Fla. Feb. 20, 2024). Source: <https://storage.courtlistener.com/recap/gov.uscourts.flnd.405819/gov.uscourts.flnd.405819.180.0.pdf>.

<sup>213</sup> *Compare Southwest Border Sectors, Total Encounters By Fiscal Year*. U.S. BORDER PATROL (undated) (covering FY 1960 to FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF>. and *Southwest Border Migration FY 2020*. U.S. CUSTOMS AND BORDER PROTECTION (modified Sept. 19, 2023). Source:

<https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>. with *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025) (covering FY 2022 to present). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>214</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

<sup>215</sup> *Id.*

<sup>216</sup> *See, e.g., Order Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists*. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 20, 2020). Source:

[https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf).

<sup>217</sup> *See id.*; 42 U.S.C. § 265 (2023) ("Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose."). Source:

[https://uscode.house.gov/view.xhtml?req=\(title:42%20section:265%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:42%20section:265%20edition:prelim)).

Conversely, between February 2021 and February 2025, more than 6 million inadmissible applicants for admission encountered at the Southwest border were processed for removal under the INA.<sup>218</sup> Not surprisingly, that massive surge in illegal migration has severely taxed CBP's limited resources, and the resources of the Border Patrol in particular.

At the end of FY 2020 (the last year for which staffing statistics<sup>219</sup> are available), there were fewer than 17,000 Border Patrol agents stationed along the 1,954-mile<sup>220</sup> Southwest border.

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

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

Under the last administration, migrants crossed the border illegally in groups consisting of hundreds of individuals<sup>221</sup>, an uncommon phenomenon in the past. Many if not most were so-called "give ups" (to contrast them with "got aways"<sup>222</sup>), that is aliens who entered illegally and waited for agents to arrive in the (legitimate) hope they will be processed and released.

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

That is especially true in the case of large numbers of aliens travelling in "family units" and where apprehensions involve UACs.

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

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<sup>218</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 17, 2024). Source: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021>.

<sup>219</sup> *See Border Patrol Agent Nationwide Staffing by Fiscal Year*. U.S. BORDER PATROL (undated) (16,878 agents on the Southwest border in FY 2020). Source: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf>.

<sup>220</sup> *Border Wall System*. U.S. CUSTOMS AND BORDER PROTECTION (undated). Source: <https://www.cbp.gov/node/293681/printable/print>.

<sup>221</sup> *See, e.g.,* Caralle, Katelyn. *The ticking border time bomb: 1,000 migrants in the largest caravan in HISTORY crosses the Rio Grande into El Paso - with huge numbers being released onto the streets and just nine days until Title 42 ends*. DAILY MAIL (Dec. 12, 2022). Source: <https://www.dailymail.co.uk/news/article-11529519/Largest-migrant-caravan-HISTORY-illegally-crosses-Rio-Grande-El-Paso.html>.

<sup>222</sup> *See infra*.

In FY 2022, Border Patrol agents set a record for UAC apprehensions at the Southwest border, encountering 149,000-plus UACs<sup>223</sup> who were travelling alone. That was nearly twice as many UACs as in FY 2019<sup>224</sup>, when agents apprehended just over 76,000 unaccompanied children at the Southwest border — a then-record.

As for family units, agents apprehended more than 482,000 adults and children travelling in FMUs in FY 2022<sup>225</sup>, more than the nearly 473,700 apprehended at the Southwest border in FY 2019<sup>226</sup> (a year in which more than 55 percent of Southwest border apprehensions involved aliens in FMUs).

FMU apprehensions rose even further in FY 2023, when agents caught more than 631,000 adults and children who had crossed the Southwest border together illegally<sup>227</sup>. In FY 2024<sup>228</sup>, there were more than 555,000 Border Patrol Southwest border FMU apprehensions.

The illicit crossing of large groups of migrants together—and in particular groups including significant numbers of aliens in family units and/or unaccompanied alien children—isn't mere happenstance, as Chief Scott explained<sup>229</sup>:

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

“Got Aways”

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

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<sup>223</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>224</sup> *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month - FY 2019*. U.S. BORDER PATROL (undated). Source: [https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf).

<sup>225</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>226</sup> *Southwest Border Migration FY 2019*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 14, 2019). Source: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>227</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>228</sup> *Id.*

<sup>229</sup> *Letter from Rodney Scott to Sens. Charles Schumer, Mitch McConnell, Gary Peters, and Rob Portman* (Sept. 11, 2021). Source: <https://justthenews.com/sites/default/files/2021-09/Honorable%20Rob%20Portman%20%20US%20Senate%20Security%20Concerns%20-%20Rodney%20Scott.pdf>.

Under the first years of the Biden administration, hundreds of illegal entrants per day evaded apprehension by overwhelmed Border Patrol agents and made their way successfully into the interior of the United States. Those aliens are defined in statute as “got aways”<sup>230</sup>.

Congress added that definition to the U.S. Code by section 1092 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017)<sup>231</sup>, under the header “Border Security Metrics”, which is now codified at 6 U.S.C. §223<sup>232</sup>.

Section 1092 of NDAA 2017<sup>233</sup> requires the DHS secretary to “develop metrics, informed by situational awareness, to measure the effectiveness of security between ports of entry”, and to provide an annual report on the results to the GAO and to the Senate Homeland Security and Governmental Affairs and House Homeland Security Committees.

DHS filed the last such report, for FY 2022<sup>234</sup>, in July 2023, but it only includes “detected got away” statistics from FY 2011 through the end of FY 2021.<sup>235</sup>

It reveals that during that 11-year period, got-ways at the Southwest border peaked in FY 2013 (171,051), and remained roughly static at just over 101,000 between FY 2015 and FY 2017 before jumping again in FY 2018 (127,944) and FY 2019 (150,090), then dipping again in FY 2020 (135,593), roughly coinciding with the implementation of MPP and Title 42.<sup>236</sup>

In FY 2021, however, CBP detected more than 389,000 got aways at the Southwest border, 128 percent more than the previous record set in FY 2013<sup>237</sup>.

Again, those are the last published got away numbers, but Fox News reported in May 2024 that there were an additional 606,131 known got aways in FY 2022, 670,674 in FY 2023, and more than 175,000 in FY 2024 as of the date of that report<sup>238</sup>. And those are just the got aways DHS is aware of.

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<sup>230</sup> See 6 U.S.C. § 223(a)(3) (2024) (“Got away. The term ‘got away’ means an unlawful border crosser who- (A) is directly or indirectly observed making an unlawful entry into the United States; (B) is not apprehended; and (C) is not a turn back.”). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>231</sup> Sec. 1092 of National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>232</sup> See 6 U.S.C. § 223(a)(3) (2024) Source:

<https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>233</sup> Sec. 1092 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>234</sup> *Department of Homeland Security Border Security Metrics Report: 2022*. U.S. DEP’T OF HOMELAND SECURITY (Jul. 3, 2023). Source: [https://ohss.dhs.gov/sites/default/files/2023-12/2023\\_0703\\_plcy\\_fiscal\\_year\\_2022\\_border\\_security\\_metrics\\_report\\_2021\\_data\\_0.pdf](https://ohss.dhs.gov/sites/default/files/2023-12/2023_0703_plcy_fiscal_year_2022_border_security_metrics_report_2021_data_0.pdf).

<sup>235</sup> See *id.* at 18.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Shaw, Adam and Melugin, Bill. *New data reveals Illegal immigrants eluding Border Patrol spiked under Biden, surpassing predecessors*. FOX NEWS (May 15, 2024). Source: <https://www.foxnews.com/politics/new-data-reveals-illegal-immigrants-eluding-border-patrol-spiked-under-biden-surpassing-predecessors>.

That’s roughly 1.8 to 1.9 million aliens who entered illegally under the Biden administration and evaded apprehension, largely free from any official constraint — more people than residents of Phoenix, Ariz.<sup>239</sup>, America’s fifth-largest city.

F. “Biden-Harris Administration Announces New Border Enforcement Actions”

The Biden administration implemented two programs to slow illegal entries by allowing inadmissible applicants to enter through the ports of entry, summarized in a January 5 White House “fact sheet”<sup>240</sup> captioned “Biden-Harris Administration Announces New Border Enforcement Actions”.

*The CBP One App Interview Policy*

According to that fact sheet:

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

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

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

Second, the CBP One app interview policy didn’t start “when Title 42 eventually lifted” (on May 11<sup>241</sup>); it was rolled out a week after that announcement on January 12, as CBP subsequently admitted<sup>242</sup>.

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<sup>239</sup> *QuickFacts. Phoenix city, Arizona; United States.* U.S. CENSUS BUREAU (undated). Source:

<https://www.census.gov/quickfacts/fact/table/phoenixcityarizona,philadelphiacitypennsylvania,US/BZA210222>.

<sup>240</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions.* WHITE HOUSE (Jan. 5, 2023). Source: <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions>.

<sup>241</sup> Krikorian, Mark and Bensman, Todd. *5/11: The End of Title 42.* CENTER FOR IMMIGRATION STUDIES (May 11, 2023). Source: <https://cis.org/Parsing-Immigration-Policy/511-End-Title-42>.

<sup>242</sup> *See CBP Releases May 2023 Monthly Operational Update.* U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) (“From January 12, when the scheduling function was introduced, until May 31, 2023, more than 106,000 individuals used the CBP One mobile application to schedule an appointment to present at a southwest border port of entry for inspection.”). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

That said, here's how it worked: Any foreign national (either a Mexican national or OTM) could download and access the CBP One mobile app, which, as DHS explained, "serves as a single portal to a variety of CBP services".

Mexican nationals anywhere in the country, and OTMs in central and northern Mexico or in the southernmost Mexican states of Tabasco and Chiapas (bordering Guatemala), could then use the app to schedule an "appointment" to present themselves for inspection under section 235 of the INA (or, as CBP has described it, "to be processed under Title 8"<sup>243</sup>, "Title 8" of the U.S. Code being the INA) at a Southwest border port.

By May 2023, DHS was making 1,000 CBP One app port appointment slots available daily, but on June 1, 2023<sup>244</sup>, the agency expanded that to 1,250 daily appointment slots. Later that month<sup>245</sup>, the number of CBP One port interview slots was expanded further, to 1,450 per day—or 529,000-plus per year.

After CBP announced in August 2024 it would be extending CBP One appointment coverage to the two Mexican states bordering Guatemala, the Mexican National Institute of Migration (INM), declared<sup>246</sup> it would be launching a "safe mobility corridor" for OTMs travelling into the country from the south, one at Villahermosa in Tabasco and the other in Tapachula, Chiapas.

As the institute's press release explained:

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

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

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

To assist the Mexican government in identifying OTM migrants who scheduled appointments using CBP One, on August 22, CBP announced<sup>247</sup> it was "allow[ing] the Government of Mexico

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<sup>243</sup> *CBP Releases May 2023 Monthly Operational Update*. U.S. CUSTOMS AND BORDER PROTECTION (Jun. 20, 2023) Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-may-2023-monthly-operational-update>.

<sup>244</sup> *Id.*

<sup>245</sup> *CBP One™ Appointments Increased to 1,450 Per Day*. U.S. Customs and Border Protection (Jun. 30, 2023). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>.

<sup>246</sup> *The Government of Mexico and the INM articulate an emerging safe mobility corridor for the transfer of foreign persons with a CBP One appointment*. INSTITUTO NACIONAL DE MIGRACION (Aug. 31, 2024). Source: <https://www.gob.mx/inm/prensa/el-gobierno-mexicano-y-el-inm-articulan-corredor-emergente-de-movilidad-segura-para-el-traslado-de-personas-extranjeras-con-cita-cbp-one>.

<sup>247</sup> *Agency Information Collection Activities; Emergency Revision; Collection of Advance Information From Certain Undocumented Individuals on the Land Border*. 89 Fed. Reg. 67953 (Aug. 22, 2024). Source: <https://www.govinfo.gov/content/pkg/FR-2024-08-22/pdf/2024-18847.pdf>.

access to a tool which will permit certain Government of Mexico personnel to validate an individual's CBP One appointment and change the locations in Mexico from which individuals can request appointments via CBP One".

That effectively moved the U.S. Southwest border to the Mexico-Guatemala border and placed the Mexican government in charge of U.S. port protection.

This policy was illegal, for at least two reasons.

First, there was no authority in the INA to use the ports of entry to process facially inadmissible aliens.

In fact, section 2 of the Secure Fence Act of 2006<sup>248</sup> directs the DHS secretary to "take all actions . . . necessary and appropriate to achieve and maintain operational control over the entire international land. . . borders of the United States", defining the term "operation control" as the "prevention of all unlawful *entries* into the United States, including entries by. . . other unlawful aliens" (emphasis added).

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

Second, and relatedly, the vast majority of inadmissible aliens who scheduled appointments using the app were thereafter paroled into the United States, in violation of the strict limitations on that parole authority.

As the House Homeland Security Committee reported<sup>249</sup> in October 2023: "Overall, 95.8 percent of all inadmissible aliens who scheduled appointments through the app during this time were ultimately issued a [NTA] and released into the United States on parole."

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

In addition to its illegality, the CBP One app interview policy undermined border security.

As noted *infra*, section 1092 of NDAA 2017<sup>250</sup> established metrics for measuring border security between the ports, now codified at 6 U.S.C. §223<sup>251</sup>. Section 1092(c)(1) of NDAA 2017<sup>252</sup> also established metrics Congress deemed critical in assessing whether, and to what degree, DHS is securing the border *at* the ports of entry.

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<sup>248</sup> Secure Fence Act of 2006, Pub. L. 109-367, at sec. 2 (Oct. 26, 2006). Source:

<https://www.congress.gov/109/plaws/publ367/PLAW-109publ367.pdf>.

<sup>249</sup> *New Documents Obtained by Homeland Majority Detail Shocking Abuse of CBP One*. U.S. HOUSE OF REPS., COMM. ON HOMELAND SECURITY (Oct. 23, 2023). Source: <https://homeland.house.gov/2023/10/23/new-documents-obtained-by-homeland-majority-detail-shocking-abuse-of-cbp-one-app/>.

<sup>250</sup> Sec. 1092 of National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-840 (2016). Source: <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

<sup>251</sup> 6 U.S.C. § 223 (2024). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title6-section223&num=0&saved=%7CKHRpdGxlOjYgc2VjdGlvbjoyMjMgZWRpdGlvbjpwcmVsaW0p%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>252</sup> *Id.* at para. (c)(1).

The first set of metrics, subparagraph (A)<sup>253</sup>, focuses exclusively on inadmissible applicants for admission, requiring the DHS secretary to report, on an annual basis, his:

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

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

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

In July 2024, CBP officers at the Southwest border ports of entry encountered nearly 48,000 inadmissible aliens<sup>254</sup>, a 160-percent increase compared to June 2022, before this policy took effect. That increase was largely driven by the tens of thousands of aliens per month taking advantage of the CBP One app interview policy.

And, because nearly all the aliens who took advantage of that policy were allowed to enter the United States, “the number of unlawful entries at” the Southwest ports of entry skyrocketed, and by Congress’ own metrics, the border was less secure.

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

In that vein, the DHS Office of Inspector General (DHS OIG) in August 2024 issued a report titled “CBP Did Not Thoroughly Plan for CBP One™ Risks, and Opportunities to Implement Improvements Exist”<sup>255</sup>.

As DHS OIG explained therein:

*Although CBP uses biographic and biometric information submitted into CBP One™ in advance to determine whether arriving noncitizens have derogatory records, **it does not leverage the information to identify suspicious trends as part of its pre-arrival vetting procedures.** Based on our analysis of CBP One™ data, we identified potentially unrelated noncitizens who repeatedly claimed identical*

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<sup>253</sup> *Id.* at subpara. (c)(1)(A).

<sup>254</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (revised May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>255</sup> *CBP Did Not Thoroughly Plan for CBP One™ Risks, and Opportunities to Implement Improvements Exist*. OIG-24-48. U.S. DEP’T OF HOMELAND SECURITY, OFC. OF THE INSPECTOR GEN. (Aug. 19, 2024). Source: <https://www.oig.dhs.gov/sites/default/files/assets/2024-08/OIG-24-48-Aug24.pdf>.

*intended U.S. residences. CBP currently does not have a mechanism to routinely analyze CBP One™ data submitted across the eligible POEs for trends, which may be useful intelligence to help guide front-line CBP officers when interviewing noncitizens during appointment processing.*<sup>256</sup> [Emphasis added.]

DHS OIG analyzed CBP data and concluded that nearly 209,000 of the just over 264,550 initial users (79 percent)<sup>257</sup> gave the same intended address in the United States as at least one other user, “despite appearing to be unrelated”.

If that’s not suspicious enough, DHS OIG identified seven individual U.S. addresses that nearly 1,700 different app users had claimed as their intended destinations.<sup>258</sup>

This is indicative of fraud in a program that lacked statutory authority and ensured the entry of inadmissible aliens, and in turn presented law-enforcement and national-security risks.

Those risks were heightened by the fact that CBP lacked the intelligence to properly vet those migrants. As this Committee explained last August:

***Immigration authorities do not vet illegal aliens against databases in the aliens’ countries of origin. As a result, if there is derogatory information about an alien in that alien’s home country, the current checks are unlikely to reveal it.***  
[Emphasis added; footnotes omitted.]<sup>259</sup>

Those risks materialized. An August report<sup>260</sup> from this committee revealed eight Tajikistani nationals “with potential ISIS ties” were arrested by ICE in June 2024, three of whom “were released into the country after using the Biden-Harris-Administration’s CBP One phone application to schedule an appointment at a port of entry”.

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

Those are vulnerabilities were compounded by the fact that, according to CBP<sup>261</sup>, “more than 936,500 individuals. . . successfully scheduled appointments to present at ports of entry” using the app as of the end of December.

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<sup>256</sup> *Id.* at “Highlights”.

<sup>257</sup> *Id.* at 14.

<sup>258</sup> *Id.*

<sup>259</sup> *The Consequences of the Biden-Harris Administration’s Open-Borders Policies: The Cases of Four Illegal Aliens Who Viciously Attacked a Man on a Chicago Train.* U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 21, 2024), at 7. Source: <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/08-21-2024%20The%20Cases%20of%20Four%20Illegal%20Aliens%20Who%20Viciously%20Attacked%20a%20Man%20on%20a%20Chicago%20Train.pdf>.

<sup>260</sup> *Terror at Our Door: How the Biden-Harris Administration’s Open-Borders Policies Undermine National Security and Endanger Americans.* U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 5, 2024), at 3. Source: [https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/FILE\\_6538.pdf](https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/FILE_6538.pdf).

<sup>261</sup> *CBP Releases December 2024 Monthly Update.* U.S. CUSTOMS AND BORDER PROTECTION (Jan. 27, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2024-monthly-update>.

As set forth above, the purpose of the inspection protocol Congress crafted in section 235 of the INA<sup>262</sup>, and CBP's primary role in that process (both between the ports and at them), is to ensure inadmissible aliens are unable to enter unlawfully.

The Biden administration's CBP One app interview policy turned that on its head by converting Congress's port inspection protocol into a conduit to enable inadmissible applicants for admission *to enter illegally*.

*"Processes for Cubans, Haitians, Nicaraguans, and Venezuelans"*

The second initiative the administration announced by the White House on January 5, 2023<sup>263</sup> extended an October 2022 parole program for Venezuelan nationals<sup>264</sup> to include Cuban, Haitian, and Nicaraguan, nationals, as well. That program is formally called "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans"<sup>265</sup>, but is better known as "CHNV Parole".

As the White House explained<sup>266</sup>:

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

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

That's especially true given that on January 9, 2023, the administration published notices in the Federal Register on its implementation of this parole program for nationals of Venezuela<sup>267</sup>,

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<sup>262</sup> Sec. 235 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>. See also *infra*.

<sup>263</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>264</sup> See *DHS Announces New Migration Enforcement Process for Venezuelans*. U.S. DEP'T OF HOMELAND SECURITY (Oct. 12, 2022) ("Our comprehensive effort to reduce the irregular migration of Venezuelans also includes a new process to lawfully and safely bring up to 24,000 qualifying Venezuelans into the United States"). Source: <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

<sup>265</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Aug. 29, 2024). Source: <https://www.uscis.gov/CHNV>.

<sup>266</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*. WHITE HOUSE (Jan. 5, 2023). Source: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

<sup>267</sup> *Implementation of Changes to the Parole Process for Venezuelans*, 88 Fed. Reg. 1279 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00253/implementation-of-changes-to-the-parole-process-for-venezuelans>.

Nicaragua<sup>268</sup>, Haiti<sup>269</sup>, and Cuba<sup>270</sup>, which allowed CHNV nationals who bypassed the parole program and entered illegally “a one-time option to voluntarily depart or voluntarily withdraw their application for admission to maintain eligibility to participate in this parole process”.

That negated any border deterrence value CHNV parole had: if nationals of those countries came illegally and weren’t apprehended, they could remain indefinitely; but if they were apprehended, they could withdraw their applications for admission and get in line for a CBP One app interview or apply for parole under CHNV parole.

Nor did the program necessarily allow migrants to escape persecution in the CHNV countries. As the Center discovered<sup>271</sup> after a lengthy FOIA battle, beneficiaries flew into the United States on CHNV parole from 77 different countries, including Australia, Argentina, and Iceland.

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

To explain, it’s important to note that the CHNV parole application is a multi-step process that began when a “supporter” in the United States filed an I-134A<sup>272</sup>, “Online Request to be a Supporter and Declaration of Financial Support”, through a USCIS portal. In that form, the supporter agreed to financially support a given CHNV national.

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

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

On August 2, 2024, Fox News revealed<sup>273</sup> the program was placed on hold in July “after an internal report unearthed large amounts of fraud in applications for those sponsoring the applicants”.

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

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<sup>268</sup> *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. 1255 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans>.

<sup>269</sup> *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1243 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians>.

<sup>270</sup> *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. 1266 (Jan. 9, 2023). Source: <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans>.

<sup>271</sup> Bensman, Todd. *New Data: Many Migrants in Biden’s ‘Humanitarian’ Flights Scheme Coming in from Safe Countries and Vacation Wonderlands*. CENTER FOR IMMIGRATION STUDIES (Jun. 17, 2024). Source: <https://cis.org/Bensman/New-Data-Many-Migrants-Bidens-Humanitarian-Flights-Scheme-Coming-Safe-Countries-and>.

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

<sup>273</sup> Shaw, Adam. *Biden admin freezes controversial migrant flight program after fraud revelations*. FOX NEWS (Aug. 2, 2024). Source: <https://www.foxnews.com/politics/biden-admin-freezes-controversial-migrant-flight-program-after-fraud-revelations>.

Worse, according to Fox News, FDNS also found that 24 of the 1,000 Social Security numbers most used by sponsors “belonged to a dead person. Meanwhile, 100 physical addresses were used between 124 and 739 times on over 19,000 forms”<sup>274</sup>.

Despite those indicia of fraud, however, DHS quickly resumed processing applicants for CHNV parole<sup>275</sup>. In a tweet<sup>276</sup>, former USCIS Director Emilio Gonzalez contended the program was restarted notwithstanding its susceptibility to fraud because Mexican authorities complained there were “too many migrant camps” in the country.

That makes sense, given that congressional disclosures<sup>277</sup> revealed 1.6 million inadmissible applicants for admission were awaiting travel authorizations under the program as of mid-October 2023.

Why would supporters file fraudulent applications? That is unclear, but as the Center explained in August 2023<sup>278</sup>, CHNV parole is uniquely “ripe for human exploitation” by smugglers and sex- and human-traffickers who pose as would-be sponsors.

USCIS was plainly aware of these dangers, as it warned CHNV applicants they were “not obligated to repay, reimburse, work for, serve, marry, or otherwise compensate their supporter in exchange for filing Form I-134A on their behalf or for providing financial support while they are in the United States”<sup>279</sup>.

In any event, but importantly, there was no authority for this programmatic parole program in the INA<sup>280</sup>, and not surprisingly, a 20-state coalition filed suit<sup>281</sup> to block CHNV parole.

The state plaintiffs claimed that the administration “did not provide an opportunity for public comment” and failed to “undertake a formal notice-and-comment rulemaking process”<sup>282</sup>. Nor, they contended, did the departments seek their opinions about the plan before proceeding.<sup>283</sup>

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

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<sup>274</sup> *Id.*

<sup>275</sup> *See Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Aug. 29, 2024) (“DHS has resumed processing of Advance Travel Authorizations (ATAs) in the parole processes for certain nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV).”). Source: <https://www.uscis.gov/CHNV>.

<sup>276</sup> Gonzalez, Emilio. Source: <https://x.com/emiliotgonzalez/status/1830931211625136256/photo/1>.

<sup>277</sup> *Chairman Green Blasts Biden-Harris Administration’s CHNV Mass-Parole Program Amid Horrific Crimes by Recent Parolees*. U.S. HOUSE OF REPS., COMM. ON HOMELAND SECURITY (Sept. 5, 2024). Source: <https://homeland.house.gov/2024/09/05/chairman-green-blasts-biden-harris-administrations-chnv-mass-parole-program-amid-horrific-crimes-by-recent-parolees/>.

<sup>278</sup> Arthur, Andrew. *Biden’s CHNV Parole Program — Ripe for Human Exploitation*. CENTER FOR IMMIGRATION STUDIES (Aug. 25, 2023). Source: <https://cis.org/Arthur/Bidens-CHNV-Parole-Program-Ripe-Human-Exploitation>.

<sup>279</sup> *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Aug. 29, 2024). Source: <https://web.archive.org/web/20241203113420/https://www.uscis.gov/CHNV>.

<sup>280</sup> *See* Sec. 212(d)(5)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>. *See also supra*.

<sup>281</sup> *Texas v. U.S. DHS*, 6:23-cv-00007, Complaint (S.D. Tex. Jan. 24, 2023). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.1.0.pdf>.

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

<sup>283</sup> *Id.*

That is particularly salient given the requirement in the parole statute<sup>284</sup> that every parolee “be returned to the custody from which he was paroled” when parole was terminated.

Not only would it cost hundreds of millions of dollars to detain the 531,690 CHNV nationals<sup>285</sup> who were allowed to enter on CHNV parole through the end of December at the end of their two-year parole periods, but USCIS didn’t even tell CHNV beneficiaries they’d ever be required to leave.

On the “Frequently Asked Questions” webpage<sup>286</sup> for the program, one question asks: “If I am paroled into the United States through these processes, what happens when my 2-year period of parole ends?”

USCIS’s response: “There are a full range of existing lawful immigration pathways, including an extension of parole, immigrant and nonimmigrant visas, asylum, and Temporary Protected Status (TPS), that certain parolees may be eligible for in accordance with U.S. laws.”<sup>287</sup> Absent from that list is “you will be taken into custody and removed”.

The states’ points were valid, but on March 8, 2024, a U.S. district court judge issued an opinion and order<sup>288</sup> dismissing the states’ claims, finding they failed to establish standing to bring the suit.

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

In March 2024 local police arrested Cory Alvarez, a Haitian national and CHNV beneficiary, for aggravated rape of a 15-year-old girl in a Massachusetts migrant shelter<sup>289</sup>. A local judge refused to honor an ICE detainer for the alien, forcing the agency to take Alvarez into custody at his residence on August 13<sup>290</sup>.

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<sup>284</sup> Sec. 212(d)(5)(A)(i) of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim>.

<sup>285</sup> *CBP Releases December 2024 Monthly Update*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 27, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2024-monthly-update>.

<sup>286</sup> *Frequently Asked Questions About the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*. U.S. CITIZENSHIP AND IMMIGRATION SERVS. (updated Oct. 4, 2024). Source: <https://web.archive.org/web/20241203141257/https://www.uscis.gov/humanitarian/frequently-asked-questions-about-the-processes-for-cubans-haitians-nicaraguans-and-venezuelans>.

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

<sup>288</sup> *Texas v. U.S. DHS*, 6:23-cv-00007, Memorandum Opinion and Order (S.D. Tex. Mar. 8, 2024). Source: [https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.305.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txsd.1903141/gov.uscourts.txsd.1903141.305.0_1.pdf).

<sup>289</sup> Melugin, Bill; Shaw, Adam; Jenkins, Griff; and Wehner, Greg. *Haitian migrant charged with rape of 15-year-old girl entered via controversial parole program: sources*. Fox News (Mar. 15, 2024). Source: <https://www.foxnews.com/politics/haitian-migrant-charged-rape-15-year-old-girl-entered-controversial-parole-program-sources>.

<sup>290</sup> *ERO Boston arrests Haitian national accused of raping child in Massachusetts migrant shelter*. U.S. Immigration and Customs Enforcement (Aug. 13, 2024). Source: <https://www.ice.gov/news/releases/ero-boston-arrests-haitian-national-accused-raping-child-massachusetts-migrant>.

In a Fox News report<sup>291</sup> on that ICE arrest, the outlet quoted an agency official who complained:

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

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

Alvarez had a supporter who lived in New Jersey<sup>292</sup>. He apparently received little support, however, given he was living in a state-funded shelter in a different state where the attack purportedly took place.

On September 4, 2024, ICE arrested a second Haitian national, Akim Marc Desire, who also has been charged with sexually assaulting a minor in Massachusetts<sup>293</sup>. Reports indicate that Desire also entered under CHNV parole<sup>294</sup>.

Again, through the end of December, approximately 531,690 Cubans, Haitians, Nicaraguans, and Venezuelans were granted parole under CHNV parole: 110,240 Cubans, 211,040 Haitians, 93,070 Nicaraguans, and 117,330 Venezuelans.<sup>295</sup>

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

The Biden administration never provided a total figure on the number of inadmissible applicants for admission it released into the United States in contravention of the detention mandates in section 235(b) of the INA.

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<sup>291</sup> Hagstrom, Anders and Melugin, Bill. *ICE finds, arrests Haitian migrant who was released on \$500 bond after being charged with raping child in MA.* Fox News (Aug. 13, 2024). Source: <https://www.foxnews.com/us/ice-finds-arrests-haitian-migrant-who-released-500-bond-after-being-charged-rape-child-ma>.

<sup>292</sup> See Melugin, Bill; Shaw, Adam; Jenkins, Griff; and Wehner, Greg. *Haitian migrant charged with rape of 15-year-old girl entered via controversial parole program: sources.* Fox News (Mar. 15, 2024) ("Alvarez's charges relate to a March incident in which he was accused of raping a 15-year-old girl while staying at a migrant hotel in Massachusetts."). Source: <https://www.foxnews.com/politics/haitian-migrant-charged-rape-15-year-old-girl-entered-controversial-parole-program-sources>.

<sup>293</sup> *ERO Boston arrests Haitian national charged with sexually assaulting Massachusetts minor.* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Sept. 4, 2024). Source: <https://www.ice.gov/news/releases/ero-boston-arrests-haitian-national-charged-sexually-assaulting-massachusetts-minor#:~:text=ERO%20Boston%20officers%20arrested%20Akim,of%20children%20in%20our%20community>.

<sup>294</sup> *Haitian migrant accused of molesting child is in US via controversial Biden-Harris program.* WFIN (Sept. 4, 2024). Source: <https://wfin.com/fox-political-news/haitian-migrant-accused-of-molesting-child-is-in-us-via-controversial-biden-harris-program/>.

<sup>295</sup> *CBP Releases December 2024 Monthly Update.* U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 27, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2024-monthly-update>.

In June 2024, however, the Center determined that more than 2 million<sup>296</sup> such aliens had been released into the United States since February 2021 just under DHS’s limited parole authority, an incomplete total given much of DHS’s data was preliminary.

In that vein, the committee should keep in mind (as noted *supra*) that 531,690 Cubans, Haitians, Nicaraguans, and Venezuelans were allowed to enter on CHNV parole as of the end of December<sup>297</sup>, and that more than 936,500 aliens “scheduled appointments to present at ports of entry” using the CBP One app as of that date, the vast majority of whom were released into this country on parole.

In addition, CBP statistics reveal Border Patrol agents at the Southwest border released more than 2.044 million illegal migrants on NTA/OR between February 2021 and the end of July<sup>298</sup> and 95,000-plus others<sup>299</sup> with NTRs.

Those figures do not include more than 324,000 unaccompanied alien children from non-contiguous countries encountered by CBP at the Southwest border between FY 2022 and February 2024<sup>300</sup>, whom DHS is required by law<sup>301</sup> to transfer to HHS for placement with “sponsors” in the United States.

Nor does it include the dispositions of nearly 919,000 migrants whom the DHS Office of Homeland Security Statistics (OHSS) reported<sup>302</sup> Border Patrol transferred to ICE between February 2021 and the end of May 2024--some or all of whom ICE thereafter released. Note that in the month of May 2022 alone, ICE released almost 9,950 of the fewer than 20,000 aliens it was holding who had first been encountered by CBP, just short of half.<sup>303</sup>

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<sup>296</sup> See Arthur, Andrew. *Biden Has Paroled In Two Million-Plus Inadmissible Aliens*. Center for Immigration Studies (Jun. 21, 2024). Source: <https://cis.org/Arthur/Biden-Has-Paroled-Two-MillionPlus-Inadmissible-Aliens>.

<sup>297</sup> *CBP Releases December 2024 Monthly Update*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 27, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2024-monthly-update>.

<sup>298</sup> See *Custody and Transfer Statistics, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025) (26,793 releases between October 1, 2024, and January 31, 2025). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>. *Custody and Transfer Statistics FY 2024, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Nov. 19, 2025) (861,233 releases). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>; *Custody and Transfer Statistics Fiscal Year 2023, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 29, 2025) (604,834 releases). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2023>; *Custody and Transfer Statistics FY 2022, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 29, 2025). (310,976 releases). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>; *Custody and Transfer Statistics FY 2021, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified Jun. 5, 2024) (247,542 releases between February 1 and September 30, 2021). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021>.

<sup>299</sup> *Southwest Border: Challenges and Efforts Implementing New Processes for Noncitizen Families*. GOV’T ACCOUNTABILITY OFC. (Sept. 28, 2022), GAO-22-105456. Source: <https://www.gao.gov/products/gao-22-105456>.

<sup>300</sup> See *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

<sup>301</sup> See fn. 164, *supra*.

<sup>302</sup> See *Immigration Enforcement and Legal Processes Monthly Tables*. U.S. DEP’T OF HOMELAND SECURITY, OFC. OF HOMELAND SECURITY STATISTICS (undated). Source: <https://ohss.dhs.gov/topics/immigration/immigration-enforcement/immigration-enforcement-and-legal-processes-monthly>.

<sup>303</sup> *Biden v. Texas*, Case No. 2:21-cv-00067-Z, Defendants’ Monthly Report for May 2022 (N.D. Tex. Jun. 15, 2022). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.140.2.pdf>.

Nor does that total—or can it—include the more than 1.8 million-plus “got-aways” whom Fox News<sup>304</sup> reported successfully evaded apprehension at the Southwest border and entered illegally.

That figure —purportedly based upon CBP statistics —is probably low, as the Congressional Budget Office (CBO) estimated<sup>305</sup> in January 2024 that there were 860,000 got aways in FY 2023, not 670,674 as Fox News reported.

Given these statistics, this committee was likely correct when it reported<sup>306</sup> in August that: “In less than four years, the Biden-Harris Administration has released into the United States more than 5.6 million illegal aliens, with another 1.9 million illegal alien ‘gotaways’ escaping into the country during the same time”.

## V. Immigration Enforcement Under Trump II

Immigration enforcement has changed significantly under the second Trump administration.

### A. Border Security

Between February 1 and the end of April, CBP officers and Border Patrol agents encountered 34,762 inadmissible applicants for admission<sup>307</sup>—23,912 illegal entrants apprehended by Border Patrol agents and 10,850 aliens deemed inadmissible by OFO at the Southwest border ports.

That’s a nearly 94 percent decrease compared to overall encounters during the same three-month period in FY 2024 (559,009), a 94.2 percent decrease in apprehensions (February to April 2024: 407,009), and a 92.9 percent decrease in port encounters (February to April 2024: 152,000).<sup>308</sup>

The reasons for that decline are many, but none is more obvious than the fact that DHS under the current administration has returned to a historical policy of border deterrence.

The three key components of any successful border deterrence strategy are: (1) apprehension, detention, and removal of inadmissible aliens; (2) prosecutions for illegal entries and reentries; and (3) infrastructure.

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<sup>304</sup> Shaw, Adam and Melugin, Bill. *New data reveals Illegal immigrants eluding Border Patrol spiked under Biden, surpassing predecessors*. FOX NEWS (May 15, 2024). Source: <https://www.foxnews.com/politics/new-data-reveals-illegal-immigrants-eluding-border-patrol-spiked-under-biden-surpassing-predecessors>.

<sup>305</sup> See *The Demographic Outlook: 2024 to 2054*. CONG. BUDGET OFC. (January 2024), at 21. Source: <https://www.cbo.gov/system/files/2024-01/59697-Demographic-Outlook.pdf#page=9>.

<sup>306</sup> *The Consequences of the Biden-Harris Administration's Open-Borders Policies: The Cases of Four Illegal Aliens Who Viciously Attacked a Man on a Chicago Train*. U.S. HOUSE OF REPS., COMM. ON THE JUDICIARY (Aug. 21, 2024). Source: <https://judiciary.house.gov/media/press-releases/consequences-biden-harris-administrations-open-borders-policies-cases-four>.

<sup>307</sup> *Nationwide Encounters*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

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

Between February and the end of April, Border Patrol agents at the Southwest border released just seven illegal entrants with NTAs<sup>309</sup>, .09 percent as many as they had in the month of December alone.

And, in March 2025 alone, 1,596 aliens were charged<sup>310</sup> with misdemeanor improper entry under section 275 of the INA<sup>311</sup>, 240 percent more than in December, and 1,008 others were charged with felony improper reentry<sup>312</sup> under that provision, 18 percent more than in December.

Finally, in March, nearly 3,000 aliens were charged<sup>313</sup> with illegal reentry after removal under section 276 of the INA<sup>314</sup>, a 45-percent increase compared to December.

In April, DHS Secretary Kristi Noem issued waivers<sup>315</sup> for infrastructure construction at the Southwest border to close three “critical gaps” along 2.5 miles of fencing in California. That is just the start of planned improvements along the border that will serve as a force multiplier for agents and an impediment to smugglers.

In addition to deterrence, the Trump administration secured an agreement with the government of Mexico to send 10,000 Mexican National Guard and Army troops<sup>316</sup> to the south side of the international boundary to deter smugglers and illegal migrants from approaching the U.S. border.

And at the ports, one of the new president’s first actions was to shut down the CBP One app interview process<sup>317</sup>—likely the key reason for the marked decline in OFO Southwest border encounters.

That will free up CBO officers to find and interdict migrants and illegal drug smugglers who are attempting to move surreptitiously through those ports of entry and facilitate the free flow of lawful commerce and travel.

## B. Executive Actions

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<sup>309</sup> See *Custody and Transfer Statistics, USBP Monthly Southwest Border Encounters by Processing Disposition*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 12, 2025). Source: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>310</sup> *Prosecuting Immigration Crimes Report (PICR)*, U.S. DEP’T OF JUSTICE (updated Apr. 9, 2025). Source: <https://www.justice.gov/usao/resources/PICReport>.

<sup>311</sup> Sec. 275 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1325&num=0&edition=prelim>.

<sup>312</sup> *Prosecuting Immigration Crimes Report (PICR)*, U.S. DEP’T OF JUSTICE (updated Apr. 9, 2025). Source: <https://www.justice.gov/usao/resources/PICReport>.

<sup>313</sup> *Id.*

<sup>314</sup> Sec. 276 of the INA (2025): Source: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1326&num=0&edition=prelim>.

<sup>315</sup> *DHS issues waiver to expedite new border wall construction in California*. U.S. CUSTOMS AND BORDER PROTECTION (April 8, 2025). Source: <https://www.cbp.gov/newsroom/national-media-release/dhs-issues-waiver-expedite-new-border-wall-construction-california>.

<sup>316</sup> *Mexico deploys the first of 10,000 troops to US border after Trump's tariff threat*. Voice of America (Feb. 6, 2025). Source: <https://www.voanews.com/a/mexico-deploys-the-first-of-10-000-national-guard-troops-to-us-border-after-trump-s-tariff-threat/7964846.html>.

<sup>317</sup> Heilweil, Rebecca. *Trump shuts down CBP One app, closing a pathway to America*. FEDSCOOP (Jan. 21, 2025). Source: <https://fedscoop.com/trump-shuts-down-border-app-cbp-one/>.

The new president issued a number of executive actions quickly after returning to office. Here are just a few

On January 20, he issued Executive Order (EO) 14161, “Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats”<sup>318</sup>, which directs DHS and the State Department to implement “enhanced vetting” for visa applicants and aliens in this country.

That day, he also issued EO 14165<sup>319</sup>, “Securing Our Borders”, which among other things ended CHNV parole, as well as Presidential Proclamation (PP) 10886<sup>320</sup>, “Declaring a National Emergency at the Southern Border of the United States”, which (again, among other things) authorizes the use of Department of Defense assets for border security.

Also on Inauguration Day, the president issued EO 14159<sup>321</sup>, “Protecting the American People Against Invasion”.

The Center has explained<sup>322</sup> that this EO:

*Declares that it is the policy of the United States to faithfully execute the immigration laws against all inadmissible and removable aliens and to achieve the total and efficient enforcement of those laws, including through lawful incentives and detention capabilities.*

*Revokes former President Biden’s immigration-related executive orders.*

*Directs executive agencies to take all appropriate action to promptly revoke all memoranda, guidance, or other policies based on former President Biden’s executive orders and to “employ all lawful means to ensure the faithful execution of the immigration laws of the United States”.*

*Instructs the Secretary of Homeland Security to take all appropriate action to enable the Director of U.S. Immigration and Customs Enforcement, the Commissioner of U.S. Customs and Border Protection, and the Director of U.S. Citizenship and Immigration Services to set priorities for their agencies that protect the public safety and national security interests of the American people, including by ensuring the successful enforcement of final orders of removal.*

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<sup>318</sup> *Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats*. 90 Fed. Reg. 8451 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/30/2025-02009/protecting-the-united-states-from-foreign-terrorists-and-other-national-security-and-public-safety>.

<sup>319</sup> *Securing Our Borders*. 90 Fed. Reg. 8467 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/30/2025-02015/securing-our-borders>.

<sup>320</sup> *Declaring a National Emergency at the Southern Border of the United States*. 90 Fed. Reg. 8327 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/29/2025-01948/declaring-a-national-emergency-at-the-southern-border-of-the-united-states>.

<sup>321</sup> *Protecting the American People Against Invasion*. 90 Fed. Reg. 8443 (Jan. 20, 2025). Source: <https://www.federalregister.gov/documents/2025/01/29/2025-02006/protecting-the-american-people-against-invasion>.

<sup>322</sup> *Outline of President Trump’s January 20 Immigration and Border Executive Actions*. CENTER FOR IMMIGRATION STUDIES (Jan. 27, 2025). Source: <https://cis.org/Report/Outline-President-Trumps-January-20-Immigration-and-Border-Executive-Actions>.

*Directs the Secretary of Homeland Security to ensure that the primary mission of U.S. Immigration and Customs Enforcement's Homeland Security Investigations division is the enforcement of the provisions of the INA and other Federal laws related to the illegal entry and unlawful presence of aliens in the United States and the enforcement of the purposes of this order.*

*Directs the Attorney General, in coordination with the Secretary of State and the Secretary of Homeland Security, to take all appropriate action to prioritize the prosecution of criminal offenses related to the unauthorized entry or continued unauthorized presence of aliens in the United States.*

*Instructs the Attorney General and Secretary of Homeland Security to establish homeland security task forces in all states to end the presence of criminal cartels, foreign gangs, transnational criminal organizations, dismantle cross border human smuggling, end human trafficking, and directs the task forces focus on offenses involving children.*

*Orders the Secretary of Homeland Security and Attorney General to announce and publicize the legal obligation of all unregistered aliens to comply with Chapter 12 of Title 8 of the U.S. Code, including registration requirements and ensure that failure to comply with the legal obligations is treated as civil and criminal enforcement priorities.*

### C. Interior Enforcement

Perhaps the highest-profile aspect of the president's immigration policies, and the one most pertinent to today's hearing, is interior enforcement—an effort over which ICE has primary jurisdiction.

Spearheading that effort on behalf of the administration is Tom Homan, formally the “White House Executive Associate Director of Enforcement and Removal Operations” but better known as Trump's “border czar”.

As NPR has reported:

*Homan, a former police officer and Border Patrol agent, has worked under six presidents during his three decades in law enforcement. He was executive associate director of enforcement and removal operations for Immigration and Customs Enforcement under President Obama. During that administration, ICE carried out a record number of deportations.<sup>323</sup>*

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<sup>323</sup> Treisman, Rachel. *What to know about Tom Homan, the former ICE head returning as Trump's 'border czar'.* NPR (Nov. 11, 2024). Source: <https://www.npr.org/2024/11/11/nx-s1-5186522/tom-homan-border-czar-trump>.

Under Homan’s direction, ICE has partnered with CBP, the FBI, DEA, U.S. Marshals Service and other federal agencies to apprehend aliens- and alien criminals in particular-- for prosecution, detention, and removal.<sup>324</sup>

ICE and its federal partners arrested an average of 660-plus removable aliens per day during Trump’s first 100 days back in office<sup>325</sup>. Three-quarters were criminals, including ones with “convictions or charges for 9,639 assaults, 6,398 DWIs or DUIs and 1,479 weapon offenses”— as well as “498 . . . accused or convicted of murder”.<sup>326</sup>

In addition, 65,682 aliens were removed in the administration’s first 100 days, putting DHS on track for an annual removal rate of around 240,000.

Compared to an unauthorized population that the Center conservatively estimates<sup>327</sup> to be around 15.4 million, 240,000 removals per year do not appear to be that significant.

Physical removals are not the only strategy that the Trump administration is using to decrease the unauthorized population, however. It’s also prompting aliens to self-deport.

To that end, DHS launched a multi-million-dollar media campaign<sup>328</sup> to dissuade would-be illegal migrants from coming to the United States and to encourage those unlawfully here to leave “now or face deportation with the inability to return to the United States”.

Whether the Trump White House is aware or not, it’s taking a page out of President Obama’s playbook when he was faced with a surge of Central American families and children entering illegally in 2014.<sup>329</sup>

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<sup>324</sup> ICE, *federal partners arrest 133 alien offenders during enhanced operation in New York*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 4, 2025). Source: <https://www.ice.gov/news/releases/ice-federal-partners-arrest-133-alien-offenders-during-enhanced-operation-new-york>.

<sup>325</sup> *100 days of record-breaking immigration enforcement in the US interior*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 29, 2025). Source: <https://www.ice.gov/news/releases/100-days-record-breaking-immigration-enforcement-us-interior>.

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

<sup>327</sup> Camarota, Steven A. and Zeigler, Karen. *Foreign-Born Number and Share of U.S. Population at All-Time Highs in January 2025*. CENTER FOR IMMIGRATION STUDIES (Mar. 12, 2025). Source: <https://cis.org/Report/ForeignBorn-Number-and-Share-US-Population-AllTime-Highs-January-2025>.

<sup>328</sup> *DHS Announces Nationwide and International Ad Campaign Warning Illegal Aliens to Self-Deport and Stay Out*. U.S. DEP’T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/17/dhs-announces-ad-campaign-warning-illegal-alien-self-deport-and-stay-out>.

<sup>329</sup> See *The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border*. THE WHITE HOUSE (Aug. 1, 2014) (“On June 20, the Honduran government began a nationwide media campaign using CBP-provided materials highlighting the dangers of land-based migration, which is being shown on gas station screens and broadcast on 80 TV outlets and 120 radio stations. . . . Guatemala’s First Lady launched the “Quédate!” campaign discouraging illegal immigration to the United States. Through public statements she is noting the dangers of the journey and urged parents not to send their children illegally to the United States. On June 26, Guatemala media Prensa Libre.El Quetzalteco, and Guatevisión launched an independent campaign on June 26 to raise awareness of the unaccompanied minors issue . . . On July 14, the Government of El Salvador announced the launch of a six-month, \$1.2 million media campaign on the dangers of migration by children and families. Phase one will focus on the dangers of the trip, while phase two will highlight government efforts to reduce migration push factors. On July 10, the Mayor’s Office of San Salvador, the Municipal Institute for Youth and the NGO Vision Democrática launched an unaccompanied minor campaign called “Sueño vs. Pesadilla” (Dream vs. Nightmare). The campaign, conducted in partnership with ten universities and 2,000 youth volunteers, includes earned media, social media and direct volunteer outreach to key communities in San Salvador.”). Source: <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american>.

In addition, Secretary Noem has announced<sup>330</sup> DHS would begin requiring aliens unlawfully present to register with the federal government and be fingerprinted in accordance with section 262 of the INA.<sup>331</sup>

As the department noted in a March 21 announcement on that requirement<sup>332</sup>, aliens who don't register or who fail to carry evidence of registration face prosecution and “a fine, imprisonment, or both” -- penalties provided for in section 266 of the INA.<sup>333</sup>

The Center recently noted<sup>334</sup> that when DHS operated a more narrowly tailored registration program for nationals of certain designated countries in the early 2000s, “80,000 people complied with the registration law and 13,000 were placed in deportation proceedings, and an estimated 15,000 aliens from Pakistan, one of the designated countries, left on their own – i.e., self-deported”.

Perhaps the most exceptional Trump administration self-deportation plan, however, involves paying aliens unlawfully present to leave.

On May 5, DHS announced<sup>335</sup> “a historic opportunity for illegal aliens to receive both financial and travel assistance to facilitate travel back to their home country through the CBP Home App”<sup>336</sup>—a reconfigured version of the prior CBP One app.

Under that plan: “Any illegal alien who uses the CBP Home App to self-deport will also receive a stipend of \$1,000 dollars, paid after their return to their home country has been confirmed through the app.”

In my analysis<sup>337</sup> of this “historic opportunity”, I noted that: “While it may be controversial, it could also be a cost- and resource-effective way to drive down the unauthorized population — assuming enough people take the department up on its offer.”

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<sup>330</sup> *Secretary Noem Announces Agency Will Enforce Laws That Penalize Aliens in the Country Illegally*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/25/secretary-noem-announces-agency-will-enforce-laws-penalize-aliens-country-illegally>.

<sup>331</sup> Sec. 262 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1302&num=0&edition=prelim>.

<sup>332</sup> *Secretary Noem Announces Agency Will Enforce Laws That Penalize Aliens in the Country Illegally*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/02/25/secretary-noem-announces-agency-will-enforce-laws-penalize-aliens-country-illegally>.

<sup>333</sup> Sec. 266 of the INA (2025). Source: <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title8-section1306&num=0&saved=%7C7C3JhbnVsZWlkOIVTQy1wcmVsaW0tdGI0bGU4LXNlY3Rpb24xMzAy%7C%7C%7C0%7Cfalse%7Cprelim>.

<sup>334</sup> *Immigration in Trump's First 100 Days*. CENTER FOR IMMIGRATION STUDIES (Apr. 23, 2025). Source: <https://cis.org/Report/Immigration-Trumps-First-100-Days>.

<sup>335</sup> *DHS Announces Historic Travel Assistance and Stipend for Voluntary Self-Deportation*. U.S. DEP'T OF HOMELAND SECURITY (undated). Source: <https://www.dhs.gov/news/2025/05/05/dhs-announces-historic-travel-assistance-and-stipend-voluntary-self-deportation>.

<sup>336</sup> *CBP Home Mobile Application*. U.S. CUSTOMS AND BORDER PROTECTION (modified May 13, 2025). Source: <https://www.cbp.gov/about/mobile-apps-directory/cbphome>.

<sup>337</sup> Arthur, Andrew. *DHS to Pay Illegal Aliens to Leave*. CENTER FOR IMMIGRATION STUDIES (May 8, 2025). Source: <https://cis.org/Arthur/DHS-Pay-Illegal-Aliens-Leave>.

That’s because deportation is costly, exceeding on average \$17,000 per removal, whereas self-deportation under this program would only cost an estimated \$4,500 per person.

Those payments, coupled with registration requirements and a credible risk of prosecution and deportation, would likely encourage hundreds of thousands of aliens unlawfully present to leave each year, and possibly more, up to a million.

## VI. “Sanctuary Policies”

The Center uses the term “sanctuary jurisdictions”<sup>338</sup> to refer to states and localities with laws, ordinances, regulations, resolutions, policies, or other practices that obstruct immigration enforcement and shield criminal aliens from ICE enforcement— either by refusing ICE detainers or prohibiting agencies from complying with those detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding communication or information exchanges between their personnel and federal immigration officers.

### A. History Of Sanctuary Policies

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

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

Criminal recidivism is a serious issue for law enforcement. A May 2018 study from the Bureau of Justice Statistics<sup>339</sup> found that of 401,288 state prisoners released in 2005, 44 percent were rearrested during the first year after they were released, an estimated 68 percent within 3 years, 79 percent within 6 years, and 83 percent within 9 years.

That local cooperation with immigration enforcement changed, however, after the expansion<sup>340</sup> of the George W. Bush-era “Secure Communities”<sup>341</sup> program under the Obama administration.

As ICE has explained:

*For decades, local jurisdictions have shared the fingerprints of individuals arrested and/or booked into custody with the FBI to see if those individuals have a criminal record and outstanding warrants. Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable, ICE takes enforcement action –*

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<sup>338</sup> Vaughan, Jessica and Griffin. Bryan. *Map: Sanctuary Cities, Counties, and States*. CENTER FOR IMMIGRATION STUDIES (May 7, 2025). Source: <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

<sup>339</sup> *Special Report, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATS. (MAY 2018). Source: <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

<sup>340</sup> *Activated Jurisdictions*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 3, 2011). Source: <https://web.archive.org/web/20110509095810/http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

<sup>341</sup> *Secure Communities*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/secure-communities#:~:text=Secure%20Communities%20had%20a%20long,criminal%20aliens%20from%20the%20U.S.>

*prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and risk to public safety – as well as those who have violated the nation’s immigration laws.*<sup>342</sup>

Then-DHS Secretary Jeh Johnson ended Secure Communities in November 2014<sup>343</sup>, asserting that: “Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.”

By that point, however, state and local officials came to believe sanctuary policies were a winning political issue with their constituents, and many of them only “doubled down”<sup>344</sup> on those policies after Trump’s November 2016 election victory.

#### B. “Protecting the Rights of All Residents”

Most sanctuary jurisdictions contend they have adopted such policies for reasons roughly along the lines of Arlington County, Va.’s “Trust Policy”<sup>345</sup>, which states: “The County is committed to protecting the rights of all residents, regardless of their immigration or citizenship status, and to ensuring every person in Arlington has an equal opportunity to participate in our economy.”

As an aside, at a May 13 hearing, the Arlington County Board removed two sections of that policy “which previously allowed Arlington police to notify [ICE] when undocumented individuals **were arrested for serious crimes such as terrorism, gang activity, or human trafficking**”<sup>346</sup>—an unusual move for a jurisdiction that is home to the Pentagon.

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

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

<sup>343</sup> Memorandum from Jeh Johnson, Secretary of Homeland Security. DEP’T OF HOMELAND SECURITY (Nov. 20, 2014). Source: [https://web.archive.org/web/20160401195026/https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://web.archive.org/web/20160401195026/https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>344</sup> See, e.g., Davis, Aaron. *D.C. will go ‘beyond sanctuary,’ create legal defense fund for illegal immigrants*. WASHINGTON POST (Jan. 9, 2017) (“In a statement, Bowser said the District is ‘doubling down’ on its status as a sanctuary city, where D.C. police have already been instructed to not cooperate with federal authorities working to deport residents.”). Source: [https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7_story.html).

<sup>345</sup> *Arlington’s Commitment to Strengthening Trust with Our Immigrant Communities*. Arlington County Bd. (updated May 13, 2025). Source: <https://www.arlingtonva.us/files/sharedassets/public/v/1/county-board/documents/trust-policy-updated-may-13-2025.pdf>; see also Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (review of sanctuary policies in the states of California and Illinois and the city of Chicago), Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

<sup>346</sup> Gonzalez, John. *Arlington board limits police collaboration with ICE, sparking debate over public safety*. ABC NEWS 7 (May 15, 2025) (emphasis added). Source: <https://wjla.com/newsletter-daily/arlington-limits-police-collaboration-ice-united-states-immigration-customs-enforcement-county-board-immigrants-arrests-charges-violent-crimes-concerns-virginia-dmv-sparking-debate-public-safety>.

Moreover, an October 2021 Center study<sup>347</sup> found no evidence that ICE cooperation reduces the rate at which immigrants report crimes locally, suggesting that the very rationale for sanctuary policies is based on an erroneous (or fallacious) premise.

### C. Detainers

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

As ICE explains<sup>348</sup>, it issues those requests because:

*When jails, prisons or other confinement facilities agree to honor immigration detainers, ICE officers can take custody of removable aliens in a safe, controlled environment instead of at-large in the community.*

*At-large arrests are unpredictable and can be dangerous to the public, aliens and federal law enforcement officers. It's safer to assume custody of removable aliens in a secure, private environment.*

*Detainers also conserve scarce government resources and taxpayer dollars. When a confinement facility allows ICE to take custody of removable aliens when they're released, the agency doesn't need to expend resources to locate and arrest an alien in the community.*

Simply put, when sanctuary jurisdictions refuse to honor ICE detainers, “officers pursue the alien in the community. These at-large arrests are more dangerous for the public, aliens and officers.”<sup>349</sup>

In April, my colleague Jessica Vaughan reported<sup>350</sup> that from the beginning of FY 2022 to February 6, 2025, “more than 25,000 detainers were declined by” jails in sanctuary jurisdictions, and “in more than 1,400 instances the jails failed to give adequate notification to ICE to take custody of the aliens”.

That included 72 releases notwithstanding ICE detainers for aliens with homicide charges and convictions.<sup>351</sup>

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

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<sup>347</sup> Camarota, Steven and Zeigler, Karen. *No Evidence that Cooperation with ICE Reduces Immigrant Crime Reporting*. CENTER FOR IMMIGRATION STUDIES (Oct. 19, 2021). Source: <https://cis.org/Camarota/No-Evidence-Cooperation-ICE-Reduces-Immigrant-Crime-Reporting>.

<sup>348</sup> *Immigration Detainers*. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (undated). Source: <https://www.ice.gov/immigration-detainers>.

<sup>349</sup> *Id.*

<sup>350</sup> Vaughan, Jessica. *Which Sanctuary Jurisdictions Have Released the Most Criminals?* CENTER FOR IMMIGRATION STUDIES (Apr. 9, 2025). Source: <https://cis.org/Vaughan/Which-Sanctuary-Jurisdictions-Have-Released-Most-Criminals>.

<sup>351</sup> *Id.*

As a legal matter, many of those sanctuary policies appear to violate federal law. Specifically, 8 U.S.C. § 1373(a)<sup>352</sup> states:

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

Similarly, 8 U.S.C. § 1644<sup>353</sup> provides:

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

Attorney General Pam Bondi specifically referenced section 1373(a) in a February 5 memo<sup>354</sup> in which she announced that: “Sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice.”

The next day, DOJ filed a federal complaint<sup>355</sup> against Illinois and the city of Chicago<sup>356</sup>, alleging sanctuary policies in those jurisdictions: “undermine federal immigration law’s protections for information sharing and are thus preempted” by and violate the Supremacy Clause<sup>357</sup>; discriminate against the federal government by “singl[ing] out federal immigration officials, expressly and implicitly, for unfavorable and uncooperative treatment when other law enforcement officials are not so treated”; and unlawfully regulate the federal government in that, “By refusing to honor civil detainers and warrants expressly authorized by Congress, Defendants have unlawfully eliminated these means for federal immigration officials to carry out their statutory functions”.

## E. Policies Barring ICE Detention

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<sup>352</sup> 8 U.S.C. § 1373(a) (2025). Source: <https://www.law.cornell.edu/uscode/text/8/1373>; see also See Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (legislative history of section 1373(a)). Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

<sup>353</sup> 8 U.S.C. § 1644 (2025). Source: <https://www.law.cornell.edu/uscode/text/8/1644>; see also See Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (legislative history of section 1644). Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

<sup>354</sup> *Sanctuary Jurisdiction Directives, Memorandum from Pam Bondi, Attorney General*. U.S. DEP’T OF JUSTICE (Feb. 5, 2025). Source: <https://www.justice.gov/ag/media/1388531/dl?inline>.

<sup>355</sup> *U.S. v. Illinois*, No. 1:25-cv-1285, Complaint (N.D. Ill. 2025). Source: [https://storage.courtlistener.com/recap/gov.uscourts.ilnd.473062/gov.uscourts.ilnd.473062.1.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.ilnd.473062/gov.uscourts.ilnd.473062.1.0_2.pdf).

<sup>356</sup> See Fishman, George. *Is Federal Anti-Sanctuary Law Constitutional?* CENTER FOR IMMIGRATION STUDIES (Feb. 26, 2025) (review of sanctuary policies in the state of Illinois and the city of Chicago), Source: <https://cis.org/Report/Federal-AntiSanctuary-Law-Constitutional>.

<sup>357</sup> See U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). Source: [https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE\\_00013395/](https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/).

A number of sanctuary states and localities have also attempted to bar ICE from detaining aliens within their jurisdictions.

For example, in August 2021, New Jersey enacted Assembly Bill (AB) 5207<sup>358</sup>, which prohibited the state, its political subdivisions, and (most importantly) private entities from contracting prospectively with ICE to own or operate detention facilities.

“Three New Jersey counties previously housed ICE detainees in their jails, but they stopped in 2021, just about the time the law in question took effect.”<sup>359</sup> That left CoreCivic, a private entity, operating the only remaining ICE detention facility in the state (the Elizabeth Detention Center<sup>360</sup>), under a contract set to expire on August 31, 2023.

Consequently, in February 2023, CoreCivic filed a complaint<sup>361</sup> in federal district court in New Jersey, seeking declaratory and injunctive relief and alleging AB 5207 was unconstitutional because it was:

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

On August 23, 2023, Judge Robert Kirsch of the U.S. District Court for the District of New Jersey struck down<sup>362</sup> that bill in part as unconstitutional, ruling:

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

The state has appealed that order.<sup>363</sup>

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<sup>358</sup> A.B. 5207 (2021), N.J. (enacted). Source: <https://www.njleg.state.nj.us/bill-search/2020/A5207>.

<sup>359</sup> DeFilippo, Dana. *N.J. law barring prison operator from contracting with ICE is unconstitutional, judge says*. New Jersey Monitor (Aug. 29, 2023). Source: <https://newjerseymonitor.com/2023/08/29/law-banning-immigrant-detention-in-new-jersey-is-unconstitutional-judge-rules/>.

<sup>360</sup> *Elizabeth Detention Center*. CORECIVIC (undated). Source: <https://www.corecivic.com/facilities/elizabeth-detention-center>.

<sup>361</sup> *CoreCivic v. Murphy*, No. 23-967, Complaint (D. N.J. Feb. 17, 2023), at 1, 14. Source: [https://www.documentcloud.org/documents/23686412-complaint\\_230220\\_074306/](https://www.documentcloud.org/documents/23686412-complaint_230220_074306/).

<sup>362</sup> *CoreCivic v. Murphy*, No. 23-967, Opinion (D. N.J. Aug. 28, 2023). Source: <https://newjerseymonitor.com/wp-content/uploads/2023/08/8-29-23-Corecivic.pdf>.

<sup>363</sup> See Nieto-Munoz, Sophie. *Federal appeals court to hear New Jersey immigrant detention case*. NEW JERSEY MONITOR (Apr. 28, 2025) (“In March, the state Attorney General’s Office asked the 3rd Circuit to finally hear the state’s appeal, stressing that while

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

If ICE cannot detain aliens in New Jersey or other sanctuary states, it's not going to release them — it will send them to some other jurisdiction, likely one far away from their lawyers and families and more amenable to immigration enforcement.

As I recently noted<sup>364</sup>:

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

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

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

I have no idea why Khalil was transferred from New Jersey to Louisiana, but it is possible—if not likely— it had something to do with a lack of ICE detention space in the former.

## CONCLUSION

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

That heat, however, is rising to the point that immigration officers and members of our communities are imperiled.

On May 14, the U.S. Attorney's Office for the Central District of California issued a press release<sup>365</sup> captioned “South Los Angeles Man and Woman Arrested on Federal Charge for Impeding Federal Agents Engaged in Immigration Enforcement”, which states:

*According to an affidavit filed with the complaint, on the morning of February 28, Homeland Security Investigations (HSI) and United States Border Patrol agents executed four search warrants at separate residences in Los Angeles, one of them*

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the appeal is active, the state cannot enforce the 2021 law as it pertains to private companies. The hearing is scheduled for May 1 at 9:30 a.m.”). Source: <https://newjerseymonitor.com/2025/04/28/federal-appeals-court-to-hear-new-jersey-immigration-detention-case/>.

<sup>364</sup> Arthur, Andrew. *Why All the Hullabaloo Over ICE Detention in New Jersey?* CENTER FOR IMMIGRATION STUDIES (May 14, 2025). Source: <https://cis.org/Arthur/Why-All-Hullabaloo-Over-ICE-Detention-New-Jersey>.

<sup>365</sup> *South Los Angeles Man and Woman Arrested on Federal Charge for Impeding Federal Agents Engaged in Immigration Enforcement*. U.S. Atty's Ofc., C.D. Cal. (May 14, 2025). Source: <https://www.justice.gov/usao-cdca/pr/south-los-angeles-man-and-woman-arrested-federal-charge-impeding-federal-agents>.

*occurring at an address in South Los Angeles. A small crowd began to concentrate outside the residence and some bystanders in the crowd directed hostile remarks at the agents, who later got in their government vehicles and left the area.*

*At the intersection of 61st Street and Broadway in South Los Angeles, Torres and Flores – driving a Honda Fit – allegedly pulled in front of one of the government vehicles and blocked its pathway at the intersection. The defendants also drove westbound on 61st Street in an opposing lane, passing another two government vehicles. The defendants allegedly pulled in front of one of the vehicles and slammed on the brakes, which the agents believed was an attempt to cause a collision.*

*Torres and Flores aggressively followed one of the government vehicles for two miles, attempting to cross multiple lanes of traffic as it followed it and the other cars.*

On May 10, the New York Post reported<sup>366</sup>: “A Massachusetts police union is calling for charges against a City Councilmember who allegedly assaulted local and federal officers — and incited a caught-on-video chaotic protest of an [ICE] arrest of an accused violent criminal.”

On March 19, a federal grand jury in Kansas indicted<sup>367</sup> a Mexican national, Diego Barron-Esquivel, for “forcibly assaulting and causing bodily harm to an [ICE] deportation officer while the officer was performing his official duties” in February.

Those are just allegations, and the accused are entitled to a presumption of innocence. If those allegations are true, however, it underscores the dangers posed by those seeking to impede ICE operations.

The purpose of the Laken Riley Act—the first bill passed this Congress—was to force ICE to take criminal aliens into custody and detain them. And yet just 111 days after that bill was enacted, some argue ICE should not enforce the law at all.

In her November 29, 2023, Memorandum Opinion and Order in *Texas v. U.S. DHS*<sup>368</sup>, U.S. District Court Judge Alia Moses explained:

***The immigration system . . . dysfunctional and flawed as it is, would work if properly implemented. Instead, the status quo is a harmful mixture of political rancor, ego, and economic and geopolitical realities that serves no one. So***

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<sup>366</sup> Galvin, Shane. *Mass. pol Etel Haxhij assaulted officers, incited chaotic melee over ICE arrest of violent illegal migrant: police union*. NEW YORK POST (May 10, 2025). Source: <https://nypost.com/2025/05/10/us-news/chaotic-video-shows-massachusetts-ice-arrest-being-disrupted-by-unruly-crowd-leading-to-2-arrests/>.

<sup>367</sup> *Mexican national indicted for assaulting federal agent*. U.S. ATT’Y’S OFC., D. KANS. (Mar. 19, 2025). Source: <https://www.justice.gov/usao-ks/pr/mexican-national-indicted-assaulting-federal-agent>.

<sup>368</sup> *Texas v. U.S. DHS*, Case No. DR-23-CV-00055-AM, Memorandum Opinion and Order, at 6 (W.D. Tex. Nov. 29, 2023) (Moses, J.). Source: <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Concertina%20Wire%20PI%20Denial%20File%20Stamped.pdf>.

*destructive is its nature that the nation cannot help but be transfixed by, but simultaneously unable to correct, the present condition. [Emphasis added.]*

Note that Judge Moses ruled in favor of the Biden administration, allowing it to continue to cut concertina wire barriers Texas had erected along the Rio Grande to prevent the unlawful entry of migrants. But that didn't mean the court agreed with the administration's actions.

Many Americans who've watched the gyrations of sundry immigration policies over the past three administrations may agree with Judge Moses's conclusions about "the status quo".

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

I concur with Judge Moses's conclusion that our immigration system would work if it were properly implemented and allowed to work.

But some have argued the immigration laws Congress has written are unduly harsh and unfair and need amendment and therefore should not be enforced.<sup>369</sup>

I respectfully disagree with those arguments, but regardless it is crucial to our system of laws and justice that the laws be faithfully executed, and as importantly, that officers charged with enforcing the laws are not impeded, imperiled, attacked, or vilified.

If the immigration laws truly are harsh and unfair, the American people will realize it and prompt their representatives to amend the laws; the only way that will happen, however, is if the laws are first enforced.

As President Ulysses S. Grant explained in his first inaugural address<sup>370</sup>: "Laws are to govern all alike — those opposed as well as those who favor them. I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

Thank you, and I look forward to your questions.

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<sup>369</sup> See *Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law*. U.S. DEP'T OF HOMELAND SECURITY (Sep. 30, 2021) at 7 ("On his first day in office, President Biden affirmed that 'advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.' In the immigration enforcement context, scholars and professors have observed that prosecutorial discretion guidelines are essential to advancing this Administration's stated commitment to 'advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.'"). Source: <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.122.7.pdf>.

<sup>370</sup> Ulysses S. Grant, First Inaugural Address, March 4, 1869. LIBRARY OF CONGRESS (undated). Source: <https://www.loc.gov/item/today-in-history/april-27/#:~:text=I%20shall%20on%20all%20subjects,Ulysses%20S.>