



**U.S. House of Representatives
Committee on Homeland Security**

**“Open Borders, Closed Case:
Secretary Mayorkas’ Dereliction of Duty on the Border Crisis.”**

June 14, 2023

**Testimony of Eleanor Acer
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Chairman Green, Ranking Member Thompson, and distinguished Members of the Committee, thank you for the opportunity to testify before you today. My name is Eleanor Acer, and I serve as Human Rights First's Senior Director for Refugee Protection. I have over twenty-five years of experience monitoring and advocating for adherence to human rights and refugee law under both Democratic and Republican administrations. Human Rights First is an independent, non-profit organization that, for more than four decades, has pressed the United States to take a lead role in promoting, defending and upholding human rights. It has partnered with human rights defenders in Cuba, El Salvador, Hong Kong, Russia, Saudi Arabia, Ukraine and elsewhere around the world and, here at home, with attorneys, veterans and many others.

Working with volunteer lawyers at many of the nation's leading law firms, we have provided pro bono legal representation to refugees seeking asylum, helping thousands to receive protection in this country. These have included pro-democracy advocates and victims of religious persecution from China, journalists forced to flee Guatemala, Ethiopia, Honduras, Iran, and Nigeria, LGBTQ+ people seeking protection from persecution, victims of political repression from Venezuela, Syria, Egypt and Nicaragua, and Indigenous and other families targeted due to their opposition to brutal armed groups with transnational reach in Honduras, El Salvador, and Guatemala.

Over the last few years, our human rights researchers have traveled repeatedly to Mexican border cities to speak with people seeking asylum who have been turned away or left stranded in danger by the Remain in Mexico and Title 42 policies, and we have tracked horrific accounts of human suffering inflicted by these policies. I personally witnessed the first days of implementation of the Remain in Mexico policy from Tijuana under the Trump administration, and the final days of the Title 42 policy from Matamoros and Reynosa last month. My testimony will focus on a few key areas:

- First, our laws and treaties rightly allow people fleeing persecution to seek asylum—and this right to seek asylum is both morally just and politically popular.
- Second, not only did failed Trump administration policies like Remain in Mexico and Title 42 evade and violate refugee law, but they spurred chaos and inflicted massive human suffering.
- Third, the Biden administration should swiftly end its ban on asylum, which endangers the lives of refugees seeking asylum and is inconsistent with the law.
- Fourth, orchestrated rhetoric painting migrants and asylum seekers as threats or “invaders” fuels white supremacist conspiracy theories and violence targeting Black, Brown, immigrant, Jewish and other people. Lawmakers must refuse to provide a platform for this rhetoric and must swiftly call out racist fearmongering and counter disinformation with reliable and accurate data.
- Finally, Congress and the Biden administration should work together to implement and support effective strategies including strengthened regional refugee resettlement and parole; provide the necessary resources to address adjudication and processing challenges; and properly staff safe, effective and fair asylum adjudications. Parole and release from detention are legally authorized and mass detention would neither be humane nor fiscally responsible.

I. Upholding Asylum is Morally Right and Politically Popular Across Party Lines

The right to seek asylum is a fundamental human right enshrined in the Universal Declaration of Human Rights. In the wake of World War II, the United States helped lead efforts to draft the Refugee Convention, which along with its Protocol, prohibits the return of people to persecution. United States law specifically provides for people in search of refuge to seek asylum at ports of entry and after entering the United States.

The majority of American voters, across party lines, believe that the United States should provide asylum to people fleeing persecution or violence in their home countries.¹ Many Americans are the children, grandchildren, and great-grandchildren of people who fled political, religious and other persecution. Moreover, lawmakers of both parties also believe the right to asylum should be protected.

Proponents of unjust anti-asylum policies often refuse to acknowledge the factors pushing people to leave their countries in search of refuge, or the fact that the vast majority of the world's refugees are hosted by countries other than the United States. In reality, the human rights situations in many countries in the Americas have deteriorated in recent years, pushing people to flee in search of protection, safety and stability. For example:

- In Cuba, where freedom of expression, association and other basic human rights are sharply restricted, repression has [increased](#) over the last few years, as security forces responded [violently](#) with an extended wave of brutal repression to the country's historic protests against economic difficulties and lack of fundamental freedoms.
- In Haiti, violence and political instability [escalated](#) after the 2021 assassination of the president, and in late 2022 the [UN High Commissioner for Human Rights](#), [UN High Commissioner for Refugees](#) and the [UN Humanitarian Coordinator](#) for Haiti all warned that people should not be returned to the country due to the dire and dangerous conditions there.
- In Nicaragua, political persecution continued to [escalate](#) against civil society, journalists, activists, church leaders, nuns, and ordinary people—who live in fear and cannot safely engage in public assembly or religious worship—and further [intensified](#) during the year with a [crackdown](#) against civil society in connection with November 2022 elections. In January 2023 [guidance](#), the U.N. Refugee Agency (UNHCR) stated this crackdown “may be characterized as a massive violation of human rights.”
- In Venezuela, the human rights situation has grown [significantly worse](#) in recent years due to harsh crackdowns on political opposition, the ruling party's reliance on widely condemned elections to control all branches of the government, horrific use of [torture](#), and a severe humanitarian crisis.
- Human rights violations have continued or escalated in other countries as well, including in Guatemala where the rule of law has [deteriorated](#), concerns of [authoritarianism](#) are rising, and [persecution](#) has [escalated](#) against [journalists, Indigenous and human rights](#) activists, and

¹ In a November 2022 [poll](#) conducted by the U.S. Immigration Policy Center, 87% of Democrats, 74% of Independents and 57% Republicans expressed support for asylum. Another May [2022 poll](#) found that a majority of voters across the political spectrum supported asylum and wanted the Biden administration to end the Title 42 policy. Voters “by a margin of 58% to 32% [said] that they would prefer a candidate who favors allowing people to legally request asylum at the southern border over a candidate who opposes doing so.”

judicial officials combating impunity for human rights violations, as well as in Honduras, El Salvador, and other countries, as Human Rights Watch documented in its recent annual [report](#).

The reality is that many people fleeing these and other places have fled to other countries in the Americas. In fact, of the 7.1 million people who have fled Venezuela in search of safety and stability, about [6 million](#) are hosted in Colombia, Ecuador, Peru and other countries in Latin America and the Caribbean. Costa Rica is hosting about [200,000](#) or more Nicaraguans, and experienced a [five-fold increase](#) in total asylum claims in the first six months of 2022, as compared to the year before. Mexico [hosts](#) about 500,000 refugees and asylum seekers, though many face grave [threats](#) to their safety there.

The United States is more than capable of humanely receiving and fairly processing the asylum claims of the portion of people seeking refuge here from repression, violence and persecution.

II. Failed Trump Administration Policies Inflicted Chaos and Human Rights Abuses

The Title 42 and Remain in Mexico policies were failed policies implemented by the Trump administration that violated and evaded immigration law, inflicted disorder and dysfunction at the border, and led to massive human rights abuses. These dysfunctional policies also spurred repeat entries, led to family separations, [pushed](#) people seeking asylum to cross outside ports of entry, and [inflated](#) border statistics.

A. Remain in Mexico or “Migrant Protection Protocols” (MPP)

The Remain in Mexico policy—often referred to as “MPP”—was a blatant evasion of U.S. refugee law and asylum processes. Initiated by the Trump administration through a flimsy four-page memorandum, the policy turned away people seeking asylum and other migrants awaiting immigration court hearings to “wait” in danger, in Mexico, for their U.S. hearings. The Remain in Mexico policy—and others like it that force asylum seekers to wait outside the United States for their cases to be heard—simply cannot be implemented lawfully, safely, fairly, or humanely.

Human Rights First [tracked](#) at least 1,544 publicly reported cases of kidnappings, murder, torture, rape and other violent attacks against people returned to Mexico under MPP during the Trump administration. For example, after the Department of Homeland Security (DHS) returned them to Nuevo Laredo under MPP, a Guatemalan family with two young children, five Cuban asylum seekers, and four Venezuelan women and a girl were among those kidnapped and held captive in multiple separate [incidents](#). Others were subjected to horrific sexual violence, including a [9-year-old disabled girl](#) and her mother, who were kidnapped near the Tijuana port of entry and repeatedly raped. Another [asylum seeker](#) was kidnapped and raped in front of her three-year old son after DHS sent them to Matamoros. In yet another [case](#), DHS forced a Nicaraguan mother and her nine-month-old baby to wait in Mexico under MPP; they were kidnapped by cartels, who punched the mother in the neck and forced her to call family members and beg for ransom money. A seven-year-old Honduran girl and her mother were abducted after DHS [returned](#) them to Nuevo Laredo under MPP. She told her mother “Mommy, I don’t want to die” after overhearing the kidnappers threatening to murder other migrants.

During the court-ordered reimplementing of MPP in 2022 (due to litigation brought against the Biden administration by Trump-aligned state attorneys general attempting to force the continuation of MPP), asylum seekers continued to report horrific kidnappings, rapes, and other violent attacks after

DHS returned them to Mexico (under what was known as MPP 2.0). As Human Rights First detailed in a [September 2022 report](#), these included: a Nicaraguan woman kidnapped and sexually assaulted; a Venezuelan asylum seeker beaten and shot at; a teenage girl sexually assaulted; and two Nicaraguans kidnapped by a cartel and forced to watch as cartel members put a gun in another man's mouth and threatened to kill him.

MPP hearings also remained a due process farce under MPP 2.0. Only [five percent](#) of the people returned to Mexico under MPP 2.0 managed to find attorneys to represent them. Just to attend their U.S. immigration court appointments, asylum seekers were forced to risk kidnapping and violence. Many were abducted while traveling through border regions to attend hearings or directly outside U.S. ports of entry before or after hearings. Cartels extorted returned asylum seekers based on the date of their next MPP hearing, effectively imposing a tax on the time the U.S. government forced them to wait in Mexico under the policy. For asylum seekers subjected to this process, the dangers, impediments to legal counsel, and abhorrent conditions forced many to give up on their requests for U.S. asylum protection.

MPP also wasted government resources. DHS's own analysis concluded that the personnel required for MPP diverted resources from other immigration priorities. DHS Secretary Mayorkas [concluded](#) that "there are inherent problems with the program that no amount of resources can sufficiently fix, and that other problems "cannot be addressed without detracting from key Administration priorities and more enduring solutions." In June 2022, the U.S. Supreme Court [confirmed](#) that the DHS Secretary had the authority to end the policy.

B. [Title 42](#)

Beginning in March 2020, the Trump administration [exploited Title 42](#), a public health authority, to block and expel people at the U.S. southwest border without due process, adherence to refugee law and treaties, or immigration law consequences. Federal courts have vacated and enjoined the Title 42 policy, including in a November 2022 D.C. district court ruling that [vacated](#) the policy for violating U.S. law. A March 2022 [ruling](#) by the U.S. Court of Appeals for the D.C. Circuit prohibited DHS from using Title 42 to return asylum-seeking families "to places where they will be persecuted or tortured."

Asylum seekers and migrants returned to Mexico under Title 42 endured kidnappings, rape, and other attacks. Under the Trump administration, these [included](#) a pregnant Honduran asylum seeker who had been repeatedly raped in Mexico and was expelled under Title 42 while experiencing contractions, a Guatemalan asylum seeker, who had been kidnapped for a month in Mexico and was beaten by a U.S. Customs and Border Protection (CBP) agent with a baton while being expelled to Nogales, Mexico, and a Honduran woman who was [turned away](#) from a shelter in Reynosa, Mexico, along with her three-year-old toddler and five-day-old baby after being expelled. The Trump administration also used Title 42 to deny Nicaraguan political activists opposed to President Daniel Ortega the ability to seek asylum and instead expelled them directly back to Nicaragua, as the Washington Post [reported](#).

Human Rights First has tracked over [13,480](#) kidnappings, torture, and other attacks against asylum seekers and migrants impacted by the Title 42 policy during the first two years of President Biden's administration. These included: a 34-year-old Haitian asylum seeker, [Jocelyn Anselme](#), who was murdered in Tijuana in May 2022 while blocked from seeking asylum under Title 42; a [Nicaraguan woman](#) kidnapped with her four-year-old child and raped, who remained stranded in danger in Mexico; a [lesbian asylum seeker](#) from El Salvador raped after being expelled to Mexico under Title

42; [a 13-year-old girl](#) who was nearly abducted at gunpoint in Juárez after her family fled political persecution in Venezuela but was expelled under Title 42; and a [transgender Honduran asylum seeker](#) who was kidnapped and raped after DHS repeatedly expelled her to Mexico.

In a December 2022 [report](#), Human Rights First found that the court-forced continuation of the Title 42 policy (pursuant to a [lawsuit](#) brought by Trump aligned attorneys general) and the Biden administration's October 2022 expansion of the Title 42 policy to expel Venezuelans: inflicted terrible human rights abuses, including for Black, Brown, Indigenous, and LGBTQ+ persons, women, and children; subjected asylum seekers to refoulement to persecution and torture in the countries they fled; endangered faith-based, humanitarian, and legal aid workers assisting asylum seekers impacted by the policy; and pushed asylum seekers to attempt dangerous crossings to reach safety.

[Proponents](#) of the [forced continuation](#) of the Title 42 “public health” policy inaccurately and absurdly painted it as a tool needed for “controlling” migration at the southwest border. Far from being an effective border management tool, the Title 42 policy was a [failed attempt](#) at a border policy. The policy actually [prevented](#) U.S. agencies from enforcing immigration law, [spurred](#) increased crossings between ports of entry, [inflated](#) border apprehension statistics, exacerbated cartel violence and insecurity at the border, facilitated discriminatory asylum policies that target Black, Brown and Indigenous asylum seekers, and subverted both U.S. and international law.

In a June 2021 [report](#), the Government Accountability Office (GAO), for example, confirmed that Title 42 expulsions led to “some individuals trying to cross the border multiple times per day” and that the repeat crossing rate rose to 34 percent during the first quarter of FY 2021, meaning that one in three people encountered at the border at that time had been previously expelled or deported. With respect to people seeking refugee protection, Title 42 and similar policies pushed asylum seekers—including Cubans, Haitians and Venezuelans—who previously mostly approached official border posts to seek asylum, to instead attempt to cross into the United States between ports of entry.²

Counterproductive policies such as Title 42 and Remain in Mexico have also benefited the criminal cartels that control extensive territories. As Human Right First detailed in a February 2022 [report](#), cartels have adapted to turnback policies by targeting the very asylum seekers turned away by CBP—kidnapping them, purporting to charge them for the right to remain in Mexico, torturing them and demanding ransom payments from their U.S family members. Some of these organizations have worked to [actively prevent](#) asylum seekers from approaching ports of entry, as the restoration of port of entry processing for asylum seekers threatens the cartels' control and extortion efforts.

Ending Title 42 does not mean that the U.S. border is “open.” It means that U.S. immigration and refugee law can no longer be evaded by the specious invocation of “public health” authority.

The last thing that Congress or the Biden administration should do is to attempt to force, prolong, codify, or resurrect policies that violate U.S. law and obligations under international refugee law and inflict disorder, family separation and massive human rights abuses on people seeking refuge. Such

² For instance, as Human Rights First explained in a June 2022 [report](#), government data confirms that in FY 2017, 99 percent of Cubans and Haitians encountered at the southern border had arrived through a port of entry. But after years of “metering” restrictions and Title 42 expulsions, in [FY 2022](#) through May 2022, just 0.2 percent of Cubans and 14 percent of Haitians arriving at the southern border were able to present themselves at a port of entry. The percentage of Haitians arriving through ports of entry rose in April and May 2022, as some ports of entry processed limited numbers of Haitian asylum seekers through Title 42 exceptions. More limited [data](#) also shows that the percentage of Venezuelan asylum seekers presenting themselves at ports of entry followed a similar trend, plummeting from 56 percent in FY 2020 to just 0.2 percent in FY 2022 through May 2022.

policies are not actual “solutions,” but tools to deny access to this country to Black, Brown, Indigenous, LGBTQ+ and other people seeking asylum from persecution.

III. Inhumane, Counterproductive Asylum Policies Remain in Place under the Biden Administration

Two and a half years since President Biden took office, his administration has taken some important initial steps toward ending Trump administration policies that created chaos, subvert refugee law and endanger the lives of people seeking asylum. These steps include President Biden’s February 2021 [executive order](#) directing review of Trump administration policies, the Secretary of Homeland Security’s [termination](#) and [re-termination](#) of the notorious Remain in Mexico (RMX) policy, and the termination of the Title 42 policy in May 2023. The Biden administration has also taken steps to expand refugee resettlement from the Americas and provide some regular pathways to the United States through parole.

The Biden administration wielded the Title 42 policy for over two years—in part due to [lawsuits](#) filed by state politicians aligned with the prior administration—and [expanded it](#) multiple times to expel additional nationalities to danger. Despite finally ending this inhumane and dysfunctional policy, the Biden administration has recently taken steps backward, implementing other Trump-era policies in the face of border arrivals and orchestrated, politically driven anti-immigrant rhetoric. Other inhumane Trump administration [policies](#) remain on the books due to the slow pace of agency regulatory action.

In May 2023, the Biden administration DHS and DOJ issued a regulation promulgating an [asylum ban](#)—an approach [repeatedly initiated by](#) the Trump administration and [repeatedly found unlawful by](#) the [courts](#).

- During the period that the Trump administration’s transit ban was in effect, asylum seekers who were denied protection and ordered deported due to the ban [included](#) a Venezuelan opposition journalist and her one-year-old child; a Cuban asylum seeker who was beaten and subjected to forced labor due to his political activity; a gay Honduran asylum seeker who was threatened and assaulted for his sexual orientation; and a Congolese woman who had been beaten by police in her country when she sought information about her husband who had been jailed and tortured due to his political activity.
- Asylum seekers who underwent credible fear interviews in CBP custody under the Trump administration—many of whom were also subjected to the asylum transit ban—were denied a meaningful opportunity to present their asylum claim and many were ordered deported, [including](#) a 16-year-old girl who fled trafficking and sexual exploitation, an Indigenous Guatemalan woman who was sexually assaulted because of her ethnicity, and a Central American woman fleeing domestic violence by an abuser who killed one of her children.

The Biden administration’s asylum ban unlawfully makes refugees ineligible for asylum based on how they enter the United States and whether they applied for protection in a country they traveled through on their way to seek safety. It will return refugees to persecution, torture, and death in their home countries and other countries where their lives are at risk and leave other refugees in limbo in the United States without permanent status or a pathway to citizenship. During the year that the Trump

administration's similar transit ban was in effect, it [resulted](#) in the denial of asylum to refugees with well-founded fears of persecution and deprivation of a path to citizenship for refugees left only with withholding of removal due to the transit ban. The Biden administration's misguided approach breaches President Biden's [campaign promise](#) to end restrictions on asylum seekers traveling through other countries and [endangers](#) many Black, Brown, Indigenous, LGBTQ+ and other asylum seekers. It also advances the [agenda](#) of anti-immigrant groups, including the Federation for American Immigration Reform, which was [designated](#) a hate group by the Southern Poverty Law Center and [praised](#) the Biden administration's plans to impose an asylum ban as a "good first step."

In January 2023, Human Rights First joined a diverse³ coalition of nearly 300 organizations in a [letter](#) to the Biden administration, urging it to abandon its plan to issue the asylum ban. Nearly 80 Members of Congress echoed that call, in a bicameral [letter](#) to President Biden. Faith-based organizations also [called](#) on the Biden administration to uphold asylum and abandon plans to propose an asylum ban. Nonetheless, in February 2023 the Biden administration published its proposed asylum ban, which met widespread opposition. Of the 51,000 comments received in response to the proposed rule after a mere 30-day comment period, the [vast majority](#) of comments opposed the ban, including comments from UNHCR, the union representing asylum officers who would be forced to implement the illegal ban, former immigration judges, 82 members of Congress from the President's own party, Black-led, civil rights, and LGBTQ+ organizations, Catholic Bishops, rabbis, and Holocaust survivors and their family members. Despite the widespread opposition, the administration finalized the illegal ban in May 2023 and began wielding it against asylum seekers.

In addition, the Biden administration has been conducting fast-track asylum screenings through expedited removal in CBP custody at the border, undercutting any meaningful opportunity for an asylum seeker to explain their case, and applying the asylum ban in these screenings to rapidly deport asylum seekers without a hearing regardless of their risk of persecution. On June 5, 2023, 112 organizations [wrote](#) to the Biden administration warning that this practice has already produced systemic due process barriers, effectively denies asylum seekers any meaningful chance to consult with counsel, and rushes them through a sham process to quickly deport them. The National Immigrant Justice Center also issued a [report](#) finding that the government is actively obstructing access to counsel and that the program "appears designed to rush people through to deportation without legal advice or representation." The conduct of credible fear interviews in CBP custody is similar to a Trump-era policy known as the "Prompt Asylum Case Review" program and "Humanitarian Asylum Review Program," or [PACR/HARP](#).

PACR/HARP was also a due process, humanitarian and [refugee protection fiasco](#). Notably, President Biden directed DHS to terminate PACR/HARP in his February 2021 [executive order](#). Asylum seekers detained in CBP custody [have frequently reported](#) being provided insufficient or inedible food and water; lack of access to showers and other basic hygiene; and inability to sleep because of lack of adequate bedding and cold conditions. Conducting credible fear interviews in CBP custody drastically

³ The diverse coalition of prominent labor, LGBTQ, faith, and civil rights signatories include: ACLU, Amnesty International, CHIRLA, Community Change Action, FIRM Action, HIAS, Haitian Bridge Alliance, Immigration Equality, Immigration Hub, Indivisible, International Mayan League, MoveOn, IRAP, IRC, NILC, National Immigrant Justice Center, PFLAG National, Refugee Council USA, The Leadership Conference on Civil and Human Rights, UndocuBlack Network, UnidosUS, and the Welcome with Dignity campaign.

exacerbates the deficiencies of the expedited removal process, which continues to [result](#) in the deportation of refugees to persecution and torture.

Over the last month or so, Human Rights First and other researchers have spoken with hundreds of asylum seekers stranded in the highly dangerous Mexican border cities of Matamoros, Reynosa, Nogales, and—this week—Ciudad Juárez. Findings include:

- The Biden administration’s new asylum ban is stranding many people seeking asylum to wait in places where they are targets of brutal violence and kidnappings and left in horrendous conditions without access to basic services. Haitian and other Black people seeking asylum are targets of anti-Black discrimination and violence;
- Human Rights First has spoken to hundreds of people waiting in Mexico, and they overwhelmingly had no knowledge of the Biden administration’s asylum ban;
- People seeking asylum continue to struggle to secure one of the limited CBP One appointments while they wait in danger – including an LGBTQI+ asylum seeker who was nearly kidnapped in Sonora, and two Haitian couples and a baby who escaped a potential kidnapping near the Nogales port of entry in late May;
- People seeking asylum who do not have appointments have been turned away from ports of entry by CBP officers and/or by Mexican authorities, and in other cases left to “wait” in a line that barely budes – some left waiting in their country of feared persecution.

Human Rights First [issued reports](#) in recent weeks in collaboration with some of the other organizations that are monitoring the implementation of the Biden administration’s asylum ban including the Haitian Bridge Alliance and organizations participating in a delegation the Haitian Bridge Alliance led, the Florence Immigrant & Refugee Rights Project and the Kino Border Initiative.

There is a more humane, effective and legal way forward, as Human Rights First has explained in its most recent set of [recommendations](#), which are outlined below.

IV. Anti-Immigrant Narratives Endanger Communities and Drive Harmful Policies

Anti-immigrant fear-mongering that paints migrants and people seeking asylum as threats and “invaders” fuels white supremacist conspiracy theories and violence targeting Black, Brown, immigrant, Jewish and other people, as Human Rights First’s experts on extremism and antisemitism have detailed in a recent [fact sheet](#). By portraying immigrants as an existential threat to native-born Americans, [this type of rhetoric makes violence more likely](#), as we have seen in recent years. [Eleven people in Pittsburgh](#) and [23 people in El Paso](#) were murdered by white supremacists animated by fears of supposed immigrant “invaders.” As these horrifying attacks demonstrate, we cannot divorce this “invasion” rhetoric from its violent and racist origins.

These narratives often rely on a vitriolic combination of disinformation and bigoted stereotypes. For example, immigrants are often portrayed as criminal or violent, even when extensive research shows [native-born Americans are much more likely to commit crimes than are immigrants](#). In recent years, immigrants have been increasingly blamed for the devastating growth of fentanyl usage across the country, despite the reality that [fentanyl is most likely to enter the United States through legal points of entry by U.S. citizens](#).

In recent months, some [members](#) of Congress [have](#) continued to promote this [harmful rhetoric](#), including in advance of the lifting of Title 42. To prevent Congressional hearings from serving as vehicles to further popularize extremist rhetoric, lawmakers must effectively challenge the disinformation, bigoted stereotypes, and conspiracy theories on which these narratives rely. For example, 115 Members of Congress co-sponsored [H. Res. 413](#), which condemns the white supremacist “great replacement” conspiracy theory and the terrorist attack targeting the Black community it inspired in Buffalo, New York. Representative Raskin, Ranking Member of the Committee on Oversight and Accountability, publicly [called on his fellow Committee members](#) to denounce white supremacy. Lawmakers, especially those in positions of leadership, can and must proactively and repeatedly counter such statements on the public record, ensure the voices of targeted communities have representation, and support efforts to protect the rights of migrants and asylum seekers.

V. The Use of Parole and Release from Detention are Authorized by Law

DHS has the legal authority to parole people into the country “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” The parole authority is spelled out in 8 U.S.C. 1182(d)(5)(A) of U.S. law. The use of parole for eligible people does not mean that the U.S. border is “open.” U.S. immigration authorities have used parole authority for decades to parole people into the United States – including people from the Soviet Union and Vietnam (1988), Cubans through the Cuban Family Reunification Parole Program (CFRP) (2007), and Ukrainians through Uniting for Ukraine (2022).

The Biden administration has also created [programs](#) to allow certain individuals from Cuba, Haiti, Nicaragua, and Venezuela to apply for parole if they meet requirements including having a sponsor in the United States. The existence of regular pathways can enable some people to travel safely and without resorting to irregular travel. The Biden administration should strengthen its use of parole including to improve access to it for highly vulnerable persons who are not eligible under current initiatives.

The use of parole however is not, and is no substitute for, asylum or refugee resettlement. People facing grave threats cannot wait to apply for parole, and many cannot afford or are not eligible to apply for these parole initiatives due to their requirements. Parole authority or other regular pathways to the United States should never be used as an attempt to justify the denial of access to asylum.

Moreover, it is not illegal to release people from immigration detention. U.S. law provides for ways to release people from immigration detention and custody. For instance, CBP has the discretion to put people it encounters into removal proceedings, with or without sending them to detention, or to use expedited removal. People seeking asylum who are initially referred into expedited removal can for instance be released from immigration detention on parole under U.S. law – as both Democratic and Republican administrations have repeatedly confirmed through their actions and official guidance.

Human rights reports have documented the [abuses](#) suffered by people held in immigration detention, as well as the [waste](#) of government resources inherent in the massive use of immigration detention. Detention costs on average [\\$144.42 per bed, per day](#). Studies have [repeatedly confirmed](#) that asylum seekers and migrants overwhelmingly appear for hearings after release from DHS custody, rendering

the use of costly and harmful immigration detention unnecessary to ensure future appearance. It is both fiscally irresponsible and incredibly inhumane to endeavor to send all people awaiting asylum or other immigration court adjudications to detention centers. Detained asylum seekers and migrants are also [cut off](#) from legal representation; only 37.6 percent of detained individuals with pending cases have been able to secure legal representation while 63.8 percent of all people released from detention who have pending cases are represented, according to [data](#) analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC). Legal representation is [critical](#) to [ensuring](#) that individuals understand our byzantine immigration laws and court proceedings (described by one immigration judge as “[death penalty cases heard in traffic court settings](#)”), and thus demonstrate they meet the criteria to receive asylum or other relief that they are eligible for under U.S. law.

VI. Recommendations for Upholding Refugee Law

Instead of seeking to prolong, use or resurrect inhumane and counterproductive policies that were part of the Trump administration’s agenda, the Biden administration and Congress should work together to:

- Uphold refugee law at U.S. borders without discrimination, including to maximize (rather than restrict or “meter”) asylum at ports of entry, and ensure people seeking asylum have prompt access to ports of entry—not limited to CBP One, but also assured to people approaching ports of entry to seek asylum. Maximizing asylum at ports of entry after years of blockage is essential not only to uphold refugee law, but also to end the counterproductive consequences of Trump policies that, by restricting and blocking access to asylum at ports of entry, have long pushed populations that previously sought asylum at ports of entry to instead attempt to cross the border.
- Immediately rescind the Biden administration’s asylum ban, which punishes refugees and bars them from asylum, stop subjecting asylum seekers to expedited removal including through dangerously fast-tracked screenings in CBP custody where asylum seekers do not have meaningful access to counsel, and rescind remaining fatally flawed policies of the Trump administration that ban refugees from asylum.
- Enhance support for human rights and refugee hosting capacity in other countries in the Americas, including through efforts to support development of strong asylum systems, reception capacities, access to employment, and protection of rights and safety of refugees and migrants in Mexico and other countries in the Americas.
- Ramp up, speed up, support and strengthen regional refugee resettlement, improve parole and other safe migration pathways in the Americas, but never use the existence of such pathways to deny access to asylum.
- Implement a humanitarian, rather than a punitive and attempted deterrence-based, approach to refugee protection through effective, sustainable, humane [refugee reception](#) structures, coordination, [funding mechanisms](#), and case support to address the lack of dedicated humanitarian and refugee protection structures that has long hampered the U.S. response to people seeking refuge at its own borders.

- Upgrade asylum adjudication processes so they are accurate, fair, properly staffed, and prompt, including: improve the [new asylum rule process](#) so it leads to efficiency rather than rushed and counterproductive inaccurate adjudications, fund sufficient asylum adjudication capacities to address asylum backlogs and ensure timely adjudication of new cases, and support and champion funding for legal representation.
- Stand firm against anti-immigrant rhetoric and efforts, and unequivocally reject attempts to exploit Congressional hearings as opportunities to platform dangerous anti-immigrant conspiracy theories. Reject and oppose anti-asylum Congressional proposals, including efforts to force continuation or enactment into law of the Trump administration’s cruel, racist, and counterproductive policies. Draconian policies will not appease perpetrators of xenophobic, racist rhetoric, but will inflict massive human suffering, create more dysfunction, and subvert refugee law globally.

Human Rights First has detailed these steps in its comprehensive [recommendations](#) paper issued in January 2023. These strategies lay out a more humane and effective approach.

Let’s be clear: we are not, by any stretch of the imagination, an “open borders” nation. Any such assertion is patently false. For example, CBP conducts security checks of people seeking entry at ports of entry or otherwise encountered, and puts people into removal proceedings, expedited removal, and/or refers them to ICE for check-ins. Too often they send people seeking refugee protection to immigration jails. Human Rights First has issued countless reports documenting past and present [asylum bans](#) and the horrifying [impact of Title 42](#). Unfortunately, our government has repeatedly focused on harsh, rights-violating policies that attempt to deter and punish people seeking to migrate or request asylum at the border, only exacerbating bottlenecks and dangerous conditions along the Southwest border and in detention.

Instead of prolonging, codifying, using, or resurrecting unjust, inhumane, and dysfunctional policies aimed at decimating asylum that were initiated under the Trump administration, the Biden administration and Members of Congress should uphold U.S. refugee law, the human right to seek asylum, and U.S. commitments under international refugee law. This includes abandoning efforts to ban or deny asylum to refugees who are otherwise eligible for asylum under U.S. law.

The crisis we are facing is a *global humanitarian crisis*; people are fleeing their home countries due to a rise in political instability, authoritarianism, human rights abuses, climate change, and more. The United States is not meeting the moment, nor is it leading by example; other nations, including those with far less capacity than ours, are welcoming and hosting the overwhelming majority of the world’s refugees. We can and must do better to uphold refugee law at home.

**HOUSE COMMITTEE ON HOMELAND SECURITY
OPEN BORDERS, CLOSED CASE: SECRETARY MAYORKAS'
DERELICTION OF DUTY ON THE BORDER CRISIS
JUNE 14, 2023**

**PREPARED TESTIMONY OF
JOSEPH B. EDLOW
FOUNDER, THE EDLOW GROUP LLC**

Chairman Green, Ranking Member Thompson, and distinguished members of this committee, thank you for the opportunity to present testimony regarding the ongoing crisis threatening the integrity of our immigration system.

As this committee investigates the actions and inaction of the Department of Homeland Security, the conclusion that the Administration and Department have failed to comply with the law, as written, and often times acted in contravention of the law, is inevitable. This Administration has seen fit to ignore the law, instead favoring poorly conceived and even more so poorly executed policy decisions. The actions through executive orders, departmental memos, and rules seemingly upend the Immigration and Nationality Act (INA) and congressional intent. These decisions, implemented at each immigration agency, have eroded this country's immigration system and have propelled the crisis to its current levels.

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

Executive Order and Memos

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

¹ Memo. from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

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

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

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

On April 3, 2022, ICE's Principal Legal Advisor, Kerry Doyle, issued a memo on prosecutorial discretion, aligning ICE action in immigration court with the Mayorkas Memo.⁷ The April Memo provided that ICE attorneys were to exercise prosecutorial discretion in cases that were not deemed priority cases. This could include dismissal as well as administrative closure (pausing the case indefinitely).

² Memo. from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf

³ Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

⁴ *Id.*

⁵ Memo. From Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

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

⁷ Memo. from Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

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

Prosecutorial discretion is a critical tool for any police or prosecuting agency, when used correctly. The Supreme Court has even upheld such measures. Writing for the Court, Justice Scalia found that a “...well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”⁸ In interpreting “seemingly mandatory legislative commands,” the Court found that there exists a “deep-rooted nature of law enforcement discretion...”⁹ However, that discretion is not absolute and cannot replace whole statutory text. Prosecutorial discretion should be viewed in the context of a case-by-case analysis in an individual matter. The use of prosecutorial discretion to exempt an entire class of individuals from law enforcement action, as is suggested in these memos, is not discretion at all.

The results of these memos speak for themselves. In Fiscal Year 2022, ICE recorded a little more than 72,000 alien removals from the United States.¹⁰ While that may appear to be large number, the Executive Office for Immigration Review (the immigration courts) reports that in just the first quarter of 2023, immigration judges have ordered almost 47,000 people removed and have affirmed credible or reasonable fear denials in more than 4,000 matters.¹¹

During the period that these memos were in effect, and beyond, the number of encounters along the southwest border steadily climbed. In Fiscal Year 2022, U.S. Customs and Border Protection (CBP) recorded a staggering and unprecedented 2,378,944 encounters.¹² Thus far in Fiscal Year 2023, CBP has already recorded 1,431,964 encounters as of the end of April.¹³ These are just the known and reported numbers and do not account for the thousands of “got aways” who were able to elude Border Patrol agents.

⁸ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).

⁹ *Id.* at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999)).

¹⁰ U.S. Immig. and Customs Enforcement, *ICE releases FY 2022 annual report* (Dec. 30, 2022), available at: <https://www.ice.gov/news/releases/ice-releases-fy-2022-annual-report>.

¹¹ Exec. Off. For Immig. Review, *FY2023 First Quarter Decision Outcomes* (Jan. 16, 2023), available at: <https://www.justice.gov/eoir/page/file/1105111/download>.

¹² U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 17, 2023), available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

¹³ *Id.*

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

The Regulations

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

Under section 235(b)(1) of the Immigration and Nationality Act (INA)¹⁴, aliens apprehended by CBP entering illegally along the border or without proper documents at the ports of entry are subject to “expedited removal”, meaning that they can be quickly removed without receiving removal orders from an immigration judge (IJ).

If an arriving alien claims to fear harm or asks for asylum, however, CBP must hand the alien over to an asylum officer (AO) in U.S. Citizenship and Immigration Services (USCIS) for a “credible fear” interview.¹⁵ Credible fear is a screening process to assess whether the alien may have an asylum claim, and thus proving credible fear is easier than establishing eligibility for asylum.¹⁶ If an AO finds that the alien does not have credible fear (makes a “negative credible fear determination”), the alien can ask for a review of that decision by an IJ.¹⁷ If the IJ upholds the negative credible fear determination, the alien is to be removed immediately.

When an AO or IJ makes a “positive credible fear determination”, on the other hand, the alien is placed into removal proceedings to apply for asylum before an IJ.¹⁸ Most aliens who have claimed a fear of return in the past received a positive credible fear assessment (83 percent between FY 2008 and FY 2019)¹⁹, but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.²⁰

¹⁴ Section 235(b)(1) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁵ Section 235(b)(1)(A)(ii) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁶ See section 235(b)(1)(B)(v) of the INA (defining “Credible fear of persecution”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁷ Section 235(b)(1)(B)(iii)(III) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁸ Section 235(b)(1)(B)(ii) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁹ Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, U.S. Dep’t of Justice, Executive Office for Immigration Review (generated Oct. 23, 2019), available at: <https://www.justice.gov/eoir/file/1216991/download>.

²⁰ *Id.*

In 2022, DHS issued an interim final rule entitled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.”²¹ Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview before another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory withholding of removal²² or protection under the Convention Against Torture²³, must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

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

In addition to the practical problems associated with this rule, it impermissibly shifts authorities from the Department of Justice to the Department of Homeland Security. As Congress was creating the new DHS, it specifically determined which functions would be enumerated.²⁴ Regarding asylum officers, or USCIS in general, Congress specified which immigration functions would be transferred to the new created department.²⁵ Section 451 of the HSA established the Bureau of Citizenship and Immigration Services and provided its function as transferred from the DOJ.²⁶ By including a catchall provision for any functions that

²¹ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Interim Final Rule Mar. 29, 2022) (to be codified at 8 C.F.R. parts 208, 212, 235, 1003, 1208, 1235, and 1240).

²² Statutory withholding of removal specifies that an alien may not be removed “to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social, or political opinion.” 8 U.S.C. § 1231(b)(3)(A).

²³ Following the U.S. ratifying its signing of the Convention Against Torture in 1994, Congress implemented CAT protections in Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 aimed at not effecting the removal of a person who would be subjected to torture upon such removal. See Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242(a) (1998).

²⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

²⁵ *Id.*

²⁶ *Id.* at §451(b), 116 Stat. 2135, 2196 (2002). (“(b) Transfer of Functions from the Commissioner. – In accordance with title XV (relating to transition provisions), there are transferred from the Commissioner of Immigration and Naturalization Services the following functions and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date specified in section 455:

may have been missed in the paragraphs 1 through 4, it is apparent that the intent was to ensure that whatever adjudicative functions were being performed by INS prior to the transfer, would be continued by USCIS subsequent to it. Nothing in the provision suggests that any further functions be transferred.

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

- (1) *In general.* – The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.²⁷²⁸

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

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

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- (1) Adjudications of immigrant visa petitions.
 - (2) Adjudications of naturalization petitions.
 - (3) Adjudications of asylum and refugee applications.
 - (4) Adjudications performed at service centers.
 - (5) All other adjudications performed by the Immigration and Naturalization Service immediately before the effective date specified in section 455.”)

²⁷ 8 U.S.C. 1103(g).

²⁸ The Immigration Reform, Accountability and Security Enhancement Act of 2002 (S. 2444; 107th Cong.) was introduced in May of 2002 but was never passed. This language was retained for the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102, 116 Stat. 2135, 2273-2274 (2002).

Relevant to the border, a notice of proposed rulemaking was published on February 23, 2023.²⁹ Starting with the name, “Circumvention of Lawful Pathways,” the proposed rule is an ineffective measure and empty gesture. Despite its perceived enforcement provisions, this rule, if implemented, would allow most aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter the U.S. or continue to utilize unlawful mass parole programs to accomplish the same. As the Biden Administration continues to steadfastly grip to its executive order on removing barriers to immigration,³⁰ this rule, finalized on May 16, 2023 will do exactly that.³¹

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

The crux of the rule is the concept that a presumption of asylum ineligibility exists for any alien entering the United States who does not meet certain criteria. Specifically, the proposed rule requires that to be eligible for asylum one of three criteria must be met: (1) the alien must have appropriate documentation; (2) must present at a port of entry with a prescheduled appointment through the CBP ONE App; or (3) must have sought protection in a third country and received a final determination. The last criteria is akin to the Third Country Transit Rule, which likewise largely prohibited asylum eligibility for a non-contiguous alien who did not apply for protection in a country where such processes are available.³²

The similarities to the previous rule end there, however. While this appears to be a strong measure to control migration along the southern border, it becomes apparent that the exceptions swallow the rule. We are left with the question of to whom this rule will actually apply once implemented. Of the three criteria, the one that we presume will most often be utilized is the prescheduled appointments. It is not likely that many aliens will suddenly obtain legitimate documentation and, if they were able to do so, they likely would not be applying for asylum but would be entering on a type of visa. This is an important distinction because credible fear

²⁹ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

³⁰ Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 2877 (Feb. 5, 2021).

³¹ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (Final on May 16, 2023)(to be codified at 8 C.F.R. parts 208 and 1208).

³² Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750-11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

procedures would not apply to an admitted alien (i.e. one that actually has a valid authorization). The third criterion may be used more often than the first but it is unclear to the extent that an alien would avail themselves of protection in Mexico and other nations in Central and South America. Whether they are being smuggled to the United States or make the journey on their own, the lack of resources and familiarity with the law will also make this criterion rarely met.

The rule is clearly encouraging aliens to use the second criterion. A prescheduled appointment through the CBP ONE App is the most available option for aliens with access to smart phones or other technology allowing them to contact the system. However, even this criterion is waived if the alien can demonstrate that “it was not possible to access or use the...system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”³³ In essence, everything must align perfectly for this criterion to be the basis for the presumption of ineligibility. Relying on technology is itself a risky proposition as factors such as bugs within the app or lack of available cellular service or a reliable internet connection could all hamper an alien’s ability to successfully schedule an appointment. Additionally, while we do not have statistics on literacy rates of migrants, it would be fairly common to find migrants without a strong grasp of the English language. If language and literacy are included as prerequisites, this will likely include a far larger population of migrants who would overcome the rule’s presumption. Lastly, the catchall of “other or ongoing and serious obstacle” is left undefined in the regulatory text. As asylum officers and immigration judges will be trained on identification of the presumption, leaving a catchall which will seemingly be within the discretion of the adjudicator will allow virtually any reason to pass muster. This will result in the presumption being raised against hardly any alien crossing into the United States.

For those few aliens against whom the presumption will be raised, the rule has fashioned it as a rebuttable presumption. Again, the exceptions and now the rebuttals swallow the rule itself. An alien may rebut the presumption when proving that the alien has a medical emergency, “faces an imminent and extreme threat to life or safety,” or meets the statutory definition of trafficking victims.³⁴ Of the three, the most concerning is the threat to life or safety. It is well-established that the trek to the United States is dangerous with more migrants killed or kidnapped each year. The dangers of the journey are further exacerbated with the influence of cartels and other criminal organizations that view smuggling migrants

³³ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

³⁴ *Id.*

as a for-profit business without regard to their safety. From FY17 through FY21, CBP has reported over 1,700 migrant deaths.³⁵ FY21 had the most in a single year with 568 deaths.³⁶ Additionally, in that same time period, Border Patrol rescued over 8,400 individuals.³⁷ FY21 again saw the most rescues in a single year with 3,423.³⁸ These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

While the rule claims to disincentivize illegal border crossers, the Department's provisions have instead created additional incentives to make the perilous journey either as unaccompanied children or with children in tow. In addition to the fact that the NPRM does not apply to unaccompanied children, the Department of Justice rule requires granting asylum despite ineligibility in an effort to preserve family unity. In a relevant portion, the Department of Justice's regulation states that "[w]here a principal asylum applicant is eligible for withholding...and would be granted asylum but for the presumption...and where an accompanying spouse or child ...does not independently qualify for asylum or other protections...the presumption shall be deemed rebutted."³⁹ Caselaw has long held that grantees of withholding of removal cannot receive derivative benefits for their spouses and children.⁴⁰ This provision seeks to sidestep that issue by granting full asylum status to the principal and family even if the principal alien cannot otherwise rebut the presumption.

Parole Abuse

While the Department claims that a lack of available pathways has made the aforementioned rules necessary, that lack has not stopped the Department from abusing its parole authority. For a section of law meant to be used sparingly and in exceptional circumstances, the Department has relied heavily on its parole powers

³⁵ U.S. Customs and Border Protection, *Border Rescues and Mortality Data* (Feb. 6, 2023), <https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Circumvention of Lawful Pathways*, 88 Fed. Reg. 11704, 11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

⁴⁰ *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

to permit aliens to enter the counter *en masse*, many without a notice to appear before an immigration judge. Section 212(d)(5) of the INA authorizes parole of aliens “into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit...”⁴¹ Additionally, the legislative history of parole authority, cited by the former INS in its initial regulation, makes clear that the intent was to exercise the authority in a narrow and restrictive manner. The original rule stated:

The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. H. Rep. No. 1365, 82nd Cong., 2d Sess. at 52 (1952). In 1965, a Congressional committee stated that the parole provisions ‘were designated to authorize the Attorney General to act on an ***emergent, individual, and isolated situation***, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.’ 5 Rep. No. 748, 98th Cong., 1st Sess. at 17 (1965).⁴²

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

When reviewing the Border Patrol monthly disposition and transfer statistics, it becomes apparent that parole was the path of choice to quickly process and move aliens northward. Border Patrol monthly disposition and transfer statistics for fiscal years 2022 and 2023 demonstrate just how commonplace parole has become. While Border Patrol suggestions that the “processing disposition decision related to each apprehension is made on a case-by-case basis...”⁴³ the raw numbers belie that disclaimer. In fiscal year 2022, parole numbers steadily rose to culminate in over 95,000 paroles granted in September 2022.⁴⁴ That trend has

⁴¹ 8 U.S.C. § 1182(d)(5).

⁴² Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) (emphasis added).

⁴³ Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

⁴⁴ Customs and Border Protection, *Custody and Transfer Statistics FY2022* (Nov. 14, 2022), available at: <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22>.

continued in this fiscal year as Border Patrol recorded over 130,000 paroles in December 2022.⁴⁵

Moreso than individual aliens, the Department has gone farther astray as it has implemented parole programs, contrary to law, for nationals of certain countries. Beginning in October, 2022, the Department announced that it was utilizing new pathways to “create a more orderly and safe process for people fleeing the humanitarian and economic crisis in Venezuela.”⁴⁶ This was augmented in January, 2023, when the Department announced expanded parole programs for nationals of Nicaragua, Cuba, and Haiti.⁴⁷ The program permits nationals of those countries, and their immediate relatives, to seek parole when sponsored by someone with lawful status in the United States. It is worth noting that the sponsor need not be a relative of the beneficiary.

While the previous administration did end parole programs, such as the Central American Minors (“CAM”) program, it is undeniable that some parole programs continued to exist and operate. These programs were far more limited in scope. The Filipino World War II Veterans Parole Program, the Haitian Family Reunification Parole Program, and the Cuban Family Reunification Parole Program only account for a fraction of the number of paroles granted by the Biden Administration in just a single month. Additionally, the Cuban Family Reunification Parole Program stems from the Cuba Accords, something that cannot be said about the other countries currently enjoying broad parole.

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

The Legal Immigration Backlog

This committee is well aware of the vast number of pending matters presently before USCIS. As of December 31, 2022, USCIS reported a pending

⁴⁵ Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at:

<https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

⁴⁶ Dep’t of Homeland Sec., *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), available at: <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans>.

⁴⁷ Dep’t of Homeland Sec., *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), available at:

<https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

caseload of 8,841,152 matters. While the agency claims to want to reduce this number, actions speak louder than words. It was recently reported that USCIS adjudicators were being shifted from their assigned work in order to support operations along the southwest border.

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

Conclusion

The Department of Homeland Security has taken many measures in the past two and a half years aimed at addressing the border crisis however it appears that no one thought to simply enforce the law as written. In an effort to remove barriers and to create a subjectively orderly system, the Department has conflated law and policy and ensured that when the two were in conflict, that policy won the day. The memos that undermine grounds of inadmissibility and removability, the rules that undermine congressional action and established authorities, and the parole programs that are simply incongruous with the law paint a clear picture. The Department has, through its own actions, created the worst border crisis in American history. A return to the rule of law is long overdue and it is incumbent upon Congress to demand that corrective action be immediately taken.

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US Border Patrol

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**Testimony by Rodney S. Scott, for House Homeland Security Committee Hearing, “Open Borders, Closed Case: Secretary Mayorkas’ Dereliction of Duty on the Border Crisis.”
June 14, 2023**

Chairman Green, Ranking Member Thompson, Members of the committee, good morning and thank you for inviting me to testify before you.

I am appearing before you to ensure that you and the American people have an opportunity to understand that the chaos at our southwest border, and the subsequent national security vulnerabilities and consequences are a direct result of informed and intentional decisions made by the Biden administration. The chaos at our borders is not a reflection on the dedicated career government personnel. The career professionals that make up DHS, and specifically US Customs and Border Protection (CBP), including the US Border Patrol (USBP), deserve our praise and admiration. I am confident that they do everything they can each and every day to secure our borders and protect America even as this administration undermines their efforts.

The information and professional assessments that I provide are grounded in nearly three decades of experience as a career Border Patrol agent and my firsthand experience working in the Biden administration, as Chief of the US Border Patrol, until I retired in August 2021. For much of my career I was honored to participate in the transition from an uncontrolled chaotic southwest border to a border that was increasingly secure. Unfortunately, that progress was reversed by the Biden administration. The informed and intentional decisions made by the Biden administration directly resulted in the predicted disintegration of border security into the chaos that now threatens to be a new normal.

The current administration, supported by a lot of media, is misleading America by asserting that they inherited a border in shambles, surges in immigration like we are experiencing are normal and that they are solving the border “challenge” by allowing aliens, without any legal immigration documents, to enter the US through official Ports of Entry. The aliens are allowed to schedule an appointment via the CBPone app, assert a fear claim and then get released with Notice to Appear in immigration court in a few years. Or they can apply for a program that relies on an expanded use of Parole authority to get into the country without immigration documents. This parole program is arguably illegal, because in part, the process lacks the individual case by case determination as required by law.

Let me be clear, the crisis at our border is still raging and poses both immediate and strategic national security threats to America. Despite the current administration’s claims, just because US Border Patrol encountered 11,000 illegal aliens on a single day with Title 42 in place does not mean that arresting 3,500 illegal aliens a day under Title 8 is a good day. First, 3,500 arrests each day continues to overwhelm USBP capabilities and empowers the cartels to control who

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and what enters the US. For context, from fiscal years (FY) 2015 through 2020, USBP averaged approximately 1,250 arrests each day. FY15 and FY17 averaged below 1,000 arrests each day. Over the course of those years, USBP was improving situational awareness and improving interdiction effectiveness. This progress ended and chaos ensued with the signing of several executive orders and public announcements on, and following January 20, 2021. The message that was heard around the world was that the US borders are open and even those without legal immigration documents will be allowed to enter the United States. As you know, this resulted in over 6 million encounters¹ and over 1.4 million known got-a-ways².

Second, these numbers and comparisons alone still fail to adequately demonstrate the severity of the border crisis or the daily consequences of mass migration. Simple encounter and arrest numbers fail to portray how much time it takes to arrest, search, transport, and then process each individual. These numbers also fail to show the thousands of hours that agents spend transporting sick and injured aliens to local hospitals and then providing 24/7 security monitoring until the alien is released.

Thirdly, these numbers fail to adequately portray the loss in situational awareness as agents are not patrolling the border while they routinely detain and then transport large groups of illegal aliens out of remote areas, often three aliens at a time depending on the terrain and the vehicle capacity. Nor do they account for the number of agents required to monitor and provide care during administrative processing. Further, these numbers do not address the loss in agent effectiveness that occurred when the border wall system, to include the surveillance technology package, was terminated leaving hundreds of miles of border without persistent surveillance capability and sporadic gaps in border barrier. These numbers also fail to show how many human trafficking incidents went undetected or measure the loss of intelligence because agents and officers do not have time to conduct thorough interviews.

Fourthly, these numbers do not address how many people got into the US undetected or the volume of narcotics that was successfully smuggled to your city. If you are unaware, the Got-a-ways reported by USBP are only the known got-a-ways. They were detected but there were no agents left to interdict them. An illegal entry unseen is an illegal entry uncounted!

Additionally, these numbers also fail to acknowledge the impacts associated with the increased volume of undocumented migrants being funneled into our ports of entry. By redirecting CBP Officers to conduct civil immigration processing the wait times for legal trade and travel are increased. This further disrupts our supply chains and increases the cost of imported goods. Even more importantly, it also reduces the time officers have to conduct thorough inspections and interviews to identify potential threats. I would like to remind everyone that this is their real job. Nineteen (19) terrorists carried out the 9/11 attacks because the 20th terrorist was denied entry into the US by an alert officer that had time to conduct an effective inspection interview.

¹ [Nationwide Encounters | U.S. Customs and Border Protection \(cbp.gov\)](https://www.cbp.gov)

² Public statements by USBP Chief Raul Ortiz

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I would also like to remind everyone that the majority of Fentanyl and other illicit narcotics, readily available in every state across our nation, originated outside the US. Every agent and officer taken away from inspection and patrol duties decreases our ability to interdict these poisons before they can make it to your families, friends, or neighbors.

I started my testimony with a strong assertion that I believe the chaos at our southwest border and the national security vulnerabilities and consequences are a direct result of informed and intentional decisions made by the Biden administration. I do not make this assertion lightly. As Chief of the US Border Patrol, my staff and I engaged directly with the transition teams prior to the inauguration, as well as President Biden's appointed personnel following the inauguration.

In two very brief direct engagements with Secretary Mayorkas, he acknowledged that the significant numbers of illegal entries were overwhelming Border Patrol capabilities and was not sustainable. He also acknowledged his prior experience in DHS and that he understood there must be consequences for illegal entry to stem the flow. The first engagement was a senior DHS leadership call with the Secretary and the second engagement was at a meeting with border Sheriffs in El Paso, TX. Unfortunately, I quickly learned that the Secretary's words and action were routinely very different. Routine conversations, formal and informal operational guidance, combine with the public actions and statements of Secretary Mayorkas and other Biden administration officials, quickly resulted in the conclusion that the administration had no intention of securing the border in any meaningful way despite the legal requirements to do so.

Biden administration personnel made it very clear in every engagement that their focus was on expediting immigration processing to increase throughput and open new opportunities for migrants to enter the US. This was very consistent with the statements made during the presidential campaign. My personal interactions also made it clear that many of the political appointees did not believe that millions of unknown, unvetted foreigners illegally entering the US were a problem. The only issue that the Biden administration appointees wanted to discuss was how to avoid the optics of large numbers of aliens, especially unaccompanied alien children, being detained in government facilities.

Nonpartisan career government personnel, to include myself, advised the Biden administration repeatedly that the removal of consequences for illegally entering the US, reimplementing catch and release, and very publicly terminating the construction on the border wall system would undoubtedly result in an influx of illegal aliens that would overwhelm US capabilities and empower the cartels. The Biden administration refused to acknowledge the national security threats that increase proportionately with any increase in illegal immigration and/or the fraud in our asylum processes. Despite being briefed and provided written warnings, the Biden administration refused to acknowledge that mass illegal immigration transfers control of the US border directly to the cartels.

From day one, political leadership in the Biden administration ignored career professionals and increasingly made policy decisions that resulted in thousands of aliens being released into the

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US. As predicted, the volume of illegal immigration rapidly increased, overwhelmed Border Patrol and effectively transferred control of our southwest border to the Mexican drug cartels.

I watched the border security gains that were made over three decades vanish and the safety of border communities spiral backwards. Policy makers must understand that this is not simply an immigration issue. This is a national security threat. Cartels use illegal aliens to overwhelm law enforcement creating controllable gaps in border security. These gaps are exploited to smuggle anything they want into the US. To think that well-resourced terrorist networks and hostile nations are not exploiting this vulnerability is naive.

Prioritizing immigration processing over enforcement also means that deployed agents are spread so thin that they often lack the capability to make an interdiction, even after an illegal entry is detected. This does not include the unknown gotaways along the hundreds of miles of border that lack persistent surveillance and go unpatrolled for days and even weeks. In my professional assessment, as a direct result of decisions and actions taken by the Biden administration and specifically Secretary Mayorkas, U.S. Border Patrol has lost the ability to know who and what is entering our homeland.

Border security is national security. My firsthand experiences taught me that border security and immigration policy are two distinctly different, yet interrelated issues. Border security is simply knowing and controlling who and what enters our homeland. Immigration and customs laws and policies are irrelevant if you cannot control the initial entry.

I realize that some people see the border security and immigration enforcement decisions of this administration, and specifically Secretary Mayorkas, as simple policy differences. I do not agree with that opinion. Policy is how you carry out your duties and responsibilities under the law. Our government officials should not be allowed to use policy differences as an excuse to ignore the law. By law, the Secretary of Homeland Security is required to take action to prevent the entry of illegal aliens and to secure the border. I argue that even if unattainable the law requires the Secretary to at least try to meet these objectives.

I believe that Secretary Mayorkas and subordinate political appointees have taken actions and made public statements clearly demonstrating that the Secretary has made informed decisions to ignore legal responsibilities. Instead, he has chosen to dedicate the resources of the Department to provide care, feeding, and even facilitating the movement of aliens that entered the US illegally. I would argue that once again his actions do not match his words and go against his own enforcement prioritization guidance issued on September 30, 2021. This guidance states that Department resources should be focused on the most significant national security and public threats. Despite issuing that guidance, he has chosen to expend a significant portion of the resources and capabilities of the Department to process civil immigration cases at the expense of addressing significant national security and public safety threats at the border.

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I have heard many people of both parties rightly argue that we have never had enough resources to detain and prosecute everyone that enters the US illegally, and that this is why we must leverage prosecutorial discretion. While on the surface this statement is true, it is also misleading, as it leaves out some very important facts. Prior to Secretary Mayorkas taking the helm at DHS, prosecutorial discretion was heavily complimented by deterrence strategies and effective polices that decreased the total number of illegal entries. As illegal entries decreased the percentage of law violators that could be detained and prosecuted increased, This acted as a further deterrent. These cascading effects resulted in improved border security year over year until January 20, 2021

I believe the intent of the law is clear even in areas where the means and methods are not clearly defined. My personal observations and experience have led me to believe that Secretary Mayorkas has intentionally ignored legal responsibilities and empowered his subordinates to do the same. Specific areas of concern are outlined below.

Secretary Mayorkas has ignored his duty to prevent aliens from illegally entering the United States as required by law.

8 USC 1103 (a)(5) Secretary of Homeland Security... He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

Secretary Mayorkas has ignored his duty and failed to take any meaningful action towards establishing operational control of the US borders as required by law.

The Secure Fence Act of 2006 states in part that:

...the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States...

Biden administration personnel demonstrated contempt for the Impoundment Control Act of 1974 and openly discussed methods to ignore the Appropriations Acts that authorized and funded border wall construction. They prevented any meaningful construction, while creating the appearance that work was being done to avoid an Impoundment Act violation.

The Presidential Proclamation³ that paused border wall construction was issued on January 20, 2021. The Proclamation included a required review of each project and that a submission of a

³ [Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction | The White House](#)

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plan within 60 days. It also included the following statement,

“while providing for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose. The plan shall be developed within 60 days from the date of this proclamation. After the plan is developed, the Secretary of Defense and the Secretary of Homeland Security shall take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan.”

Based on statements made during the 2020 presidential campaign, I had anticipated this type of guidance and directed my staff to create a database with details of every wall project. The database would include, but not be limited to, the origination of the specific operational requirement, funding source, construction status, and any foreseeable questions that the new incoming administration may ask. That database was completed well before the Presidential Proclamation was issued. This information was presented and made available to Secretary Mayorkas and several Biden administration personnel on multiple occasions. Yet, to my knowledge, no meaningful construction of Congressionally appropriated wall projects has been resumed.

While the statements of Secretary Mayorkas and subordinate political appointees usually include at least one small fact to evoke understandable compassion for the plight of migrants, I have yet to hear a single statement or see any action toward protecting Americans or securing our borders. I acknowledge and champion our responsibility as humans to help others, but Secretary Mayorkas oversees the **United States** Department of Homeland Security, with significant capabilities and billions of tax dollars in appropriated funds, that are supposed to be used to protect Americans, and America. This administration is clearly not doing that.

I look forward to answering your questions.



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Honor First!

HOUSE HOMELAND SECURITY COMMITTEE

**OPEN BORDERS, CLOSED CASE: SECRETARY
MAYORKAS' DERELICTION OF DUTY ON THE
BORDER CRISIS**

JUNE 14, 2023

**WRITTEN TESTIMONY OF CHAD WOLF
EXECUTIVE DIRECTOR, CHIEF STRATEGY OFFICER, & CHAIR OF THE
CENTER FOR HOMELAND SECURITY & IMMIGRATION
AMERICA FIRST POLICY INSTITUTE**

Chairman Green and Representative Thompson:

Thank you for the opportunity to testify before the House Homeland Security Committee.

By any objective measure or metric, the U.S. is facing the worst humanitarian and national security crisis along our southern border in our Nation's history.

As someone who understands the difficulty and complexity of running the Department of Homeland Security (DHS), I do not state this lightly. It is clear to me and millions of Americans that the Biden Administration has failed in its constitutional duty to "take Care that the [immigration and border security] Laws be faithfully executed."¹ This is a dereliction of duty.

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

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

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

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

¹ U.S. CONST. ART. II, § 3 (cleaned up).

deterred illegal immigration, disrupted the Mexican cartels, disincentivized the flow of deadly fentanyl, and enforced the laws enacted by Congress.

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

The Trump Administration utilized previously untapped legal authority found in section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to put in place the highly successful Remain in Mexico policy, or Migrant Protection Protocols;² President Trump also struck historic Asylum Cooperative Agreements with the Northern Triangle countries to redirect illegal aliens to seek asylum closer to their home country under the authority provided by section 208(a)(2)(A) of the INA.³ The Trump Administration also issued a third-country transit regulation under section 208(b)(2)(C) of the INA to thwart asylum forum shopping, bolstered internal relocation guidance for adjudicators,⁴ streamlined asylum cases at the border to speed up deportations of those found ineligible, and restored the definition of refugee⁵ to Congress's intent of requiring persecution by a government actor on one or more of the protected grounds. No Presidential Administration can do more under existing law—and none should do any less.

These policies were necessary because economic migrants and human traffickers were exploiting the loopholes in our laws by making fraudulent asylum claims to block their quick deportation under expedited removal.⁶ Only between 10-15% of illegal aliens apprehended at the southern border who claim asylum actually qualify for this humanitarian relief.⁷ The rest, to put it mildly, are trying to game the system. Under the Immigration and Nationality Act (INA), they need to—but they cannot—satisfy the appropriately rigorous “well-founded fear of persecution” standard in order to obtain humanitarian relief.⁸ Such artful circumvention of the law is the same as breaking the law. And every President has a *bona fide* duty to stop the lawbreakers. Anything short is a contravention of the laws Congress has gone to all the trouble of enacting—repeatedly.

² 8 U.S.C. 1225(b)(2)(C).

³ 8 U.S.C. 1158(a)(2)(A).

⁴ See 8 C.F.R. 208.13(b)(3).

⁵ 8 U.S.C. 1101(a)(42).

⁶ 8 U.S.C. 1225(b)(1)(A)(i).

⁷ See DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim, available at <https://www.justice.gov/eoir/page/file/1062976/download>.

⁸ 8 U.S.C. 1101(A)(42).

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

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

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

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

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

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

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

⁹ See <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

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

Federal District Court Judge Wetherell struck down this practice, writing “The Court finds in favor of Florida because, as detailed below, the evidence establishes that [the Biden Administration] have effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing ‘alternatives to detention’ over actual detention and by releasing more than a million aliens into the country—on ‘parole’ or pursuant to the exercise of ‘prosecutorial discretion’ under a wholly inapplicable statute—without even initiating removal proceedings.”¹⁰

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

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

Again, the court blocked the implementation of this policy, holding that it “appears that DHS is preparing to flout the Court’s order,” noting that this policy “sounds virtually identical” to the catch-and-release policy he blocked in March 2023. The judge further explained, “In both instances, aliens are being released into the country on an expedited basis without being placed in removal proceedings and with little to no vetting and no monitoring.”¹¹

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

¹⁰ State of Florida v. U.S., Case No. 3:21-cv-1066-TKW-ZCB (N.D. Fl. Mar. 8, 2023).

¹¹ State of Florida v. Mayorkas, Case No. 3:23-cv9962-TKW-ZCB (N.D. Fla. May 11, 2023).

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

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

- **Nullifying Interior Enforcement:** On Day One, the Biden Administration issued a 100 Day deportation freeze for all illegal aliens, including those with criminal convictions. Federal District Judge Drew Tipton enjoined this non-enforcement policy on the grounds that it was “arbitrary and capricious” and that the policy “fails to provide any concrete, reasonable justification for a 100-day pause on deportations.”¹² DHS has since issued “enforcement” priorities that exempt 99% of illegal aliens from the threat of deportation. The Biden Administration has sidelined ICE agents and effectively accomplished the goals of the extremist “Defund ICE” movement.
- **De Facto Amnesty:** President Biden campaigned on granting amnesty to all illegal aliens—a policy that even the previous Congress rejected. But the President was undeterred. Ignoring the Constitution’s grant of the legislative power to the *Congress* (and not to the President), he decided to achieve in practice what Congress did not permit him to achieve in principle. As a result, the DHS Secretary implemented a *de facto* amnesty when he declared that being here unlawfully is not grounds for removal. The obvious remedy corresponding to a violation of the law was arbitrarily taken off the table.

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

¹² Texas v. United States, Civil Action No.: 6-21-cv-00003 (S.D. Tex. Feb. 24, 2021).

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

- **Giving USCIS Asylum Officers Jurisdiction over Border Asylum Claims:** Through an unlawful regulation, the Biden Administration has given U.S. Citizenship and Immigration Services asylum officers the ability to decide the asylum claims of illegal aliens apprehended at the border. Congress created DHS through the Homeland Security Act of 2002, with much—but not all—immigration jurisdiction that was held by the former Immigration and Naturalization Service within the Department of Justice transferred to DHS.¹⁴ By this authorizing statute, only immigration judges have the legal authority to hear asylum claims of aliens in removal proceedings as this authority was not delegated to DHS.¹⁵ It is apparent that the Biden Administration made this unlawful move under the belief that USCIS employees will be more like to grant relief. DHS data shows that USCIS asylum officers are granting asylum at nearly twice the historical rate of immigration judges.¹⁶
- **Categorical Parole:** Perhaps the most egregious example of violating the law is the DHS Secretary's unlawful use of the parole authority. Section 212(d)(5) of the INA could not be clearer that the right to grant this kind of parole comes from a remarkably narrow sliver of statutory authority, only allowable on a case-by-case basis for: (1) urgent humanitarian reasons or (2) significant public benefit.¹⁷ DHS has ignored the statutory requirements and turned this limited authority into an override of the legal immigration system.

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

¹³ See U.S. Immigration and Customs Enforcement, ICE Annual Report Fiscal Year 2022, fig. 20 (Dec. 30, 2022), available at <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf>.

¹⁴ Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002).

¹⁵ *Id.*; see also Arthur, Andrew & Law, Robert, Public Comment Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers (Oct. 18, 2021), available at https://cis.org/sites/default/files/2021-10/JNPRM_Asylum_Procedures_FINAL_submitted_10-18-2021.pdf

¹⁶ See Department of Homeland Security, Asylum Processing Rule Cohort Reports, available at <https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report>

¹⁷ 8 U.S.C. 1182(d)(5).

statute an unheralded power representing a transformative expansion in its regulatory authority,” that’s usually a sign of desperation because the President and/or the agency know in their heart of hearts that they do not have the statutory authority they are claiming.¹⁸ Everyone else knows it as well. As if that Supreme Court prescription wasn’t enough, the Court in *West Virginia* also said that when the Executive suddenly “locate[s] [its] newfound power in the vague language of an ancillary provision of the [law],” its claimed authority is on conspicuously shaky, and presumptively unsound, ground.¹⁹

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

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

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

You needn’t take my word for it. Even the Inspectors General of both DHS and the Department of Defense have issued scathing reports on the national security vulnerabilities the homeland has been exposed to because of this reckless, senseless, dangerous, and of course unlawful decision.²⁰ There are a number of instances where these Afghan parolees have committed heinous crimes, include rape.

¹⁸ 142 S. Ct. 2587, 2610 (2022) (cleaned up and alterations made).

¹⁹ *Id.* (cleaned up and alterations made).

²⁰ *See, e.g.*, U.S. DEPARTMENT OF DEFENSE INSPECTOR GENERAL, Evaluation of the Screening of Displaced Persons from Afghanistan, Report No. DODIG-2022-065 (Feb. 15, 2022), *available at* <https://media.defense.gov/2022/Feb/17/2002940841/-1/-1/1/DODIG-222-065.PDF>.

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

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

Here is the reality:

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

²¹ Dreier, Hannah, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, NEW YORK TIMES (Feb. 25, 2023).

- The Biden Administration is aware of tens of thousands of children being subjected to abusive work conditions, according to The New York Times.²²
- And there is no operational control over large portions of the border. This is not just my assessment, but that of outgoing Border Patrol Chief Ruiz and other career U.S. Customs and Border Protection officials when questioned by Congress or in litigation challenging Biden Administration policies.

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

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

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

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

²² Dreier, Hannah, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, NEW YORK TIMES (Apr. 17, 2023).

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

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

For the reasons cited here and for others I am happy to discuss, it is my professional opinion that **the Biden Administration has been derelict in its duty** to faithfully execute the law, as written, and to protect American communities.

Thank you and I look forward to answering your questions.